GENDER, LAW AND JURISPRUDENCE

'A jurisprudence is a theory of the relation between life and law'[1]

Few courses elicit such mixed student responses as Jurisprudence and/or Legal Theory. For some, it is a welcome relief from the doctrinal emphasis of the core curriculum; for others, it is an irritant to be endured, or even better avoided, assuming one follows a programme in which jurisprudence is not required. It is true that in recent decades the subject has undergone considerable transformation. The traditional emphasis on general jurisprudence, cast as a seemingly irresolvable tension between certain schools of jurisprudential thought (usually legal positivism and natural law), has given way to a more diverse, eclectic selection of themes, encompassing both the traditional syllabus and a proliferation of new legal theories somewhat different in orientation and approach. Whereas legal positivism and natural law are preoccupied in various ways with the question of what law *is*, new approaches – feminism, critical legal studies and critical race theory – appear more concerned with what law *does*, with the effects of law on lived experience and the potential of law to transform that experience in positive ways. Too often though, the jurisprudence curriculum unfolds as a succession of discrete debates within self-referential bodies of literature with little or nothing to say to one another. For example, feminism is deeply interested in how law is implicated in the production and maintenance of gender norms but struggles to get excited about whether the rule of recognition is a convention, fiction or social fact. Similarly, legal positivism, while enthusiastically engaging with questions pertaining to the relationship between law and morality, has no discernible interest in probing the relationship between law and gender.

In this chapter, I consider two debates which occupy a central place in the jurisprudence curriculum to show how attention to gender can throw useful light on mainstream jurisprudential debate. The first is the 'what is law?' question, to which I bestow a gendered twist by probing feminist assertions that (the concept of) law is gendered. The second is an equally familiar focus of jurisprudential angst, namely, the question of whether there is a right answer to legal disputes.

Debate 1 Is (the concept of law) gendered?

What does it mean to say that law is gendered? No one would deny that certain laws reflect, or contribute to the production of, gendered social arrangements. Indeed, much feminist scholarship has been devoted to exposing and critiquing the role law has played, historically and contemporaneously, in promoting and maintaining gender inequalities in the family, workplace, and intimate sexual relations. But to claim that law - as opposed to particular legal regimes - is gendered is to assert that gender is implicated in a general sense, that it is part of what we apprehend as law and/or is relevant to understanding how and what law does. This larger claim more readily corresponds with the ethos and spirit of general jurisprudence and, unsurprisingly, features centrally in feminist engagements with legal theory. As Nicola Lacey, one of the few female scholars successfully to penetrate the bastion of the jurisprudential mainstream, remarks, 'the idea of feminist legal theory… suggests there is something not merely about particular laws or sets of laws, but rather and more generally, about the very structure or method of modern law which is hierarchically gendered'.[2] Similarly, Ngaire Naffine speculates that 'a problem of sex [is] bias built

[1] Catharine MacKinnon, *Towards a Theory of Law and State* (Harvard UP 1989) 237.
[2] Nicola Lacey, *Unspeakable Subjects* (Hart 1998) 2.

into the very forms of law'.[3] Both scholars intimate that gender relates not only to the content of law but also to how law is conceived, structured and practised.

Pioneering feminist legal scholar, Catharine MacKinnon, goes further. She asserts that law is *male*, expressing and enacting men's power over women. How does law do this? Surely law is, or aspires to be, neutral, rational and objective, if not in content, certainly in application. According to MacKinnon, it is anything but: 'Law sees and treats women the way men see and treat women'.[4] The perspective or standpoint of law is male. Critically, however, law does not present itself as such but uses notions of neutrality, rationality, and objectivity to mask the partiality of its position, law's investment in sustaining male power. The adoption of a gender-neutral stance in relation to the application of legal norms places gender-differential outcomes outside the formal scope of law's operations. The recasting of messy social problems as abstract dilemmas of rationality filters out of legal consideration 'extraneities' such as gendered asymmetries of power and privilege. And, of course, the stubborn adherence to a stance of dispassionate indifference to the consequences of its own operations cements law's position as 'a neutral arbiter among conflicting interests',[5] neither responsible for existing distributions of power and resources nor charged with redressing them. Hence, 'what counts as [legal] reason corresponds with the way things are'.[6]

