> As to the applicant's inability to marry a woman, this does not stem from any legal impediment and, in this respect, it cannot be said that the right to marry has been impaired as a consequence of the provisions of domestic law.
>
> As to her inability to marry a man, the criteria adopted by English law are in this respect in conformity with the concept of marriage to which the right guaranteed by Article 12 refers.
>
> Although some Contracting States would not regard as valid a marriage between a person in Miss Cossey's situation and a man, the developments which have occurred to date cannot be said to evidence any general abandonment of the traditional concept of marriage. In these circumstances, the Court does not consider that it is open to it to take a new approach to the interpretation of Article 12 on the point at issue. It finds, furthermore, that attachment to the traditional concept of marriage provides sufficient reason for the continued adoption of biological criteria for determining a person's sex for the purposes of marriage, this being a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry.
>
> The Court thus concludes that there is no violation of Article 12.

In spite of the decision, no fewer than eight judges issued partly or fully dissenting opinions in respect of the judgment, thus suggesting that before too much longer the court will require the United Kingdom to relax its law.

Professor Katherine O'Donovan[26] examined the issues raised in *Corbett v Corbett* in the following manner.

LEGAL CONSTRUCTION OF SEX AND GENDER[27]

Katherine O'Donovan

> ... Gender is the term used to denote the social meaning of sex categorisation. Sex is determined through physical assessment; gender refers to the social consequences for the individual of that assessment. Gender stereotypes embody society's view of appropriate behaviour for men and women. These take the form of gender roles, reinforced by law, thorough which individuals conform to their label and to the community's conventions. Gender identity is the psychological experience of being female or male for the individual; it is the sense of oneself as belonging to one gender category ... [28]
>
> *Legal Definitions of Sex*
>
> Legal classification of women and men as belonging to two different and separate groups follows from biological and social classifications. Biology forms the material base on which an elaborate system of social and legal distinction is built. As has already been shown, medical research no longer justifies the use of biology as support for treating the social or legal categories woman and man as opposite and closed. Nevertheless the law continues to classify human beings as if there were two clear divisions into which everyone falls on an either/or basis. In general the way in which this occurs is where legislation uses a classificatory scheme based on sex. A criminal, victim, employee, recipient of public benefit, taxpayer may be specified as belonging to one sex category only. The courts are

26 Currently Professor of Law, Queen Mary and Westfield College, University of London.

27 Katherine O'Donovan, *Sexual Divisions in Law* (Weidenfeld & Nicolson, 1985) Chapter 3.

28 *Ibid*, p 62.

then called upon to define legally what it means to be a woman or a man, within that legislative classification.

Two methods of approaching this judicial task of sex determination have emerged. These are the *essentialist approach* and the *cluster concept approach*. With the essentialist approach the court looks to one essential feature and assigns all individuals biologically to either the female sex or the male sex. This method is familiar to the lawyer who is continuously engaged on the task of classifying events, things, people. It is the method most used in legal reasoning. The apparent opposition of women and men leads, not surprisingly, to the logical approach in which individuals are either A or Z. The cluster concept method looks to a group of similar features which then suggest that the individual falls into one category. It is the insistence on one essential feature rather than a group of features that distinguishes essentialism from the cluster approach. Examples of the application of both methods in law will be given below, with a critique and a suggested alternative.

The essentialist approach

In the English case *Corbett v Corbett* a couple had married knowing that, whereas both had been classified as male at birth, one had undergone a sex-change operation in an attempt to move into the female category. The marriage was a failure and the male partner brought an action to have the marriage declared null and void on the ground that both parties were members of the male sex. The court agreed, taking the view that 'sex is clearly an essential determinant of the relationship called marriage because it is and always has been recognised as the union of man and woman. It is the institution on which the family is built, and in which the capacity for natural heterosexual intercourse is an essential element'.[29] Sex as a concept seems to have been used here both in the sense of biological category and in the sense of sexual intercourse.

The court went on to distinguish sex as a biological category from gender. Dealing with the argument that law permits recognition of the transsexual as a woman for national insurance purposes and that therefore it was illogical not to do the same for marriage, the court said, 'these submissions, in effect, confuse sex with gender. Marriage is a relationship which depends on sex and not on gender.'[30] Social appearance or gender identity are irrelevant in determining whether a person is male or female; the *Corbett* case makes clear that the legal test, for marriage at least, is biological.

