# THE BATTERED BODY

## A Feminist Legal History

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## CERTIFICATE

I certify that this thesis has not already been submitted for any degree and is not being submitted as part of candidature for any other degree.

I also certify that the thesis has been written by me and that any help that I have received in preparing the thesis, and all sources used, have been acknowledged in this thesis.

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# ABSTRACT

This thesis investigates a current debate within feminist theory, and specifically within feminist legal theory, about how to challenge the liberal construction of women's subjectivity. It contends that positioning women as either equal to or different from the universalised liberal subject (based on male experience) fails to recognise women's experience as diverse, and differentiated. This thesis explores this issue through the empirical area of the treatment in the public sphere (constituted by the state and the law) of domestic violence, and of domestic violence survivors who kill their abusive spouses. It argues that the current feminist jurisprudential responses to the battered woman who kills, articulated through criticisms of the Battered Woman Syndrome, identify the need to challenge the binary oppositional framework in which these cases are decided and discussed by liberal legalism. However, it suggests that these responses do not ground their discussion in the historical preconditions which gave rise to the debate and the feminist framework in which that debate is conducted.

This thesis argues that an historical re-examination of the ways in which women's experience of domestic violence, as well as the law's reading of it, was constructed is an important contribution to feminist legal theory. It undertakes this historical re-examination by situating the Battered Woman Syndrome and domestic violence within the struggles and campaigns of feminism in the past, especially feminism as it developed through the Women's Liberation Movement of the 1970s. It argues that the understanding of women and women's experience as diversely constituted through this period is essential for an understanding of current debates.

This thesis represents an interdisciplinary feminist legal history. It uses both the method and evidence of history to challenge the legal understandings of battered women who kill. It posits that an interdisciplinary engagement between postmodern legal and historical theories, which contest objective assessments of subjects' experience, allows for a more complex and comprehensive assessment of how to approach, and critique, the Battered Woman Syndrome. It suggests that

this can be accomplished by applying the techniques of narrative developed in historical theory to feminist legal theory. It therefore posits that a postmodern methodological approach, realised through a genealogical investigation of the subjectivity of battered women, is of value in the current debate about how to deal with the paradox presented by feminism's engagement with liberalism, and evidenced through the law's assessment of the battered woman who kills.

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*For Sarah Zetlein*

*(1971 – 1996)*

# CONTENTS

# ABBREVIATIONS

| | |
|---|---|
| ACTU | Australian Council of Trade Unions |
| AFWV | Australian Federation of Women Voters |
| ALP | Australian Labor Party |
| ALWG | Australian Legal Workers Group |
| AWNL | Australian Women's National League |
| BCL | British Commonwealth League |
| BWS | Battered Woman Syndrome |
| CLS | Critical Legal Studies |
| CPA | Communist Party of Australia |
| CWA | Country Women's Association |
| DSS | Department of Social Security |
| DVTF | Domestic Violence Task Force, NSW 1981 |
| FLAG | Feminist Legal Action Group |
| FTYC | First Ten Years Collection |
| IWY | International Women's Year |
| NCVAW | National Committee on Violence Against Women, 1991 |
| NCW | National Council of Women |
| NSW | New South Wales |
| PAG | Prisoner's Action Group |
| RL/WB | Robyn Lansdowne, Wendy Bacon: Private Papers |
| SANSW | State Archives of New South Wales |
| UAW | Union of Australian Women |
| WBB | Women Behind Bars |
| WCTU | Women's Christian Temperance Union |
| WEL | Women's Electoral Lobby |
| WLM | Women's Liberation Movement |
| WPA | Women's Political Association |
| WPEL | Women's Political Electoral League |

# PROLOGUE

> ...to rob [someone] of their language in the very name of language: this is the first step in all legal murders.[1]

## R v Violet Mary Roberts, Bruce Maurice Roberts[2]

On December 13, 1975, Australia was going to the polls to make sense of the fracas that emanated from the dismissal of Labor Prime Minister, Gough Whitlam. In Pacific Palms, a tiny settlement not far from Forster on the New South Wales coast, a woman, Violet Roberts, went to the local school to vote. Her husband was with her. They had been travelling all day by bus from Sydney, where they had gone to collect the belongings of their son, David, who had died of leukemia. Eric Roberts had been drinking on this journey, consuming a flagon of wine. He continued to drink when they arrived home, and was visibly drunk when they went to the school to vote at about 5.30 pm.[3] He was verbally abusive toward Violet at the polling booth, using offensive language that embarrassed her in front of her neighbours.[4]

The couple returned home, and Eric Roberts retired to the bedroom, undressed, and commenced to drink more wine from a flagon. Unusually, he fell asleep early. Violet waited until he was in a sound sleep, at about 9.30 pm, and left the house to have a conversation with her seventeen year old son Bruce, who lived in an old bus at the back of the Roberts' lot.[5] She and Bruce talked for a while, had a glass of wine, and played cassettes.[6] After about an hour, she told Bruce, 'I am going. I

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1 Roland Barthes (1993), 'Dominici or the Triumph of Literature', *Mythologies*, (first published 1972), (ed. and trans. A. Lavers), Jonathon Cape, London, pp. 43-46. p. 46

2 *R v Violet Mary Roberts, Bruce Maurice Roberts*, unreported, Supreme Court of New South Wales, Newcastle, 15 March 1976.

3 *R v Roberts*, summing up, p. 26 (quoted from Violet Roberts' Record of Interview).

4 ibid.

5 *R v Roberts*, summing up, p. 19 (quoted from Violet Roberts' unsworn statement).

6 ibid.

suppose I had better go on over',[7] and returned to the house. She went to the bedroom to put on her nightgown in order to go to bed, and noticed that Eric 'appeared to be dead.'[8] Confused as to what had happened, Violet returned to Bruce, who was still in the bus. She was afraid that Bruce was going to get into trouble, get the blame, because she could not remember killing Eric. She tried to think of a story, something 'just enough to fit the picture', in order to protect Bruce.[9]

Violet and Bruce returned to the house, and deliberated over what they were going to do. They decided to hide the weapon, to make it appear as if someone else had killed Eric Roberts,[10] then called the police.[11] On their arrival from the Taree Police Station, Detective Stubbs and other uniformed officers found a man lying dead in his bed, with a hole in his chest, the wife and son standing nearby, no weapon, and a denial that there had ever been a weapon. Doctor Thurlow, who was called to the crime scene a little after 12 am, declared that Eric Roberts had been dead for two hours.[12] The police located a shotgun in nearby scrub, and Violet Roberts, who despite her confusion, and her declaration that 'It is all clouded, I don't know what happened', told the police that she had killed her husband.[13]

Violet and Bruce Roberts were placed under arrest for the murder of Eric Roberts, and were taken to the Taree Police Station. In the car on the way to the station, Detective Stubbs had a conversation with Bruce Roberts,[14] in which Bruce said he

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7 ibid.

8 ibid.

9 *R v Roberts*, summing up, p. 20 (quoted from Violet Roberts' unsworn statement).

10 *R v Roberts*, summing up, p. 27 (extracted and quoted from Bruce Roberts' Record of Interview, Question 33).

11 *R v Roberts*, summing up, p. 17.

12 ibid.

13 *R v Roberts*, summing up, p. 25.

14 *R v Roberts*, p. 17. Note that Chief Justice Taylor emphasises that this conversation 'has not been denied.' Therefore, although technically inadmissible as hearsay, an evidentiary principle to be discussed further in Chapter Seven, Bruce's comments could be construed as an out of court admission, or confession, of his involvement in the crime. The principle behind this exception to the hearsay rule is that a confessional statement is construed as being against the accused's interest, especially in criminal proceedings, therefore not likely to have been made lightly. It is also based

did not fire the shot that had killed his father, but had discussed with his mother the possibility and desirability of killing Eric Roberts on other occasions.[15] Bruce told Detective Stubbs that on the night of the killing, his mother had come to him, and said, 'He is in a drunken sleep now and now is a good time to get rid of him.' He said that they then went to the house, where Violet took the rifle and the magazine from a wardrobe in the bedroom where Eric slept, and that he assembled it. Bruce then said he gave the rifle to his mother, who fired the shot. Detective Stubbs said to him: 'I still don't believe you. Think about it.' After their arrival at the station, Bruce was heard to say to his mother: 'Gee, Mum we have made a mess of this. To which she replied: 'Well, at least we don't have to be worried about him around again.' She then added: 'I did it. I did it. And I would do it again. I shot the bastard.'[16]

While undertaking Records of Interview with the accused, the police tried to uncover the train of events that had led to Eric Roberts' death, including the crucial question of who loaded, and fired, the gun that fatally shot him. In her version, Violet attested that when Eric fell asleep at 9.30 pm that night, she went to see Bruce in his bus, and discussed shooting Eric. She acknowledged that they had discussed shooting him on other occasions, recalling she felt that 'if he [was] not around the family we could have a much better life.'[17] She said she decided to

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on the idea that an accused can always testify at trial to any unreliability in the out of court statement. In Bruce's situation, this was not the case- the conversation with Detective Stubbs was not denied- and as such was admissible. For a general discussion of this point see: Andrew Ligertwood (1993), *Australian Evidence* (second edition),Butterworths, Sydney, pp. 477-487. This exception to the hearsay rule is now codified by section 65(2)(d), *Evidence Act* 1995 (NSW). It must also be noted that out of court confessions or admissions are only admissible in exception to the hearsay rule against the party making them. Thus, Bruce's comments could not be used as evidence against Violet in this context: see for example: R *v Ciesielski* [1972] 1 NSWLR 50, R *v Spinks* (1981) 74 Cr App R 263.

15 R *v Roberts* ,p 18. Extracted and quoted from Question 19 in Bruce Roberts' Record of Interview, where Bruce allegedly denied that they discussed hitting his father on the head with a hammer to kill him: 'He said that what he said was that they would hit him on the head with a hammer and sober him up', p. 18.

16 R *v Roberts*, summing up, p. 29, (paraphrased from out of court statements made by the co-accused). See comments at n. 14

17 R *v Roberts*, summing up, p. 27 (quoted from Violet Roberts' Record Of Interview).

shoot him as she had 'had quite enough of his violence.'[18] After their conversation, Violet and Bruce went to the house. Violet said she took the gun from the wardrobe in the bedroom where Eric slept, and then left the room in order to give it to Bruce to assemble. When she returned to the bedroom, 'with every intention of shooting him myself', she asked Bruce to give her the gun, and he said: 'He is already dead.'[19]

Bruce's Record of Interview elaborated what he had told Detective Stubbs in the police car on the way to the station. He said his mother had come to him in the bus, and said: 'Now would be a good time to get rid of him.' She then asked him if he would assemble the gun if she got it from the house. He said: 'You are not really serious, are you?', and she replied: 'Yes, I am.' Bruce stayed in the bus while his mother went inside to fetch the gun. She returned to the bus, and he put the rifle together, cocked it, put a bullet in the chamber for her, and stood the gun against the tank stand. He told her she should not be so stupid, that she 'should forget the whole thing.' Bruce returned to the bus, then heard a shot. His mother came back to him and said: 'I have just shot the old bastard and I hope he is dead.' He asked her what they were going to do, and she said: 'I do not know. Just leave him there to rot.' He said: 'We have got to do something.' 'The only thing to do', she said, 'is to give him a proper burial...we ring the police and say we found him like that.' Later, she said: 'What are we going to do with the gun?' He said: 'We will have to hide it to make it look as though he has been shot by someone.' They deliberated their options, then Bruce picked up the gun in order to hide it. On their return to the house, Violet and Bruce Roberts rang the police to say they had discovered Eric Roberts dead in his bedroom.[20]

Violet and Bruce Roberts were assigned counsel, and the case came to trial in Newcastle before Chief Justice Taylor, and a jury, in March 1976.[21] The case

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18 ibid.

19 ibid.

20 *R v Roberts*, summing up, p. 25. (reconstructed from cross examination of Bruce Roberts).

21 The case was decided on 15 March 1976, in Newcastle, under the criminal jurisdiction of the Supreme Court of NSW.

brought against the Roberts by the Crown was that despite the confusion over who actually pulled the trigger, both Bruce and Violet, through their records of interview, had evidenced an intention to kill Eric Roberts. As such, the elements needed to sustain a charge of murder - both *actus reus* and *mens rea* - were actionable against both of them. In these terms, the case was construed as one of dual responsibility, of common purpose in killing the deceased, and that both the person who did the shooting with intention to kill and the person who assisted with the intention of bringing about that same killing, should be found guilty of murder. In building their case, the prosecution asserted that the motive for the killing (the basis of the intention to kill) was greed and revenge over the estate of Eric and Violet's deceased son, David. David Roberts' will expressed an intention to leave his possessions, and the proceeds of insurance policies amounting to $23 000, to his mother, and his brothers and sisters. As the will was legally invalid (it was not written in the correct form) the money by law was to be divided equally between Violet and Eric. The prosecution stressed that Violet killed Eric to regain possession of an estate that she believed was rightfully hers, and to which Eric had no entitlement on the basis of their dead son's wishes.[22]

The defence counsel[23] constructed a case for Violet Roberts around the use of diminished responsibility as a mitigating defence to murder. It was contended that Violet believed she had shot her husband, but was suffering from such an abnormality of mind that her responsibility for what she was doing was so seriously affected, within the meaning of the code,[24] that she ought to be found guilty of manslaughter, and not murder. In order to sustain 'an abnormality of mind', the Defence relied primarily on one witness - the Government psychiatrist, Dr. Otto Schmalzbach,[25] who had interviewed and assessed Violet Roberts in terms of her

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22 John Slee (1980), 'A Question Of Defence', *Sydney Morning Herald*, 5 September, p. 3. Note that the motive is referred to in the summing up, but additional detail is drawn from the *Sydney Morning Herald's* legal writer five years later in analysis of the defence options used, and those potentially available, in the Roberts' trial during the campaign for their release.

23 Mr. Luland.

24 See *Crimes Act* NSW (1900) s 23A.

25 It is important to note the supreme influence of Dr. Schmalzbach's testimony in this case. In the report by FLAG (Feminist Legal Action Group) on women homicide

mental and psychological history. He revealed a background of a woman married to an alcoholic, who ill-treated her and their six children, who was, as a result, admitted to Kenmore Psychiatric Hospital on several occasions. Her children had been made state wards on these occasions. The expert witness described her behaviour as 'unmanageable, depressive, prone to excess drinking and exhibiting delusions of persecution.'[26] Violet Roberts was 'depressed and concerned at her present predicament', and retained no recollection of shooting her husband. Schmalzbach's testimony concluded: 'The fact remains that she displayed on a number of occasions...severe depression and intoxication, at one stage becoming violent and requiring physical restraint...It is further my opinion that her mental condition was further contributed to and aggravated by a personality defect.'[27]

Violet Roberts herself did not testify - she gave an unsworn statement, read out in court, that attempted to explain her state of mind, and her confusion over the killing of her husband:

> I have never been a violent person, I have never had any wish of violence towards anyone at all...although I have drunk to excess at times, my husband Eric was really terrible. He had always been very cruel to myself and to all the children, right from when they were small babies and they were all frightened of him all their lives and I

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offender in New South Wales, published in 1982, the authors note that in the absence of a diagnosis of an 'abnormality of mind' by the Government Psychiatrist as required under s 23A *Crimes Act* NSW (1900), whatever the views of other psychiatrist's approached by the defence, no plea on the accused's behalf would be accepted, leaving the often complicated or conflicting psychiatric evidence to be decided by a jury. As the authors note: 'In practice, then the position of the Government Psychiatrist, Dr Schmalzbach is a powerful one. The practice of psychiatry is a field where there are many conflicting views- diagnosis being far from an exact science, especially where the state of mind being analysed is in the past rather than the present. Prejudices and preferences of the Government Psychiatrist could have considerable influence on pretrial determination of cases.', FLAG (1982), *Feminist Legal Action Group Report: Women Homicide Offenders in New South Wales,* FLAG, Sydney, p. 120. Wendy Bacon has also noted the danger of Dr. Schmalzbach's influence, especially in terms of the description of a condition he names as 'The Delilah Syndrome': 'This new syndrome focuses on neurotic women and the way in which they provoke men to violence. I hope it is not a tiding of future trends in this country.': Wendy Bacon (1983), *The Anne Conlon Memorial Lecture,* 11 August, New South Wales Women's Advisory Council to the Premier, Sydney, pp. 8-30, p. 13.

26 *R v Roberts,* summing up, p. 28 (extracted and quoted from Dr Schmalzbach's report).

27 *R v Roberts,* summing up, p. 29 (extracted and quoted from Dr. Schmlazbach's testimony).

> was too. He often beat me up and the children, and towards the end I put up with it, because a few times I had called the police...and after the police would go away I would get another hiding for having told the police what he had done...[he also] used me very badly in various ways that I just can't speak about to anybody, it is just too bad, I always used to become very depressed, and I was very much so around the time of the shooting. My eldest son had only been dead three months, and I was in great shock, which I believe I still am, and I believe I will always be in shock because David has died. I can't say anymore.[28]

Bruce did testify, subjecting himself to cross examination, revealing his defence as the fact that although he loaded the gun, he did not believe his mother would go through with the murder. Bruce was asked by the Crown Prosecutor: 'Did you shoot your father?', to which he replied: 'No I did not.' The Crown Prosecutor then asked him: 'Did you believe that your mother was going to shoot him?', to which he also replied: 'No I did not.'[29] As no other defence was adduced on Bruce's behalf, the Defence counsel argued that this negation of his common intent or purpose excluded him from culpability under the Crown's case of dual responsibility, and as such, he should not be found guilty.

In commenting on Bruce and Violet's defence, Chief Justice Taylor rightly stressed the relevant points of law, and made the issues surrounding the police evidence, on which the Crown's case was founded, very clear. The jury were under no obligation to accept the records of interview if they believed they were not executed freely or voluntarily.[30] He did, however, comment:

> Would you really load a rifle for a woman...in the background of the hate she felt for this man, the suffering that she had had to put up with from him over a period of years, the wrongdoing that she felt and the boy felt too, by virtue of his being about to acquire half the dead boy's possessions against the dead boy's wishes [?] Do you really think it is acceptable to say, in those circumstances, he put a loaded rifle there for a woman to use with her husband lying dead drunk on the bed and she having proclaimed that it was a good idea to get rid of him, that he did not think she would use it?[31]

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28 *R v Roberts,* summing up, pp. 19-20.

29 *R v Roberts,* summing up, p. 32, (extracted and quoted from cross examination of Bruce Roberts).

30 *R v Roberts,* summing up, p 31.

31 ibid.

Chief Justice Taylor concluded by reiterating to the jury the necessity for the Crown to prove Violet and Bruce's guilt beyond reasonable doubt and to reiterate the onus on the jury to consider the Roberts' verdicts separately, although they had been charged together.[32]

The jury retired at 10.37 am, on 15 March 1976. Later that afternoon, Violet and Bruce Roberts were both found guilty of the murder of their husband and father, Eric Roberts. Under the operation of section 19 of the *Crimes Act* 1900 (NSW), Violet received a mandatory life sentence; and Bruce, a minor at the time, received a 15 year sentence, with a six year non-parole period.