Within feminist theory, MacKinnon's stance is often criticised as presenting an uncompromising picture of law as enacting male power.[7] The operations of power are more complex, it is argued, and not so relentlessly one-way. While it is true that, broadly speaking, legal and social arrangements do still tend to work to men's benefit and women's disadvantage, the gendered effects of regulatory regimes may vary, making it is wrong to assert that law, always and inevitably, assumes a male point of view. To reject the claim that law is *male*, however, is not to conclude that law is not *gendered* in just the ways MacKinnon suggests. This is because the power of her critique lies not in exposing law's perspective as male but in excavating the modalities that law deploys to promote the appearance of not having a perspective at all: 'Male dominance', she declares, 'is perhaps the most pervasive and tenacious system of power in history… Its point of view is the standard for point-of-viewlessness, its particularity the meaning of universality'.[8] It is important to clarify the scope and limits of what MacKinnon is propounding here. It is sometimes suggested that the feminist critique of law is misplaced; law, it is argued, makes no claim to neutrality as between different interests as legal operations almost always produce outcomes which benefit some and disadvantage others. That the content of law may be tilted in ways which reinforce male (or other group) interests, critics submit, constitutes no great theoretical insight. However, this is to misunderstand MacKinnon's claim. Her critique, and that of feminist legal scholarship more broadly, goes further implicating not just law's substance but also law's form in gendered operations and effects. The engagement is not only with *what* law does but *how* law does it. Law's *modus operandi*, the conventions and techniques which govern it as a discursive practice - the primacy of logic, impetus to abstraction, deference to coherence, valorisation of *a priori* reasoning - these are the target of feminist critique.

This is more than an assertion that because law is blind to power, it allows power to operate unchecked. In fact, law is not blind to power though such a conception of the law-power relation is enabled by a modality in which the legal and the social are invariably placed at an appropriately safe distance from one another. This is precisely the point. To think of law in its own terms, that is, to apprehend it as a distinct corpus of norms subject to specific techniques of derivation, navigation,

[3] Ngaire Naffine, *Law and the Sexes* (Allen & Unwin 1990) x.
[4] MacKinnon, supra n 1, 162.
[5] Ibid, 159.
[6] ibid. 162.
[7] See eg Carol Smart, *Feminism and the Power of Law* (Routledge 1989) ch 4.
[8] MacKinnon, supra n 1, 116.

and application, is to plot the terrain of law's operations with the coordinates already fixed and in place. Within this mapping, law is formally positioned in relation to its 'others' (morality, politics, society), reflecting a conceptual schema so familiar to legal thought as rarely to provoke challenge, a schema in which power is seen to be exercised by and through law but is not *of* law.[9] Law is always located at a conceptual and normative remove from the objects, implications, and effects of its operations.

What is at issue here is no less than the relation between law and life, between legal and social being. Granted, mainstream jurisprudence accepts the social and legal are related. Within this framing, the legal is generally posited as a derivation of the social: Les Green, for example, regards law as 'a social construction… made by people thinking and acting'.[10] But, Green continues, 'law exists in a physical universe that is not socially constructed and it is created by and for people who are not socially constructed either'.[11] What does Green mean when he says that people are not socially constructed? Is he referring to the materiality of their bodies, the cognitive operations of their minds or what? What about people's gender? Is that socially constructed? Elsewhere Green agrees that gender is 'as socially constructed as it gets'[12] though sex he regards as a brute biological fact. Green draws here on a distinction common in social theory between sex as nature and gender as social construction.[13] This distinction has been the focus of repeated challenge in feminist theory for positing too sharp a division between nature and culture.[14] In particular, our perception of sex, understood as biological difference, is arguably already overlaid by cultural assumptions about what corporeal divergences signify.[15] Nevertheless, returning to the notion that 'people' are not social constructed but that gender is, are people then genderless (but presumably sexed)? When we say that 'people thinking and acting' produce law, do they think and act without reference to gender (because gender is socially constructed and people are not)?

