Law and Gender

JOANNE CONAGHAN

CLARENDON LAW SERIES

LAW AND GENDER

JOANNE CONAGHAN

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To Paddy, with love and gratitude

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Joanne Conaghan
Culdaff, Co Donegal

LIST OF ABBREVIATIONS

CA	Court of Appeal
CJ	Chief Justice
CLJ	*Cambridge Law Journal*
CLRC	Criminal Law Revision Committee
CLS	*Critical Legal Studies*
DPP	Director of Public Prosecutions
EU	European Union
Fam LQ	*Family Law Quarterly*
HC	House of Commons
HL	House of Lords
HMSO	Her Majesty's Stationery Office
JLS	*Journal of Legal Studies*
L	Lord/Lady
LJ	Lord/Lady Justice
LQR	*Law Quarterly Review*
L Rev	*Law Review*
MLR	*Modern Law Review*
NYU	New York University
OJLS	*Oxford Journal of Legal Studies*
QC	Queen's Counsel
UK	United Kingdom
UN	United Nations

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1

THE INCONGRUITY OF LAW AND GENDER

1.1 INTRODUCTION: IN WHICH WE DISCOVER THAT LAW HAS A FEMININE SIDE

We are here to do homage to our lady of the common law; we are her men of life and limb and earthly worship.[1]

In October 1911, the famous Oxford jurist, Sir Frederick Pollock, delivered a series of lectures at Columbia University Law School entitled *The Genius of the Common Law* in which the common law is depicted as a medieval lady surrounded by her knights. As the seven lectures unfold, Pollock recounts how 'our lady of the common law' confronts 'giants and gods', 'enemies in the gate', and 'ransom and rescue', over all of which she triumphs either by 'alliance or conquest'.[2] By the time the lectures conclude, she has become a 'shrewd old lady'[3] whom the men of law are encouraged to revere in the hope of catching sight of her 'most benignant smile'.[4] Pollock finishes this extraordinary eulogy with an exhortation designed to ignite the aspirations and stoke the nobler ambitions of anyone who chooses the path of legal practice, declaring: 'There is no more arduous enterprise for lawful men, and none more noble, than the perpetual quest of justice laid upon all of us who are pledged to serve our lady of the common law'.[5]

Pollock's image of the common law as a lady has been picked up by other jurists. Benjamin Cardozo, for example, in an address

[1] Sir Frederick Pollock, *The Genius of the Common Law* (New York: Columbia University Press, 1912), 2.

[2] Pollock, *Genius of the Common Law*. The phrases in quotations correspond to the titles of lectures two, four, five, and six respectively.

[3] Pollock, *Genius*, 54.

[4] Pollock, *Genius*, 62.

[5] Pollock, *Genius*, 125.

to the first graduands of St John's Law School in 1928, offers a quasi-sexual presentation of our lady of the common law as a beauty and insatiable flirt.[6] More recently, Lord Justice Laws of the English Court of Appeal borrowed Pollock's sobriquet for the title of a public lecture in which he describes our lady of the common law as a 'hard mistress to please'.[7] Nor have the quasi-religious connotations of the imagery gone unnoticed. Cardozo's speech was notably reproduced in the *Catholic Lawyer*. Our lady of the common law is also the subject of an address by John Hu to the American Guild of Catholic Lawyers in 1953 in which the portrayal is somewhat more restrained. According to Hu, the common law is like 'a patient and kindly housewife who knows how to make, stitch by stitch, a seamless tunic for you to wear',[8] the seamless tunic representing the continuity and coherence of common law principles.

The depiction of the common law variously as a medieval lady, beauty on a pedestal, incorrigible flirt, patient housewife, and shrewd old lady may seem to capture a surprisingly diverse array of images of femininity but the personification of law and more particularly justice, as a woman is neither new nor unusual. Indeed, Justitia or Lady Justice is perhaps the most ubiquitous representation in legal iconography. While her name and precise status may vary, Lady Justice is transnational, transcultural, and transhistorical, as at home among the goddesses of Ancient Greece as upon the rooftops of suburban courthouses. Today Justitia may be found perched on or near almost any place of law or government, whether the Old Bailey, Dublin Castle, or Amsterdam Town Hall.[9] She almost invariably carries a sword and scales, is sometimes blindfolded, and is

[6] B Cardozo, 'Our Lady of the Common Law' (1972) 18 *Catholic Lawyer* 276; originally delivered in 1928.

[7] Lord Justice Laws, 'Our Lady of the Common Law' (Incorporated Council of Law Reporting, 1 March 2012) <http://www.iclr.co.uk/images/iclr/documents/2011transcript.pdf> accessed 28 May 2012.

[8] J C H Hu, 'The Natural Law and our Common Law' (1954) 23 *Fordham L Rev* 13, 30.

[9] For a comprehensive survey of images of justice, see J Resnick and D Curtis, *Representing Justice: Invention, Controversy and Rights in City-States and Democratic Courtrooms* (New Haven: Yale University Press, 2010).

often accompanied by additional objects including snakes, dogs, books, skulls, and a variety of other things. Linda Mulcahy explains the symbolic value of these props in the following terms:

> The sword depicts the power of the state, the scale the balancing of right and wrong, the blindfold her impartiality, the book her association with the written law, the lector rods are a Roman emblem, the globe suggests her universality, the serpent is associated with evil and provides a contrast with the friendship and loyalty of the dog, and the skull represents human mortality from which justice does not suffer because it is eternal.[10]

While the image of justice as female is so prevalent as barely to attract a glance and rarely any sustained reflection, the idea of representing law in female form seems intuitively odd. After all, for large parts of its history, law served as a bastion of male privilege and female subjection. There is ample evidence, historical but to some extent still current, of the collusion of law in the support of a patriarchal social order in which women were positioned as (at best) different from men and therefore occupying a separate social sphere, or (at worst) inferior and therefore cast in the role of serving or amusing men or constituting objects of their property. Upon marriage, women slipped below the legal radar almost entirely: under the common law doctrine of coverture, a wife's personhood became legally absorbed in that of her husband so that a woman's entry into the married state was tantamount to a form of 'civil death'.

In legal education and practice, women have long been positioned as outsiders. Until the late 19th and early 20th century, they were completely excluded, legal knowledge and practice evolving over centuries on the premise that law was an unreservedly masculine enterprise. Even after securing entry into the legal profession (in England in the early 20th century) women were for the most part consigned to the margins of legal practice, facing particular challenges in reconciling their

[10] L Mulcahy, 'Imagining Alternative Visions of Justice: An Exploration of the Controversy Surrounding Stirling Lee's Depictions of Justitia in Nineteenth Century Liverpool' (2011) *Law, Culture and the Humanities* 1, 12, n59.