Our legal lives as men, women and persons

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To be recognised as a legal person is to be individualised: it is to be rendered a separate and distinct being, the unitary bearer of rights and duties. By contrast, to be assigned a legal sex is to be grouped with others, to be placed within one of only two sexes, as either a man or a woman, a necessarily crude dichotomy. It is to be legally defined by the characteristics we are said to share with half the human population rather than regarded as an individual in our own right. This paper entails a critical comparative analysis of the legal concept of person and the legal concept of sex: of maleness or femaleness. It questions the logic and defensibility of this double characterisation of our legal lives. How can law reconcile its deep commitment to individualism with its persisting commitment to a two-sex system?

> 'When you are criticizing the philosophy of an epoch do not chiefly direct your attention to those intellectual positions which its exponents feel it necessary explicitly to defend. There will be some fundamental assumptions which adherents of all the variant systems within the epoch unconsciously presuppose. Such assumptions appear so obvious that people do not know what they are assuming because no other way of putting things has ever occurred to them.'[1]

> 'It is simply that the generative ideas of the seventeenth century ... have served their term. The difficulties inherent in their constitutive concepts balk us now: their paradoxes clog our thinking.'[2]

A. THE PROBLEM

In the legal world, we are obliged to assume different *personae*. To have a presence in this world at all as legal beings, we must qualify as legal persons: that is persons as law defines them. If one is a live-born human being, one is

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1. Alfred North Whitehead *Science and the Modern World* (New York: Macmillan, 1925), quoted in Susanne K Langer *Philosophy in a New Key* (Cambridge, Mass: Harvard University Press, 1942), as extracted in Mary Warnock (ed) *Women Philosophers* (London: Everyman J M Dent, 1996) p 112.
2. Susanne K Langer *Philosophy in a New Key*, extracted in Warnock (ed), above n 1, p 119.

automatically a person, but then one is further required to be a person of a certain sex, a man *or* a woman, one kind of person, not both or neither.[3] As a human legal person,[4] one is obliged not only to have a sex but also to be the same specific sex all one's legal life, unless one adopts extraordinary measures to change it.[5] One cannot choose not to have a sex, or to have a particular sex only intermittently,[6] or to have a sex of one's choosing as the spirit moves one, a woman one day, a man the next. As a legal person, it is generally thought by liberal jurists that our legal relations (which make us persons in law) should be largely of our choosing, but this is not true of those relations which make us a woman or a man.[7]

Such a suggestion, that we choose our own sex, or elect to have none at all, might seem frivolous. After all, sex is surely a brute fact and in our daily lives there is rarely any doubt about what we are. Our sex goes without saying, and so we may think about it rarely; and yet we assume ourselves to be one sex or the other, and so does everyone else who comes upon us. Once a person's sex becomes uncertain, it is difficult to know how to proceed with them. As a judge of the European Court of Human Rights recently remarked: 'Sexual identity is not only a fundamental aspect of everyone's personality but, through the ubiquity of the sex dichotomy, also an important societal fact.'[8] We live our lives as men and women; our sex is a (perhaps *the*) fundamental background and foreground condition of our lives. And yet there is nothing intrinsic to law that compels *it* to compel *us* to have a sex and then only the one sex.[9]

On the contrary, there is good reason why law should not oblige us as legal persons to have a sex and, if it is to sex us, why it should not compel us to have a sex not of our choosing; why it might even be anathema to the most basic

3. The registration of births requires the sex, but not the race or religion, to be registered and the parents have no choice in either the fact of registration or the sex of their child.

4. The corporation as legal person seems to escape the requirement to have a sex but see Suzanne Corcoran 'Does a Corporation have a Sex? Corporations as Legal Persons' in Ngaire Naffine and Rosemary J Owens (eds) *Sexing the Subject of Law* (New South Wales: Law Book Co and Sweet & Maxwell, 1997) p 215.

5. Until July 2004, these measures were essentially surgical and chemical. With the passage of the Gender Recognition Act (UK), which received the Royal Assent on 1 July 2004, a medically diagnosed condition of gender dysphoria will also suffice.

6. That is to say, whenever law demands that I state my sex I am obliged to supply it. I cannot abstain. Of course my legal sex does not play an explicit role in all my legal relations. It is central to my marriage, but it has little to do with my ownership of my car.

7. The view that our legal relations (rather than our intrinsic natures) constitute us both as persons and as sexed individuals is not universally held among jurists. However it will be the view defended in this paper, for reasons that will become apparent.

8. Judge Martins remarking in his dissenting opinion in *Cossey v UK* [1990] 13 EHRR 622, and cited by Chisholm J in *Re Kevin (validity of marriage of transsexual)* [2001] January Fam CA 1074, para 202. *Cossey* has since been overturned by *Goodwin v UK, I v UK* (2002) 35 EHRR 18. See further R Sandland 'Crossing and Not Crossing: Gender, Sexuality and Melancholy in the European Court of Human Rights, *Goodwin v UK, I v UK*' (2003) 11 Feminist LS 191.

9. As the trial judge stated in *Re Kevin (validity of marriage of transsexual)* [2001] Fam CA 1074, para 281: 'On the face of it ... there is no problem about parties agreeing that an insurance policy relating to a man should apply terms normally applied to a woman, or even, I suppose, that a contract could deem a man to be a woman or vice versa ...'

tenets of law to push us into one of two types. The reason is that our modern liberal law aspires to deal in persons as 'individuals', in a number of senses of this word.[10] Law's fundamental unit is the individual, not the group, and so it is important that the corporation can function as a single legal being. And this is precisely why the corporation as person continues to be regarded as conceptually interesting. Personification always creates a one, a unit, an individual, but in the case of the corporation it must make an individual out of a collective – it must make one of many.[11] Law is therefore committed, in large part, to methodological individualism: that is to say, its method is to define and employ the individual as its basic analytical unit. Personification thus entails individuation. Clearly there are strong liberal reasons for treating the individual as the basic unit of legal meaning and value, for treating each of us as an end in self. (Some of these reasons will be elaborated below.)

Our liberal law is also, in large part, committed to abstract individualism. That is to say, in order to treat us as individuals and not as types, it conceives of persons at a high level of abstraction. Those characteristics which both type and particularise us, especially our main group affiliations (say with others of the same cultural group or religion or sexuality) are largely deemed irrelevant for most legal purposes. This was not always the case. The paradigmatic legal individual, the universal human holder of full legal rights, would once have been portrayed unflinchingly as the sane adult male head of family. The modern problem with this specification of our legal subject is that it is manifestly discriminatory and so it is now thought to be decidedly illiberal as a way of depicting him. Human rights instruments of the twentieth century have openly condemned the practice of discriminating between and against persons according to the old legal statuses.[12]

Because of an estimable legal desire not to invoke any way of being human which will normalise some and render others exceptional, and so divide and exclude,[13] there is a strong liberal investment in staying vague about the precise nature of the individual in law. Any clearer portrayal of our legal subject, it is assumed, will necessarily prove adversely discriminatory.[14] Abstract

10. As Max Weber asserted, 'The term "individualism" embraces the utmost heterogeneity of meaning': M Weber *The Protestant Ethic and the Spirit of Capitalism*, as quoted in Steven Lukes *Individualism* (Oxford: Basil Blackwell, 1973) p 43.

11. For a recent philosophical account of this legal need to impose unity on the corporation see Philip Pettit 'Collective Intentions' in Ngaire Naffine, Rosemary Owens and John Williams (eds) *Intention in Law and Philosophy* (Dartmouth, Aldershot: Ashgate, 2001) p 241.