This ambiguity is not accidental and reflects a deeper problem with the way in which the legal and the social are configured in mainstream jurisprudence. Focusing on the nature of law, jurisprudence pays scant attention to the nature of social being; this is merely part of the background to the main enquiry into legal phenomena. Whether or not gender is natural or social is, irrelevant for jurisprudential purposes because nature and society are irrelevant except insofar as they provide the context for law's operations. But how do we know we can explore what law is with limited reference to or exploration of the relation between law and its 'context'? And how do we know people are not socially or even legally constructed? The assumption that 'people' are in some unspecified sense beyond law and society is precisely that, an assumption about the nature of social being, taking the form of a truth, which is then cemented in the architecture of legal thought.

At this point, feminism converges with other critical theories in taking a different view of people and their relation to law. Let's begin with the distinction between what is real and how we perceive and/or represent what is real, the troubling dichotomy between matter and meaning. One approach, broadly associated with modernity, is to assume that reality can be accurately represented. The object of knowledge becomes the correct depiction of the real. Objective knowledge of the world, the product of detached, unsituated contemplation, is therefore both

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[9] See eg Les Green arguing that laws 'express and channel social power' ('Introduction' to HLA Hart, *The Concept of Law* (Clarendon Press 1994), xxxiii).

[10] ibid, xvi.

[11] Ibid.

[12] Les Green 'Sex-Neutral Marriage' (2011) 64 *Current Legal Problems* 4.

[13] See eg Robert Stoller, *Sex and Gender* (Hogarth Press 1968).

[14] For further discussion, see Joanne Conaghan, *Law and Gender* (Clarendon Press 2013) 17-25.

[15] eg until the 18th century. women were commonly viewed not as anatomically different from men but as anatomically deficient; ie there was only *one* sex and it was male (Thomas Laqueur, *Making Sex: Body and Gender from the Greeks to Freud* (Harvard UP 1990)).

possible and desirable. Another approach, generally attributed to postmodernism, asserts that because what we perceive to be real is always mediated through language, reality cannot exist outside our social/linguistic constructions: knowledge is socially situated and subjective. On the one hand then, we have matter, stuff, the physical world to which Green alludes. On the other, we have meaning, the ideas, concepts and beliefs which inform how we apprehend, interpret, and experience the material world, including corporeality. Putting the dilemma in the crudest possible terms, modernist thinking tends to assume that matter determines meaning while postmodernists veer towards the notion that meaning determines matter.[16]

Let's bring this back to how we conceive the relation between law and life: it seems that modernism views life as producing law while postmodernism sees law as producing life. Framed in this way, one or other position would appear to be wrong, but let us suppose that neither is. Suppose instead that law and life are just so hopelessly intertwined that depicting their relation in some total or unconditional sense is simply not possible. The precise nature of the relation between law and life is arguably as complex as that between meaning and matter. Surely what is critical is to acknowledge that complexity, not assume it away. Theoretical physicist and feminist theorist, Karen Barad, describes the relation between matter and meaning as *entangled.* Barad rejects accounts of the world in which the natural and social are conceived as distinct and separate realms, problematising ideas of human agency and causation and challenging simplistic conceptions of natural realism versus social constructivism.[17] Perhaps this is a good way to view the relation between life and law: Both the social and the legal act upon, within and through one another so that while it may be true that law comes into being through people thinking and acting, it is equally true that people come into being through law thinking and acting. People *are* socially constructed but they are also embodied and materially situated: the challenge is surely to articulate a jurisprudence which encompasses the entanglement of matter and meaning in social and legal being.