This is the story of Violet and Bruce Roberts, that was told at their trial, a story that did not allow them to speak of other stories that were never seen, or had no place to be heard. It is, however, a story that after the campaign for their release in 1980 had achieved its goal, would appear illusory. The layers of meaning and conversion of voices that produced the crime, and the release, could never be expressed through it alone. The story of Violet and Bruce Roberts is one of multiple narratives, of interconnected yet distant genealogies, bound together in a *rhizomatic* relationship.

## The Story of Violet Roberts[33]

In late 1979, during her incarceration at Mulawa, Violet Roberts was interviewed as part of a study by a group called FLAG (Feminist Legal Action Group) into female

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32 *R v Roberts,* summing up, p 34

33 Although Bruce and Violet's stories are in many ways inextricable, especially in terms of the public acknowledgements of their histories, both the trial and the campaign for their release considered them in the context of co-accused. I have considered Violet's story separately. The primary reason behind this narrative device is that this thesis as a whole attempts to examine the discourse around battered women, as opposed to abused children. Although similar, Bruce's story and Bruce's circumstances are distinct from that of Violet. Her relationship with Eric Roberts, read and constructed through the marriage contract, involves a matrix of factors identified as shared by other battered women, factors which are to be both contested and investigated later in the thesis as both the basis of a feminist inspired discourse around domestic violence, and as the foundation for the establishment of the Battered Woman Syndrome as a defence to murder.

homicide offenders in New South Wales. The process of telling Violet's story within a context (legal, feminist, reformist) by FLAG alerted the principal researchers, Wendy Bacon and Robyn Lansdowne, to the injustice of Violet and Bruce's trial and sentencing. This story of Violet Roberts then, unlike that told at her trial, was from her perspective,[34] and began long before Eric Roberts was shot in December 1975.

From the day they married in 1952, Eric Roberts had been brutal to his wife, Violet. He was a violent alcoholic, and lashed out at her whenever he was drinking. At least once a week he would beat Violet, punching her with a closed fist in the face and body. On one occasion he smashed her face so badly - broke her teeth, pummeled her face and eyes - that she was forced to spend a few days in hospital. He was possessive and jealous, constantly accusing Violet of having relationships with other men, and tried to keep her under surveillance at all times.[35] As she explained in 1980:

> He would only drink a little before he would start to get violent. He would sit there and his fists would start clenching and he would be staring and the fear would go through me. I would know he was going to start bashing. I would wonder what he was thinking about and then he would start accusing me of something. I usually didn't know what he was talking about. Then he would start punching.[36]

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34 It must be noted that although the story can be justified as 'from [Violet's] perspective', it can not be necessarily in her voice. The story was reconstructed from material interpreted and written by FLAG and the feminist prison abolition/reform group Women Behind Bars, quoting Violet herself when appropriate. The original interviews conducted by FLAG with Violet in Mulawa could not ethically be used in this project, despite my access to them, in order to respect and preserve the confidentiality of the relationship between FLAG and Violet that was established in 1979, when the interviews were recorded; as well as to respect the wishes of Robyn Lansdowne and Wendy Bacon as custodians of this material.

35 Women Behind Bars (1980b), *Release Violet and Bruce Roberts Campaign*, pamphlet, Liverpool Women's Health Centre, (RL/WB), p. 3. NB. This pamphlet was constructed directly from Violet Roberts' Application For Release on License, in 1980. The copy I have seen of the application shows clearly annotations and editing which correspond with the final text of the pamphlet.

36 ibid.

Eric also forced Violet to have sex with him. If she said she was too tired, he would accuse her of sleeping with other men, call her names, and punch her insensible.[37]

Eric was similarly violent and unpredictable toward their six children. Violet had to watch them constantly. If she turned her back, he would hit one of them. For example, Eric hit Bruce in the face when he was five months old, and made his mouth bleed. When Bruce was nine years old, his father punched him for asking for a cup of tea. He threw Bruce through a fibro wall, smashing it with Bruce's back and head. On another occasion, Eric came home while the children were eating their dinner, and made the three older boys get on their hands and knees outside and eat grass. He stood over them, screaming: 'Eat, swallow it.'[38]

Violet tried to leave Eric on several occasions. Once, he beat her so badly he was gaoled for six months. As she retold it in a radio interview in 1980:

> I think he would have beat me to death that time if it hadn't been for his father and a couple of brothers...they were visiting- it was New Year's Eve, and they all pulled him off me or...I really believe he would have pummeled me to death. He was beating me so savagely out in the paddock...the nightdress was just saturated with blood - it was dripping with blood when I took it off- off my face - my nose was bleeding - mouth all busted - it was a really savage hiding and he did get six months for that.[39]

Even with Eric in gaol, Violet found it difficult to leave. She had no money, six children, and she lived in Pacific Palms, isolated and far from her family. She was only able to leave when her brother turned up in a car, and drove Violet and the children to her sister's house in Goulburn.[40]

In 1967, Violet Roberts had a nervous breakdown, and was admitted to Kenmore Psychiatric Hospital. She later reflected on her state of mind: 'I was extremely

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37 ibid.

38 Application For Release: Violet Roberts, Bruce Roberts, 20 April (1980),(RL/WB), para 4.2.

39 2 SER-FM. Interview with Bruce and Violet Roberts (transcript), Annie Bremmer and Chris Deegan, 25 October 1980, p 3 (RL/WB).

40 Women Behind Bars (1980b), p. 3.

depressed. I felt I could cope no longer.'[41] She was further devastated when her children were made wards of the state.

Between 1967 and 1974 Violet supported herself by working as a domestic, and did not see Eric Roberts. She had moved back to Pacific Palms in 1971, and lived with Eric's father, and several of her children, in the family home. There was no other way that Violet could have got a house for the family to live in together, and she knew that they would have protection from Eric. Mr. Roberts had made it very clear that his son was not welcome in Pacific Palms.[42]

In January 1974, Mr. Roberts died. By October, Eric Roberts had contacted Violet, telling her he had given up drinking and was lonely, that he was a changed man. She took him back, but within a few months he was drinking again, and his behaviour was worse than it had ever been. He was violent and crude, whether drinking or sober. He cashed Violet's pension cheques at the local shops, and spent the money, her money, on alcohol.[43] She tried to tell him to leave, but he ripped her dress off her shoulder, and punched her insensible. She was terrified, and couldn't leave because Eric kept the keys to the car, her car, in his pocket, and her area was not served by public transport. She was alone and isolated, and became totally incapacitated by grief when her eldest son, David, died of leukemia in October 1975. Violet described this time of her life, five years later, like this:

> The two months between David's death and the killing of my husband were like a nightmare. I was in shock and grief at the death of my son. I felt completely trapped in a life that had become completely unbearable. Twice I tried to take my own life. Once I lay on the road wanting to be run over by a car. On another occasion I took an overdose of Valium, prescribed to me by our family doctor, Dr. Sanders.[44]

By election day, December 13 1975, Violet Roberts was despairing. She went with Eric to the local school to vote. He was drunk, and dragging her by the wrist, saying to her: 'Hold me up, I'm pissed.' She was frightened. She knew his patterns,

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41 ibid.

42 ibid.

43 ibid., p. 4.

44 ibid.

knew that when they returned home the arguing, the violence and the enforced sex would continue as they always did.[45] Violet Roberts recalled the events of that day vividly:

> I was extremely depressed and miserable. I was also very tired and I had a sore and swollen right hand. Eric had broken a bone in one of my fingers two days previously when we were staying overnight at a motel in Sydney, by wrenching and twisting my hand.
>
> We had gone down to Sydney to collect our dead son David's gear. I was still numb from his death and collecting his clothes made all the grief come back. On [that day] we were up at 6 am and spent the whole day travelling by public transport from Sydney back to Pacific Palms.
>
> All the way Eric was upending a bottle on the train and bus, drinking cheap wine out of a bottle in brown paper. Apart from the fact that I knew [this meant a beating later], I was as mad as a hornet that he didn't have the decency to wait until he got home...I felt such a fool, but wasn't game to say anything because he would have started on me right then and there. So I just seethed.[46]

That night, worn out, tired and miserable, Violet waited until Eric was asleep and then left the house. She went to the back of the lot, to where one of her son's, Bruce, lived in an old bus. Together, they drank a few glasses of wine, talked and played cassettes. After several hours, she returned to the house. What happened then, she later recalled like this:

> I can remember walking up the back steps of the house. To my knowledge I did not have a gun in my hand. I can remember walking up those steps but I do not remember walking into the house. I believe now that he was in bed asleep but it could easily have been the other way where he would have been waiting there to grab me. Because that has happened so many times. I do not remember hearing a shot...Bruce has told me that he shot him, and that I was not in the room when he was shot. I believe that to be true. But I wish it had been me who shot him, so that my son, who has already suffered so much hell would not have to suffer any more.[47]

Bruce rang the police. As soon as they arrived they separated Bruce and Violet, and took them to Taree Police Station. Violet told Detective Stubbs that she had killed

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45 ibid.

46 ibid.

47 ibid.

Eric because she believed from something he said that he suspected Bruce, and she wanted to protect her son. They were both made to sign records of interview, and both were charged with murder. This is how Violet recalled the interview five years later:

> At the time of the record of interview at 6.45 am...I had been up since 6 am the previous morning. I had travelled from Sydney all day and had been embarrassed and humiliated by my husband on the journey. I had had some drinks with Bruce in his bus. I was completely exhausted and shocked by what had happened. My hand was really hurting. It was all puffed up. I felt I didn't care what happened to me I was only worried about what would happen to Bruce. At the time I would have signed anything...[Anyway] we were in the Taree cells...when the detective came out two days after we had been there and he said to me 'who's handling your son's [David's] estate?' and I said to him, 'what's my son's estate got to do with this?' And he said, 'just a bit of information we want.' And I said, 'well that's got nothing to do with the case.' But he wanted the information to make the motive [for trial]. But you see, it's just not true. The money, the child's money had nothing to do with that whatsoever. Nothing. It was entirely the brutality.[48]

Violet met her designated lawyer ('someone from the public service')[49] for half an hour the day before the trial commenced. Violet told him what it was like to be married to Eric Roberts for twenty four years, what it was like to try and leave. She told him about her doctor, Dr. Sanders, who had treated her for injuries and depression during her marriage to Eric, and about her neighbours, who had witnessed the fear, violence and torture that Eric Roberts had inflicted on his wife and children for so many years.[50] The lawyer, however, never attempted to include the history of abuse into Violet's case. At the trial, he relied on a defence of diminished responsibility, using the government psychiatrist's report to attempt to establish that Violet was suffering from an abnormality of mind when she committed the crime.[51] As such, he never called any of the witnesses (such as neighbours of the Roberts') who could have testified to the abuse suffered by

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48 2 SER-FM (1980), p. 3; Women Behind Bars (1980b), p. 4.

49 Application for Release (1980), para 10.1.

50 'Justifiable Homicide', (transcript) *60 Minutes,* Channel Nine, 9 March 1980, (RL/WB), pp. 4-5.

51 *R v Roberts,* summing up, p. 31.

Violet and Bruce. Violet recalled that they were never given the opportunity to speak:

> I remember I asked for Mr. and Mrs. N to be called as witnesses...they could both have given evidence that they had seen me with bruises on my face at different times. When we were at the trial, we walked past them in the recess. I believed that they were going to be called. I was surprised when they were not...[52]

Violet too was silenced. Her history was never heard in court, as she gave an unsworn statement. Removed from the drama played out before her, she was viewed in the dock that day as a key figure in the legally expeditious narrative of greed and revenge:

> I expected that when the prosecutor had finished my barrister would speak about my husband's violence...I couldn't do anything about it during the trial, however, because I was sitting in the dock and so couldn't speak to my lawyers. Also I was still numb from David's death on the day I [was meant to] stand up and speak from the dock. I was especially upset because it was his birthday...[and they kept] talking about his money...[53]

Despite the adduction of evidence to support a defence of diminished responsibility, and despite the fact that the Crown did not significantly contradict this defence, on March 17 1976, the jury convicted Violet and Bruce of murder, and Violet was sentenced to life imprisonment under section 19 *Crimes Act* 1900 (NSW).[54]

Aware that in two recent similar cases a history of violence had been adduced as evidentiary preconditions to the murder of a spouse by a woman or other family member,[55] Wendy Bacon and Robyn Lansdowne, through FLAG and the

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52 Application for release (1980), para 9.4.

53 ibid., para 9.7

54 *R v Roberts* p. 20. See Chapter Six for a discussion of the operation of and reform to section 19.

55 The two cases referred to were the Krope case, decided in Melbourne in 1978, and the Calleja case in New South Wales in 1979. In the Krope case, William Krope, 17, shot his father 17 times with a .22 rifle in December 1977. William Krope was charged with murder, and his mother Josephine, of conspiring to murder. As the defence of diminished responsibility was not available in Victoria, the defence relied on self-defence to mitigate the charge, and as such adduced extensive evidence of

prison/abolition reform group Women Behind Bars[56], initiated a campaign for Violet and Bruce's release.

The campaign, to be examined in detail in Chapter Six, was itself a product of the interconnecting politics of prison reform and Women's Liberation, and a proactive media and a liberal state. It successfully galvanised public opinion around the Roberts' circumstances, and harnessed the growing understanding of domestic violence in the community. Through this campaign, Violet's own story, her experiences of fear and violence, became central evidentiary matters, and the basis of the narrative that resulted in her (and Bruce's) release on license in October 1980.[57]

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Frederick Krope's violence towards his wife and three children during the 30 year period of his marriage. The co-accused's sister and daughter, Gloria Krope, was the reigning Miss Australia at the time the case went to trial, resulting in favourable and sympathetic press. The Kropes were acquitted. In the Calleja case, Charles Calleja was shot by his sixteen year old daughter in January 1979. His wife Marcia and their daughters, aged 16, 18 and 19, were charged with murder. They pleaded guilty to manslaughter, relying on a defence of diminished responsibility as per section 23A *Crimes Act* 1900 (NSW). The plea and the accompanying psychiatric evidence were accepted, and as such the case was not tried before a jury. Evidence documenting Charles Calleja's history of violence toward his family was adduced at trial. The defence argued that there was only one motive for their actions: self-preservation, and that diminished responsibilty should be pleaded to mitigate their sentences. All four women were released on a five year, $100 good behaviour bond. See: Robyn Lansdowne (1980), 'Violet Roberts: Justifiable Homicide?'. *Sydney Women's Liberation Newsletter,* March, pp 2-3; John Slee (1980), 'The Inside Report', *Sydney Morning Herald,* September 4, p. 3.

56 Women Behind Bars (WBB) was a feminist group formed in 1975 committed to improving the conditions for women in prison, and working toward the abolition of prisons altogether. The preconditions of WBB, and the role played by Wendy Bacon in this group, will be examined in Chapter Five.

57 See Chapter Six for a discussion of the campaign, and for a discussion of the meaning and process of a release on license.

# INTRODUCTION

> To acknowledge the social construction of women does not entail the abandonment of critical theory or the spectre of relativism. Rather, it calls for a commitment to a historical, or genealogical approach to understanding the specificity of social, political and ethical relations as they are embodied in this or that community or culture.[1]

The events surrounding the Violet and Bruce Roberts' case can be seen as a microhistory, a focus for a more generalised analysis which illuminates the nature and meaning of the tangled narratives, alternative perceptions of truth and evidence, and varied public understanding that informed their case. This thesis sets out to investigate the significance that the Violet and Bruce Roberts case had for subsequent Australian marital homicides involving battered women; and also to construct and deconstruct the ways in which narratives about women like Violet Roberts have been told by the law in subsequent decades. By comparing and analysing two versions of Violet Roberts' story - that told at her trial, and that told to secure her release - the prologue drew attention to the distinctive and separate functions of the rules of truth telling and evidence that exist in law and history; and how these rules are problematised by feminist perceptions of a broader discourse about the battered woman.

To contrast these two stories of Violet and Bruce Roberts' in this way raises some difficult theoretical and methodological issues. To divide up their stories into what was told at trial, and what was told later during the campaign for their release, is prima facie an artificial process. The benefit, and privilege, bequeathed by historical analysis of any kind, and of empirical research at all times, is that the preconditions behind any narrative, or historical instance, are always, already, ever present. Under the scrutiny of the historical gaze, the story told at Violet and Bruce Roberts' trial

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1 Moira Gatens (1996), 'Embodiment, ethics and difference', in *Imaginary Bodies: Ethics, Power and Corporeality*, Routledge, London , pp. 95-107, p. 105.

gives indications, clues, hints, as to a tragic untold story of family horror, and of silencing before the law. For an historian, then, the task of comparing the two public stories of Violet and Bruce seems to be straightforward: a process of filling in the gaps, fleshing out the silences, reclaiming a voice for the central protagonists. What the historical gaze does *not* achieve as a matter of course, however, are ways of explaining the nature of the representation and valuing of truth, and correspondingly of experience as a form of differentiated and lived truth in legal narrative and in legal discourse. Any project which takes as its central sphere of investigation manifestations of the operation of law - in this case, investigations of the history of the battered woman who kills, and her treatment by and within the legal system - must engage with the processes and meanings that the law creates and leaves as narrative traces.

The gaps in the story of Violet and Bruce Roberts' trial need to be examined in two distinct, yet interconnected ways. One is what is revealed about the Roberts' as subjects within a yet to be articulated history of the struggle for their release, and the political struggle for the public recognition of battered women who kill. The other is the way they are constructed by the law through a particular series of informed rules and practices, which are based on a particular epistemological framework. What is at stake in the telling of Violet's and Bruce's stories, and what becomes crucial within this project as a whole, is therefore the unravelling of a feminist historical approach to, and reading of, battered women before the law and its epistemological framework.

In this thesis, I attempt to map out a methodological approach to a current debate within the law, specifically within feminist jurisprudence, about the nature of a defence available to women like Violet Roberts who kill their spouses: the Battered Woman Syndrome (BWS). As an arm of self-defence or provocation, BWS was introduced into Australian common law in the 1992 case of *R v Konttinen*.[2] The defence is designed to give evidentiary value to the history of violence that in the

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2 Unreported, Supreme Court of South Australia, 18-20 March 1992. NB: Battered Woman Syndrome was first developed in the Canadian case of *R v Lavallee* [1990] 1 SCR 852. The legal implications of the Battered Woman Syndrome will be examined in Chapter Nine.

majority of cases provides the pre-conditions for women who kill their spouses. Through expert psychological testimony, a woman's actions are evaluated in terms of a psychologically aberrant state of mind, conditioned by her exposure to fear and helplessness, caused by the nature of her relationship with her spouse. This 'syndromisation' of the behaviour of the female accused, if assessed and proven in court through acceptance of the Battered Woman Syndrome, subsequently acts as a defence (often exculpatory) to murder.

Feminist legal scholars, in discussing and debating the value of the defence, have noted the conundrum that it poses in terms of feminist theorising about female subjects before the law. On the one hand, the defence acts as a significant challenge to traditional understandings of women's actions in these marital homicides by treating the female accused in terms of her specific subjective characteristics, thus recognising her difference from other 'premeditated' perpetrators of homicide. On the other, by voicing the woman's history of domestic violence as a factor contributing to her psychological make up, BWS denies her the ability to tell her story in her own voice: her personal experience becomes subsumed in expert testimony. The denial of the agency of a female accused therefore raises the question: is BWS a significant recognition of the experience of domestic violence by the common law, or is it a reading of domestic violence exacted within the confines of a legal standard, which some battered women will meet, and others will not?