12. Article 7 of the Universal Declaration of Human Rights 1948, for example, asserts that 'All are equal before the law and entitled without any discrimination to equal protection of the law'. Article 2 provides a non-exhaustive list of unacceptable distinctions which include 'race, colour, sex, language, political ... opinion, national or social origin, property birth or other status'. Similarly the US Declaration of the Rights and Duties of Man 1948 declares that 'All persons are equal before the law ... without distinction as to race, sex, language, creed or any other factor' (art 2).

13. This was Rawls' good instinct when he invoked the veil of ignorance. See John Rawls *A Theory of Justice* (Cambridge, Mass: Harvard University Press, 1971).

14. Anti-discrimination legislation proscribes discrimination against the intellectually and physically disabled, children and women (which of course carries the implicit confirmation that the legal norm of humanity is the intellectually and physically able adult man).

individualism is therefore closely linked to a liberal legal commitment to equality of all persons, whatever their cultural or racial or sexual typing or identifications. The underlying assumption is that it is meaningful and useful to think of individuals at a high level of generality and that this allows us to identify a universal legal subject. Over the course of the twentieth century, with the explicit endorsement of universal human rights, the legal individual has if anything become increasingly abstract.

We will consider shortly, in some detail, how the varieties of legal individualism relate to legal conceptions of the person. But for the moment we may simply note that law's subject, its unit, its person, its basic concept, is an individual. Its oft-stated concern is to preserve the autonomy and integrity of individuals, conceived in a highly abstract manner. The shorthand of liberal individualism often expresses this legal aspiration.

How then can we, as lawyers and jurists, preserve and respect this methodological and abstract individualism if we simultaneously classify persons according to a crude dichotomy, obliging us all to conform to one of only two types, who by dint of that typing must be like (without choice) others of that type, and unlike those of the other type – and who must relate in certain ways to their own type for many legal purposes and in quite different ways to the other? Surely then individualism is damaged, even lost, within a two-type system? There seems to be a paradox here, at the heart of law.

The British philosopher Mary Midgley has expressed just these concerns about the relationship between personal and sexual identity in philosophical thought. She claims that the individualism that imbues our Western philosophical tradition has simply failed to make sense of the two human kinds that are men and women. 'Individualism', she says, 'runs into particular difficulties over the topic of gender because theorists always find it hard to admit that human beings, like other animals, come in two kinds ... The topic is genuinely tricky, because the sex difference is not quite like any other difference. Many current intellectual approaches tend to treat it as just one among many differences of power and status'.[15] She disagrees with such approaches, saying that the differences do not reduce to power and status but rather there is 'a deeper, much more mysterious difference in kind, making people in all human cultures fall into two groups according to gender. Failure to think about this difference muddles our whole notion of a human being'.[16]

Midgley might be construed as saying that sex difference is fundamental, universal, and so perhaps inevitable, and certainly we know of no society which has operated without it. But whatever we believe about the indelibility of sex difference, it does not follow that it should automatically and unreflectingly find its way into law and be made compulsory. Law is not obliged to operate with a two-sex system and indeed its deep commitment to individualism as the basis of justice makes sexing inherently problematic. For law is then faced with the predicament (arguably of its own making) of recognising and preserving the individuality of its subjects, while defending a way of sorting those individuals into two types who for at least some of their legal lives must relate

15. Mary Midgley 'Sex and Personal Identity' in Mary Midgley *Utopias, Dolphins and Computers: Problems of Philosophical Plumbing* (London and New York: Routledge, 1996) p 73.

16. Midgley, above n 15.

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to each other as these types. We may call this the problem of the one and the two; it is the problem of making sense of our being two legal sexes within a law that purports to treat all of us as distinctive individuals, as ones. How serious is this problem for law? Does it entail a fundamental contradiction within the jurisprudence of persons – the law of what we are – or only a minor, local and intermittent difficulty?

To answer these questions, we must define our basic legal terms. We need to consider what law means by the terms 'person', 'man' and 'woman' and how these terms relate to one another. Do these terms invoke two or three quite different, mutually exclusive legal entities? Are they concepts of the same order or is one a subset of the others? Is one concept more fundamental than the others, so that perhaps one is essential to our legal thinking, but the others are not, or at least not for all of the time? Are the concepts compatible? Do they co-exist in a logical manner or are they fundamentally in tension? Is it logical, even intelligible, for example, to think of an entity as both a person and as a man or as a woman? Moreover does the legal concept of a man function in the same manner as the legal concept of a woman and do the concepts of man and woman relate in the same manner to the legal concept of a person?

B. PERSONIFYING AS INDIVIDUALISING

Perhaps the most fundamental purpose of the legal invention of the person is to create and endow a being with legal as well as moral value. There is a number of ways of expressing this legal intention underlying the manufacture and application of the concept of the person. In Kantian terms, personification ensures that the being in question is an end in self, not the means to the ends of others.[17] Personification sharply distinguishes the entity thus designated from its conceptual opposite, property: that which is a person has moral status while that which is property is mere thing for use or object or instrument.[18] Humans are persons; animals are in most respects mere property, which we humans can put to our uses.[19] Personification thus endows with moral significance; concomitantly rendering something as property strips it of moral status.[20] To personify is to accord respect and dignity; it is to recognise moral value.

17. Immanuel Kant *The Metaphysics of Morals* trans Mary Gregor (Cambridge: Cambridge University Press, 1991). To Kant 'Humanity itself is a dignity: for a man cannot be used merely as a means by any man ... but must be used at the same time as an end' (p 255).

18. This statement perhaps overdraws the distinction between persons and property though it is common to do so. In truth there are entities whose status seems to hover somewhere between the two concepts. The human dead body is one such entity; the human foetus is another.

19. The historical and philosophical background of this modern legal understanding of animals is explored in Mary Midgley *Animals and Why They Matter: A Journey Around the Species Barrier* (Harmondsworth, England: Penguin, 1983). A more sustained analysis is to be found in Mary Midgley *Beast and Man: The Roots of Human Nature* (Ithaca, New York: Cornell University Press, 1978).

20. On the legal and moral distinction between persons and property see Margaret Davies and Ngaire Naffine *Are Persons Property? Legal Debates about Property and Personality* (Dartmouth, Aldershot: Ashgate, 2001).

An important means by which law endows with value, as it personifies, is to ensure that each of us is legally distinct and separate and counts for neither more nor less than one. Persons in law are individuals. The personification of women entailed their emergence as clear and distinct legal individuals. Married women came out of coverture and assumed a separate legal identity. Moral as well as legal dignity is thought to reside in the person thus being counted and treated as one: as an individual, not a member of a group,[21] and not subsumed into the legal identity of another.