This is where the form law takes in the mainstream jurisprudential imagination becomes a problem. MacKinnon calls attention to the liberal view of law as 'the mind of society',[18] that is, as rational, disembodied, immaterial. She argues that this conception of law actively enables and empowers gender and other hierarchies. Law is conceived as 'other' than matter, formally distinct from, though acting upon, the material world.[19] The Cartesian metaphor helps to support an idea of law as discrete, bounded, autonomous, reinforcing the conceptual and normative distance of law from life, and of the legal subject from his/her embodiment. The concepts which underpin this realization of law, for example, the unitary legal subject, formal equality, dualistic configurations of legal space (public/private, self/other, reason/affect) also presuppose the expulsion of matter from law. Even the distinction between form and substance, between how and what law does, is intelligible only within a frame in which the intra-constitution of being and doing (the way in which what we are and what we do shape and inform each other) is disregarded. In other words, the conditions for the existence of the concept of law which is the predominant focus of mainstream jurisprudence include a set of assumptions about the relation of matter and meaning, reality and representation, which are at the very least contestable.[20] It may be too that the highly prized jurisprudential quest to formulate a unified concept of law, separate from and independent of the contexts in which law operates, is quixotically misplaced. Increasingly this seems to be recognised by jurisprudential scholars. Brian Tamanaha, for example, calls for a 'non-essentialist' conception of law, attentive, first

[16]For a good introduction to these issues, see Susan Hekman, *The Material of Knowledge: Feminist Disclosures* (Indiana UP 2010) especially ch 1.

[17] Karen Barad, *Meeting the Universe Halfway: Quantum Physics and the Entanglement of Matter and Meaning* (Duke UP 2007).

[18] MacKinnon supra n 1, 159.

[19] See also Margaret Davies, *Law Unlimited, Materialism, Pluralism and Legal Theory* (Routledge 2017) 44.

[20] Ibid.

and foremost, to the relation of law and society in any given context.[21] Lacey too insists on contextualising the conceptual structures of law within broader social practices, not least to ensure that changes in those structures over time and place can be tracked and analysed.[22]

Let's return now to our original question: is (the concept of) law gendered? Gender is clearly not a category of formal significance in conventional jurisprudence. It is that very absence which occasions pause for thought: how can law, which all agree is a social construct, be without gender (which is 'as socially constructed as it gets') and a primary feature of social ordering? Scratching the surface of legal theory, we find that law is not only without gender but without sex: matter, including corporeality, is formally expunged from law's contours which are purely intellectual, disembodied, immaterial, rationally derived. As Margaret Davies observes: 'The assumption seems to be that law is separate from and indeed precedes the acts through which it is made manifest'.[23] To put it another way, what counts for purposes of jurisprudential reflection is an *idea* of law, already conceived as separate and distinct from its multiple and power-inflected instantiations in everyday life.

Suppose for a moment we resist the impulse so engrained in legal thought to disconnect law from everything else. Suppose instead we seek out the connectedness of law, including the connection between law and material life. Why *should* materiality be expunged from law? If we accept instead that matter and meaning are deeply entangled, then to posit a notion of law unmarked by materiality seems highly questionable. From there, it is no small step to speculate that the materiality of law (bearing in mind the conditions in which law, as we currently understand it, has come into being) *is* male or at the very least gendered. In other words, recognising the entanglement of matter and meaning brings gender (as well as race and other features of identity which may be corporeally mediated) to the foreground of legal thinking and theorising. Correspondingly, probing the absence of gender flushes out the suppressed materiality in conventional legal thought, allowing it to emerge.

In a recent feminist analysis of HLA Hart's *Concept of Law*, Emma Cunliffe tracks the various ways in which gendered, specifically masculine traits creep into Hart's construction of the 'ordinary citizen', from whose perspective Hart explores the idea of legal obligation.[24] Cunliffe shows how Hart's general non-empirical legal subject is underpinned by assumptions about individual autonomy and human rationality which are historically and contextually contingent as well as symbolically, culturally or socially aligned with masculinity. Her critique illustrates how a stance which purports to be genderless may nevertheless incorporate gendered assumptions into reasoning about how people experience and apprehend law or how they are positioned in relation to law's operations which in due course transmute into apparently unassailable assertions about the nature of legal obligation. Ultimately, the important question here is not whether law is gendered but how that gendering process may be understood within the framework of a broader enquiry into the relation between life and law, underpinned by a theoretical orientation which is unrestricted and acknowledges the significance of materiality in jurisprudential endeavours.