The discussion of BWS undertaken in this thesis (and more obliquely in the legal literature)[3] taps into feminist theoretical challenges to liberalism, and its

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3 See for example: Julie Stubbs and Julia Tolmie (1994), 'Battered Woman Syndrome in Australia: A challenge to gender bias in the law?', in Julie Stubbs (ed.), *Women, Male Violence and The Law,* The Institute of Criminology, Sydney, pp. 119-225; Patricia Weiser Easteal (1993), 'Sentencing Battered Women', *Killing The Beloved: Homicide between Adult Sexual Intimates,* Australian Institute of Criminology, Canberra, pp. 129-143; Ian Leader-Elliot (1993), 'Battered But Not Beaten: Women Who Kill In Self-Defence', 15 *Sydney Law Review* 403; Donna Martinson et al (1991), 'A Forum on Lavallee v R.: Women and Self-Defence', 25 *University of British Columbia Law Review* 23; Katherine O'Donovan (1993), 'Law's Knowledge: The Judge, The Expert, The Battered Woman and Her Syndrome', 20 *Journal of Law and Society* 427; Elizabeth A. Sheehy, Julie Stubbs and Julia Tolmie (1992), 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations', 16 *Criminal Law Journal* 369;

epistemological construction of women as subjects who are either equal to or different from the standard subject of civil society, embodied as male. The feminist challenge to liberalism, and the need to overcome what Martha Minnow has called 'the difference dilemma'[4] is a central and recurring theme of this thesis. The tradition of liberalism is discussed as a precursor to the binary social and philosophical construction of women by the law in Chapter One, by the state in Chapters Two and Four, and as a paradox to be challenged by feminist theory in Chapters Eight, Nine and Ten. It is also important that the parameters of liberalism as it relates to feminism should be canvassed here to provide a background for the following argument and discussion.

**Liberalism and Feminism**

Liberalism developed as a political philosophy emanating from a criticism of absolute monarchy and hereditary rule in the eighteenth and nineteenth centuries.[5] The central organising tenets of this philosophy were claims for the representation of citizens in the process of government, and the securing of the ideals of liberty and equality for citizens in that process. Liberalism is, therefore, a philosophy grounded in the idealisation of individualism and civil liberty.[6] John Locke's (1690) foundation for the assumptions of liberalism was that human beings were naturally free, equal and independent. He postulated that a 'state of nature' existed prior to the formation of society. Society came into being by consent, in order to achieve the protection of these innate rights and freedoms.[7] Liberalism therefore gave birth to and privileged the notion of a public sphere, through the concept of a social contract in which citizens gave their consent to limited regulation in order to

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Martha Mahoney, (1991) 'Legal Images of Battered Women: Redefining The Issue of Separation', 90 *Michigan Law Review* 1. A full analysis and commentary of the literature around BWS is provided in Chapter Nine.

4 Martha Minnow (1984), 'Learning to Live with the dilemma of difference: Bilingual and special education', 48 *Law and Contemporary Problems* 157.

5 Andrew Gamble (1987), *An Introduction to Modern Social and Political Thought,* Macmillan, London, pp. 66-99.

6 ibid.

maximise their freedom. Liberalism concomitantly gave birth to the notion of an individual, as a subject capable of using reason to accomplish the protections of life, liberty and property which precipitated the social contract in the first place.

The idea of a rational individual was set in opposition to the state of nature, from which it advanced. But, as Carole Pateman has shown, the individual, the subject of the social contract, was, in essence, indeed exclusively, a *male* individual.[8] For philosophers like Jean-Jacques Rousseau, reason, as a basis for progress through knowledge, was an innate characteristic of men. Women, on the other hand, were identified, dualistically, as men's compliment. Their characteristics were immutably tied to virtues and responsibilities that were 'natural', and non-rational.[9] In this way, Genevieve Lloyd argues, the ambivalence of the feminine entered into Western thought: 'the feminine was construed as an immature stage of consciousness, left behind by advancing Reason, but also an object of adulation, as the exemplar for Reason's aspiration to a future return to nature.'[10]

The construction of the female subject, then, exists in a paradoxical relationship to liberalism. Women, in these terms, are human subjects sharing in the concepts of equality of citizens, but also the subjects of distinctions between Reason and Nature, and the idealisation of civil society (a public sphere) in which democracy and civil liberty could be enacted, above the recognition of the 'domestic' sphere. In Rousseau's concept of Nature/Reason, women are seen as Other: as subjects excluded from the civil society and its processes. This conception of their difference - their connection to 'natural' qualities of emotion, nurturing, irregularity, even chaos - were reflected in and exacerbated by the assumption that subjects capable of and permitted to take part in the 'society of equals' were male (furthermore they were propertied, white and heterosexual). The result for women

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7 John Locke (1990), *Two Treatises of Government* (first published 1690), Everyman Press, London; Jonathan Wolff (1996), *An Introduction to Political Philosophy*, Oxford University Press, Oxford, pp. 18-26.

8 Carole Pateman (1991), *The Sexual Contract*, Polity Press, London.

9 Jean-Jacques Rousseau (1973), *The Social Contract and Discourses* (first published 1750), Everyman Press, London; Jean-Jacques Rousseau (1974), *Emile* (first published 1762), Everyman Press, London. See also Wolff (1996), pp. 26-32.

generally, and for liberal philosophers like Mary Wollstonecraft and John Stuart Mill[11] who attempted to reconcile the distinctions between women as a subject 'different' from the individual championed by liberalism, yet still logically entitled to the equality that liberalism bequeathed, is a status Joan Scott describes as 'feminism's incurable paradoxical condition.'[12] This condition is the effect of contradictions in liberal democratic theory, which offers universal guarantees of inclusion, but extends a singular standard for that inclusion. Difference, or multiplicity, fit uneasily into the ideas and structures of liberalism. As Scott argues, since the democratic revolutions of the eighteenth century, women have needed:

> To prove sameness in order to qualify for equality if they are to meet the singular standard (of masculine individualism) held out for inclusion, but they have had to argue for equality as women, thus raising the issue of their difference. The equal versus different dilemma does not admit of resolution. It is built into feminism, which at once embodies and protests against the contradictions of liberal political theory.[13]

This insurmountable paradoxical condition is exacerbated by the location of men and women into the categories of 'public' and 'private' spheres. Carol Pateman has argued that:

> The private, womanly sphere (natural) and the public, masculine sphere (civil) are opposed but gain their meaning from each other, and the meaning of the civil freedom of public life is thrown into relief when counterposed to the natural subjection that characterises the private realm...what it means to be an 'individual', a maker of contracts and civilly free, is revealed by the subjection of women in the private sphere.[14]

Western, liberal law is a key arbiter of this public/private divide. It wields great power in determining how, and when, women can be conceived of as equal citizens within the foundations of liberal theory, and when they must remain in the

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10 Genevieve Lloyd (1984), *The Man of Reason: 'Male' and 'Female' in Western Philosophy*, Methuen, London, p. 58.

11 Mary Wollstonecraft (1982), *Vindication of the Rights of Women* (first published 1792), Penguin Books, Harmondsworth; John Stuart Mill (1976), *On Liberty* (first published 1859), Penguin, Harmondsworth.

12 Joan W. Scott (1997), 'Comment on Hawkesworth's "Confounding Gender"', *Signs*, vol. 22, no. 3, pp. 697-702, p. 698.

13 ibid.

14 Pateman (1991), p. 11.

shadows of the private. Chapter One of this thesis discusses the construction of criminal law doctrine as a discourse of liberalism, and identifies the ways in which defences for battered women who kill perpetuate the relegation of women to the private sphere, which results in a disavowal of her status as equal to what is known in law as the 'Reasonable Man.' This construction of the experience of the battered woman as *different*, and therefore disadvantaged in terms of claims for equal justice, is inextricably intertwined with the fact that domestic violence, as a crime itself, and as the precursor to the homicides discussed in this thesis, is committed within the privacy of the home and family, and within marriage.

Margaret Thornton, reflecting upon law's role in constituting the idea of a public/private divide and its consequent role in regulating the family, has noted that the public/private dichotomy is itself a 'well-nurtured myth.'[15] She argues that the 'temporally permeable nature of the "dichotomy" enables it to operate as an ideological device: "private" being effectively invoked if the state espouses non-intervention; "public" to the contrary.'[16] This ideology leaves unchallenged the male/female split entrenched in liberal theory, and dominant since Rousseau's *Emile*, which has resulted in real difficulty and hostility for women as they claim a distinct, yet equal, subjectivity in a multifarious public sphere, constituted by the state and the law.[17]

For much feminist theory, then, a notion of 'public' is recognised as both the material and ideologised spheres *outside* of the family and home which historically control women, both spatially and politically. However, such recognition has difficulty in acknowledging that the public is itself divided, or acknowledging the

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15 Margaret Thornton (1995), 'The cartography of public and private', in Thornton (ed.), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, pp. 2-16, p. 11. The use of 'mythical' in this context has two interrelated meanings. The first is the mythical representation of 'male' and 'female' in Western philosophy, which grounds epistemologically such normative value systems as the Gemeinschaft/Gesellschaft dichotomy. (For a thorough and detailed analysis of this point see Lloyd (1984).) The second meaning is Thornton's collateral point about the mythical status of the nature of the spheres (public/private) that the gendered subject inhabits.

16 ibid.

17 See Lloyd (1984), pp. 74-86.

broader web of technologies of definition and control from which such simple dichotomous categorisations of social order escape.[18]

Feminist reforms and challenges to the relegation of women to the 'private' sphere thus face a complex double bind, especially in terms of a relationship with the Australian state.[19] Social liberals, and feminists of varying persuasions, by arguing that forms of oppression of women, including domestic violence, are constructed and regulated by public/private ideology, have campaigned via the state (or polity) for cogent change for women, as will be discussed in Chapters Two, Four and Six. In this way, any challenge by feminism to the construction of women as subjects before the law (such as battered women who kill) has necessitated an engagement with the public sphere which relegates women to the private, reinforcing the intractable paradox in which feminism finds itself. A result of the equivocal relationship between liberalism and feminism, as Thornton notes, is that 'the feminist reform movement has been compelled to rely upon the good graces of a masculinist public qua polity that has been antipathetic to the feminine.'[20]

Some feminist legal theorists have taken on board the philosophical challenge incurred when attempting to use the law to fight its own discriminatory excesses. They have noted that it is the law's construction of women as different which prevents their treatment as equal citizens. For some this recognition involves basing claims on women's extant equality, and for others illuminating their difference. More recent feminist jurisprudence has taken on board the 'paradox' that Scott and Thornton describe.[21] This position, one which is advocated in the conclusions of

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18 See Nancy Fraser (1995), 'Sex, Lies and the Public Sphere' in Jerry D. Leonard (ed.) (1995) *Legal Studies as Cultural Studies*, State University of New York Press, New York, pp. 175-195, where she advocates a re-reckoning of the public sphere as a multiple, and shifting entity.

19 See Marian Sawer (1993), 'Reclaiming social liberalism: the women's movement and the state', in Renate Howe (ed.) *Women and The State: Australian Perspectives,* A Special Edition of the Journal of Australian Studies, La Trobe University Press, in Association with the Centre for Australian Studies Deakin University, and the Ideas for Australia Program, Bundoora Victoria, pp. 1-21. See also comments made about the nature of the Australian state in Chapter Three

20 Thornton (1995), p. 7.

21 See comments about the field of feminist jurisprudence discussed later in the Introduction, which place these positions, and cite scholars invested in this debate.

this thesis, is that women are both equal to and different from men, and from each other. From this perspective, challenges to the construction of women as legal subjects, and as subjects categorised by liberalism more generally, must undergo critical re-figuring. Women's experiences, and their differentiated conceptions of truth through experience, do not necessarily fit within the ambit of truth and reason delineated by traditional legal and political theory. The challenge therefore becomes one of finding a means of allowing both this differentiated truth, and the experience of the private, to be heard by the public sphere (in this case, specifically the law).

It is from this perspective - the feminist conception of the dilemma of difference - that the circumstances of the battered woman who kills are investigated in this thesis. By comparing the story of Violet Roberts with the emergence of the BWS as a compromised response to circumstances like hers, it supports the questions posed by feminist legal writers in relation to the BWS, questions which are influenced by the dilemma of difference itself.

### History, Discourse, and the Law

What the literature around the BWS does not discuss, however, are the historical conditions which lie behind the emergence of BWS, and which complicate the paradox it presents. The history of the campaigns directed by feminist groups in the 1970s and 1980s challenging legal, state and public perceptions of domestic violence and its relation to marital homicides, is not taken into account when evaluating the BWS. This thesis asks not only *why* the battered woman who kills finds herself caught within the paradox of liberalism's construction of the female subject, but also *how* the circumstances of such a female subject, and the BWS, were occasioned in the first place. It sets out to demonstrate that history - and specifically a history of feminist challenges to the circumstances of the battered woman who kills - is an important means by which the difference dilemma can be investigated. It attempts a history of the battered body, a feminist legal history which privileges historical method and historical narrative as an important tool for feminist jurisprudence in its quest to recognise a differentiated subjectivity for women before the law.

Although other disciplines like psychology, anthropology or sociology have the potential to make important incursions into the ways in which a multifarious public sphere has constructed women, it is history, as a discourse committed to exposing the pre-conditions of both events and ideas, that provides – it is argued - a genuinely critical means of challenging the rationalising enterprise of liberal law and its construction of women. Accordingly, this thesis undertakes an historical examination of the ways in which domestic violence was named and identified by feminists in the past, and the ways this identification influenced and effected the jurisprudential criticisms of the battered woman's placement in law more generally.

An important proposition in this thesis is that the Women's Liberation Movement, specifically the refuge movement, shaped the development and entrenchment of a discourse on domestic violence. Michel Foucault's concept of discourse is useful in this context for spelling out the material and philosophical conditions for a challenge to the law's conception of battered women who kill. In *The Archaeology of Knowledge* he wrote:

> The question posed by language analysis of some...fact or other is always: according to what rules has a particular statement been made and consequently according to what rules could other similar statements be made? The description of the events of discourse poses a quite different question: *how is it that one particular statement appeared before another?*[22]

In commenting on this statement, Michele Barret has unravelled the meaning of 'discourse' as power. She points out that: 'this is, perhaps, the most important point to grasp about Foucault's concept of a discourse: it enables us to understand how *what* is said fits into a network that has its own history and conditions of existence.'[23]

The naming of domestic violence *as* domestic violence by second wave feminism played a powerful role in discursively contesting the broader networks which have attempted to name, hide, control and harness the issue of family violence, (for

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22 Michel Foucault (1972), *The Archaeology of Knowledge*, (AM Sheridan, trans.), Routledge, London, p. 27.

23 Michele Barret (1991), *The Politics of Truth: From Marx to Foucault*, Polity Press with Blackwell Publishers, Cambridge (UK), p. 126.

example medicine, law, policing, psychology, the media, the state). The politics of naming has been long recognised by feminists as a tool for exposing the range of oppression and harms endured by women. Catherine MacKinnon, in reflecting on the development of the legal claim for sexual harassment legislation, has discussed the role that *language* played in developing a relevant discursive terrain. She argues that the matrix of circumstances which constitute women's experience of sexual harassment did not traditionally amount to anything shaped, tangible, coherent:

> To the women to whom it happened, it wasn't part of anything, let alone something big and shared like gender. It fit no known pattern. It was neither a regularity not an irregularity...[w]hen law recognised sexual harassment as a practice of sex discrimination, it moved from the realm of... the primitive language in which sexual abuse lives inside a woman, into an experience with a form, an etiology, a cumulativness – as well as a club.[24]

The process MacKinnon identifies for sexual harassment is pertinent also for feminisms' role in claiming a language – a name - for violence in the home. This is not to suggest that 'labelling' domestic violence as domestic violence itself serves an instrumental function in reshaping the policies that keep women bound to the marriage contract. What it does suggest is a movement towards something 'big and shared', a creation of a space in which the battered woman can understand the shared or collective experience of violence (no matter how individualised are their emotions or injuries). The shift from 'wife beating' in the 1890s, to the more insidiously suggestive 'cruelty' of the civil jurisdiction in the first six decades of the twentieth century, to the emergence of 'domestic violence' in the mid 1970s, is significant.[25] As Meaghan Morris has argued:

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24 Catharine MacKinnon (1987), *Feminism Unmodified: Discourse on Life and Law*, Harvard University Press, Cambridge (Mass.), p. 106.

25 Note that the development of these terms will be positioned in relation to their broader context in Chapters Three and Four. Other names in circulation in the 1970s (and therefore indicative of the names which existed before domestic violence) included: violent relationships, wife battering, violence in the home. See generally Erin Pizzey (1977), *Scream Quietly or the Neighbours Will Hear* (first published 1974), Ridley Enslow Publishers, New Jersey; and Chapter Two.

> If the politics of language debates seem invisible, it is in part because verbal language is the most intensely naturalised – i.e. transparent – mode of social control at work in our culture.[26]

It must be noted that this 'mode of social control' does not remain fixed: we are currently in a period of legal and political discourses which focus variously on 'violence against women' and 'women's safety.'[27] This change arises both from rigorous debate around the issues, and global challenges to political ideologies. It is important therefore to acknowledge the debates around the terminology of 'domestic violence'. I have chosen to use the term 'domestic violence' throughout this project, however, as it was the term coined and developed through the refuge movement, femocracy and Women's Liberation Movement generally, and thus expresses and emphasises the role that 1970s feminism has had on encouraging a public discourse around the battered woman who kills. [28]

From this approach, a different set of questions can be added to those already posed by feminist legal scholars to the BWS: How does BWS fit into the production of knowledge signified by feminism as 'domestic violence', and does the law take this knowledge seriously? In pursuing these questions, what I am *not*

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26 Meaghan Morris (1988), 'A-mazing Grace: Notes on Mary Daly's Poetics', in *The Pirate's Fiancee: Feminism, reading, postmodernism*, Verso, London, pp. 27-50, p. 34.

27 The term 'violence against women' has in itself a long history, but it has been most recently (and controversially) used as a policy platform for the National Committee on Violence Against Women (1991) *National Committee on Violence Against Women: Position Paper*, Canberra, Australian Government Printing Service. The term chosen by the NCVAW to differentiate domestic violence against women from other forms of violence committed in the home: itself a valid point, and a sophisticated cultural reading of the power of language. This position was taken to be exclusionary by some who felt it acted as a statement of privileging women's (read: feminist) platforms in isolation. The elliptic term 'women's safety' refers to the latest statistical information available on domestic violence in Australia, which is included within William McLennan (1996), *Women's Safety in Australia*, Australian Bureau of Statistics, Canberra.