Jurists employ the term 'person' in a variety of ways and we should remain sensitive to these different shades of meaning if we are to do justice to the jurisprudence of persons. But always jurists individualise as they personify: the privilege and consequent dignity of being a person in law arises out of being treated as singular – a legal being in one's own right. Elsewhere I have identified three different legal usages of the term person and called them P1, 2 and 3.[22]

First there are analytical jurists who insist that the legal person is pure abstraction, a product of legal norms, not a real live flesh-and-blood individual (P1). He[23] is a necessary piece of legal artifice who comes into existence because law must have a basic unit of analysis: it needs a subject. Though they concede that it is human beings to whom rights and duties apply – that personifying rights concern human behaviour – such jurists also tend to assert the logical independence of legal norms from the non-legal world of real people. The legal concept of a person, they affirm, does not depend on metaphysical presuppositions about the nature of persons as moral or social individuals. The legal person is a convenience and contrivance of law; he is interior to law, a creation and a fiction of law and he can be whatever law wants him to be. He is a figment of the legal imagination. As Lawson advances this understanding of law's subject: 'Legal personality and legal persons are, as it were, mathematical equations devised for the purpose of simplifying legal calculations.'[24] Derham has expressed the abstract quality of persons in this way:

> 'Just as the concept "one" in arithmetic is essential to the logical system developed and yet is not one something (eg apple or orange, etc), so a legal system (or any system perhaps) must be provided with a basic unit before legal relationships can be devised ... The legal person is the unit or entity adopted. For the logic of the system it is just as much a pure "concept" as "one" in arithmetic. It is just as independent from a human being as one is from an "apple".'[25]

In a similar vein, Kelsen has said that: 'The person exists only insofar as he "has" duties and rights; apart from them the person has no existence

21. This was precisely the move from status to contract.

22. Ngaire Naffine 'Who are Law's Persons? From Cheshire Cats to Responsible Subjects' (2003) 66(3) MLR 346.

23. The choice of pronoun is deliberate; the reasons for the choice of male rather than female pronoun should become apparent over the course of the paper.

24. F H Lawson 'The Creative Use of Legal Concepts' (1957) 32 NYULR 907 at 915.

25. D P Derham 'Theories of Legal Personality' in Leicester Webb (ed) *Legal Personality and Political Pluralism* (Melbourne: Melbourne University Press, 1958) pp 1, 5.

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whatsoever.'[26] Persons are only the rights and duties: there is no separate additional being who possesses them. Or as Tur has more recently expounded what I call the P1 idea of the person: the concept is 'wholly formal ... an empty slot'.[27] Legal persons, in this view, should not be confused with real people: they are only the 'pale persons',[28] the spectral people generated within legal relations, not the richly coloured beings of real life.[29] They may be 'real fictions' – in that they truly exist as legal constructs – but they are not real people.[30]

But nevertheless a bedrock assumption of such theorists is that the device of the person will serve to individualise. As Gunther Teubner observes, 'the legal construction of legal person allow[s] for one and only one centre of action and will: the "person" that has to be conceived as the point of attribution for action, rights, duties and liabilities'. To Teubner 'The unitary imputation [is] always present in the case of the legal person'.[31]

P1 theorists may say they are not committed to any particular view of the nature of human beings in their construction of the legal person, and yet the way they think of the legal person is always as *one discrete* legal being coming into relation with another singular legal being through the invocation of a legally recognised right or the assumption of a legally imposed duty. This remains true whether the person is regarded as the entity which comes into being by dint of the recognised right-duty relation or whether the person is regarded as the legal relation itself. Legal personality depends on methodological individualism: persons and their relations are always either units or the relation between units. And this linking of individualism and personification serves an important symbolic moral function, often unacknowledged by such analytical theorists. It assigns moral value to the person thus recognised.

A second type of legal theorist, by contrast, positively embraces the view that legal personification entails the recognition of the dignity that resides in being a discrete and real individual human being (P2). In this view there is a direct link between real corporeal human individuals and legal individuals: the legal world corresponds to the non-legal world of real people. The legal person is not conceptually autonomous – purely a product of distinctively legal norms. As Philippe Ducor expresses this view of the person, 'The human being is the paradigmatic subject of rights'.[32] This understanding of human being is

26. Hans Kelsen *General Theory of Law and State* (New York: Russell and Russell, 1945) p 94.

27. Richard Tur 'The "Person" in Law' in Arthur Peacocke and Grant Gillett (eds) *Persons and Personality: A Contemporary Inquiry* (Oxford: Basil Blackwell, 1987) p 121.

28. This is a term employed by Gunther Teubner, in a conversation with the author in March 2003, about the nature of legal persons.

29. To Teubner and Hutter, legal persons are '"virtual realities" [which] are closely linked with the intrinsic psychic dynamics of the people involved, while never merging with them': Gunther Teubner and Michael Hutter 'Homo Juridicus and Homo Oeconomicus: Communicative Fictions?' in Theodor Baums, Klaus Hopt and Norbert Horn (eds) *Corporations, Capital Markets and Business in the Law* (Den Haag: Kluwer, 2000) p 569 at p 570.

30. For an intriguing discussion of the real fiction of the legal person see Teubner and Hutter, above n 29, p 569.

31. Gunther Teubner *Law as an Autopoietic System* (Oxford: Blackwell, 1993) p 150.

32. Philippe Ducor 'The Legal Status of Human Materials' (1996) 44 Drake LR 195 at 200.

intended to be all embracing: human legal being begins with and includes the baby who has achieved separation from the mother and so entered both the human and legal world as a distinct being, as a legal subject, and it continues until legal death.

Legal rights, in this view, 'inhere in the natural condition of being human'.[33] And perhaps the most fundamental right of this human being is the right to physical integrity. Human dignity is said to reside in what is thought to be our natural inviolability, our separation and freedom from intrusion by others. Legal personality, in this P2 sense, essentially recognises and evokes what we are thought to be in real life and that is bounded and distinct human beings characterised by our natural integrity. Thus it has been judicially declared that 'Anglo-American law starts with the premise of thorough-going self determination. It follows that each man is considered to be master of his body'.[34] Or as Lord Justice Goff asserted in *Collins v Wilcock*: 'The fundamental principle, plain and incontestable is that every person's body is inviolate.'[35] Each human being counts as one; each is a respected and distinct individual. Our dignity as humans demands this recognition of our distinctness, separability and inviolability as human persons.[36]

A third type of legal theorist offers still a different gloss on the person as individual. Here the legal person is thought to be, quintessentially, an intelligent and responsible subject, that is a moral agent. I call him P3. The legal person, in this account, directly corresponds to those beings in the non-legal world who possess intelligent agency and so can assert their individuality through positive reflective rational decisions, through the assertion of the individual will. Richard Tur describes this state of legal being as 'full legal personality'; it 'requires that a person be able to initiate actions in the courts, to "sue or be sued"'.[37] Michael Moore has perhaps provided the most elaborate account of this highly abstracted rational and supposedly universal legal subject.[38] In his view, legal persons must be 'practical reasoners';[39] they must 'act for reasons'.[40]

Because P3 emphasises mental attributes, the person thus conceived need not in theory be embodied or material.[41] As the philosopher EJ Lowe has observed in sympathetic vein, 'if we want to detect the presence of a person ... we do not in fact necessarily look for bodily characteristics of any sort: we look for intelligent activity, and where we find it we attribute its source to a person'.[42]

33. David Kinley (ed) *Human Rights in Australian Law: Principles, Practice and Potential* (Sydney: Federation Press, 1998) pp 4, 5.
34. *Natanson v Kline* 350 P 2d 1093 at1104 (S Ct Kansas, 1960).
35. [1984] 1 WLR 1172 at 1177.
36. Clearly corporations do not feature largely in this analysis.
37. Tur, above n 27, p 119.
38. Michael S Moore *Law and Psychiatry: Rethinking the Relationship* (Cambridge: Cambridge University Press, 1984) p 48. See also Michael S Moore *Placing Blame: A General Theory of the Criminal Law* (Oxford: Clarendon Press, 1997).
39. Moore (1984), above n 38, p 49.
40. Moore (1984), above n 38, p 3.
41. P3 is therefore very close in conception to Derek Parfit's account of the person. For Parfit, 'physical continuity is the least important element in a person's continued existence': *Reasons and Persons* (Oxford: Clarendon Press, 1984) p 284.
42. E J Lowe *Kinds of Being: A Study of Individuation, Identity and the Logic of Sortal Terms* (Oxford: Basil Blackwell, 1980) pp 109–110.