The biological test laid down by Ormrod J in *Corbett* is the chromosomal, gonadal and genital test. If all three are congruent, they determine a person's sex. Social and psychological matters of gender identity and gender role were considered irrelevant for marriage where sex was established as 'an essential determinant of the nature of the relationship'.

It is possible to criticise this judgment on a number of grounds. At an individualistic level it may result in hardship to persons who belong neither to the male nor to the female category and who therefore cannot marry, as in the Australian case *C and D*.[31] There the husband was a genuine intersex with an ovary and a fallopian tube internally on the right side, but with nothing internally on the left. He was classified male at birth because of a small penis and

29 [1971] P 83, p 105.

30 *Ibid*, p 107.

31 (1979) FLC 90–636; (1975) 53 ALJ 659 (note by R Bailey).

testicle on the left side. Having grown up psychologically and socially as a male, in adulthood he sought surgical treatment for correction of the penile deformity. An article in the *Medical Journal of Australia* written soon after the decision to intervene surgically gives an account of the problem faced by the medical and surgical specialists:

> in spite of the bisexual gonadal structure, the female chromosomal arrangement, the female internal genitalia and the equivocal results of the hormonal assays, there was no doubt, in view of the assigned male sex, the male psychological orientation in a person of this age and the possibility of converting his external genitals into an acceptable male pattern, that he should continue in the sex in which he has been reared.[32]

Surgery was performed over a period of time to remove the female internal organs and breasts, and to reconstruct the penis into one of normal size and shape. The patient married, and after some years the wife sought a declaration of nullity on the ground that the husband had been unable to consummate the marriage. The Australian court held that the marriage was null because of an absence of consent on the part of the wife, who was the victim of mistaken identity. The explanation was that 'the wife was contemplating immediately prior to marriage and did in fact believe that she was marrying a male. She did not in fact marry a male but a combination of both male and female and notwithstanding that the husband exhibited as a male, he was in fact not, and the wife was mistaken as to the identity of her husband.[33]

The effect of this decision and of the *Corbett* case is that hermaphrodites cannot marry, and neither can transsexuals who have undergone surgery. A postoperative transsexual is incapable of consummating a marriage as a member of the category assigned at birth, but does not in law belong to the chosen category. On an abstract level these decisions reinforce belief in the categories woman and man as closed categories, rather than as points along a continuum. Yet to Dr Money the question whether an individual is really a woman or a man is meaningless: 'All you can say is that this is a person whose sex organs differentiated as a male and whose gender identity differentiated as a female.'[34] And in the case of hermaphrodites one cannot even make this guarded statement. The legal essentialist approach to the definition of sex is not consonant with medical research.

We are dealing with two aspects of the essentialist approach here. Firstly, there is the sense in which biology is taken to be the quintessence of the legal definition of sex. Secondly, there is the notion that certain areas of law operate on sex as a critical element. There is no doubt that Ormrod J's approach in *Corbett* is essentialist in the first sense. He said that 'the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed either by natural development of organs of the opposite sex or by medical or surgical means.'[35] yet the husband in *C and D*, a genuine intersex, did not belong to one sex, and there are medical records of similar patients. Even if chromosomes are taken as the *sine qua non* of a sex category, cases of XO and of XXY may cause problems. Furthermore, the objective of the medical profession has been to bring the

32 Fraser, Sir K, O'Reilly MJJ and Rintoul JR, 'Hermaphroditus Versus, with Report of a Case' (1966) 1 *Med J of Aus*, 1003, 1006.

33 *Op cit*, note 12, pp 78–327

34 Money J and Tucker P, *Sexual Signatures* (London: Abacus, 1977) p 69.

35 [1971] P 83, p 104.

physical appearance of patients into line with gender identity. In many cases this means confirming individuals in the sex category in which they were socialised as children. But to Ormrod J, 'a person with male chromosomes, male gonads and male genitalia cannot reproduce a person who is naturally capable of performing the essential role of a woman in marriage.'[36]

What is the essential role of a woman in marriage? It cannot be the biological reproduction of children as the inability to procreate does not render a marriage void, and neither does the unwillingness to have children. It is true that marriages which have not been sexually consummated are voidable in English law, but there have been a number of decisions holding that the use of contraceptives does not prevent consummation.[37] Biological reproduction is not essential to marriage. If procreation is not the purpose of marriage, but the law nevertheless requires the parties to belong to different biological categories, then it seems that marriage is not a private matter for the individuals concerned, but a public institution for heterosexual intercourse. It is highly unlikely that the court in *Corbett* was referring to women's social role in marriage, for the distinction between sex and gender had already been established.