28 It is also important to note that the context in which I discuss domestic violence in this thesis as a whole, is as a crime predominantly perpetrated by men against women. This analysis is based on both the specific reading of domestic violence developed by 1970s feminism, and by research that indicates the veracity of the proposition. See for example, Patricia Easteal (1996), 'Till Death Do Us Part', in Kerry Greenwood (ed.) *The Thing She Loves: Why Women Kill*, Allen and Unwin, Sydney, pp. 2-18; Nicholas Seddon, (1993) *Domestic Violence in Australia: The Legal Response* (second edition), Federation Press, Sydney, p. 6; Australian Law Reform Commission (1986) *Domestic Violence*, Discussion Paper 30, ALRC, Sydney, para. 19.

attempting to do is write about legal processes per se. The discourses of law become relevant to the project as a whole via a discussion of their use of historical facts and narrative structure, and because the cases discussed in this thesis are legally constituted. In other words, I am investigating law in its role as a signifier and reflector of cultural meaning, as opposed to just investigating its developmental and instrumental function. What I hope to produce, therefore, is an historical examination of how contemporary understandings of domestic violence reflect a particular, and not necessary, account of feminist history, and how that history then becomes useful for feminist legal theory. It is important to note that in this thesis I am assessing and investigating both 'law' and 'history' (and their related theoretical manifestations of jurisprudence and historiography) in terms of Western discourses. Despite the problems inherent in accepting this bias, my research is constrained by the Western body of law, specifically Australian case law and legislation, with which I am attempting to engage.[29]

## Current Scholarship

Before explaining my methodological approach (which itself gives an indication of how these fields and theories work together) I will give a brief summary of the main areas of theoretical concern.

My approach to and discussion of the difference dilemma places this thesis clearly within the field of feminist jurisprudence, especially the work of feminist legal writers who contest the specific construction of the battered woman who kills through the BWS and other traditional defences. I refer to and generally support the analysis offered by scholars such as Stubbs and Tolmie, O'Donovan, Sheehy et

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29 For insightful and politically astute analyses of the problems of adhering Western discourses to the historicizing of other races see generally: Heather Goodall (1992), '"The Whole Truth and Nothing But...": Some Intersections of Western Law, Aboriginal History and Community Memory', in Bain Attwood and John Arnold (eds.), *Power, Knowledge and Aborigines*, A Special Journal of Australian Studies, La Trobe University Press with the National Centre for Australian Studies, Monash University, Victoria, 105-119; Dipesh Chakrabarty (1992), 'Trafficking in History and Theory: Subaltern Studies', in KK Ruthven (ed.) *Beyond The Disciplines: The New Humanities*, Australian Academy of Humanities/Highland Press, Canberra, pp. 101-108; Robert Young (1995), *White Mythologies: Writing History and The West*, (first published 1990), Routledge, London.

al, and Mahoney,[30] which will be canvassed fully in Chapter Nine. However, my main proposition is that these writers, although aware of the construction of battered women who kill as substantively 'different' from the male legal subject, fail to historicise the pre-conditions of that construction. This proposition entails an examination of the concepts of experience and subjectivity, as developed both in feminist legal theory more generally (that is, that which does not relate specifically or substantively to the battered woman who kills) and feminist history more specifically.

As discussed previously, my advocacy of a theoretical position in which women are equal to and different from the standard liberal subject, involves a critique of writers like MacKinnon, Gilligan, and Williams[31] who advocate an 'either/or' approach to discussions of women's legal subjectivity. This thesis supports the work of feminist legal writers who are more consciously involved in the interrelationship between postmodernism and feminist legal theory, refusing such binary oppositions. Especially valuable is the work of writers like Smart, discussed in Chapter Eight, who investigates the meanings of truth/experience for women in legal doctrine, and their usefulness for broadening the theoretical terrain.[32] Attention is also directed in Chapter Eight toward the work of Frug, Davies and Ashe,[33] who espouse a consciously postmodern position, and a focus on subjectivity of women.

The position of these postmodern feminist legal writers is embedded within developments occurring in the broader field of jurisprudence. It follows on critically from the work of Critical Legal Studies scholars like Tushnet, and Gabel

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30 See n. 3, and generally Chapter Nine.

31 Catharine MacKinnon (1987); Carol Gilligan (1982), *In a Different Voice: Psychological Theory and Women's Development,* Harvard University Press, Cambridge (Mass.), and Wendy Williams (1982), 'The Equality Crisis: Some Reflections of Culture, Courts and Feminism', 7 *Women's Rights Law Report* 175. See generally Chapter Eight.

32 See for example Carol Smart (1990), 'Law's Truth/women's experience', in Regina Graycar (ed.) *Dissenting Opinions: Feminist Explorations in Law and Society,* Allen and Unwin, Sydney, pp. 1-20. See generally Chapter Eight.

33 Mary Jo Frug (1992), *Postmodern Legal Feminism,* Routledge, New York; Margaret Davies (1994), *Asking The Law Question,* Law Book Company and Sweet and Maxwell, Sydney; and Marie Ashe (1995), 'Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence', in Leonard (ed.) (1995). See generally Chapter Eight.

and Kennedy,[34] who critique law as a liberal discourse and uncover its objective conception of truth, and who are discussed in Chapter Seven. I also refer to in Chapter Seven, and support, the conclusions and analysis of scholars of postmodern jurisprudence like Boyle, Carty and Schalg,[35] who are committed to exposing the ways in which a critical investigation of legal subjectivity is made possible.

I draw extensively on the work of scholars of jurisprudence, who in seeking to broaden the claims for marginalised groups for justice and legal visibility, look for interdisciplinary engagements. Such engagements extend the critiques of the truth and rationality of law, and its consideration of experiences that stand outside those of the universalised public citizen. This field of jurisprudence, which attempts to reconceive jurisprudence as implicated in and informed by both critical literary theory and cultural studies, is important to this thesis. Work like that represented in Leonard, and in Brooks and Gewirtz[36] furthers the purely theoretical commitment to postmodernism evidenced by Frug, Boyle et al, by seeking ways of connecting law and theories of the law, to disciplines which are more free to understand how groups and individuals which exist in an equivocal relationship with liberalism can be heard or given voice.

The perspective evidenced in Brooks and Gewirtz, and undertaken by scholars like Delgado and Abrams[37] is crucial, for it begins to re-conceive the boundaries of how law tells stories, and how it therefore perceives the experiences behind those

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34 Mark Tushnet (1991), 'Critical Legal Studies: A Political History', 100 *Yale Law Journal* 1515; and Peter Gabel and Duncan Kennedy (1984), 'Roll Over Beethoven', 36 *Stanford Law Review* 1. See generally Chapter Seven.

35 James Boyle (1991), 'Is Subjectivity Possible? The Postmodern Subject in Legal Theory', 62 *University of Colorado Law Review* 489; Antony Carty (ed.) (1990), *Postmodern Law: Enlightenment, Revolution, and the Death of Man,* Edinburgh University Press, Edinburgh; and Pierre Schalg (1991), 'Symposium Foreword: Postmodernism and Law', 62 *University of Colorado Law Review* 439.

36 Leonard (ed.)(1995); Peter Brooks and Paul Gewirtz (eds.) (1996), *Law's Stories: Narrative and Rhetoric in the Law,* Yale University Press, New Haven. See generally Chapter Seven.

37 Richard Delgado (1989), 'Storytelling for Oppositionists and Others: A Plea for Narrative', 87 *Michigan Law Review* 2411; and Kathryn Abrams (1991), 'Hearing the Call of Stories', 79 *California Law Review* 971. See generally Chapter Seven.

stories. The contention of this thesis, however, is that although these developments are important in pushing the boundaries between disciplines, especially between law and literary theory, a significant recognition of the potential of history for jurisprudence is still under negotiation. Although Critical Legal historians like Gordon[38] have identified the power of history for challenging the foundations of law as an objective product of liberal theory, this project has not yet been extended to the ways in which that foundation categorises and constructs subjects and subjectivities.

From this perspective, this thesis is placed within the field of historical theory committed to historicising subjectivity. In many respects, this is, and always has been, the aim of feminist history, especially Australian feminist history which is central to this thesis.

Feminist history, as a distinct historiographical school, has long criticised positivist histories as employing a veneer of apolitical objectivity. The melding of activism and scholarship at the re-birth of Australian feminism in the 1970s, for example, was hallmarked by the involvement of young feminist scholars in history departments, and by the subsequent production of historical texts which challenged the dominant view and practice of reading Australian history.[39] Influenced by the work of cultural and Marxist historians like E P Thompson, the early works of feminist historians, both in Australia and overseas, owed much to

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38 Robert Gordon (1984), 'Critical Legal Histories', 36 *Stanford Law Review* 57. See generally Chapter Seven.

39 This challenge was arguably initiated by two key texts in 1970: Anna Yeatman (1970), 'The Liberation of Women', *Arena*, no. 21, pp. 19-25; and Ann Curthoys (1970), 'Women's Liberation and Historiography', *Arena*, no. 22, pp. 35-40. The publication of five feminist historical texts in 1975 heightened the profile of feminist history as a discipline in itself, and helped ground the work of other women writing in this area. These 'key five' were: Miriam Dixson (1976), *The Real Matilda: Women and Identity in Australia 1788 to 1975*, Penguin, Melbourne; Anne Summers (1975), *Damned Whores and God's Police: The Colonisation of Women in Australia*, Penguin, Melbourne; Edna Ryan and Anne Conlon (1975), *Gentle Invaders: Australian Women at Work, 1788-1974*, Nelson, Melbourne' Beverley Kingston (1975), *My Wife, My Daughter, and Poor May Ann*, Nelson, Melbourne; Ann Curthoys, Susan Eade and Peter Spearitt (eds.) (1975), *Women at Work*, Australian Society for the Study of Labour History, Canberra. For a discussion of the continuity between these texts and current Australian feminist history writing see: Ann Curthoys (1996), 'Visions, Nightmares, Dreams: Women's History, 1975', *Australian Historical Studies*, vol. 27, no. 106, April, pp. 1- 13.

the reclaiming process instigated by Marx. Women were identified as an oppressed 'class', in conflict with men, a formulation articulated through concepts like the sexual division of labour. The early projects were redemptive. Part of the methodological process behind this vision entailed a political project of reclaiming women's voices, and women's place, within the broad meta-narrative of history: of writing wrongs.

The other, later, aspect of the Australian feminist historical project was to subject this empirical work (the collection and collation of evidence) to a theoretical, feminist vigour which challenged the epistemological assumptions behind the production of knowledge. It sought to reveal the operation and construction of difference both in terms of women as historical subjects, and in terms of gender more generally. Joan Scott has suggested that the interactive relationship between history and theory went unnoticed by many feminist writers. Writing on 'women's topics' as a politicised act was impossible if unaccompanied by an analysis of *how* gender hierarchies were constructed, legitimated and challenged. The 'how' question entailed a study of processes, not of origins, of multiple rather than single causes. As Scott has indicated, historians, especially feminist historians, asking 'how' instead of just 'why, what and where' continue to draw attention to structures and institutions.[40] The question also insists, however, that historians understand what these cultural organisations mean, in order to understand how they work. In this way, historians could address the philosophical assumptions about women, including the assumption that they possess inherent and immutable characteristics and objective identities. By approaching gender as an historical subject *before* researching a particular empirical topic, the 'how' questions could be more satisfactorily answered. This creates a process which leaves a greater theoretical space for the historian to use the experience of the past responsively, and to suggest potential change by demonstrating how particular ideas about women were constructed.

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40 Joan W. Scott (1988), *Gender and The Politics of History*, Columbia University Press, New York, p 4.

In this way, feminist historians of varying persuasions[41] were able to analyse past discriminations and absences in ways that extended to the categories 'male' and 'female' themselves. I assert that feminist historians were, and are, of 'varying persuasions' because it would be incorrect to assume that all scholars working in the field of feminist history either shared the same ideological or political focus, or the same commitment to using theories like Foucault's in the writing and researching of history. There is, and always has been, a difference between 'feminist history', 'histories of feminism' and 'women's history', (which suggests a topic based, 'reclaiming' approach). What is arguably shared between different perceptions of what feminist history is and does is a distrust of the objectivity of the positivist historical narrative voice and approach which has silenced women, and left them both theoretically and empirically at the historical margins, or worse, hidden by history's public face.

Feminist history therefore mirrors, and also follows, the historical project described by Michel Foucault as 'genealogy'. Foucault has described genealogy as 'retrieving an indispensable restraint: it must record the singularity of events outside of any monotonous finality.'[42] Genealogy also 'rejects the meta-historical deployment of ideal significations and indefinite teleologies.'[43] Genealogy is therefore a form of history that seeks to answer questions of construction, as opposed to origin. It is connected with, yet set apart from, other challenges within historical theory to the issue of history's own existence as a grand, objective, narrative. These other

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41 See generally Judith Allen, (1986), 'Evidence and Silence: Feminism and the Limits of History', in Carole Pateman and Elizabeth Grosz (eds.), *Feminist Challenges: Social and Political Theory,* Allen and Unwin, Sydney, pp. 173-215; Scott (1988); Catherine Hall (1992), *White, Male and Middle-Class: Explorations in Feminism and History,* Routledge, New York; Gisela Bock (1989), 'Women's History and Gender History: Aspects of an International Debate', *Gender & History,* vol. 1, no. 1, Spring, pp. 7-30; Elizabeth Fox-Genovese (1982), 'Placing Women in Women's History', *New Left Review* 133, May-June, pp. 5-24. See also Jill Julius Matthews (1996), 'Doing Theory or Using Theory: Australian Feminist/Women's History in the 1990s', *Australian Historical Studies,* vol. 27, no. 106, pp. 49-58, for a discussion of the ambivalence of the theory/history relationship for some feminist historians.

42 Michel Foucault (1984), 'Nietzsche, Genealogy, History', in Paul Rabinow (ed.) *The Foucault Reader,* Pantheon, New York, pp. 76-100, p. 78.

43 ibid.

theories, developed by historians like E H Carr,[44] and discussed in Chapter Seven, have identified that history can never be truly impartial or objective as it is always inscribed by the subjectivity of its author and its sources.

What genealogy attempts to do is extend this position to the ways in which the *subjects of* history are also constructed. It is consciously implicated, therefore, not only in correcting oversights from inaccurate or incomplete visions found in traditional history, but in discovering and challenging the creation of those gaps, omissions, and also paradoxes, in the first place. This perception of genealogy is particularly useful for feminist historians investigating questions such as how the 'incurable' condition of feminism's relationship to liberalism has been enacted from a variety of disciplines. It is this type of project that has been realised in Australian feminist history by historians like Judith Allen. Allen, whose field of investigation intersects with the subject of this thesis (writing about the construction of crime, and female offenders through the contradictions of liberal law and a liberal state)[45] does not, however, emphasise the role of law; does not ask 'how' the law itself could be genealogically problematised.

This thesis therefore draws upon the methodology and theory of genealogy to illuminate a diverse range of fields that intersect in the specific construction of the battered woman who kills. An investigation of BWS that engages with its own history (itself a web of narratives derived from feminist legal theory, feminist history, the politics of domestic violence and prison reform, the relationship of all of these elements with the state, and with traditional, liberal interpretations of law) will provide a way of seeing beyond the paradox that faces the current socio-legal problem of battered women who kill. To accept, or avoid, BWS' own genealogy I believe does a disservice to the potential it attempts to afford to women both living through domestic violence, and women theoretically and politically trying to read and challenge its social dominance. History - commonly misread within other discourses like the law – is an extremely significant tool which can be used to

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44 E H Carr (1962), *What is History?,* Macmillan and Co. Ltd., London. See generally Chapter Seven.

45 See for example Judith Allen (1990), *Sex and Secrets: Crimes Involving Australian Women Since 1880,* Oxford University Press, Melbourne.

challenge *status quo* understandings of domestic violence, and correspondingly the BWS.

**Narrative and Postmodernism**

This thesis argues, however, that an interdisciplinary exchange between discourses like law and history, especially when complicated by feminist challenges to subjectivity, is never straightforward. The notion that history is of use to the law in understanding often-hidden claims for justice has been recognised by both legal theorists (Cover, Wesiberg, Gordon)[46] and also by the courts in recent times.[47] The 1992 High Court decision of *Mabo v Queensland,*[48] for example, specifically attempted to recognise Aboriginal rights to land by using historical texts and evidence that put the previous acceptance by the law of the doctrine of *terra nullius* into disrepute in their decision to recognise native title. The judgement, which has initiated an intense public debate over the issue of Aboriginal human rights, attempted to integrate the claims of Aboriginal rights, 'liberal' justice, international law and Australian common law in a single decision. The work of historians, notably Henry Reynolds, was identified by the court as an evidentiary base for reversing the earlier principle that 'Australian colonies became British possessions by settlement and not by conquest.'[49] However, despite the evidence of occupation before white settlement offered by Reynolds and others, the nature of legal evidentiary and narrative procedure resulted in a diminished value being placed on certain stories and accounts of the past that remain outside the recognised stories

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46 Robert Cover (1983), 'The Supreme Court 1982 Term Foreword: Nomos and Narrative', 97 *Harvard Law Review* 4; Robert Weisberg (1996), 'Proclaiming Trials as Narrative', in Brooks and Gewirtz (eds.), pp. 61-83; Gordon (1984). See generally Chapter Seven.

47 See also discussion of *EEOC v Sears* in Chapter Seven, in which the competing conceptions of feminist historians, replicating the problems of the 'difference dilemma', were metaphorically 'put on trial'. For an overview of the case see Ruth Milkman (1986), 'Women's History and the Sears Case', *Feminist Studies,* vol. 12, no. 2, pp. 375-400.

48 (1992) 175 CLR 1.

49 *Coe v Commonwealth* (1979) 24 ALR 118, 127; see also *Milirripum and Others v Nabalco Pty Ltd and the Commonwealth of Australia* (1970) 17 FLR 141.

of the law. As Gerry Simpson argues in relation to Justice Brennan's judgement in *Mabo*:

> [The] judgement is only explicable as a skillfully reasoned attempt to reconcile the competing discourses of history, politics, common law, precedent and international law. Despite this, the interests represented by each of these discourses are unlikely to be appeased by the judgement. The claims of *Aboriginal* history in particular remain unsatisfied.[50]

Although the political questions and issues of justice concerning race surrounding *Mabo* are not the focus of this thesis, it is worth noting this attempt by the High Court to acknowledge the evidence of other discourses like history. It also worth noting that despite this attempt, the forms and diversity of voices which informed the history used by the Court were either unable to be fully incorporated, or were reinterpreted to fit the narrative form that was judicially expeditious in the circumstances. What *Mabo* indicates is that historical and legal narrative are conceived of in incommensurable ways, which *prima facie* prevent feminist historical analyses of categories and identities.

Nevertheless narrative, as a shared conceptual tool of both legal and historical discourse, is a means by which the law, and correlatively jurisprudence, can consider a different subjectivity for women as presented by genealogical investigation. This entails a discussion in this thesis of developments in narrative theory, by scholars like Lyotard, Barthes, and White.[51] Narrative in the terms described by these scholars becomes a theory which demands a distinction between 'story' (a sequence of events or action) and 'discourse' (the discursive presentation or narration of events). This thesis presents narrative in both of these forms. It is narrative perceived of as a discourse, however, which is argued to

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50 Gerry Simpson (1993), '*Mabo*, International Law, *Terra Nullius* and the Stories of Settlement: An Unresolved Jurisprudence', 19 *Melbourne University Law Review* 195, p. 209, (emphasis added).