Whereas P2 is meant to conjure up a corporeal human being, P3 concentrates instead on mental activity which in theory at least could be possessed by non-human beings. For as Lowe further elucidates, 'there is not apparently an absurdity in speaking of an immaterial person'.[43] Here individualism entails the assertion of an individual as abstract will. Anyone with this capability counts as a person.

In sum we can say that in different ways all three of our legal persons are individualised in their personification – though each emphasises a slightly different dimension of individualism, of being an individual.

C. SEXING AS IMPOSED COMMONALITY

None of these definitions mentions the sex of persons and all assume that legal personality can be fully explained and comprehended in a sex-neutral manner. An important reason why the sexing of persons does not form any part of these understandings of the legal person, I suggest, is that sexing runs counter to all three types of personification. Personifying individualises. It is a fundamental legal classification highly compatible with liberalism in that it is intended to render separate and distinct those who are permitted within it, and thus to free us from each other. By contrast, sexing classifies us in an illegitimate, illiberal fashion: it starkly dichotomises us, whether we want it to or not, placing us into one of only two categories of being, and then imposing common characteristics within each of the two groups and presupposing standard differences between the groups.

Let us consider our three legal persons and the respective forms of their implicit rejection of sexing. P1 entails a rejection of any extra-legal natural person, human or non-human, male of female, as defining of personality. The person, as abstraction, resides in shifting constellations of legal rights and duties that in turn are constitutive of legal relations. Persons exist in the particularity of a given legal relation; their natures are not set beforehand.

P2 by contrast quite explicitly invokes a real extra-legal human being – a biological human as our legal subject, in contradistinction to an animal. This is the human of human rights law, the universal protagonist of the major human rights instruments. But then how are we meant to conjure up this legal human being – how is 'he' to be made manifest given that there is no such thing as a standard human? P2 does not seem to admit of two types of human being at birth, even though legal sexing commences at birth with the birth certificate. We do not expect human rights lawyers to invoke male and female persons.[44] There is only one universal human category of legal person/individual suggesting a common standard human form. The paradox of this P2 person is that 'he' is intended to give legal life to real embodied human beings and yet at the same time 'he' is highly abstracted – a thought experiment. Real people

43. Lowe, above n 42.

44. Of course there is an international Convention on the Elimination of Discrimination Against Women and there is also domestic anti-discrimination legislation. But the point of such legislation is not to endow women with a specific legal character as female human persons but rather to disqualify sex as a legitimate category of discrimination.

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are sexed.[45] P2 persons are somehow embodied in that they are human, not animal, beings but they lack a defining sex.

P3, our third legal person, is a mental being, and in the view of many, remains intelligible even when completely abstracted (by way of thought experiment) from the physical world. Logically this person could entail a computer or a highly intelligent animal, should one be discovered. P3 is close to the person defined in orthodox mentalist philosophical theories of the person in that he is only contingently embodied and therefore only contingently sexed. He is a mental being who is not further defined by the limiting body; he asserts his distinctiveness against all others through acts of mind.[46] Sex can therefore have no formal place in this theory of the person. For as the case law insists, we must scrutinise the body in order to sex; and so (with sex thus interpreted) the sexing move is the precise opposite of P3 personification with its abstraction of the individual from their material being, their transcendence of the body which is the basis of their individual freedom. P3s relate as minds not as bodies and certainly not as sexes.[47]

The main theories of the person therefore all implicitly eschew sex. My further claim is that sexing is formally recognised to be antithetical to personification within mainstream jurisprudence but that this does not stop law sexing us. This recognition of the problematic legal existential nature of sexing is evident in the story of status to contract, which is intended as a story of the getting of freedom, as the individual emerges from status and so from the group.[48] Sex like age and like class is a status category, made obligatory by the state, and which serves to impose commonalities not of our choosing. It is a legacy of a time of caste and hierarchy.

The suspect nature of sexing, and our law's appreciation of this disturbing fact, is further evident from the introduction of gender-neutral and gender-inclusive legal language. We see it in anti-discrimination legislation that implicitly asserts sex difference but then says it must not count against sexed persons: it must not cluster them adversely, stereotype them, treat them as a caste.[49] It is evident in the legal view that sexing is now inessential to most legal relations (contract not status should prevail) and should be kept to a bare minimum. In essence, it should be confined to sexual relations, to marriage law in particular where the sex of the parties is still deemed critical to the contract. Outside of these sexed relations, legal individuals should have no legally relevant sex (precisely because sex de-individualises). The message here is that sexing can be intermittent and is therefore often inessential.

Legal concerns about the illiberal nature of sexing are also implicit in judicial denials of law's responsibility for the attribution of sex. Rather the legal hand

45. And of course they have a number of other distinguishing characteristics. But the thesis of this paper is that sex remains one of the most fundamental biological and social categories which is explicitly recognised and imposed by law.

46. Certainly Parfit does not require bodily continuity for continuity of the person.

47. As Katherine O'Donovan made plain in *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

48. For a discussion of the emergence of modern legal personality and the possessive individual see Naffine and Davies, above n 20, p 63.

49. Human rights instruments of the twentieth century openly condemned the practice of discriminating between and against persons according to the old legal statuses.

is said to be compelled by nature; there is little choice but to sex as nature not law is doing the work of sexing. This view is clearly evident in the influential English 'transsexual' case[50] of *Corbett v Corbett* in which April Ashley, a male-to-female transsexual person, sought to have her sex change legally recognised for the purpose of the law of marriage.[51] As Ormrod J affirmed:

> 'The criteria [for sex determination] must, in my judgment, be biological, for even the most extreme degree of transsexualism in a male or the most severe hormonal imbalance which can exist in 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.'[52]

In this view, our sex is indelible, the natural residue after the move to contract. While the legal person is an artefact of law, sex is construed as a thing of nature: it is regarded as a natural, not a legal category, which means that law is not responsible for the formation of the concept.[53] To invoke Ormrod J again: 'the biological sexual constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.'[54] Sex does not need a legal justification as a legal category. The person is a legal concept and so must be legally defined and explained and defended;[55] but sex it would seem is treated as a natural kind, 'a kind of thing that is distinguished by nature itself'.[56]

As Lowe elucidates:

> 'the crucial distinguishing feature of natural kinds is that they are subject to natural law. Laws of nature ... are propositions concerning sorts or kinds ... Thus gold qualifies as a natural kind because there are laws governing its form and behaviour – such as that it is weighty ... and so forth. Similarly, mammals comprise a natural kind, in virtue of their being such distinctively

50. Though a High Court decision, the essentially biological approach to sex determination adopted in this case has remained English common law since 1970 and has recently been affirmed by the House of Lords in *Bellinger v Bellinger* [2003] UKHL 21. See S Cowan '"That Woman is a Woman!" The Case of *Bellinger v Bellinger* and the Mysterious (Dis)appearance of Sex: *Bellinger v Bellinger* [2003] 2 All ER 593' (2004) 12(1) Feminist LS, forthcoming. However this situation will alter dramatically with the implementation of the Gender Recognition Act (assented to 1 July 2004).

51. For a detailed critical account of the English, US and Australian transsexual jurisprudence see Laura Grenfell 'Making Sex: Law's Narratives of Sex, Gender and Identity' (2003) 23 LS 66.

52. *Corbett v Corbett (otherwise Ashley)* [1971] P 83 at 106.