This brings us to the second aspect of biological sex as the essence of the law in some areas, as in marriage. In *Corbett*, by distinguishing sex from gender, marriage law from social security law, the court implied that the law can constitute a person differently, depending on whether sex is essential or not. However, as will be shown below, this approach leads to internal incoherence in the law and may create more problems than it solves.

The cluster-concept approach

Critics of the essentialist method as exemplified in the *Corbett* case argue that the chromosome pattern which can never be changed should be ignored and that the genital test should take account of any changes that have occurred through surgery. If the genitals, gender identity and gender role are congruent, the individual should be categorised accordingly – that is, the category should be determined by apparent sex. These criticisms are based not only on compassion to individuals but also on logic. It is said in relation to adultery and rape, two areas of the law where penetration of one sexual organ by another is a necessary element, that no enquiry as to sexual identity is necessary, and that this should be the general approach. The requirement of penetration presupposes an organ capable of penetration possessed by one and an organ capable of being penetrated possessed by the other, and this establishes a sufficient degree of sexual differentiation.[38]

These critics attack the reasoning on sex determination which proceeds on the basis of either A or Z and suggest that the cluster concept form of reasoning be substituted. In looking to matters such as physical and social appearances, gender identity and gender role, the court would be looking at a cluster of concepts about what constitutes a woman or a man, rather than at one essential determinant. Compassion towards hermaphrodites and transsexuals tends to be the reason for these criticisms. Examples from other jurisdictions such as Germany, France, Switzerland and the United States, where persons are

36 *Ibid*, p 106.

37 *Baster v Baxter* [1948] AC 274.

38 Bartholomew, GW, 'Hermaphrodites and the Law' (1960) 2 *Univ of Malaya LJ* 83 p 108; Finlay HA, 'Sexual Identity and the Law of Nullity' (1980) 54 *Aust LJ* 115 p 125.

classified according to appearance and chosen gender, are referred to as examples for English law.[39]

The European Commission on Human Rights has held (in V*an Oosterwijck v Belgium*) that it is a violation of private and family life to require the transsexual to carry documents of identity manifestly incompatible with personal appearance. The Commission made the finding that the refusal by a signatory state to the European Declaration on Human Rights to recognise gender identity results in the treatment of the transsexual 'as an ambiguous being, an 'appearance', disregarding in particular the effects of a lawful medical treatment aimed at bringing the physical sex and the psychical sex into accord with each other'.[40]

Fair though these criticisms may be, they nevertheless accept that the law should operate on an assumption that the two sexes are distinct entities. Academic writers also accept two categories. 'As a working hypothesis this is not unreasonable, but ... it does not quite correspond with physiological reality and is therefore likely to break down from time to time.'[41] Concern is expressed because errors may be made, or because the essentialist approach is inhumane, but the premise that certain areas of the law should be organised around sexual differentiation is not queried. The cluster-concept approach may permit sex classification according to personal choice rather than by ascription. In its acknowledgement of gender in establishing apparent sex and rejection of the essentialist presupposition of two fixed and immutable categories it is preferable to essentialism. However, the cluster-concept approach has not been accepted by the courts in any jurisdiction for sex determination in relation to marriage, or other legal areas where sex has been found to be an essential element. The question remains open as to whether courts will look to apparent sex rather than biological sex in future cases.

The decision by the European Commission on Human Rights in the *Van Oosterwijck* case suggests that another way of approaching issues of sex determination might be to classify matters of gender as covered by the right to respect for private and family life. This would presumably leave states to continue to regulate areas where they considered biological sex an essential determinant. In the *Van Oosterwijck* case the right of respect for private life as laid down in Article 8 of the European Convention on Human Rights was explained as not just a right to live without publicity, for 'it comprises also to a certain degree the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality.[42] It was also the view of the majority of the Commission that the right to marry under Article 12 of the Convention had been violated, as

39 On Germany, see Horton KC, 'The Law and Transsexualism in West Germany' (1978) *Fam Law* 191; on France see Pace PJ, 'Sexual Identity and the Criminal Law' (1983) *Crim L Rev* 317; on Switzerland see *In re Laber*, Neuchatel Cantonal Court, 2 July 1945, cited by Kennedy I, 2 *Anglo-American L Rev* 112 (1973); on the US see Walz MB, 'Transsexuals and the Law' (1979) 5 *J of Contem L* 181.