Debate 2 Is there (always) a right answer to legal disputes?

[21] Brian Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001).
[22] Nicola Lacey, *In Search of Criminal Responsibility* (OUP 2016).
[23] Davies, supra n 19, 44.
[24] Emma Cunliffe, 'Ambiguities: Law, Morality, and Legal Subjectivity in HLA Hart's Concept of Law' in Maria Drakopoulou (ed) *Feminist Encounters with Legal Philosophy* (Routledge 2013) 185.

No one is more in pursuit of a right answer to a legal dispute than the first-year law student. Correspondingly, it is a matter of regret to most graduates that the cumulative effect of their legal education is to disabuse them of the notion that any right answer exists. In only one element of their legal studies does the holy grail of legal correctness still tantalize. No self-respecting course in jurisprudence fails to give sustained attention to the question of whether, and to what extent, legal norms *actually determine* legal outcomes. From the rigidity of legal formalism to the indeterminacy of rule-scepticism,[25] the degree of constraint which law imposes on judicial decision-making continues to excite scholarly debate.

What bearing does the dilemma of legal in/determinacy have on gender and feminist theory? An obvious concern is that if legal norms *do* deliver right answers, how do we account for past decisions plainly imbued with dubious assumptions about gender roles and relations? Did the common law *really* require that Miss Bebb be denied entry into the legal profession because of her sex?[26] One can of course dismiss such objectionable decisions as erroneous: there was/is a right answer but in this instance the court failed to reach it. The notion that judges sometimes get things wrong is plausible but, from the perspective of Miss Bebb and feminist theory, hardly satisfying. Judges seem to have got things wrong *a lot* in times gone by, especially when it came to women. The more likely explanation is that judges were/are influenced by social and cultural norms when interpreting and applying the law, including gender norms. What is the status of these norms - many of which were contestable even within the historical contexts in which they arose - in legal decision-making? If judges *acting properly* can rely on values and beliefs which in retrospect are plainly objectionable, how is it possible to say there is a right answer to legal disputes?

Why does the notion that law delivers right answers hold such appeal, notwithstanding its patent fallibility? Moreover, what consequences flow from organizing our expectations of, and aspirations for, law around this idea(l)? Clearly the belief that law delivers right answers buttresses law's authority and therefore its effectiveness as a mode of governance. Judges too are more comfortable with the idea that they expound rather than create law and are loathe to abandon the view that their capacity to determine legal outcomes *is* appropriately constrained by the doctrinal framework. Duncan Kennedy argues that judges are in denial about the fact that they bring into play their own ideological preferences in legal decision-making.[27] That judges experience themselves as constrained is not in question, Kennedy contends: it is this experience of constraint which enables them to engage in what are effectively political acts while willfully blind to the fact that they are doing so. For Kennedy law is a form of political practice, but a distinct form in which the ideological preferences of judges find expression within techniques of legal reasoning. Dworkin too agrees that law is political. However, unlike Kennedy, who sees judges as bad faith political actors, Dworkin views recourse to political (and moral) arguments as part of what doing law entails. Far from acting in bad faith, legal fidelity requires judges to interpret and apply law so that it fits with what has gone before, drawing on the political and institutional history of the relevant legal materials. In this process, there may well be room for judicial disagreement about what is the right outcome but there *is* a right outcome nevertheless (although it can require Herculean judicial superpowers to reach it).[28]

Kennedy and Dworkin are much preoccupied with the political dimensions of law, reflecting the concerns and anxieties of North American legal scholars. By contrast, Hart has little to say about politics and even less about adjudication. Moreover, notwithstanding that he characterizes law as a

[25] *Hart's Concept of Law*, n 9 above, ch VII. Hart argues against the idea that law always delivers a right answer, acknowledging that in 'hard cases' judges must exercise 'discretion' and make new law.
[26] *Bebb v Law Society* [1914] 1 Ch 286.
[27] Duncan Kennedy, *A Critique of Adjudication* (Harvard UP 1997).
[28] Ronald Dworkin, *Law's Empire* (Harvard UP 1986) especially chs 2 & 3.