53. Consequently there is no perceived need to provide a legislative definition. Thus the Births and Deaths Registration Act 1953 (UK) requires the entry of the sex of a child on the birth certificate but does not provide a definition of sex. The practice of the Registrar is to follow Ormrod J in *Corbett* and employ purely biological criteria.

54. *Corbett v Corbett (otherwise Ashley)* [1971] P 83 at 104. This biological approach to the endeavour of a person to change sex was rejected by the Full Court of the Australian Family Court in *A-G for the Commonwealth v Kevin and Jennifer* on 21 February 2003.

55. The scope of the concept of person, in particular, is disputed – should it exclude animals, as it does? Should it include corporations as it does?

56. Thomas Mautner (ed) *The Penguin Dictionary of Philosophy* (London: Penguin, 2000) p 375.

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> mammalian laws as that mammals are warm-blooded and that they suckle their young.'[57]

Lowe believes 'that entities in this class must enjoy some sort of ontological priority over both abstract and artefactual objects'.[58] It is nature that defines natural kinds, not society, and certainly not law. As Michael Moore explains the concept of death understood as a natural kind of event: it 'occurs in the world and ... it is not arbitrary that we possess some symbol to name this thing'.[59]

So too with the legal understanding of sex, especially as expounded by Ormrod J. Sex is viewed as a biological fact which law adopts and endorses; it is neither a legal nor a social creation; it is not an arbitrary, and so variable, product of social or legal culture. It is a natural fact, not a legal fiction, which law is bound to accept in its natural form. In other words it is not truly a legal concept even though it is firmly within law's lexicon.[60] It is thought to draw its meaning entirely from another discipline: the biological sciences.

Although the prevailing legal view is that nature is there to take care of sex difference, law nevertheless enforces sexual nature, from the moment of our birth,[61] sometimes with an insistence that seems to border on cruelty.[62] The legal relationship in which sex is most conspicuous and most discussed is that of marriage.[63] But there is a wide variety of legal relations – for instance, with immigration and customs officials, with government and private insurers, with providers of medical and adoption and pension services – in which we must

57. Lowe, above n 42, pp 5–6.

58. Lowe, above n 42, p 1.

59. Michael S Moore 'A Natural Law Theory of Interpretation' (1985) 58 S Cal LR 277 at 294. Moore is not wishing to deny that scientific knowledge of death can change and therefore so too can its meaning. Thus 'Whether a person is really dead or not will be ascertained by applying the best scientific theory we have about what death really is' (at 294). And indeed the legal meaning of death has changed under the influence of science. We now have 'beating-heart' cadavers, who are legally dead (that is whole brain dead), but whose organs are artificially sustained for the purpose of organ transplants to the living.

60. While the Australian departures from the English biological essentialist treatment of sex admit the effects of culture and the preference of the individual, they preserve a firm biological foundation of the definition of sex. One starts with genitals and hormones. Then surgery and society is allowed to influence the definition. The Australian approach does not question the underlying assumption of the trans-gender jurisprudence that sex difference (however it is defined) must exist and be legally recognised.

61. The Births and Deaths Registration Act 1953 (UK) requires the sex of a child to be entered on the birth certificate. It does not however supply a legislative definition of sex, for reasons discussed below.

62. A dramatic instance of compulsory sexing causing humiliation and injury is the imprisonment of a man who dresses and lives as a woman in a prison for men. The surgical assignment of intersex babies to one sex or the other may be regarded as another illustration of the brutality of sexing.

63. *Hyde v Hyde and Woodmansee* (1866) LR 1 P & D 130 at 133, per Wilde JO provides the classical common law definition of 'marriage' as the union of 'a man and a woman'. This definition has very recently been declared by the Court of Appeal of Ontario to be in violation of the Canadian Constitution in that it denies the equality rights of same-sex couples. See *Halpern et al v A-G of Canada et al* (10 June 2003).

declare our sex. And of course we are required to be a clear determinate sex, not a hybrid or no sex. We live and we die sexed as legal men and women and with virtually no choice in the matter.

D. LEGAL PERSONS AND LEGAL SEXES – WHO COMES FIRST? DOES ONE TRUMP THE OTHER?

We have observed that personification is individualising and that sexing groups persons, imposing unchosen commonalities. The endeavour to individualise through personification is impeded, even thwarted, whenever sexing occurs. I now argue, further, and perhaps more controversially, that this sexing is always there, that it is always getting in the way. The reason is that personification and sexing are *both* fundamental to law and yet *always* in tension.

To say that personification and sexing are *both* fundamental to law is to challenge the prevailing orthodoxy that person is a fundamental legal concept while sex is not; that the concepts do their work at different levels and that sexing is only relevant intermittently. The person (not man or woman or even human being) is characteristically regarded as law's most basic concept, its most primitive unit, beyond which one cannot go, which cannot be further divided, and without which law cannot think or work. In this sense law's person may be fruitfully compared with P F Strawson's famous account of the person. He too regarded the concept as primitive, meaning that it is irreducible, indivisible and it is also basic and necessary to our thought.[64] From this it follows that sex should logically come after personification, perhaps as a qualifying condition, and perhaps only sporadically and minimally?[65] The idea is that the sexed body comes into and out of legal existence, only for limited purposes, when absolutely necessary – in particular for sexual purposes.[66] But in the main it is meant to be subservient to a more abstract being that is the person.

It is because sexing is always legally interpreted as entailing the identification of a specific type of biological entity that many theorists of the person – philosophers and jurists alike – say that we *can* think of persons without sexing. To demonstrate the inessential nature of our biological beings, they employ thought experiments in which we are asked to imagine people radically changed and yet still persons.[67] A standard change made in such

64. P F Strawson in his book *Individuals* (Garden City New York: Anchor Books, 1963) therefore offered a famous challenge to the dualist account of the person which allows the concept to be divided into mind and body.

65. Though as Rousseau said, men are only men for a little of the time, but women are women for all of the time. See discussion in Grenfell, above n 51.

66. Kant seemed to think this was the case, treating sexual relations as a small but necessary part of his account of the person: above n 17. 'Sexual love is destined [by nature] to preserve the species': p 220. However he counselled against 'defiling oneself by lust' at p 220.

67. For a critical analysis of the philosophical device of the thought experiment see Kathleen Wilkes *Real People: Personal Identity Without Thought Experiments* (Oxford: Clarendon Press, 1988).

experiments is, remarkably, to remove the (sexed) body. Such abstractions of the person from their materiality are intended to show us not only that we can still think of them as persons but that to be a person is precisely not (necessarily) to assume any particular corporeal form. A person is still a person, whatever their bodies are like, and consequently whichever their material sex. While we can think of someone without a sex but still as a person, it seems that we cannot think of them as not a person (without a fundamental change of character and incidentally their utter debasement).

In short, the conventional wisdom is that persons, not men and women, people law. Persons, as a legal device, are created by all legal relations (P1), persons as human beings are, in the main, regulated and protected by such laws (P2) and persons as responsible agents justify the attribution of legal responsibility (P3).

The counter-argument, that sex is fundamental and not contingent or accidental, can be made on historical grounds: to be a person, as that term has been employed in a variety of statutes on public legal life, one has had to be a man. It has been an often-unstated but utterly assumed necessary prior condition and hence built into the very definition of the person.

Sex is also basic to our legal lives materially/ontologically: the person is a fiction; it is a legal figment, an abstraction, which always achieves its practical realisation in the form of a material man or woman. Sex can also be said to be fundamental linguistically: law always invokes a two-sex system even when committed to gender neutrality. After all our law must always rely on the language that we all use and that language is profoundly sexed.