40 (1980) 3 EHRR 557. Before the European Court of Human Rights it was held that, by reason of the failure to exhaust domestic remedies, the Court was unable to take cognisance of the merits of the case.

41 Bartholomew, *op cit*, p 84.

42 *Ibid*, p 584.

'domestic law cannot authorise states completely to deprive a person or category of person of the right to marry.'[43]

There are a number of difficulties with the separation of gender into the private sphere whilst the state continues to regulate what it defines as sex in the public sphere. From the internal viewpoint of legal reasoning, inconsistency and incoherence follow. In *Corbett* the court accepted that a person could be in the male category for marriage and in the female category for contract, employment and social security. However, subsequent legal decisions show that confusion has resulted. Other difficulties are that decision-makers use biology as the basis for gender prescription, one following 'naturally' from the other. Although sex and gender may be analytically distinguishable, social practice has been to entwine the two. And the legal construction of sex as public whilst gender was private would merely be a perpetuation of dichotomies which mask inequalities between women and men. Biology or 'nature' has a social meaning when translated into law, which itself operates on the social.[44]

BREAKING WOMEN'S SILENCE IN LAW: THE DILEMMA OF THE GENDERED NATURE OF LEGAL REASONING[45]

Lucinda Finley

Language matters. Law matters. Legal language matters. I make these three statements not to offer a clever syllogism, but to bluntly put the central thesis of this article: it is an imperative task for feminist jurisprudence and for feminist lawyers – for anyone concerned about what the impact of law has been, and will be, on the realisation and meanings of justice, equality, security, and autonomy for women – to turn critical attention to the nature of legal reasoning and the language by which it is expressed.

The gendered nature of legal language is what makes it powerful and limited.

Why Law is a Gendered (Male) Language

Throughout the history of Anglo–American jurisprudence, the primary linguists of law have almost exclusively been men – white, educated, economically privileged men. Men have shaped it, they have defined it, they have interpreted it and given it meaning consistent with their understandings of the world and of people 'other' than them. As the men of law have defined law in their own image, law has excluded or marginalised the voices and meanings of these 'others'. Law, along with all the other accepted academic disciplines, has exalted one form of reasoning and called only this form 'reason'. Because the men of law have had the societal power not to have to worry too much about the competing terms and understandings of 'others', they have been insulated from challenges to their language and have thus come to see it as natural, inevitable, complete, objective, and neutral.[46]

Thus, legal language and reasoning is gendered, and that gender matches the male gender of its linguistic architects. Law is a patriarchal form of reasoning, as

43 *Ibid*, p 585.

44 Katherine O'Donovan, *op cit*, pp 64–69.

45 Lucinda Finley, 'Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 *Notre Dame Law Review*, 886.

46 See LM Linley, 'Transcending Equality'; and LM Finley, 'Choice and Freedom: Elusive Issues in the Search for Gender Justic' (1987) 96 *Yale Law Journal*, 914.

is the philosophy of liberalism of which law (or at least post Enlightenment Anglo-American law) is part.

The claim that legal language and reasoning is male gendered is partly empirical and historical. The legal system, and its reasoning structure and language have been framed on the basis of life experiences typical to empowered white males. Law's reasoning structure shares a great deal with the assumptions of the liberal intellectual and philosophical tradition, which historically has been framed by men. The reasoning structure of law is thus congruent with the patterns of socialisation, experience, and values of a particular group of privileged, educated men. Rationality, abstraction, a preference for statistical and empirical proofs over experiential or anecdotal evidence, and a conflict model of social life, corresponds to how these men have been socialised and educated to think, live, and work.