51 See for example Jean-Francois Lyotard (1984), *The Postmodern Condition*, (trans. Bennington and Massumi), University of Minnesota Press, Minneapolis; and Roland Barthes (1977), 'Introduction to the Structural Analysis of Narratives', in *Image, Music, Text*, (ed. and trans. S. Heath), Hill and Wang, New York, pp. 79-124; Hayden White (1992), *The Content of the Form: Narrative Discourse and Historical Representation*, John Hopkins University Press, Baltimore. See generally Chapters Seven and Eight.

provide a means by which groups and individuals can challenge dominant constructions of subjectivity by the law.

Central to this proposition, and central to the method and approach of this thesis as a whole, is a commitment to the opportunities offered by postmodern theory for feminism, jurisprudence and history. Postmodernism - as discussed by Jean-Francois Lyotard in *The Postmodern Condition*[52] - is a movement away from broad theoretical explanations to more localised discourse. In terms of a challenge to liberalism, a grand organising theory of knowledge referred to as a 'metanarrative', postmodernism recognises the limitations such theory has for subjects who are not represented within its boundaries. Feminism, with its implicit recognition of the ambivalence of liberalism for women, has always been 'postmodern' in this sense. Postmodernism, however, breeds a fear amongst scholars committed to working within existing frameworks like Marxism, as it is perceived as a theoretical position which is nihilistic, committed to absolute relativism, and bearing the potential to eliminate positions of truth and falsity. However, if postmodernism is understood as a methodological perspective, as opposed to a totalising metanarrative (which is of course a position it seeks to critique) its ideas become useful, especially for feminist legal thinking. As Pierre Schalg argues, 'the postmodern condition does not supplant or otherwise replace any of the (historically) prior epistemic, intellectual or cultural modes, but rather reenacts each in forms that are not their own.'[53] In this way, postmodernism is a methodology by which types of knowledge and experience, which are usually excluded from dominant ideologies and discursive practices, are given a power, and an identity as types of knowledge themselves. The issues presented in this thesis, the means by which a differentiated subjectivity for battered women who kill can be read by the law and by legal thinking, therefore relies on a postmodern approach. As Schlag again argues:

> What is required is nothing less than the 'deconstruction' of precisely the form of disciplinary thinking that repeatedly situates the conscious autonomous individual legal thinker as the privileged

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52 Lyotard (1984).

53 Schlag (1991), p. 447.

> adjudicator of the truth of propositional content and as the independent wielder of instrumental power.[54]

This concentration on the particular, the subjective, the diversity of individuals, is a theoretical perspective that grounds genealogical history. In this way, this thesis contends that postmodernism's challenge to disciplinary bodies, and their conception of corporeal bodies (the subjects of liberalism) provides a means by which the current paradox presented by the BWS can be analysed in a more sophisticated and systematic way. By insisting upon a genealogy of the battered woman who kills, translatable to legal thinking via a re-defined method of narrative borrowed from historical theory, it argues that potential exists for a re-invigorated assessment of female subjects before the law.

This thesis does not attempt to offer a new *legal* solution to the paradox presented by the battered woman who kills. Instead, it offers a methodology by which the development and preconditions of that situation can be made transparent. The intention and approach of this thesis is an investigation and analysis of some of the theoretical dimensions of the relationship of law and history, while simultaneously problematising the case of the battered woman who kills. In this sense, history becomes the privileged focus of the project as a whole: a theoretical tool of immense potential, a means of challenging our understandings of ourselves, and reading our place in the feminist project that precedes and circumscribes the political and empirical nature of this thesis.

## Structure and Sources

The difficulties of interdisciplinary analysis, complicated by the presentation of and argument for this methodological approach, has however constrained the structure of this thesis. I have divided my analysis into four sections, which each posses a particular purpose, and function, in terms of the building of a genealogy of the battered woman who kills, and which are designed to show systematically how the interactions between feminist, legal and historical theories and perspectives are of use to one another.

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54 ibid.

The first section (containing Chapters One, Two and Three) is entitled 'Context', and sets out to describe the pre-conditions of the rest of the thesis. Chapter One is a legal history informed by a critical feminist perspective. It identifies criminal law as a practice of liberal legalism, with its correlative understandings of universalised subjects. It then examines the rules surrounding cases of domestic homicide, especially the elements which constitute defences to murder, and concludes by signposting the shifts in thinking about the battered woman as a subject before the law which began in the 1970s. Chapter Two identifies that it is not possible to undertake an examination of the battered woman before the law in this way without first understanding how 'battering' has been constructed. It outlines the ways in which the public sphere (both law and state) has regulated the experience of the battered woman since the 1890s, and the ways pre-1970s feminisms approached the situation of violence in the home. Chapter Three discusses the Women's Liberation Movement, specifically the Sydney Women's Liberation Movement, and identifies how it was different from the feminisms that preceded it. It argues that because of the collective, yet diverse, political make up of the Movement, a framework existed for attacking public institutions like the state, but also private ones like marriage, that had not existed before. The Movement was unique in its concentration on politicizing experience, and personal experience, which created a place from which domestic violence could emerge as a holistic discourse in itself.

Section Two is called History, and is primarily concerned with a detailed exposition of the development, in the 1970s, of an identity for the battered women. Comprising Chapters Four, Five and Six, it analyses the ways in which feminism, the law and the state constructed them and their experience, and provides a history of the emergence of a differentiated subjectivity for battered woman, entrenched within a more generalist history of ideas and events that constituted the late 1970s and early 1980s in Sydney.

Chapter Four identifies the ways in which the Women's Liberation Movement produced a discourse on domestic violence which challenged the public sphere (via the state). However, this challenge was ambivalent, underscored by feminism's equivocal relationship with liberalism. The Chapter argues that despite the

engagement with the state over domestic violence (through the refuge movement), a similar challenge to the law (as another 'arm' of the public sphere) had not yet occurred.

Chapter Five investigates 1970s feminisms' engagement with the criminal justice system. It focuses on the Feminist Legal Action Group, which specifically investigated the position of the battered woman who kills, and its historical foundations. The particular political and personal nature of the two researchers on the project, Wendy Bacon and Robyn Lansdowne, and their connections to projects of libertarianism and critical left legal reform, are investigated through the issue of prison reform, which arose in Sydney in the mid 1970s. Through groups like Women Behind Bars, which made public the treatment of women prisoners specifically, the problems with the criminal law which condemned them to gaol in the first place were highlighted.

Chapter Six investigates the campaign for Violet Robert's release, and the reforms that took place after that release, placing the campaign in the broader prison reform movement, as well as in feminism. Thinking about the battered woman who kills in the 1980s was a complex collision of libertarian, feminist and liberal reformist perspectives, complicating the process of reform that occurred after her release. There was an understanding of the battered woman as a subject who was equal and different, but there was as yet no theoretical language for feminist jurisprudence to challenge binary understandings of the law as it related to women.

Section Three, Theory (containing Chapters Seven and Eight), is designed to explain the intersecting theoretical perspectives which are of use in translating the notion of subjectivity identified materially in the 1970s to the present. In this way, thematically, it is concerned with narrative, truth and experience, the relationship between law and history, and the uses of postmodernism for feminist legal and historical theory.

Chapter Seven discusses the interrelated yet distinct conceptions of narrative and truth for both history and law. As already discussed, the central contention of the thesis is that history (genealogy) offers jurisprudence (and perhaps the law) new potential for understanding women's experience and their differentiated, gendered

subjectivity. It unpacks the relationship between history and law as discourses, and explores how one of the shared conceptual tools (narrative) can be reinterpreted to allow a conversation between law and history, and as such a recognition of the battered woman's experience. Chapter Eight investigates feminist jurisprudence, and its response to the paradox of liberalism: the difference dilemma. It argues that postmodernism is useful for feminism in overcoming this problem, but that history, which specifically investigates the development of 'experience' and 'subjects' as categories, is still needed. It argues that a contemporary understanding of the battered woman who kills is best served by bringing the narrative theory, and thus genealogy, of history into jurisprudence.

Section Four, entitled 'A feminist legal history', is designed to demonstrate, through relating a contemporary problem to one identified in the past, how a postmodern historical approach to feminist jurisprudence is useful in overcoming the paradoxes of liberal law within which it is inscribed. From this perspective, Chapter Nine discusses the legal parameters of the BWS, as well as feminist legal criticism of it as an evidentiary device. These criticisms, it is argued, obliquely identify the problem of the paradox presented by liberalism for feminism, yet fail to historicise BWS itself. Chapter Ten then demonstrates the methodological approach of genealogy in terms of the issues raised by the BWS. This chapter is the culmination of the theoretical argument developed in Section Three; it applies the historical preconditions investigated in Section Two, to argue that the campaigns for and conceptions of the circumstances and experience of the battered woman who kills, which have been in development since the 1970s, are relevant to the contemporary debate.

This thesis, which consciously attempts to problematise what a feminist legal history is, and how it can be employed, has drawn upon a wide range of primary source material to establish and build a genealogy of the battered woman who kills. In terms of the legal issues presented, it has primarily relied on legal judgements, both reported and unreported. For the analysis of the reform of the law of provocation in the early 1980s, it has used material made available from the New South Wales' Attorney-General's Department, and from the private papers of Robyn Lansdowne, the lawyer who represented Violet and Bruce Roberts. Robyn

Lansdowne's papers, as well as those of Wendy Bacon, presented a wealth of material relating to the campaign for the Roberts' release. Additional material relating to the campaign, and relating to the influence of the feminist group Women Behind Bars was provided by interviews conducted with Robyn Lansdowne, Wendy Bacon, and Women Behind Bars activists, Julie Bishop and Toni Robertson. Recollections of the role of the Domestic Violence Task Force in New South Wales in the early 1980s were provided through an interview conducted with Helen L'Orange, head of the Women's Co-Ordination Unit in New South Wales at that time. To assist with understanding the influence of Women's Liberation Movement in creating a discourse of domestic violence and the battered woman who kills, materials from the Women's Liberation Movement archive, the First Ten Years Collection, were generously made available. Further contextual material on the intersections of political movements in the 1970s and 1980s were drawn from newsletters, journals and newspapers housed in the Mitchell Library, State Library of New South Wales.[55]

Overall, this thesis, conceived of as a genealogy, has attempted to be what Foucault describes as 'meticulous and partially documentary.'[56] As a genealogy, it begins with an analysis of the intersections of legal liberalism and feminist-generated critiques of the law's treatment of the battered woman who kills, in order to initiate the process of developing a feminist legal history which 'operate[s] on a field of entangled and confused parchments or documents that have been scratched out and recopied many times.'[57]

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55 These journals and newspapers include *MeJane, Sydney Women's Liberation Newsletter, The Dawn, Broadsheet, Alternative Criminology Journal, Sydney Morning Herald.*

56 Foucault (1984), p. 76.

57 ibid.

*Section One*

# CONTEXT

*Chapter One*

# HOMICIDE

> Legal Individualism affixes a badge to our clothing or a mask to our face which has nothing to do with what we really are or resemble. Law dresses us with a veneer of rights, duties and responsibilities (legally conceived) that has nothing to do with the real needs and attributes of human beings. Real justice to individuals has nothing necessarily in common with legal justice. The latter obscures the former.[1]

By telling two versions of Violet Roberts' story in the prologue to this thesis - her experience with violence, and her experience before the law - it becomes evident that the law as a bastion of self-enclosed logic and reason was ill equipped to transpose the subjective intentions or rationale of a battered woman into its canon. This thesis as a whole is invested in exploring *how* the law conceptualises and treats the battered woman who kills. This chapter initiates this discussion by describing the operation of the law of homicide, and defences to murder, and considering the ideology and history upon which they are based. It therefore adopts a critical feminist position, arguing that law (as a liberal discourse) has philosophical and substantive difficulty in reading the experience of the battered woman who kills, since it does not mirror the experience of the universalised subject of law, embodied as a 'reasonable man.' The chapter serves to contextualise the challenge by feminism to the paradox of liberal theory, examining the development of criminal law doctrine, and the rationale behind the various defences to murder.

It is, however, impossible to provide an objective account of the rule of law. This is not to suggest that there is no rational framework for the law itself; rather, that the

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1 Alan Norrie (1993), *Crime, Reason and History: A Critical Introduction to Criminal Law*, Weidenfeld and Nicolson, London, pp. 13-14.

(criminal) law is historically contingent, and as a result, often socially unresponsive, or contradictory.[2] Alan Norrie has argued that the historical development of criminal law doctrine, and as such, its jurisprudential contradictions, needs to be disclosed.[3] Norrie contends that there are two paramount, and interrelated values which inform criminal law doctrine: rationality and legality. Legality, or 'the rule of law' depends upon making and implementing legal rules in a non-arbitrary manner, defining a system of norms which are coherent and consistent. Legality is the value (and process) which requires judges to recognise and obey pre-existing rules through precedent. However, this application of what are, in effect, arbitrary rules, only becomes possible if there is an organising conceit: rationality. In short, legal reasoning, like logical reasoning, is dependent on rationality, on a system of justification for argument and judgement. As D N Mac Cormick has argued, it is the rationality of legal decision-making which constrains judges to 'do justice according to the law, not to legislate for what seems to them an ideally just form of society.'[4] However, as Alan Norrie has suggested, rationality is 'both a central legal virtue and an impossibility.'[5] He argues that the legal profession bases its arguments on the assumption that logical reasoning is a central requirement, yet when pushed to a position it does not accept, logic is discarded, or limits to legality are insisted upon. Glanville Williams has suggested that:

> It would be pleasant to be able to assert that the root principle underlying the administration of the criminal law is that of legality. Unfortunately...there is no unanimity about anything in criminal law: scarcely a single important principle but has been denied by some judicial decision or by some legislation. The principle of legality is a notable sufferer from this lack of agreement.[6]

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2 This position is connected to debates around the subjectivity of historical argument, research and analysis. These issues will be canvassed in Chapter Seven. However, it is important to note at this point that accepting the subjective origins of criminal law doctrine - whilst acknowledging an objective façade - gives rise to a subjective critique, in this case of the law as both an instrument of social control and male bias.

3 Norrie (1993).

4 D N Mac Cormick (1978), *Legal Reasoning and Legal Theory*, Clarendon Press, Oxford, p. 107.

5 Norrie (1993), p. 11.

6 Glanville Williams (1961), *Criminal Law: the General Part* (second edition), Stevens, London, p. 575.

The point in highlighting both the essential relationship between rationality and legality in criminal law, and also rationality's fundamental 'impossibility' is to demonstrate that the law is not a magically contained and constituted code, but a system of thinking about subjects and individuals that has its epistemological roots outside of precedent. In short, Norrie reminds us that although there is a value in prescribing a system of rules which monitors social behaviour and social control, that system must be acknowledged as owning a philosophical history and an ideological past. By unpacking that history, it becomes evident that the limits placed on criminal law may indeed be 'illogical' within the realms of legality, but reflect both the realities of social behaviour, and the biases and perceptions about legal subjects and their actions that is encoded into the law as a result of its philosophical underpinnings.[7]

Before the rules of law that could not serve justice to Violet Roberts can be analysed, it is important to discuss briefly the matrix of ideas and circumstances that have defined criminal law doctrine.

## Justice and Individualism

It has been argued that the ultimate foundational principle of criminal law is the requirement of doing justice to individuals. For the state to intervene against the individual, there must be a good reason to do so: a concept incorporated into the principles of logic and legality.[8] As the legal theorist H L A Hart has argued, criminal liability can be founded upon: '...the simple idea that unless a man has the capacity and a fair opportunity or chance to adjust his behaviour to the law its penalties ought not to be applied to him."[9]

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7 It is important to note this inherent contradiction of criminal law doctrine, because it both acts as the foundation for feminist generated reform and critique of the defences available to the battered woman who kills, and also suggests that the contradictions themselves offer the potential for the substantive law to be amended without recourse to the evidentiary standard supplied by the Battered Woman Syndrome. These issues will be discussed later in this thesis, expressly in Section Four.

8 See: Williams (1961), pp. 575-576; Norrie (1993), p. 12; N Lacey (1988), *State Punishment*, Routledge and Kegan Paul, London, p. 149.

9 H L A Hart (1968), *Punishment and Responsibility*, Clarendon Press, Oxford, p. 187.

As such, there is an intrinsic, and essential, connection between criminal punishment and individual justice. For a subject to be punished, he or she must have voluntarily broken the law, a code of which they are expected to be aware. This principle of free choice, or voluntarism, argues Hart, 'incorporates the idea that each individual person is to be protected against the claim of the rest for the highest possible measure of security, happiness or welfare which could be got at his expense by condemning him for a breach of rules and punishing him.'[10]

The centrality of the ideas of free choice, or voluntarism, ensures that the root of criminal responsibility lies in the subjective element of the accused: the *mens rea.*[11] It is this emphasis on the subjective intentions of individuals that propagates the idea that the law's first and foremost concern is with the protection of the person: the safeguarding of those individuals from the actions of both the state and from other individuals. However, criminal law, at heart, is a practical application of liberal political philosophy (from where the concept of the protection of the individual stems) and as such, the law's understanding of the social reality, the lived experience, of the individuals that it monitors and governs, are measured against the epistemological standard of the liberal subject. This conception of the subject before the law – 'juridical man' - imprints upon criminal law doctrine a contradictory matrix of principles. On the one hand, criminal law sets out to protect and honour the status of individuals against the excesses of the state and the actions of others. Yet on the other, due in part to the constraints of coherence and consistency insisted upon by legality, the law conceives of individuals as static, singularly defined beings. A chasm constantly reveals itself between the reality of individuals as social and political beings, and their definition by and existence within law.

The birth of 'juridical man' and a modern doctrine of criminal law is, as has been previously mentioned, a direct result and application of liberal political philosophy.

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10 ibid., p. 22.

11 Glanville Williams defines *mens rea* as 'denot[ing] the mental state (subjective element)' of an individual's criminal action. See Glanville Williams (1983), *Textbook of Criminal Law* (second edition), Stevens, London, p. 71. The operation of the *mens rea* as a requisite element of proving a case for murder will be discussed later in this chapter.

Michel Foucault in *Discipline and Punish* demonstrates (through the French experience)[12] how the bloody and corrupt penal system of the eighteenth century was both institutionally and logically interconnected with the maintenance of absolute monarchy. The pure rule of a sovereign legitimated a system in which the threat of terror (or punishment) was mitigated only by royal prerogative, and a system of pardon by prominent members of the community.[13] However, by the end of the eighteenth century, and through the processes of terror, revolution and the associated rise of a new social (merchant) class came a concomitant set of philosophical ideas to challenge and enforce a new social order.[14] One of the key ideas, which manifested themselves in different conflations through different texts and thinkers in different parts of Europe,[15] was that the social world was founded upon individual self-interest and right. Therefore at the heart of the birth of liberalism was an embrace of free individualism in moral, political, social *and* legal discourse: a base from which the *ancien régimes*, with their reliance on social control through absolutism and terror could be criticised and rejected.

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12 This experience of punishment and control also existed in England, which is relevant to his discussion as the source from which our common law and penal codes emerged. Although in the seventeenth century England had abolished absolute monarchy, thus distinguishing the English experience somewhat from that of France, the Whig oligarchy of the eighteenth century ran its criminal law system as if absolute monarchy still existed: Norrie (1993), p. 18. See generally: Christopher Hill (1967), *Reformation to Industrial Revolution,* Weidenfeld and Nicholson, London.