union of primary and secondary rules, Hart does not deny that judges make law at least in hard cases when the limits of a rule-based system are confronted. Building on this framework, Scottish jurist, Neil MacCormick, elaborates a theory of legal reasoning within Hart's positivist vision, stressing the syllogistic character of legal rules and, therefore, the role of logic in legal reasoning processes.[29] MacCormick's invocation of logic powerfully reaffirms the idea that law delivers right answers. At the same time, MacCormick agrees there are occasions when deductive reasoning, that is, the syllogistic application of rules, fails to determine outcomes.[30] What if the rule is ambiguous and requires interpretation or what if the claim raises a novel question of law? What then does the judge do? In the absence of a determining rule, says MacCormick, the judge must choose between competing *arguments*, the process no longer one of deductive reasoning but evaluation. This dimension of legal reasoning entails identifying and/or deploying those arguments likely to carry the greatest legal weight.

Where do legal arguments come from and how might they be characterized? According to MacCormick they derive from principles and values, not just any principles and values, but those which have penetrated legal terrain and gained approval. 'New' values or principles may be introduced but they will struggle for recognition unless and until they find full acceptance in the courts.[31] Consent is a value so deeply embedded in the fabric of law that it carries huge weight when invoked. By contrast, the principle of sex equality is relatively new to law and has taken centuries to secure a sufficient grip on legal argument to displace the presumption of irrevocable consent once justifying the marital rape exemption.[32] The legal contortion of consent to secure a husband's dominion over his wife's body evidences law's historical investment in male power, the accumulation of shared values and beliefs held by generations of (male) lawmakers. If values and principles garner weight in legal argument according to the extent to which they are accepted as legally relevant, the result will almost inevitably be a normative regime which reflects the viewpoints of those who get to participate in legal practice.

What happens if the legal community becomes more diverse, bringing into legal contention a wider range of values and principles? One hopes that historically entrenched power relations will be dislodged as new voices find expression within the conventions of legal argument. Does legal reasoning aid normative inclusion here or are there features of the reasoning process which inhibit the alignment of law with the interests and concerns of historically marginalized groups? Two features of MacCormick's analysis bear further attention in this context. The first is his emphasis on the logical structure of law as a rule-based system. It is true that legal outcomes are not always (or even often) the product of pure logic but the normative regime is underpinned by logic: logical operations structure and inform legal argumentation. Because legal recourse to values and principles occurs within a discursive framework which is founded on logic, it is easy to assume that when judges are engaged in weighing and balancing arguments (as opposed to the syllogistic application of rules) they are still, in a sense, engaged in logic. Notions of rightness thus infuse the whole adjudicative process obscuring the role played by evaluative operations in the determination of legal outcomes.

A second aspect of MacCormick's analysis of legal reasoning more directly troubles the notion that diversity provides an easy solution to the historical problem of law's positionality. MacCormick argues that the functioning needs of law as a system for regulating human conduct impose certain constraints on the development and application of values and principles in law, constraints which also serve as justificatory devices in legal argument. Specifically, for law to do its job, decision-making should be *consistent,* that is like cases should be treated alike and they should be *coherent* in

[29] Neil MacCormick, *Legal Reasoning and Legal Theory*, revised edition (OUP 1994) chs I-III.
[30] Ibid, 66-72.
[31] Ibid, 238.
[32] *R v R* [1992] I AC 599 (discussed in Conaghan, *supra* n 14 48-69).

the sense of fitting seamlessly within the broader fabric of law (echoing Dworkin's notion of law as integrity). A further constraint identified by MacCormick is that the *consequences* of decisions must be considered, requiring judges to gauge the likely impact of decisions beyond the immediate circumstances of the case. Together these constraints place significant limits on how values and principles grow and develop in legal argument. Normative contestation takes place but subject to necessary strictures to ensure the functioning of the legal whole.