My claim that legal reasoning and language are patriarchal also has a normative component, in the sense that male-based perspectives, images, and experiences are often taken to be the norms in law. Privileged white men are the norm for equality law; they are the norm for assessing the reasonable person in tort law;[47] the way men would react is the norm for self-defence law; and the male worker is the prototype for labour law.[48]

Legal language is a male language because it is principally informed by men's experiences and because it derives from the powerful social situation of men, relative to women. Universal and objective thinking is male language because intellectually, economically, and politically privileged men have had the power to ignore other perspectives and thus to come to think of their situation as the norm, their reality as reality, and their wives as objective. Disempowered, marginalised groups are far less likely to mistake their situation, experience, and views as universal. Male reasoning is dualistic and polarised thinking because men have been able, thanks to women, to organise their lives in a way that enables them not to have to see such things as work and family as mutually defining. Men have acted on their fears of women and nature to try to split nature off from culture, body from mind, passion from reason, and reproduction from production.[49] Men have had the power to privilege – to assign greater value to the side of the dichotomies that they associate with themselves. Conflict oriented thinking, seeing matters as involving conflicts of interests or rights, as contrasted to relational thinking, is male because this way of expressing things is the primary orientation of more men than women. The fact that there are many women trained in and adept at male thinking and legal language does not turn it into androgynous language – it simply means that women have learned male language, as many French speakers learn English.

The claim that law is patriarchal does not mean that women have not been addressed or comprehended by law. Women have obviously been the subjects or contemplated targets of many laws. But it is men's understanding of women, women's nature. women's capacities, and women's experiences – women refracted through the male eye – rather than women's own definitions, that has informed law.

47 See Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3; LM Finley 'Break in the Silence: Including Women's Issues in a Torts Course' (1989) 1 *Yale Journal of Law and Feminism* 41.

48 See eg Conaghan, 'The Invisibility of Women in Labour Law: Gender-Neutrality in Model-Building' (1986) 14 *International Journal of Sociology of Law* 377.

49 See eg S Griffin, *Women and Nature: The Roaring Inside Her* (1978).

One notable example of a male judicial perspective characterising women as men see them is the often flayed US Supreme Court decision in *Bradwell v Illinois*,[50] in which Justice Bradley exalted the delicate timidity and biologically bounded condition of women to conclude that women were unfit for the rude world of law practice. Another example is the decision in *Geduldig v Aiello*[51] in which the Court cordoned off the female experience of pregnancy and called this experience unique, voluntary, and unrelated in any way to the workplace.

The legal definition of rape provides another example of the male judicial perspective. It is the male's view of whether the woman consented that is determinative of consent; it is men's view of what constitutes force against men and forms a resistance by men in situations other than rape that defines whether force has been used against a woman and a woman has resisted; it is men's definition of sex – penetration of the vagina by the penis – rather than women's experience of sexualised violation and violation that defines the crime. The legal view of prostitution as a crime committed by women (and more recently also committed by men playing the woman's role in a sexual encounter with men) with no 'victims' is another obvious example. The world 'family' and the area of 'family law' is yet another example. The norm of 'family', the fundamental meaning of the term embedded in and shaped by law, is of a household headed by a man with a wife who is wholly or somewhat dependent on him. Other forms of family – especially those without a man – are regarded as abnormal. To a significant extent, the purpose of the discipline of family law is to sanction the formation of ideal families and to control and limit the formation and existence of these nonideal families, and thus to control the status and lives of women.

The Power and Limitations of Male Legal Language

Analysis of the way the law structures thought and talk about social problems is necessary to understand how the law can limit our understandings of the nature of problems and can confine our visions for change. A male gendered way of thinking about social problems is to speak in terms of objectivity, of universal abstractions, of dichotomy, and of conflict. These are essentially the ways law talks about social problems.

Modern Anglo–American law talk about social problems within the individualistic framework of patriarchal Western liberalism, a theory that itself has been challenged by feminists as resting on a fundamentally male world view. This framework sees humans as self-interested, fundamentally set apart from other people, and threatened by interactions with others. To control the threat of those who would dominate you or gain at your expense, you must strive to gain power over them. This power can easily become domination because the point of its exercise is to protect yourself by moulding another to your will.

As part of this individualistic framework, law is conceptualised as a rule-bound system for adjudicating the competing rights of self-interested, autonomous, essentially equal individuals capable of making unconstrained choices. Because of the law's individualistic focus, it sees one of the central problems that it must address to be enforcing the agreements made by free autonomous individuals, as well as enforcing a few social norms to keep the battle of human life from getting out of hand. It envisions another central task to be eliminating obvious constraints on individual choice and opportunity. The constraints are thought to emanate primarily from the state or from the bad motivations of other

50 (1873) 83 US 442.