13 Michel Foucault (1991), *Discipline and Punish: The Birth of the Prison*, (first published 1975), (trans. Alan Sheridan), Penguin, Harmondsworth, pp. 3-6, 32-73.

14 See generally Christopher Hibbert (1980), *The French Revolution*, Chaucer Press, Suffolk UK, pp. 41-42, for a cultural reading of the dissemination of ideas through the publication and community response to the tracts of the *philosophes.*

15 These different manifestations of liberalism across the European continent could be superficially summarised as: in England, through the work of Adam Smith and Thomas Hobbes, theories about the pursuit of self-interest and the definition of economic man (and later the utilitarian subject through the work of Jeremy Bentham); in Germany and emphasis on the language of right and reason, and its connections to metaphysics through the work of Hegel and Kant; and in France, the emphasis on the definition and dissemination of the Social Contract and the Rights of Man through writers such as Rousseau. For generalised discussion of the birth of liberalism see: Andrew Gamble (1987), 'Liberalism', in *An Introduction to Modern Social and Political Thought,* Macmillan, London; Simon Marginson (1988), 'The Economically Rational Individual', *Arena*, no. 84, pp. 105-114; Jonathon Wolff (1996), *An Introduction to Political Philosophy,* Oxford University Press, Oxford; Iain Hampsher-Monk (1992), *A History of Modern Political Thought*, Blackwell, Oxford.

Embedded within the celebratory ideals of equality, liberty and the fundamental rights of man, was an insistence upon economic self-determination, filtered through the political philosophical lens by the developing merchant (or middle) classes. Liberalism, in some senses, although providing a democratic blueprint of equality and freedom for all, was a philosophical justification for the enshrining of economic rights and freedoms of the literate and privileged against the excesses of absolute monarchy and hereditary rule. From this perspective, the liberal subject was fashioned in the likeness of those whose interests were best served by adopting and advocating the philosophies of Kant, Hume, Rousseau and Smith. The liberal subject, then, as a predominantly male, white, economically advantaged individual, was to set the standard for the development of what subjects should appear to be like through a range of developing discourses from the eighteenth century to the present day. [16]

It is this context of the birth of liberalism that modern criminal law doctrine can be assessed as an historically contingent phenomenon. Liberalism, and its embrace of free individualism, effected a change to the system of penal terror that preceded it. Punishment began to be reconceived as a response to the social contract by a free individual which needed to respect that individual in order to deter crime. In other words, the contract between free and equal citizens could be maintained only in reference to proportionality between individual justice and effective deterrence.[17] Foucault characterised the shift in thinking about the criminal law as one between emphasis on the body (punishment as torture and pain) to an emphasis on the soul or mind.[18] Punishment became the negation of an abstract moral right. The replacement of systems of physical torture for instantaneous death by guillotine, Foucault argues, exemplifies the shift, as it 'intended to apply the law not so much

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16 For a general discussion of the discursive impact of the Enlightenment see Michel Foucault (1984), 'What is Enlightenment?' in Paul Rabinow (ed.), *The Foucault Reader*, Pantheon, New York, pp. 32-50.

17 Norrie (1993), p. 19.

18 This characterised shift in conceptions of punishment relates to the philosophical dominance of Rene Descartes mind/body dualism, which will be discussed later in this chapter in relation to the *mens rea/actus rea* distinction in formulating the criminal transaction.

to a real body capable of feeling pain as to a juridical subject, the possessor, among other rights, of the right to exist. It had to have the abstraction of the law itself.'[19]

The idea of negation of an individual right was also encoded in the German philosophical insistence on retribution in punishment. As put forward by Immanuel Kant, an individual's guilt had to be established in advance of punishment, and punishment had to 'fit the crime'. Therefore, justice, in terms of a retributive philosophy of punishment, was contingent on ensuring that punishment was balanced between notions of the individual's guilt and responsibility for their actions with a proportionality to those actions.[20] What the retributive philosophy assumed, therefore, was that potential subjects requiring punishment were inherently calculating of their own self-interest, and their place within the social contract. Punishment (and justice) was therefore inextricably linked and integral to the work of utilitarian thinkers like Jeremy Bentham.[21]

What Bentham's theory of legislation, and the German philosophers' conceptions of retributive punishment assumed, however, was the existence of an encoded and consistent 'body of law'. For an individual to be self-calculating, to secure individual liberty and to preserve a system of deterrence, the law needed to be known in advance: it needed to be rational, comprehensive, and authoritative. It needed to become a new form of sovereignty,[22] or supreme rule, through which citizenship was defined.

Returning to the idea of liberalism as a political justification for reassessing the ownership of exclusive property rights, it is not surprising that the demand for a

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19 Foucault (1991), p. 13.

20 Norrie (1993), p. 20. The retributive philosophy of punishment, in other words, was a rational system in which there was a 'scale' of severity in accordance with the severity of the crime, which was held to provide the necessary social deterrent. Norrie notes that these concepts continue to dominate the ways in which we think about punishment.

21 Norrie (1993), p. 21. See generally Jeremy Bentham (1975), *Theory of Legislation*, Oceana, New York: 'To a calculating subject, punishment need only just exceed crime in its severity for it to be an effective deterrent. Any more would be simply needless evil brought into the world.', pp. 199-200.

22 For a traditional reading of the operation of legal sovereignty see W J Rees. (1950), 'The Theory of Sovereignty Restated', 59 *MIND* 495.

rational rule of law reflected the interests of the propertied classes. As such, Foucault argues, the tolerated illegalities and abuses of property that may have existed in the past were reconceived and coded as criminal acts: 'an objective, clear cut criminal law in which no doubts as to what was and what was not lawful was required.'[23] What the construction of a system of legality through liberalism entailed therefore was a redefinition of legal subjects. The calculating subject of modern criminal law doctrine emerges directly from political economy's free moral individual. 'Juridical man', like 'economic man' ensured, as Alan Norrie notes, that 'crime and punishment were to be exchanged as costs and benefits like any other commodity, and that punishment was an economic disincentive to crime.'[24]

The liberal encoding of criminal law- and the need of an identifiable juridical subject by an insistence on legality - illuminates the contradictions of individualism. Although reliant on individualism as an ideological organising principle, the law *abstracted* lived experience into a codified and identifiable form: a form which mirrored the experience of the propertied classes whose interests liberalism served. Juridical man, as such, was an ideal subject living in an ideal world. The matrix of class, gender and a myriad of other differences that constitute the everyday understanding of 'individual' were clouded by the law's oblique emphasis on its subjects (equal) ability to reason and calculate. That crime is committed as a *direct* result of social circumstances, and not always the outcome of rational choices made in abstraction, ensured that from the beginning, legality (or the rule of law) was to be constantly contradicted and compromised by limits to its own rationality as a result of its historical and ideological foundation.[25]

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23 Norrie (1993) p. 23 paraphrasing Foucault (1991), pp. 85-87.

24 ibid.

25 Norrie conceptualizes the contradictions of criminal law doctrine like this: 'Legal doctrine at its heart is premised upon the need to 'mind the gap' between the law's form (free individualism) and its content (the control of socially structured individuality.) Legal form is created and maintained against the persistent 'threat' of social and political 'leakage' into the processes of state judgment and punishment.': Norrie (1993), p. 26.

## Guilt and Responsibility

The law of homicide was also compounded by pre-Enlightenment concepts of morality.[26] Although thinkers like Thomas Hobbes argued that 'morality really means nothing more than obeying the law',[27] other legal theories argue that nothing which does not conform to the moral law itself can be properly regarded as effectively binding law. Legal positivists - who have jurisprudentially refined the Hobbesian view, and insist that the validity of legal rule can depend solely on legal criteria - *prima facie* deny the exchange and connection between law and morality that has descended from Natural Law theorists.[28] However, in terms of the law of

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26 The breadth of philosophical concern over the issue of interconnection and exchange between law and morality have a long, substantial history which deserves more attention than can be devoted in this context. Associated with this history, and breadth of theorising about the nature of human morality, and a such the nature of humanity itself, there is no consensus. Correlatively, there is no agreement in the wider contemporary communities that reflect this history, or in legal/jurisprudential communities and debates. For example, St Thomas Aquinas argued that it is 'necessary to tolerate certain evils lest worse evils should rise form the effort to repress them.' (paraphrased by L Waller and CR Williams (1989), *Brett, Waller and Williams Criminal Law Text and Cases* (sixth edition), Butterworths, Brisbane, para 1.4, p. 4.) Other philosophers have interpreted morality with a wide range of scope and differentiation: for example, Augustine in *City of God* on a natural understanding of good and evil; Machiavelli in *The Prince* on 'amoralism'. In short, The History of Ideas which marks Western Philosophy and history is entrenched in a central debate on the definition of moral conduct, on what behaviours are essential to promote notions of the common good. Most influential in terms of modern jurisprudence is arguably the work of John Stuart Mill, which emerges form Bentham's utilitarian philosophy, but transforms and simultaneously critiques it. In *On Liberty*, for example, he argues that if two people of full age and understanding (wherever the age of majority is fixed) wish to engage in certain conduct which will not cause injury to themselves or to others, conduct should not be prohibited by law merely because the majority of the community may consider to be morally wrong: JS Mill (1976), *On Liberty* (first published 1859), Penguin, Harmondsworth, UK. It can be argued that it is Mill's theory of liberty and morality that serve as the philosophical basis for the modern decriminalization of homosexuality, as well as the grounds on which crimes like incest remain taboo. It is worth noting the critical opposition to and debate around Mill's position in: Lord Devlin (1965), *The Enforcement of Morals*, Oxford University Press, Oxford; and H L A Hart (1963), *Law, Liberty and Morality*, Penguin Books, Harmondsworth, UK.

27 Dennis Lloyd (1964), *The Idea of Law*, Penguin Books, Harmondsworth UK, p. 26.

28 For a discussion of Natural Law Theory, especially its connections to and contradictions with positivist law, see generally: Lloyd (1964), pp. 70-94; Margaret Davies (1994), *Asking The Law Question* , Sweet and Maxwell/The Law Book Company, Sydney, pp. 56-93; P. Soper (1988), 'Making Sense of Modern

homicide, which is a genealogical referent to the Judeo-Christian commandment 'Thou shalt not kill' - the connections between law and morality seem inextricably connected: a pre-existing framework of one individual killing another is against the law. Dennis Lloyd argues that the whole idea of guilt in criminal law is linked with the idea of moral responsibility, and as a consequence 'morals reinforce the authority of the law and the duty to render obedience to its decrees.'[29]

The nature of the law of homicide as the product of both a liberal legalism and a pre-existing moral code is evident in the elements which define an act of killing as murder, and as such, against the law. Waller and Williams have argued that the two central defining elements of criminal action are the publicness of the conduct, and the involvement of moral wrongdoing.[30] The invocation of morality into criminal law doctrine in this way compounds the concept of voluntarism and calculation bequeathed by liberalism. At heart, the re-evaluation of the nature of punishment (as deterrence, and a calculated sense of loss to the subject measured proportionally against loss to the community of subjects) is justified only if the person to be punished is morally blameworthy.[31] To accept this, is to accept the liberal construct that human beings have a measure of choice in performing acts which constitute their daily activity; that they have an understanding of their own free will *and* of an accepted morality. As such, morality (and a concomitant sense of individual guilt) are inextricably connected to a legal meaning of criminal responsibility. Alan Norrie notes that:

> [T]he root of responsibility lies in the subjective mental attitude of the accused. Without this, fair opportunity and voluntariness cannot exist. The fault element is 'a mark of advancing civilisation required by the criminal law in respect of offences traditionally regarded as serious because they involve so drastic an interference with the liberty of the subject.[32]

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Jurisprudence: The Paradox of Positivism and The Challenge For Natural Law', 22 *Creighton Law Review* 67.

29 Lloyd (1964), p. 65.

30 Waller and Williams (1989), para 1.1-1.3, p. 3.

31 Waller and Williams (1989), para 1.9, p. 6.

32 Norrie (1993), p. 12, paraphrasing Glanville Williams (1983), *Textbook of Criminal Law* (second edition), p. 70.

The subjective mental state (or *mens rea*) required to situate criminal responsibility with the subject has been notoriously difficult to locate and define. The common law has accepted a notion of mens rea for a long time. The common law maxim 'actus non facit reum nisi mens sit rea' can be traced back as far as St Augustine, and has been interpreted by Sir William Blackstone as meaning 'as a vicious act is no civil crime, so on the other hand, an unwarrantable act without a vicious will is no crime at all.'[33] In other words, exercising an act against their own free will, or without an innate sense of moral culpability, a legal subject can not be found criminally responsible. Waller and Williams have noted that up to the end of the eighteenth century, the requirement of *mens rea* was a convenient expression for describing the basis of a number of defences recognised as available in all charges of crime, such as infancy, duress, coercion or insanity. However, the re-conception of criminal law doctrine in the early nineteenth century through liberal philosophy caused an ideological shift in the jurisprudential evaluation of *mens rea.* Both Jeremy Bentham, and more importantly John Austin, formed a theory of human action applicable to criminal responsibility.[34] These ideas, embedded in Rene Descarte's theory of mind/body dualism, were interpreted by Austin to separate acts and intentions when considering criminal liability.[35] For example, the act of pulling the trigger of a gun is considered a muscular contraction, which may have certain physical and chemical consequences (that is, shooting and killing someone.) As such, the body, as opposed to the gun, becomes the instrument or weapon, and blameworthiness for the *consequences* of the instrumental action can only be levelled at the subject who pulls the trigger if he or she possessed the requisite state of mind, *mens rea* or 'vicious will' that prompted the physical response or *actus reus.*[36]

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33 Waller and Willams (1989), para 1.10, p. 6, quoting Blackstone: 4 Commentaries 21.

34 For a critical feminist discussion of Descartes see: Genevieve Lloyd (1984), *The Man of Reason: 'Male' and 'Female' in Western Philosophy,* Methuen, London, pp. 38-50.

35 Waller and Williams (1989), para 1.11, p. 6 concur with this proposition.

36 NB: *actus reus* means literally 'guilty act', which is nonsensical. Only an individual can be guilty, therefore it is important to realise the law's artificial process of distinguishing physical from mental elements in criminal transactions. Note also the precedents surrounding the construction of criminal transactions as relating to the *actus reus*, especially *Thabo Meli v* R [1954] 1 All ER 373, and *R v Hallett* [1969] SASR 141.

Waller and Williams describe this dualistic conception of the elements of crime in the following way:

> It was and is argued that we cannot properly be blamed for some transaction (and hence be regarded as possessing a *mens rea* in regard to it) unless, at the time when one willed the muscular contraction that produced the particular consequences, one's mind at least correctly appreciated the existence of the surrounding circumstances and realised or foresaw the consequences that in fact resulted from the muscular contraction.[37]

In other words, criminal law doctrine, leaving aside issues of strict liability, treats mental activity as being related to physical activity, as cause is related to effect. Fundamentally, defining criminal acts around the *mens rea/actus reus* distinction buys into the ideological premises of liberalism, and its construction of juridical man. As discussed previously, the coherence of law resides in the key concepts of rationality and legality. As such, although criminal law doctrine, in some senses, enshrines individualist moral and mental intentions in the instrumentality of the *mens rea*, it necessitates and prescribes a defined standard against which that subjective mental element can be measured. In these terms, criminal law, and especially the law of homicide, can be conceived as a law of guilt (recognition of morality) and responsibility (rationally calculating the public and moral effects of actions.) However, as discussed, the standard of juridical man, manipulated by liberalism and legality, has created an abstract universal subject. Although neutral on its face, and possessing no identifiable or discriminating characteristics before the law, the notion of juridical man is ideologically and historically conceived in the image of its maker: male, white, propertied, heterosexual.[38]

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37 Waller and Williams (1989) para 1.13, p. 7.

38 For a feminist analysis of the juridical subject, and more specifically the reasonable man, see: Margaret Thornton (1995), 'The Cartography of Public and private', in Thornton (ed.) *Public and Private: Feminist Legal Debates,* Oxford University press, Melbourne, pp. 2-16; Regina Graycar and Jenny Morgan (1990), *The Hidden Gender of Law* , Federation Press, Sydney, p. 402; and Christine Boyle (1985), 'Book Review', 63 *Canadian Bar Review*, who notes at p. 431: 'Men and the law has a tendency to masquerade as "people and the law"'.

## 'The Man On The Clapham Omnibus'[39]

To sustain a criminal charge, the Crown must prove that an individual both committed the criminal act in question, and possessed the requisite mental intention to commit that act.[40] Homicide is classified, however, as either lawful or unlawful according to the circumstances. For example, to kill someone in self-defence (a category of defence to murder that will be discussed later in this chapter) is often lawful. However, as Brent Fisse notes, 'the fact that a killing is lawful does not make it any the less homicide.'[41] The division of unlawful homicide into categories is, in most Australian jurisdictions, most easily discussed in terms of the distinction between murder and manslaughter,[42] with the former being a more serious breach of the law than the latter, and as such, considered more morally blameworthy, and attracting harsher sentencing.[43] The differences in law between murder and manslaughter are intricate, and invariably uncertain.[44] Fisse notes:

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39 A depiction of the Reasonable Man, attributed to Lord Bowen: see Ngaire Naffine (1984), *Female Crime: The Construction of Women in Criminology*, Allen and Unwin, Sydney, p. 3.

40 In criminal proceedings, it is an established rule of law that the persuasive burden of proof lies with the Crown (i.e.: they have and onus to prove beyond reasonable doubt any material raised as defence or material fact: *Woolmington v DPP* [1935] AC 162.) The evidential burden, however, lies with the accused with regard to the establishment of most defences. In other words, once material evidence is adduced by the accused capable of raising a reasonable doubt as to guilt, it is then up to the Crown to refute it beyond that same standard. (*R v Zecevic* [1986] VR 797).

41 Brent Fisse (1990), *Howard's Criminal Law*, (fifth edition) Law Book Company, Sydney, p. 25.

42 Definitions of murder and manslaughter are codified in New South Wales by section 18 *Crimes Act 1900* (NSW). Traditionally, the distinction between the two was whether the act had been committed with 'malice aforethought.' Fisse (1990) notes the requisite difficulties inherent in determining the meaning of malice aforethought in terms of its contribution to he *mens rea* of the accused, at pp. 43-44. However, Fisse also notes that any discussion of malice aforethought is superfluous (despite the definition of malice included in section 5 of the Act, and the provision for defining malicious acts in section 18 (2) (a) due to the ambit of section 18 (1) (a).