Sexing, by which I mean the legal assignment of an individual to either a male or female sex, is therefore not confined to a small number of legal relations, which seem to demand it – that is, legal relations which entail sex. Sex is basic to our legal thought; it is difficult to think of legal persons without sexing. Many of our legal attitudes would not make sense if legal sexing did not occur or if people did not appear naturally to divide into two sexes. Sex assignment, I suggest, is fundamental to our form of (legal) life. This is not to say that such sexing is necessarily so and must always be the case. But in the legal world as we know it, the two-sex system is so much a part of our thinking that it assumes the appearance of necessity.[68]

It is not difficult to establish, historically, that sexing has necessarily preceded legal personification in many manifestations of the legal person. Until the final resolution of the persons' cases, statutes granting 'persons' the right to hold public office were taken to be referring to men, not women, and therefore logically it was necessary to attribute a sex to any given individual to know whether they qualified as a person. In other words, lawyers and jurists needed to know whether they were dealing with a man or a woman *before* they could know whether there was a person at all who could participate in these legal relations.

68. For a critical discussion of the two-sex system in law see Margaret Davies 'Taking the Inside Out: Sex and Gender in the Legal Subject' in Ngaire Naffine and Rosemary J Owens (eds) *Sexing the Subject of Law* (North Ryde, New South Wales: LBC, Sweet & Maxwell, 1997) p 25.

The celebrated line of English and North American cases on women as 'persons'[69] obliged the judiciary to undertake this prior sex determination explicitly rather than (as was the usual way) implicitly. They were asked to articulate the sex of the 'person' designated in a variety of statutes regulating public and professional life, and so were obliged to be open about the sexual characteristics that qualified someone for public office. In deciding the character of that individual, they looked to legislative intention, to social practice and to supposed temperament. They decided that the relevant legislation was, by long tradition, by 'uninterrupted usage',[70] referring to biological men who had always performed these public roles. Those judges who ventured to give reasons for this inveterate practice declared that it would be indecorous for women, but not for men, to tax themselves with the sort of demands placed on voters, politicians, lawyers and doctors.[71] It was thought that respect for women – respect for 'the delicacy and purity of their sex'[72] – required their exclusion from these arduous and at times immodest public pursuits.[73]

The legal sequence of sexing and then personifying is still occurring – in explicit ways – in those cases where the law still requires a sexed individual before it is prepared to recognise them as the sort of person who can participate in certain legal relations. The law of marriage is a conspicuous example. However law implicitly recognises the problems of justice generated by this (de-individualising) sexing and so, as it were, keeps the damage of sexing down to a minimum. The prevailing idea is that sexing is confined to a very limited number of legal relationships, with marriage the most important. Outside marriage, individuals are thought to be largely free to pursue their legal lives without a sex.

The second argument against the priority of personifying over sexing is ontological and material. My argument is that sex is currently fundamental (and not merely accidental) to legal identity more generally because it is

69. The classic survey of the English and United States cases is A Sachs and J H Wilson *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (Oxford: Martin Robertson, 1978).

70. *Beresford-Hope v Lady Sandhurst* (1889) 23 QBD 79 at 83. Here the court was referring to the incapacity of women to vote.

71. As Willes J asserted in *Chorlton v Lings* (1868) LR 4 PC 374 at 392, the absence of women's right to vote 'is referable to the fact that in this country ... chiefly out of respect for women, and a sense of decorum ... they have been excused from taking any share in this department of public affairs'.

72. Such respect for women was declared in *Jex-Blake v Senatus of Edinburgh University* 11 M 784 at 811 when it was decided that women should not study medicine alongside men at the University of Edinburgh.

73. The exclusion of women from public life has proven remarkably durable. It was not until 1945 that women were admitted to the Royal Society, which has been described as 'for nearly three centuries the citadel of Britain's scientific elite'. Brenda Maddox *Rosalind Franklin: The Dark Lady of DNA* (London: Harper Collins, 2002) p 82. And as Maddox observes, 'Forty-three years had passed since the Society threw out the nomination of the first to be proposed, Hertha Ayrton, an engineer and physicist, on the ground that as a married woman, she was not a legal person and therefore could not be a Fellow of a body governed by statute' (pp 82–83) Women are still excluded from some of the leading social and professional clubs whose membership includes the nation's most powerful men.

exceedingly difficult to escape from it, even when we think we have – that is when we invoke the ostensibly gender-neutral terms 'person' or 'individual'. These terms are abstractions; they are thought experiments in that they implicitly demand us to think of the human in question as unsexed. But there is a problem of intelligibility here. We do not live among disembodied, unsexed persons and indeed there are profound expectations that sex difference will be clearly identifiable. Marx said that 'man is not an abstract being, squatting outside the world. Man is the human world, the state, society'.[74] But the move away from the abstract (away from persons be they P1, 2 or 3) is a move towards a world of men and women. The point is, extending Marx's theme, and yet *contra* Marx, 'man' is an abstract being: men and women together comprise the human world. They have ontological priority.

In reality the people we deal with in our lives are men and women, and always so, such is the profoundly sex-divided and sex-organised nature of our world. In short, we live among men and women, not persons. This is why sex neutrality is always a feat of the imagination. The concept of an unsexed person is so abstract that it is virtually without meaning: to give the person meaning we give it an application; we give it some work to do and so we mentally give it flesh. Our mothers our brothers, our aunts and uncles, our husbands and our wives, all come utterly sexed and are unthinkable without it. We might therefore say that persons are abstract and men and women are concrete: the one is ideal; the other real.

We need therefore to reflect on the curious logic of personification that treats the sexed body as unnecessary or contingent. There is something very odd about saying that it is in the nature of personification to rise above the body when the only way we can live our lives as persons is *as* or *with* or *in* bodies (the preposition will be dictated by one's particular approach to the mind-body relation). It is equally odd that *if* we are explicitly to descend to the level of the material (as in the trans-gender cases), then it seems that we *must* sex in order to personify.

Part of the answer to this paradox, in formal legal terms, may be as follows. It is that sexless or sexually indeterminate human beings are unpersons for the purposes of those legal relations that explicitly demand a sex (even though such laws are in essence illiberal and run counter to all three explicit forms of legal personification). Sexually undefined persons do not have a legally recognised place in such relations and nor do they in ordinary social relations. In the recent Australian case of *Kevin*,[75] the applicant sought to have his male sex confirmed for the purpose of the law of marriage and so ensure the validity of his marriage ceremony. (Kevin is a female-to-male transsexual person.) As the trial judge recognised, to deny him his sex would not only prevent Kevin from marrying a woman, it would make him an oddity, and deny him his personhood. The compelling evidence that Kevin was viewed as a man by all the significant people in his life 'show[ed] him as a person: not an object of anatomical curiosity'.[76] Kevin would be unpersoned if he could not enter the

74. Karl Marx *Contribution to the Critique of Hegel's Philosophy of Right: Introduction* (1844) in *Early Writings*, p 43, quoted in Lukes, above n 10, p 75.
75. *Re Kevin (validity of marriage of transsexual)* [2001] January Fam CA 1074.
76. [2001] January Fam CA 1074, para 25.

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relevant legal relation as the person he believed himself to be.[77] Moreover, the personifying dignity that resided in his appropriate sexing, in the court's view, extended beyond the sexual relations where sexing is conventionally thought, by law, to reside.