51 (1973) 417 US 484.

individuals. An individualistic focus on choice does not perceive constraints as coming from history, from the operation of power and domination, from socialisation, or from class, race and gender. A final key task for individualistic liberal law is to keep the state from making irrational distinctions between people, because such distinctions can frustrate individual autonomy. It is not an appropriate task to alter structures and institutions, to help the disempowered overcome subordination, to eliminate fear and pain that may result from encounters masquerading as 'freely chosen', to value nurturing connections, or to promote care and compassion for other people.

To keep its operation fair in appearance, which it must if people are to trust resorting to the legal method for resolving competing claims, the law strives for rules that are universal, objective, and neutral. The language of individuality and neutrality keeps law from talking about values, structures, and institutions, and about how they construct knowledge, choice, and apparent possibilities for conducting the world. Also submerged is a critical awareness of systematic, systemic, or institutional power and domination. There are few ways to express within the language of law and legal reasoning the complex relationship between power, gender, and knowledge. Yet in order for feminists to use the law to help effectuate change, we must be able to talk about the connection between power and knowledge. This connection must be acknowledged in order to demystify the 'neutrality' of the law, to make the law comprehend that women's definitions have been excluded and marginalised, and to show that the language of neutrality itself is one of the devices for this silencing.

The language of neutrality and objectivity can silence the voices of those who did not participate in its creation because it takes a distanced, decontextualised stance. Within this language and reasoning system, alternative voices to the one labelled objective are suspect as biased. An explicit acknowledgement of history and the multiplicity of experiences – which might help explode the perception of objectivity – is discouraged. To talk openly about the interaction between historical events, political change, and legal change is to violate neutral principles, such as adherence to precedent – and precedents themselves are rarely talked about as products of historical and social contingencies. For example, in the recent US Supreme Court decision declaring a municipal affirmative action plan unconstitutional, *City of Richmond v Croson*,[52] the majority talks in the language of neutrality, of colour-blindness, and of blind justice and it is the more classically legal voice. The dissent, which cries out in anguish about the lessons of history, power, and domination, is open to the accusation that it speaks in the language of politics and passions, not law.

In legal language, experience and perspective are translated as bias, as something that makes the achievement of neutrality more difficult. Having no experience with or prior knowledge of something is equated with perfect neutrality. This way of thinking is evident in jury selection. A woman who has been raped would almost certainly be excluded as a juror in a rape trial – it is assumed that her lived experience of rape makes her unable to judge it objectively. Legal language cannot imagine that her experience might give her a nuanced, critical understanding capable of challenging the male-constructed vision of the crime. Yet someone with no experience of rape, either as victim, perpetrator, or solacer/supporter of victim, is deemed objective, even though it may be just their lack of experience that leaves them prone to accept the biased myths about women's behaviour that surround this crime.

52 (1989) 109 S Ct 706.

Because it is embedded in a patriarchal framework that equates abstraction and universalisation from only one group's experiences as neutrality, legal reasoning views male experiences and perspectives as the universal norm around which terms and entire areas of the law are defined. Examples of this phenomenon abound, and exposing them has been a central project of feminist jurisprudence. Thus, for example, my previous work, as well as that of several others,[53] has examined how talk about equality, couched in comparative language of sameness/difference, requires a norm or standard for comparison – and that norm becomes white males. The more a non-white person can be talked about as the same as a white male, the more deserving she or he is to be treated equally to, or the same as, white males. This language not only uses white males as the reference point, but it also exalts them. To be the same as white males is the desired end. To be different from them is undesirable and justifies disadvantage.

Many doctrinal areas of the law are also fundamentally structured around men's perspectives and experiences. The field of labour law uses a gendered meaning of workers that which is done for wages outside your own home as its focus. Thus, any talk about reforming labour law, or regulating work, will always leave unspoken, and thus unaffected, much of what women do, even women who also 'work' in the legal conventional sense. Legal intervention in work – or the perception that no intervention is needed – assumes that workers are men with wives at home who tend to the necessities of life. It is only in this framework that we can even think of work and family as separate and conflicting spheres.