This means that any attempt to change the normative tilt of law through the creative deployment of legal argument (as opposed to legislative reform) is similarly restricted. Efforts to purge legal doctrine of its patriarchal past must confront the requirement that new decisions cohere with the existing legal fabric, imbuing problematic principles with authority independent of their merits (consider again the remarkable durability of the marital rape exemption) and promoting the continuation of intellectual structures, conventions, and canons of authority in which deep cognitive biases inhere.[33] Meanwhile, regard for consistency enshrines into legal form an aesthetic of sameness and difference, privileging conformity to unarticulated normative preconceptions, which, inter alia affords a standpoint through which gender (and gender difference) is legally conceived and situated. Finally, attention to consequences leads judges into making speculative pronouncements about the future, often based on very partial knowledge and limited experience. Of course, the extent to which consequences can be correctly predicted essentially depends on what one knows; however what one knows is invariably related to what one values. When a judge concludes that imposing a duty of care on the police will impede effective policing, he is approaching the issue from the perspective of one who *knows* the police need no threat of liability to encourage them to do their job.[34] On the other hand, someone who k*nows* there is a serious problem with domestic violence and is concerned that the police appear repeatedly to fail domestic violence victims may well view the imposition of duty of care more positively.[35] In other words, consequential reasoning is only as good as the knowledge which underpins it and is an inescapably value-laden exercise.

This suggests that greater judicial and practitioner diversity, by expanding the knowledge base of legal actors, should enhance law's potency as a channel for progressive argumentation. However, while few would deny that diversity is a goal to which to aspire, there remain real difficulties with integrating diverse perspectives into a discursive form which relies for its authority and legitimation on a claim to univocality. How are we to know what constitutes a good legal argument in the absence of some consensus, some shared ethical and/or political orientation with regard to the values and principles which legal reasoning activates? Diversity poses a critical challenge to legal reasoning as it has been understood and practised for centuries. The very notion of a single correct answer to a legal dispute is at odds with the idea that diverse views on how to act may properly - legally - co-exist. Although we see such diversity in play every day in the differing conclusions reached by judges, we still rely upon the principle that only one prevails. This is more than simply the pragmatic acknowledgment that some definitive conclusion must be reached if law is to perform the functions assigned to it. The unity of law, its integrity and impenetrability, is critical to the authority it asserts in our political culture. It is not that law always and everywhere *has* to take this singular form, but that once taken, it becomes difficult to conceive otherwise. Take the principle of equality before law which we value and respect without question: Yet this very same principle makes it challenging for law to recognise diverse subjects. The legal impulse is to suppress difference (including gender difference) rendering the notion of diverse, fragmented legal subjects unintelligible within the contours of legal rationality.

[33] See eg Martha Chamallas & Jennifer Wriggins' powerful critique of the cognitive structures of tort law, *The Measure of Injury: Race, Gender and Law* (NY University Press 2010).
[34] *Hill v Chief Constable of West Yorkshire* [1988] 1 AC 53 per Lord Keith at 63.
[35] *Michael v Chief Constable of South Wales* [2015] UKSC 2, per Lady Hale at para 198.

To return then to our question, is there a right answer to legal disputes or can diverse legal answers co-exist? I have argued that a commitment to the belief that right answers exist remains deeply embedded in the practices of legal reasoning and the justifications which support those practices. At the same time, adherence to the idea of a right answer (with its associated suppositions) poses difficulties in the context of efforts to deploy legal argument progressively to equality-enhancing ends. This is not to suggest that the tools of legal argument are not worth utilising but rather to acknowledge that utilising them effectively in the interests of diversity is demanding and requires a deep and sophisticated grasp of the techniques of legal reasoning and the limitations of the legal form.

Further reading

Joanne Conaghan, *Law and Gender* (2013) especially chs 5 & 6

Margaret Davies, *Law Unlimited: Materialism, Pluralism and Legal Theory* (2013) esp chs 1-4

Nicola Lacey, *Unspeakable Subjects* (1998) especially pp 2-14 & ch 5.

Catharine MacKinnon, *Towards a Feminist Theory of State* (1989) esp chs 8 & 13