43 See sections 18 (1) (a), 18 (1) (b), 19A, 24 *Crimes Act 1900* (NSW).

44 Note that there has been some legal commentary on the need to abolish the distinction between murder and manslaughter altogether, and be replaced by one offence of unlawful homicide, with judges taking into account the relevant culpability of offenders at sentencing. (This option was mooted as obiter in *Hyam v DPP* [1975] AC 55 at 98.) See for general discussion: MR Goode (1991) *Discussion Paper: The Law of Homicide*, South Australian Review of Criminal Law, Attorney-General's

> There is a corresponding lack of clear distinction between manslaughter and lawful homicide. These difficulties are partly unavoidable, for no part of the law is more intimately connected with the mental and emotional processes of human kind and these processes are infinitely subtle and variable.[45]

In short, the major distinction between a charge of murder and a charge of manslaughter is attribution to the accused of the requisite mental intention, or *mens rea* to kill another with malice aforethought in the first case, and an absence of such in the latter.[46] In the course of everyday observation and common sense, the act of killing a person would, in most cases, be sufficient to adduce that the person who committed that act possessed the requisite mental intention, for murder. However, the law requires a rational means of determining what a persons thoughts and desires were on a given occasion in order to determine their moral culpability. The means for doing this have been couched in terms of objective and subjective tests. These could be characterised as, relatively, considering what a reasonable person behaving as the accused was seen to behave would desire or think in the same circumstances, and what the accused, taking into account their *actual* individual characteristics and background would think or desire. For a number of reasons, not the least of which is the law's desire for rationality and coherence, objective tests to determine an accused's mens rea have been given precedence in modern criminal law doctrine.[47] As Waller and Williams note: 'Objectivity is seen as providing for each case a measure which everyone can use in the same way, whereas subjectivity

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Department, Adelaide, p. 64. See also the debate around the single category of 'unlawful killing' in 1981 in New South Wales, as discussed in Chapter Six.

45 Fisse (1990), p. 26. Similarly, Sir Owen Dixon notes with regard to the 'anomalous rules which are the accident of history' which make up the inconsistency of criminal law that they are 'a very gradual evolution from an almost exclusive concern with the external act which occasioned death to a primary concern with the mind of the man who did the act', Owen Dixon (1935), 'The Development of the Law of Homicide', 9 *Australian Law Journal Supplement* 61.

46 See n. 41.

47 Waller and Williams (1989) note at para 1.22, p. 9 the philosophy behind the primacy of objective tests over subjective tests. It is important to note the relaxation of the objective element in the tests for provocation in recent years, following the judgement of Murphy J in *Moffa v* R (1977) 138 CLR 601, and mostly recently solidified by the High Court in *Stingel v The Queen* (1990) 171 CLR 312. The elements which constitute the operation of the subjective/objective distinction will be discussed later in this chapter in relation to provocation and self-defence, and also in Chpater Ten.

is seen as leading to each case being governed by personal and perhaps emotional considerations.'[48]

A reliance on a purely objective test in relation to the precipitating and different social and political loci and determinants of criminal subjects is prima facie fallacious. Justice cannot, logically, be delivered to subjects who in some way do not 'match' the characteristics of an arbitrarily defined juridical subject - in modern times re-signified as the reasonable man or reasonable person, ordinary person or quaintly, by Lord Bowen as 'the man on the Clapham omnibus.'[49]

The Reasonable Man has traditionally been used in English (and by processes of juridical transference and colonisation, Australian) common law to represent the standard human being, the legal 'good enough' subject. On one hand, the reasonable man embodies the prerequisites of calculation and self-realisation of morality insisted upon by liberal political philosophy - free thought, restraint, self-control. Conversely, the reasonable man also signposts the maximum level of human frailty of which the law is willing to make concessions. The centrality of liberal individualism (albeit an abstracted, disembodied individualism) within the law allows it to acknowledge that human beings cannot always be perfect, cannot always be relied upon to 'do the right thing.' As such, it conceives of exemptions and extenuating circumstances to those who do wrong where a reasonable man would have done likewise. For example, the law recognises that even a reasonable man might sometimes make a mistake; that some provocations might cause even a reasonable man to lose self-control and become homicidal; that under pressure of coercion or threat even a reasonable man might be forced to break the law. At common law, these are the bases of the defences of provocation, mistake, duress, which act as the bedrock of reducing crimes of murder to manslaughter. That is, by adducing a defence of provocation, a subject charged with murder can be acquitted

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48 Waller and William (1989), p. 10.

49 Naffine (1984), p. 3, where she also notes: 'Another jurist sees him [the reasonable man] as the man who in the evening pushes the lawn mower in his shirt sleeves.'

of that crime, which can attract a mandatory life sentence, and instead be convicted of manslaughter, which carries with it a discretionary shorter term of punishment.[50]

The requisite elements of law necessary to construct a defence of provocation (as well as self-defence and diminished responsibility, which although not invoking the test of the reasonable man or ordinary person *per se*, carry a similar requirement of reasonableness of action which the law objectively demarcates) will be discussed later in this chapter, in terms of their relevance and application to the battered woman who kills. However, what is important to note here are the problems associated with the Reasonable Man, and any objective tests, in the way that they determine the moral and calculating legal subject, the yardstick of human frailty and human nature.

Hilary Allen has noted that the crucial point of the reasonable man test was first established in the early nineteenth century, when English law still treated femaleness as an unquestioned legal disability akin to infancy.[51] Women were not constituted as legal persons. As such, the refusal of any 'abnormal' characteristics must, in principle, have meant that the standard of reasonableness was necessarily male. As Allen explains: 'to prove provocation, a woman, as a legally deficient

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50 Although sentencing for murder and manslaughter is *prima facie* codified in New South Wales, and was at the time of Violet Roberts' trial and sentence, it is important to signpost the fluctuating political nature of sentencing provisions. The campaign to free Bruce and Violet Roberts, which will be discussed in Chapters Five and Six, was partially driven by a legal reformist platform of abolishing mandatory life sentencing (which it achieved, and which has since been revoked.) Similarly, although Hilary Allen (1988), 'One Law For All Reasonable Persons?', 16 *International Journal of the Sociology of Law* 419 has argued that a manslaughter charge via provocation can result in an acquittal, it must be kept in mind that this is highly unlikely. *The Queen v* R (1981) 28 SASR 321 was one such case: but the acquittal was the result of public campaigning and pressure around the specific facts (which are discussed later in the text of this chapter. However, for a brief overview of the case see Bebe Loff (1982), 'Provocation and Domestic Murder: The Axe Murder Case', *Legal Service Bulletin*, April pp. 52-55.) It must also be kept in mind that provocation per se is only a partial defence to murder, and as such, invokes all the discrepancies of judicial discretion in sentencing (see: Norrie (1993), p. 15.)

51 See generally Waller and Williams (1989) for a discussion on the constitution of 'legal persons' and the exclusion of children on these grounds. Note that the minimum age of criminal responsibility in New South Wales is set at ten years (section 5 *Children (Criminal Proceedings) Act* 1987 (NSW). See also the discussion of women as legal chattels to their husband, and their negation of legal citizenship, in relation to the public/private distinction and domestic violence in Chapter Three.

subject, would have had to prove that the provocation was such as might have caused someone rather different from herself (that is, a normal adult male) to lose control and behave as she did.'[52]

By the end of the nineteenth century, it had become *formally* accepted that femaleness was no legal bar to legal citizenship. The *Act of Interpretations* 1887 (UK) enshrined legal liberalism's face of equality: legal terms imputing the masculine would also imply the corresponding female terms, unless the contrary intention was indicated.[53]

*Holmes v DPP*,[54] an English case decided in 1946, is often cited as the modern authority for the law's claim to legal, semantic, equality. The defendant, Holmes, was a man charged with murdering his wife, strangling her after being, by his own admission, 'provoked' by her confession of adultery. Both at trial and at the Court of Appeal, it was ruled that Holmes' action was not allowable as provocation: 'A confession of adultery, grievous as it is, cannot in itself justify the view that a reasonable man (or woman) would be so provoked to do as this man did.'[55]

It has been argued that *Holmes* stands for the principle that 'the standard of reasonableness...invoked is one which deliberately includes both sexes: it implies that the restraint required of Holmes "as a man" is no different from that which would be expected of a reasonable woman.'[56] This upholding of a prima facie *equal* standard of reasonableness in locating criminal responsibility rests on the argument that the criminal narrative described is one in which the law has traditionally granted more leniency to men than to women. Provocation developed in the seventeenth century as a social and legal response to 'the duelling problem.'[57] During this period, men commonly went armed, and placed grave importance on male honour, a combination which led to duelling and other forms of violence.

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52 Allen (1988), p. 422.

53 ibid., p. 423.

54 [1946] 2 All ER 41.

55 [1946] 2 All ER 124.

56 Allen (1988), p. 423.

57 Janey Greene (1989), 'A Provocation Defence For Battered Women Who Kill?', 12 *Adelaide Law Review* 145, p. 146.

Duelling was made illegal, and a killing in the case of a duel was treated as murder, invoking the death penalty.[58] The law, seeking to deter men from 'protecting' their honour in this way, fashioned a compromise. If a man's honour was insulted to the point that he issued a challenge to a duel, and the insult was strong enough to provoke an immediate forceful retaliation, the crime was to be considered manslaughter, not murder.[59]

Killing a man found in adultery with one's wife was similarly reflective of maintaining male honour, for the attitude that wives were sexual property that men wanted to keep and protect was both encouraged and condoned. As was stated in the eighteenth century case of R *v Mawgridge*: 'jealousy is the rage of a man, and adultery is the highest invasion of property.'[60] As such, provocation, both legally, historically and romantically, is linked to the *crime passionel.* The grand gesture of a man, provoked by the sexual loss of his wife, his chattel, to another man, is viewed by the law as less morally blameworthy than a man (or woman) who had killed their spouse without a background of adultery, as evidenced in the more contemporary case of *Parker v The Queen.*[61] To assume that by recognising the linguistic term 'woman' within the ambit of criminal law's tests for reasonableness in order to determine an accused's mental condition, that the law understands the

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58 ibid., p. 147.

59 See comments made by counsel in absence of the jury, *The Queen v R,,* Supreme Court of South Australia, 17-19 July, (full transcript), 1981, p 170. See also the reported judgement *The Queen v* R (1981) 28 SASR 321.

60 R *v Mawgridge* (1707) 84 ER 1107 at 1115.

61 It is interesting to note that in the leading Australian common law case on the immediacy element of provocation, *Parker v* R (1963) 111 CLR 610, Chief Dixon at 655, held that the accused could rely on a defence of provocation even though a significant time had passed between the provocative acts of the victim and the accused's final assault. The distinction between this case and those of battered women who kill, is in a narrative sense, the fact that the accused, Parker, was a man responding in rage and jealousy to an act of adultery by his wife. Ian Leader-Elliot makes this pertinent point about the case: 'It took a good story...told with judicious passion and embellished with reference to Othello, to change the law of provocation in Australia. Sir Owen Dixon's account of Frank Parker, his wife Joan and Dan Kelly, her lover, is probably the most effective use of narrative to reform the law in the Australian reports. It is, of course, a story of overwhelming jealousy and outraged male possessiveness. There are no comparable women's stories in the canon.', Ian Leader-Elliot (1993) 'Battered But Not Beaten: Women Who Kill In Self- Defence', 15 *The Sydney Law Review* 403, p. 418.

specific social positioning and characteristics of women is fallacious.[62] As Ngaire Naffine has noted:

> When it comes to characterising the nature of being human, and in particular the better side of that nature, law has in common with other spheres of learning the practice of casting women outside the field of vision and invoking the experience, the expectations and the values of the male. The result...is that when women are finally brought into the equation, they are regarded in the same way aberrant from the human = male norm. In law, the subliminal message is that reasonable people are men, not women. In other disciplines, the communication is more explicit: men are ideal and women are not.[63]

The problem with criminal law doctrine, then, as it relates to the battered woman who kills, is that it is both paradoxical and fundamentally discriminatory. Although the law of homicide entrenches, through its history and ideology, concepts of equality and individualism, its firm reliance on objective legality - on rules and yardsticks - effectively denies any real consideration of the subjective experiences of *anyone* who does not match the rational, moral reasonable man on the Clapham omnibus, least of all women, and in this context, specifically battered women.[64]

## Killing The Beloved

That women kill at all is regarded as aberrant behaviour.[65] The dualism which so effectively demarcates the scope of a criminal transaction has also, in a more

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62 This point will be examined at length in Chapters Six and Nine.

63 Naffine (1984), p. 4.

64 It is important to remember that it is not only women as a class who do not meet the standard for the reasonable man. Murphy J's dissenting judgement in *Moffa v R* (1977) 138 CLR 601 which argued for the removal of the 'objective' element of the 'ordinary person' test, for example, was based on the ground of the accused's ethnicity. The difficulties of accounting for a defendant's specific matrix of subjective characteristics is well illustrated in the case of see as preliminary background *R v Kina,* unreported, Court of Criminal Appeal of Queensland, 29 November 1993. Kina was an Aboriginal woman who killed her violent white spouse. The intersections of race and gender that this case tragically illuminates will be discussed in Chapter Nine. Justice Murphy's judgement in *Moffa* will be discussed in Chapters Six and Ten.

65 The criminological reading of the battered woman who kills is inextricably interrelated to the same philosophical foundation that constitutes a strict legal interpretation of such women. It is artificial to separate these readings in anyway, however considering the scope of this thesis, which attempts to investigate some of the discourses which inform BWS, but not all, it is regrettable that this point can not be covered with any

abstract reading, demarcated the social characteristics of gender.[66] As discussed in the Introduction, since the publication of works like Jean-Jacques Rousseau's *Emile*,[67] men have been identified with the mind: the Enlightenment characteristics of rationality, calculation, reason. Women, on the other hand, have been conceived oppositionally, have been Othered to the liberal subject, to juridical man. Just as men are conceived of as capable of exacting free choice, of embodying the mind, women have been abstracted as irrational bodies: chaotic, nurturing, sexualised, essentialised. The operation of the trajectory of gender valued dualism is evident in the exposition of the reasonable man as an objective test, a legalistic yardstick of criminal intention. It also characterises women as not just outside that yardstick, but as somehow against their nature to kill at all that problematises the experience of the battered woman even further.

The law has great difficulty accepting that men and women kill for different reasons and in different circumstances. Men, undoubtedly, account for the majority of homicides initiated by intentional violence. They are far more likely than women to kill friends, acquaintances or strangers. As Alison Wallace has noted in her study of New South Wales homicides spanning from 1968 to 1981,[68] many of these

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depth, clarity or finesse. However, please see generally: Naffine (1987); Carol Smart (1976), *Women, Crime and Criminology: A Feminist Critique*, Routledge and Kegan Paul, London; S Mukherjee and Jocelynne Scutt (1981), *Women and Crime*, Australian Institute of Criminology with Allen and Unwin, Sydney; Ann Lloyd (1995), *Doubly Deviant, Doubly Damned: Society's Treatment of Violent Women*, Penguin, Harmondswoth, UK; Alison Young (1996), *Imagining Crime: Textual Outlaws and Criminal Conversations*, Sage Publications, London.

66 See generally G. Lloyd (1984); Moira Gatens (1996), *Imaginary Bodies: Ethics, Power and Corporeality*, Routledge, London.

67 For a discussion of this text see: Jean Grimshaw (1990), 'Mary Wollstonecraft and the tensions in feminist philosophy', in Sean Sayers and Peter Osborne (eds.), *Socialism, Feminism and Philosophy: A Radical Philosophy Reader*, Routledge, London, pp. 9-26; G Lloyd (1984), pp. 57-64.

68 Alison Wallace (1986), *Homicide: The Social Reality: Research Study No 5*, NSW Bureau of Crime Statistics and Research, Sydney. Note that Wallace's project followed on from preliminary work in the field already undertaken by RW McKenzie (1961), *Murder and the social process in New South Wales 1933-1957*, Thesis submitted for the degree of Doctor of Philosophy, University of Sydney; Therese Rod (1979), *Murder in the Family in New South Wales 1958-1967*, Thesis submitted for the degree of Master of Arts (Hons.), University of Sydney Similar work was completed in Victoria by the Law Reform Commission of Victoria (1988) *Homicide Discussion Paper, No 13*, Law reform Commission, Melbourne. Studies which produced statistical date in a more

homicides result from trivial provocations and quarrels, and many are associated with social situations and activities (such as pubs, clubs and other places of entertainment). The largest single category of killing, about a third of the total number of fatal attacks by men, are domestic homicides.[69] Women are statistically far more likely to be killed by men *with whom they are intimate* than to kill. When they do kill, women's violence is almost always directed against a member of their own family, and more often than not, their spouse. Alison Wallace documents that spouse killings (precipitated by either men or women) occurred almost exclusively against a background of marital discord, and often marital violence. She argues:

> Rarely [is] marital murder an isolated act activated by mental illness, jealousy or 'passion': typically, it followed a series of violent exchanges and threats that culminated in a lethal attack. While the background circumstances were similar for the majority of killings by both husbands and wives, the immediate precipitating events varied...the majority of women killed in response to violence or threat of violence perpetrated on them by the victim, their husband. For this reason, murder-suicides are rare among husband slayers. Initially at least, a sense of relief rather than remorse characterises some of the women's response to killing.[70]

Furthermore, Wallace notes, contrary to the experience of homicide occasioned by one man against another (which can be precipitated by minor insults, or altercations) almost invariably women who killed men did *not* provoke the fatal assault by violence. [71] It was usually a cumulative response to a long history of

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concentrated manner regarding the battered woman who kills have been carried out by Wendy Bacon and Robyn Lansdowne (1982), *Feminist Legal Action Group Report: Women Homicide Offenders in NSW*, FLAG, Sydney (cited from now on as The FLAG Report); and more recently by Patricia Easteal (1993), Killing the Beloved: *Homicide Between Adult Sexual Intimates,* Australian Institute of Criminology, Canberra. The Wallace Report is generally cited by most other commentators in the criminal statistics field, and as such has been relied on in this context as the leading authority.

69 Wallace (1986), p. 84. 42.5% of all homicides committed in New South Wales between 1968-1981 occurred within the family. Spouse killings, of which 73% were committed by men on their wives or de facto wives, account for nearly one quarter of all killings in New South Wales.

70 Wallace (1986), p. 103.

71 ibid., p. 97.

abuse, in which less than half who killed did so in response to a threat of immediate violence.[72] As Kenneth Polk and David Ranson have noted:

> When men kill their women partners, in most cases it can be seen as an act whereby they are exerting their ultimate control over the woman. When women kill, they are most often attempting to protect themselves from the violence that such control involves.[73]

Studies of women who kill abusive spouses, despite the specific, and particular matrix of circumstances that create different narratives around different relationships, show surprising similarities in their collective experience of violence in the home. Patricia Easteal characterises the women who kill violent spouses, as opposed to those who do not, or those who leave, as 'hostages in their own homes': 'unlike political hostages who are trapped without the *physical* means of escape, these women develop the *emotional* inability to unlock the door.'[74] She identifies these women as isolated by their experiences of violence: they do not discuss their situation, either inside or outside of the privacy of the home, for to violate the code of secrecy would jeopardise the *status quo*, and often result in a reprisal of violence as 'punishment' for the act of speaking out. The 'don't speak' rule is exacerbated by the unpredictability of her partner's response. Domestic violence, invariably, is insidious: 'often starting with emotional abuse, escalating to slaps or shoves and then, in the cases that end in homicide, to bashings that break teeth and bones.'[75] Such assaults are normalized by periods of contrition - the

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72 Leader-Elliot (1993), p. 404. 'Domestic violence' will be discussed in Chapter Four. However, it is important to note here that although the majority of cases which lead to homicide will involve actual physical abuse, (broken bones and teeth), domestic violence can also involve sexual, emotional and economic abuse. See generally Jocelynne Scutt (1984), *Even in the Best of Homes: Violence in the Family*, Penguin, Ringwood, Victoria.