Tort law defines injuries and measures compensation primarily in relation to what keeps people out of work and what their work is worth. It is in this framework that noneconomic damages, such as pain and suffering or compensation for emotional injuries, which are often crucial founts of recovery for women, are deemed suspect and expendable. In the language of criminal law, the paradigmatic criminal is a male, and women criminals are often viewed as doubly deviant. Another example of the manifestation of the male reference points is how self-defence law looks to male notions of threat and response to assess what is reasonable. Contract law is built around the form of transactions that predominates in the male-dominated marketplace, and doctrines that are regarded as necessary to assist the weak (ie helpless women), such as reliance and restitution, are subtly demeaned by the language as 'exceptions', as deviations from the normal rules of contract. All of this suggests that for feminist law reformers, even using the terms 'equality', 'work', 'injury', 'damages', 'market', and 'contract' can involve buying into, and leaving unquestioned, the male frames of reference. It also leaves unspoken, and unrecognised, the kinds of work women do, or the kinds of injuries women suffer.

The language of law is also a language of dichotomies, oppositions, and conflict. No doubt this is partly attributable to the fact that law so frequently is invoked in situations of conflict – it is called on to resolve disputes, to respond to problems that are deemed to arise out of conflicting interests. Another reason legal language is put in terms of opposing interests is due to its place within an intellectual tradition – Western liberal thought – that orders the world in dualisms: culture/nature, mind/body, reason/emotion, public/private. Law is

53 See eg LM Finley, *Transcending Equality*; Littleton, 'Equality and Feminist Legal Theory' (1987) 48 *University of Pittsburgh Law Review*, 1043; M Minow, 'Learning to Live with the Dilemma of Difference: Bilingual and Special Education' (1985) 48 *Law and Contemporary Problems*, 157.

associated with the 'male' and higher valued side of each of these dualisms.[54] This means that law adopts the values of the privileged side of the dualisms, such as the self-interested, 'rational' exchange values of the marketplace, or the shunning of emotion. It also means that legal language has few terms for comprehending in a positive, valuable way the content of the devalued sides of the dualisms – or those, such as women, who are associated with the devalued sides. For example, law's operation within a perceived dichotomy of public/private, and its preference for the public as the proper area for its concern, leaves law largely ignorant of and unresponsive to what happens to women within the private realm. Thus the 'public' language of law contributes to the silencing of women.

The conflict aspect of legal language – the way it talks about situations and social problems as matters of conflicting rights or interests – fosters polarised understandings of issues and limits the ability to understand the other side. It also squeezes out of view other ways of seeing things, nonoppositional possibilities for dealing with social problems. Since a language of conflict means that one side has to be preferred, there will always be winners and losers. In a polarised language of hierarchical dualisms set within a patriarchal system, it will often be women, and their concerns, that will lose, be devalued, or be overlooked in the race to set priorities and choose sides.

Another problematic instance of the language of conflicting rights is the law's approach to issues of women's reproductive freedom. These issues are being framed by the law as conflicts between maternal rights, such as the right to privacy and to control one's body, and foetal rights, such as the right to life, or the right to be born in a sound and healthy state. They are also framed as conflicts between maternal rights and paternal rights, such as the man's interest in reproductive autonomy. To talk about human reproduction as a situation of conflict is a very troublesome way to understand this crucial human event in which the well-being, needs, and futures of all participants in the event, including other family members, are inextricably, sensitively connected. Just because everything that happens to one participant can affect the other does not mean they are in conflict. It suggests, rather, that they are symbiotically linked. The foetus is not there and cannot exist without the mother. An action taken for the sake of the mother that may, in a doctor's but not the mother's view, seem to pose a risk to the foetus, such as her decision to forego a caesarean birth, or to take medication while pregnant, may actually be necessary (although perhaps also still presenting a risk of harm) for the foetus because without an emotionally and physically healthy mother there cannot be a sustained foetus or child.[55]

If we stop talking about reproductive issues as issues of opposing interests, but discuss them as matters where the interests of all are always linked, for better or worse, then there is much less risk that one person in the equation – the woman – will drop out of the discussion. Yet that is what often happens in dualistic, win–lose conflict talk. As one commentator has said, 'respect for the foetus is purchased at the cost of denying the value of women.[56] Legal discourse is

54 For a discussion of the dualisms that structure liberal legal thinking see A Jagger, *Feminist Politics and Human Nature*, 1983; F Olsen, 'The Sex of Law', in Kairys, *The Politics of Law* (1990).

55 For a work that seeks to approach abortion in terms of the connections between mother and foetus, see R Goldstein, *Mother Love and Abortion: A Legal Interpretation* (1988).

56 Farrel-Smith, 'Rights-Conflict, Pregnancy and Abortion' in C Gould (ed), *Beyond Domination: New Perspectives on Women and Philosophy* (1983), p 27.