We may say therefore that not only is sexing personifying when legal relations specifically demand a sexed person but that sexing is also personifying in a more general and fundamental sense. In other words, to be a moral person with moral dignity it seems that we (at least at present) need a sex[78] and that it must be the sex that we regard as ours, as capturing ourself. As the judge observed in *Kevin*, to be 'a human being living a life as we do, among others, as a part of society', Kevin had to be legally as well as socially recognised to be a man, not a sexually indeterminate individual or the wrong sex, as Kevin saw it. He must be permitted to live a life 'that those around him perceived as a man's life ... doing what men do'.[79] He must be permitted his male dignity.

The force of sexed legal reality is further brought home to us when we consider that we do not even have legal pronouns for a non-sexed person. The absence of a language for the sexless person speaks indeed of his/her/its unintelligibility, its exclusion from our very vocabulary. The so-called gender-neutral laws are never really gender-neutral because they are linguistically obliged to say 'he' covers 'she' or to use both 'he' and 'she', thus always reproducing the two-sexed system. There is no third term, apart from 'it', but this would drive the person into property which is why men and women are never described in this way. 'It' debases; 'it' means that the beings so described are not persons; they are things.

In short, gender neutrality still assumes the form of two sexes. For apparent convenience (and strong historical precedent), the male pronoun is chosen to refer to us all, as I have done in this paper in line with persisting convention. According to one philosopher, it is simply a brute fact that the terms are asymmetrical, that the reverse cannot occur, that 'she' cannot stand for 'he'.[80] Moreover the lack of reciprocity of terms is said to be philosophically uninteresting and therefore almost completely neglected in the legal and philosophical writing on personal identity.[81] But in truth it is deeply interesting that we are still required to think of two sexes with one of the two sexed pronouns for it means that it is always a feat of the imagination, making women present in our legal language.

Sexed pronouns are not merely neutral linguistic tools, for either lawyers or lay people. In reality the choice of a sex to identify the person means that the concept of the person is always tied to one sex – that is to say, the abstraction of the person is powerfully linked to a biological and cultural sex. With the cultural conflation of man with person, of man with Man, and the powerful

77. See Kathleen A Lahey *Are We Persons Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999).

78. Hence the legal denial of a specific sex to an intersex person seems almost cruel. See *In the Marriage of C and D (falsely called C)* (1979) 5 Fam LR 636.

79. *Re Kevin (validity of marriage of transsexual)* [2001] January Fam CA 1074, para 25.

80. Wilkes, above n 67.

81. Wilkes says just this in a brief footnote on her decision to use the male pronoun in her volume.

legal precedent for this conflation, the abstract term person tends to bring to mind a man not a woman. When the person materialises, it seems that he is already sexed male.

Sexing and personification would seem therefore to be inextricably linked and yet fundamentally in tension. Both are elementary to our social and legal thinking about what and who we are and why we have moral and legal status and yet they co-exist unhappily. Personification gives dignity essentially through individualisation – through rendering someone individual and distinctive. Sexing gives (and removes) dignity essentially through attribution of sameness or similarity with others of the same sex, the attribution of difference from the other sex, and through the simultaneous avoidance of the third term: 'it'. To date we lack a liberal theory of the sexed person, of the sexed individual. Indeed we have difficulty making any sense of such a being and so the vast body of philosophical and legal writing simply ignores the problem.

E. MALE AND FEMALE PERSONS: ARE THEY SYMMETRICAL TERMS?

If the two sexes were both truly and equally embedded in our legal thinking about persons, then sexing should operate roughly symmetrically. It should type and limit each sex to a like degree, confining each to its own nature. It should necessarily represent a de-individualising move for both sexes and to a similar extent. Men should be delimited by women (the only other recognised sex) and rendered the same as other men and women should be delimited by men. Each should have an equal impact on the other.

But as we have already seen, this is not how the legal sexing of men has worked. Man has tended *not* to be a limiting condition (but woman has). Rather legal manhood has usually functioned as an enabling condition, a precondition of personhood. It has generally served to individualise, differentiate and so personify rather than sex type.[82] There has been no discernible difference between the two concepts, man and person, as the persons' cases made clear. There has been a conflation of the one with the other: to be a man is to be a person. It is not the negative state of not being a woman.

The persons' cases are only the most obvious and perhaps best-documented manifestation of this style of masculinist legal thinking. These cases provided the occasions for judges to make explicit what had previously simply been assumed. Ultimately the judges were persuaded of the view that women were persons, but it was made plain to the women of the early twentieth century that this was a major breakthrough for them. Until then, legal persons were men. The major legal thinkers have also taken it to be axiomatic that persons are men. There has been a simple, unargued and untheorised conflation of men with persons. Male sexing has been so proximate to personification that male sexing has been all but invisible. Men have largely been defined by their individuation and their individuality as persons; women by their

82. This is not to say that men have invariably benefited from their sexing as men. The conscription of men to fight in wars can certainly be regarded as a limitation on male freedom and perhaps as an illustration of personification acting in perverse ways.

homogenisation as a sex and their consequent confinement to the domestic sphere of life. Blackstone made no bones about it when he explained and defended the doctrine of coverture.[83] Atiyah implicitly recognised it in his classic work on contractual individualism. He said that 'individualism meant ... the fundamental responsibility of man for maintaining himself and his family'.[84] Although Atiyah has nothing further to say on the maleness of this individual (after all by long tradition he does not need to), he nevertheless clearly instates the man as the individual: there is no question of any intended sex neutrality here, or of the male covering the female case. If legal personification entails recognition as an individual agent (P3), then this is very close to the meaning that has been assigned to legal man. In short, persons are male persons. The adjective male is invariably dropped because it does not serve to distinguish from any other type of person – which logically would have to be a female person.

Individual men have not had to demonstrate or prove their suitability for personification (nor have women, either as a type or as individuals, had to demonstrate their unsuitability – and indeed the very sexing process denied them an opportunity to prove themselves either way). By dint of their legal sexing, men have simply been taken to possess the often-flattering qualities said to characterise their sex (and women not to) and so men, sexed by law as men, have automatically attained the privileges and shouldered the responsibilities of their sex. Male sexing has been a right of passage into law, a right of entry, an acknowledgment of superior public, and therefore legal, being. But before women insisted that they too were persons, there was no need for a formal sexing stage prior to personification. It was simply a given that to be a man was to be a person.

So what of female persons? There is a substantial literature on the social and legal characterisation of women who have been defined by their lack of individuality – their want of ability to function in the rich variety of roles demanded of public life – simply because they have been defined by their sex. Eva Figes long ago lamented the exclusion of women 'from education and public affairs', the 'vast black ocean of silence stretching back into the past'.[85] The classification of an individual as a woman has also closed much of her legal life.

These two different moves performed by sexing – the one for the man, the other for the woman – have been, until now, the resolution of the tension between personifying and sexing.[86] As a matter of inveterate usage, women *as* women, have been missing from the concept, but their absence has therefore been critical to the definition of the concept (its inherent maleness). The female

83. William Blackstone *Commentaries on the Laws of England* (1st edn, 1765) vol 1, ch 15, p 430.

84. P S Atiyah *The Rise and Fall of Freedom of Contract* (Oxford: Clarendon Press, 1979) p 271. There is a considerable feminist literature on this maleness of the individual: see especially the extensive critiques of Rawls' *Theory of Justice*, above n 13.

85. Eva Figes *Patriarchal Attitudes: My Case for Women to Revolt Explained* (London: Panther Books, 1972) pp 164–165.

86. Indeed this is the resolution identified by Mary Midgley in her essay on the tensions between sexing and individualism in the Western philosophical tradition.

sex has therefore been both excluded from, and essential to (in its positive exclusion), the concept of the person.

What might be regarded as an extreme view of the implications of sexing women, one put by many feminists, is that women are only their sex. If men are only limited as not-women in their brief acts of sex with women (as Rousseau and Kant both believed), women by contrast are always women: always not men,[87] not persons, not individuals.[88] The classification of women therefore precisely entails their elimination from the concept of person. Pateman calls it 'the exclusion of women from the central category of "individual"'.[89] Atiyah did it without thinking. Feminists now bring it to our attention, make it a central political and intellectual problem, but then wonder what to do next.

Immense progress in the legal position of women has occurred in the past 150 years, marked by the Married Women's Property Acts, the final resolution of the persons' cases in favour of women and the introduction of anti-discrimination legislation. There is reason to believe that women have become part of the concept of the person. But if the change were thoroughgoing, then the maleness of the person should by now have been brought into sharp relief by the very presence of women, and something done to rectify the lop-sided nature of the concept. Now that law has explicitly recognised the maleness of the historical category of person (as in the persons' cases), and given that it has also chosen to retain a two-sex system (with its now-recognised illiberal past), there is an inescapable demand on law to do something about its central term.

And yet there are few signs in law of a reconceptualised person or of the emergence of a second type of legal person: the female person. We are left with the legacy of individuals as male persons and have no culture or even a language for speaking of female persons. We have no way of thinking of individuals as two kinds. This problem of philosophy, identified by Midgley some twenty years ago, would seem therefore to remain one of the most pressing problems of law.

The conundrum of the female subject remains also perhaps the most vexed question of contemporary feminism.[90] And really the problem entails a cluster of very difficult questions. Does it make sense to have a female subject? If so, who can she be? If she is assigned a character won't she always include some women in her characterisation and exclude others? Won't she therefore replicate the problems of the past? That is won't she always represent yet another stereotype? Moreover how can women ever have a legal subject of their own when their subjectivity has always been implicated in their subjection? Where are we to find the materials with which to construct a positive

87. Unless of course they are trying to 'pass' as men by doing their best to approximate a male life. See Catharine MacKinnon *Feminism Unmodified* (Cambridge, Mass: Harvard University Press, 1987).

88. This thesis that women are defined by their 'lack of qualities' has been advanced in its most radical and influential form by Luce Irigaray in *Speculum of the Other Woman* trans Gillian C Gill (Ithaca, NY: Cornell University Press, 1985).

89. Carole Pateman *The Sexual Contract* (Cambridge: Polity Press, 1988) p 6.

90. For an overview of the feminist philosophical literature on the problem of the female subject see Andrea Nye *Philosophy and Feminism: At the Border* (New York: Twayne, 1995).

female sex?[91] But then of whom will feminists speak if we have no female subject? Won't we have a problem without a subject?

F. TO PERSON? TO SEX?

Justice demands that our law treat each of one of us as an individual, as a fresh case, not according to a type. Embedded in law's concept of the person is this splendid commitment to the individual. This is why sexing is always suspect: logically it must always detract from this legal commitment to individualism. Feminists of all political colours are similarly committed to the recognition of women as individuals, as persons. But then what is to be done with our subject – with women? Indeed what is to be done about the unhappy co-existence of men, women and persons?

There appear to be several options. First, we might persist with the present approach and hope that now women are no longer explicitly excluded from the category of person, that the concept now accommodates women. We can hope that the legal history of the concept has not contaminated or skewed it for good: that the concept has now undergone a sex change; that it is neither male nor female now, but something else which conduces to justice. True we must no doubt – as steady-staters – remain committed to a two-sexed system, but this is only for limited purposes: it is only for a few legal relations which we must hope do not colour the general (supposedly sex-neutral or sex-inclusive) conception of the person.

Secondly, we might do something much more dramatic. We might outlaw sexing and the sexes and, in the legal world, only have persons. We would have to do a good deal more than anti-discrimination legislation does now: for we would need to disallow any reference to sex in any legislation. Law would also be obliged to invent a sex-free pronoun which does not 'thingify' us. The fact that society is two-sexed would be declared legally irrelevant.

Thirdly, to be true to pure liberal individualism, the law might permit and enable self-ascribed sexing. This might entail a proliferation of sexes from which to choose or at least a third term (undecided? hermaphroditic?). It might also entail intermittent and variable sexing. Fundamentally we would all be persons. But in addition we might choose to have a sex to express our individuality (assuming this is possible) or we might choose to have no sex at all.

Fourthly, we might develop a second legal person, sexed female. This idea seems to have found favour with some feminists, while others have powerfully rejected it as entailing all the original problems of typing – who will she be? Which one of us? Fifthly, we might positively reconceptualise the legal person so that (somehow) s/he is truly inclusive; that is, the category is equally amenable to men and to women and one sex is not obliged to become more like the other in order to fit the concept.

91. As Anthea Nye has queried, 'How can a person or group of persons, especially if they are oppressed ... come to have an identity independent of how they are seen? If they try to escape established meanings altogether, a terrifying vacuum opens before them. Somehow new meaning must be created, but it is not clear what its source can be': above n 90, p 62.

We might also reflect on which of our present three theories of the person offers the most hope of reconciling men, women and persons. P1 seems, to me, most hospitable to reform and to women. Even when women were not P3 persons for the purposes of the persons' cases, they remained P1 persons; take for example the law of homicide and parts of property and contract law which acknowledged the presence of women in legal relations. P1 also has the valuable potential of revealing the processes of personifying. Advocates of this conception insist that it is a construction for particular purposes, that it is stipulated into being, and so they invite us to inspect the conditions of personification: to consider why and how, in a given instance/relation, x is personified.

With P1 theorists, personifying is not a matching process: it is not intended to ensure a correspondence between concept and essence, a fixed referent in the real world (while this might seem to be the corollary of P2 and P3 thinking.) Nor is it thought that beings come to law already personified and so one does not look to a type of pre-legal being before one personifies, as it were to see if they are suitable candidates because they are already in effect persons. Rather (as Kelsen in particular insisted), it is the legal relationship which creates the person, not the other way around. Law makes the person; the person (by dint of their pre-legal character) does not make the law. P1 therefore entails reasoning for legal consequences, rather than reasoning from the nature of x which then compels a certain decision. Personifying legal relations are created for all sorts of reasons (say the economic utility of recognising and regulating a given set of relations), not because there is a pre-legal person which impresses its nature on law as a person.

The other positive characteristic of P1 – and one that is especially conducive to justice – is its relational nature. Persons come into and go out of being only within the particularity of specific legal relations. Their being is not fixed and does not possess a nature before the relation. So there is potentially a great openness to this form of legal being. P1 acknowledges the plasticity of persons.

Of course there will always be social and political reasons[92] why in any given legal relation x or y are recognised as participants and thus given a legal life.[93] And so social beliefs and conventions about types will always inform and condition such legal decision-making. But this social typing does not have the same degree of force for P1, not only because P1 theorists are trying hard to expel any notion of a pre-legal person forcing law's hand, but precisely because P1 emphasises the relationality and hence multiplicity and fluidity of legal identity. Proponents of P1 also do not profess to capture or portray all of our lives in the non-legal world – whether we think of ourselves as persons, or as men, or as women, or as something else. The law of persons, and the law itself, is put in its place, as a more modest and perhaps mundane pursuit. It is only law trying to achieve certain effects. It is not a metaphysical enterprise; it does not entail a theory of being.

92. Even though P1 theorists have tended to downplay these politics.

93. Alexander Nekam in *The Personality Conception of the Legal Entity* (Cambridge, Mass: Harvard University Press, 1938) said something similar: that the legal characterisation of the person will depend on what a given community regards as natural.