73 Kenneth Polk and David Ranson (1991), 'The Role of Gender in Intimate Homicide', 24 *The Australian and New Zealand Journal of Criminology* 15, p. 23.

74 Patricia Easteal (1996), 'Till Death Us Do Part', in *The Thing She Loves: Why Women Kill*, Kerry Greenwood (ed.), Allen and Unwin, Sydney, pp. 1-18, p. 5. This article acts as a summary for Easteal's more sustained analysis in Easteal (1993). Easteal's characterisation of the 'atypical' battered woman taps into some of the myths that potentially undermine the BWS: i.e. assuming there is a standardized profile, and ideal 'reasonable battered woman.' This issue will be analysed further in Chapter Nine. However, the characterization is useful in this context for differentiating between the experiences of battered women, and those of the artificial reasonable man.

75 Easteal (1996), p. 6.

'honeymoon' phase in which the abusive spouse promises to never do it again. When the promise is broken, the woman's life becomes centred on survival, on attempting to appease the perpetrator in order to avert the resumption of violence.[76] The situation is again exacerbated by the woman's increasing lack of self-confidence and belief in her ability to survive *outside* of her particular domestic prison. Furthermore, she has often been told that if she leaves he will kill her. (These are usually not idle threats. Easteal notes that abused women are often killed after separation 'with almost the same frequency as those women who go on living with their husbands.')[77]

When a battered woman kills her spouse, it is usually predicated and provoked by an unusual set of circumstances - something that is not within the usual repertoire of violence. In Violet Roberts' case, the cumulative effect of years of abuse, grief for her dead son, emotional distress and physical abuse by her husband in the face of that grief, undoubtedly provided exceptional circumstances that preceded the killing. The case of *The Queen v R*, which is a landmark decision around the interpretation of provocation, provides another telling example. In that case, Mrs. R had endured excessive physical abuse and torture at the hands of her husband for almost three decades, and had also witnessed his violence towards their five children. However, only thirty-six hours before she killed her husband, Mrs. R learned that he sexually abused and raped all of their daughters. It was this knowledge that made her 'snap', and she finally axed her husband to death as he slept.[78]

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76 Again, Easteal's characterisation of the situation of violence borrows heavily from Lenore Walker's 'Battering Cycle' which will be discussed in Chapter Nine in relation to the BWS.

77 Easteal (1996), p. 6.

78 Note that the defendant in this case is known as 'Mrs. R' due to all names in the case being suppressed. The case itself, *The Queen v R* (1981) is significant. Due to the time lapse between the victim's provocative acts and words, and the defendant's response, and also due to the fact that she killed him while he was sleeping, the court did not direct the jury to consider provocation as a defence, although it had been raised by counsel. There was subsequently an appeal, and a retrial, surrounded by public debate, and Mrs. R was finally acquitted. As such, although the case acknowledges in theory a liberalisation of the immediacy element in provocation for battered women who kill, the acquittal itself was an anomaly, and as such resulted in an arguable unsustainable precedent. It is also important to note that in most cases of a battered women on trial,

What makes the battered woman who kills collectively unique within the subset of intra-familial homicide (and probably homicide more generally) is that because her aggressor is both someone of whom she is terrified, and also someone who is (generally) physically stronger than she is, it is usually necessary for her to kill when he is incapacitated: either drunk, asleep, or has passed out in some way.[79] It is this lack of immediacy between an aggressor's act and a woman's fatal response that is at the heart of the law's treatment of the battered woman who kills. Unlike a situation in which two equals (men) face each other in a bar room brawl, the time a woman waits to kill her spouse is interpreted, objectively, as an indication of the premeditation of her act, and the basis of the denial of her claims to any of the range of mitigating defences which may otherwise fit her case. In short, it is the law's difficulty in measuring the particular subjective characteristics and experience of the battered woman who kills against the yardstick of the legalistic and rational Reasonable Man that denies her the jurisprudential concession to human frailty, the recognition of individualism, that criminal law theoretically celebrates.

## Identifying The Body

Although criminologically there is a longstanding assumption that the essential, 'nurturing' woman does not kill, the emphasis on woman as body that emerges from liberal philosophy is paradoxically uncontested when the battered woman

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that although she may have been threatened with death many times by her aggressive spouse, something will finally snap and make her believe him: see for example: *R v Kontinnen* (unreported) Supreme Court of South Australia, 30 March, 1992 and *R v Hill* (1981) 3 A. Crim. R. 397. See discussion of these cases in Chapter Six, and Chapter Nine respectively.

79 For example, in *R v Roberts*, the victim had been drinking and fell asleep; in *The Queen v R* the victim was asleep; in *R v Kontinnen* the victim had been smoking drugs and drinking before falling asleep. In other cases of more immediate retaliation, in which the immediacy issue has not been in such contention, the victim is, however, commonly drunk at the time of the attack, which exacerbates the potentiality of violence and causes the woman to believe he will kill her: see *R v Hill, R v Woolsey*, unreported, Supreme Court of New South Wales, 19 August 1993; *R v Gilbert* unreported, Supreme Court of Western Australia, 4 November 1993. Women who do kill in the face of attack are more likely to meet standards of immediacy prescribed re objective tests (also standards of retaliation and reasonableness) and are more likely to be acquitted, or to have manslaughter per self-defence as their initial charge. However, the scope of BWS does still effect these case: see *R v Woolsey* regarding BWS and sentencing, and Chapter Nine.

commits her *actus reus*. For example, although Violet and Bruce Roberts attempted to hide the weapon with which they killed Eric Roberts, they readily rang the police and 'confessed' to the crime on the night that it was committed. In fact, in most female precipitated marital homicides, the woman will ring the police and tell them, before they arrive at the scene of the crime, what she has done.[80] In the circumstances of her terror, the recurring image of the woman offender standing before the law in a bloodied nightdress, dominates the dramatic narrative terrain around female precipitated marital homicide.[81]

If a woman's act is self-declared, it is thus considered intentional, and not accidental. The central issue of law therefore becomes the categorisation of the woman's *mens rea*, and as such, the availability and operation of defences such as provocation, self-defence, BWS, or in Violet's case, diminished responsibility. However, in a wider philosophical sense, it is important to note how the conceptions of responsibility, calculation and morality do not, abstractly, apply to the battered woman who kills in the same way as they may apply to juridical man. Violet Roberts herself again provides an excellent example of the gap between the universalised subject of liberal legalism and the battered woman who kills. Violet Roberts did not conceived herself as an amoral subject. She had no prior convictions. She was unlikely to reoffend.[82] Yet the law could not take into account the subjectivity of her experience when measured *objectively* against both the standard of the reasonable man, and the inherent moral belief of the heinousness of killing another. Julie Stubbs and Julia Tolmie have noted that women often make psychological choices based on a moral framework that values connectedness. As such, they argue, women like Violet Roberts, who place store

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80 See for example: *The Queen v* R, *R v Kontinnen, R v Woolsey.*

81 For example, the case of Pauline Hughes, who killed her husband in June 1992 and was successful in pleading self-defence before Wood J of the Supreme Court of New South Wales in April 1994, was represented in the press surrounding her case by a police photography of her standing full length in a bloodied nightdress. (see: *The Advertiser*, Friday, April 15, 1994.)

82 As Violet Roberts expressed in her unsworn testimony: 'I have never been a violent person, I have never had any wish of violence towards anyone at all.', quoted by Taylor CJ in *R v Violet Mary Roberts, R v Bruce Maurice Roberts*, unreported, Supreme Court of New South Wales, 15 March 1976.

on the preservation not only of their own safety, but on the safety of their children, or relationships, are judged as morally irrational by normative standards of moral decision making. As Stubbs and Tolmie argue: 'Within a moral framework that places primary importance on individual self-sufficiency [that is, calculation], the choice to place other considerations (or people) before one's self may appear inherently irrational.'[83]

Ian Leader-Elliot has argued that the defences to murder provide 'structure and expression to the exculpatory effects of fear and resentment'[84] which lie at the base of the law's willingness to address human frailty in the context of murder. These effects of fear find their principal expression in self-defence, although even then, fear will not always excuse murder. Resentment, on the other hand, is a far more problematic basis for claiming an excuse. Killing to avert a threat of harm can be excused, if not justified, on the ground of necessity. But, as Leader-Elliot notes, 'death inflicted in return for harm done in the past makes the defendant a self-appointed executioner who usurps the authority of the state.'[85] As was stated in the nineteenth century case of *R v Fisher*:

> What a state should we be in if a man...could be at liberty to take the law into his own hands and inflict vengeance on the offender.[86]

Provocation, which to some extent gives recognition to the exculpatory effects of resentment, is however, weighed down with restrictions, which merely reduce intentional killing to manslaughter.[87]

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83 Julie Stubbs and Julia Tolmie (1994), 'Battered Woman Syndrome in Australia: A challenge to gender bias in the law?', in Julie Stubbs (ed.), *Woman, Male Violence and The Law*, The Institute of Criminology Monograph Series, No. 6, University of Sydney, Sydney, p. 196. Stubbs and Tolmie refer to the work on this point by Marilyn MacCrimmon (1991), 'The Social Construction of Reality and The Rules of Evidence', 25 *University of British Columbia Law Review* 36, p. 48.

84 Leader-Elliot (1993), p. 404.

85 ibid.

86 (1837) 173 All ER 452

87 See for example KM Sharma (1980), 'Provocation in New South Wales: From Parker to Johnson', 54 *The Australian Law Journal* 330. See also recommendations to reform the law generally: Goode (1991); New South Wales Law Reform Commission (1993), *Provocation, Diminished Responsibility and Infanticide*, Discussion Paper No 31, NSW LRC, Sydney

The rules which limit and define the exculpatory effects of fear and resentment have been elaborated in cases of intentional homicide committed by men. As such, there is, as Ian Leader-Elliott again notes:

> [A] long and richly detailed history of the elaborations of doctrine setting the metes and bounds within which jealous rage and the provocations of infidelity can provide a partial excuse for murder...there are [however] no comparable histories of the development of doctrines allowing exculpatory effect to domestic violence or oppression suffered by women who kill men: the pages are blank.[88]

What is important to note about this comment is that it acknowledges that women have, for centuries, undoubtedly been killing violent spouses in self-defence, or when provoked by a reaction to cumulative abuse. However, it is impossible to map a specifically legal history of these women because, firstly, a battered woman is not able to be equated with a Reasonable Man, but more importantly, because there was no discursive or linguistic conception - for the law or any other aspect of the public sphere - of 'domestic violence' *per se*. As such, women both could not

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88 Leader-Elliot (1993), p. 405. I would disagree with this analysis to some extent. Although Leader-Elliot is correct in identifying the absence of women from *legal* history (i.e.: case law and strictly legal commentary), there is some recognition in other disciplines of the history of women who kill before the law: see for example: Judith Allen (1982), 'The Invention of the Pathological Family: a historical study of family violence in New South Wales', in Carol O'Donnell and Jan Craney (eds.) *Family Violence in Australia*, Longman and Cheshire, Melbourne, pp. 1-27. My own perusal of the New South Wales Police Gazettes, New South Wales State Reports and Weekly Notes from 1946-1967 (SANSW) also indicates that although the court is, in cases of marital murder whether committed by husband or wife, ready to admit to some level of 'marital discord' in the legal narrative, the actuality of the experience of violence is not a significant factor in the exposition of defences (this also applies to divorce proceedings based on fault.) See for example: *Lawton v Lawton* 69 WN 285, *R v Cable* (1947) NSW SR 183; *Henry William Bodsworth, Hazel Dulcie Bodsworth*, NSW Police Gazette, 17 March 1965, No. 11, (SANSW). For female defendants, it is almost impossible to interpret a history of violence. In *R v Fletcher* (1953) 53 NSWR 70, for example, Mrs. Fletcher killed her husband by poisoning him with thallium. Although the court noted: 'the appellant [said] that her husband treated her badly and that she did not see why she, a woman of 24 years of age, should be tied to him for life', (at 72) there is no opportunity to discuss her actions within a context of domestic violence as there did not exist any such language to do so in 1953. The issue of the development of a discourse around domestic violence will be examined in Chapter Four.

meet an objective standard required of them, and furthermore could not articulate a subjective narrative that was, until the 1970s at least, a 'problem with no name.'[89]

## Defending The Self-Defender

The difficulty of battered women who kill gaining legal recognition of their actions as concessions to human frailty is not a new problem. Judith Allen has noted that in the Australian courts between 1880 and 1910, the proportion of women convicted as charged on the capital offence of murder without mitigation was twice as high as that of men charged with the same offence. Men also received lesser convictions (acknowledged mitigation of their actions) and recommendations for mercy on the grounds of provocation in a far higher proportion of cases than did women (this was based primarily on the method of killing favoured by women - poisoning- which removed any suggestion of immediate retaliation.)[90] This pattern can be attributed to judicial and jury sympathy to men as opposed to women in the face of a lack of public understanding of the realities of domestic violence.

The pattern of a high rate of convictions for women on murder charges continued through the 1920s, 1930s and 1940s, with one discernible difference. The law began to be influenced to greater and lesser degrees by recourse to psychological explanations of violence, for both male and female defendants, with men being acquitted almost twice as often as women on the same grounds.[91] The reliance on psychological testimony, on an accused's actions as being evidence of some

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89 See Chapters Two and Four, for a discussion of feminist responses to, and naming of, 'domestic violence' from the 1890s to the 1970s.

90 J. Allen (1982), p. 11. See also *R v Fletcher, R v Floyd* [1972] 1 NSWR 373.

91 This 'pathologisation' of family violence will be discussed at length in Chapter Two. Another explanation for the higher rate of acquittals for men could be that women were not allowed to sit on juries until the late 1950s and early 1960s. This could, arguably, have resulted in women, and women's experience of violence, being assessed from male viewpoints, which either did not understand the reasons for killing, or were influenced by the mythologies of domestic violence prevalent in the community. See Chapter Two for a discussion of the myths surrounding domestic violence. For a discussion of the struggle for women to be included in jury duty, see Norman MacKenzie (1962), *Women in Australia,* F W Cheshire, Melbourne, pp. 252-255.

abnormality of mind at the time of the killing, resulted in the majority of women charged with murdering their spouse relying a defence of diminished responsibility.

Wendy Bacon and Robyn Lansdowne note that in their study of women homicide offenders in New South Wales in the late 1970s (the FLAG Report) in only six cases (half the total number where the woman killed in response to an assault) did the defence place emphasis on the victim's conduct, as distinct from the woman's mental abilities, as justifying the homicide.[92] More significantly, in three cases the only defence raised at trial was diminished responsibility, 'not withstanding that these were all situations where the woman had been the victim of repeated brutal assaults over some period of time.'[93] Violet Roberts was one of these women.[94]

The law relating to diminished responsibility in New South Wales is codified by section 23A *Crimes Act* 1900 (NSW), which commenced operation in 1974, two years before Violet Roberts' trial. The section was a response to 'dissatisfaction with the defence of insanity'[95], a complete defence, but one which results in detention for an unknown period at the Governor's Pleasure.[96] The basic element of diminished responsibility, which is a partial defence (that is, does not give rise to an acquittal, but reduces murder to manslaughter) is the establishment of 'an abnormality of mind that substantially impairs the defendant's responsibility at the

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92 Wendy Bacon and Robyn Lansdowne (1982) 'Women who kill husbands: the battered wife on trial', in O'Donnell and Craney, pp. 67-93, p 89. See discussion of Bacon and Lansdowne's research, and the FLAG Report (1982) in Chapter Five.

93 ibid.

94 Bacon and Lansdowne, in the process of undertaking research for The FLAG Report (1982) met Violet Roberts, and through their connection with groups like the Redfern Legal Centre and Women Behind Bars, initiated a campaign for Bruce and Violet's release. These connections will be investigated in Chapter 5.

95 The FLAG Report (1982), p. 311.

96 Sandra Willson was one such woman who had been charged with murder, and had been declared insane, acquitted and detained at the Governor's Pleasure. (The Governor's Pleasure refers to the removal of freedom of a person found guilty of murder but declared insane, who is detained in mental institutions until such time as the Governor on advice releases him or her: see the FLAG Report (1982), pp. 106-112 for a discussion of the Governor's Pleasure.) Sandra's case was also championed by Women Behind Bars, who campaigned for and secured her release, which is discussed in Chapter Five.

time of the killing.'[97] A successful application of diminished responsibility relies heavily on psychological reporting of the mental state of the accused. Although consciously distinguished in law from the defence of insanity, many commentators have noted that there is semantically only a question of degree between diminished responsibility and insanity. As was held in the case of *R v Rolph,*[98] the 'abnormality of mind' required to be demonstrated for diminished responsibility, and the 'mental disease or natural mental infirmity' required to sustain a defence of insanity, are closely linked. The former involves a 'substantial impairment' of mental capacity and the latter 'complete deprivation', but the material point is that both manage to characterise the accused as not acting with any degree of understanding of the fatal predicament that they find themselves in.

There are practical reasons why a defence lawyer would rely on diminished responsibility. If the Government psychiatrist, who interviews subjects charged with murder, is of the view that the woman was suffering from an abnormality of mind at the time of the killing, then it is likely the Crown will plea bargain: offering or agreeing to a plea of guilty to manslaughter in discharge for the indictment for murder. As such, the battered woman trial avoids the danger of a life sentence for murder, and the defence counsel can put all relevant matters (including the history of abuse by the deceased spouse) to the judge regarding sentencing.[99] However, a reliance on diminished responsibility, despite its easy applicability to battered women who kill (there is no objective test of reasonableness involved) suggests that a woman's conduct in killing a violent spouse is characterised as aberrant. Even if a notion of mental incapacity is invoked for the express purpose of

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97 For a discussion of the operation of diminished responsibility, insanity and the M'Naughten Rules (drawn from *Daniel M'Naughten's Case* [1843-1860] All ER Rep 229 (before the House of Lords, 1843), see Taylor CJ in *R v Roberts*, p. 21.

98 [1962] Qd. R 262. Note that the case discusses the law in relation to the Queensland provisions regarding diminished responsibility and insanity: sections 304A and 27, *Criminal Code 1899* (Qld.). Fisse (1990), p. 109 notes the distinction between New South Wales and Queensland situations.

99 The FLAG Report (1982), p. 313.

avoiding a life sentence, the woman's act is still seen by the law as the product of an impaired ability to reason as opposed to the life saving act it may have been.[100]

Furthermore, if a defence of diminished responsibility is unsuccessful (as it was in Violet Roberts' case) the accused is doubly damned. She is not only able to be convicted for murder, but has been abstracted for the purpose of the trial as potentially sick. The reality of her lived experience is not mirrored in her treatment by the Court at all. Bacon and Lansdowne note:

> In much classic psychiatry, which both mirrors and perpetuates everyday views about women, it is not acceptable for women to be angry or aggressive, and a woman who displays signs of being such is, by definition, sick.[101]

In some ways, the diminished responsibility defence, although not expressly concerned with the measurement of the women's *mens rea* against the yardstick of the reasonable man, illuminates the exclusion, and otherness, of women in general from those liberal standards. That is, women are not viewed by liberal legalism as rational or responsible beings, but as irrational, unable to cope. Therefore, it follows that when women kill, the decision must be that of a displaced sanity, as opposed to that of a rational or ordinary person on the circumstances.

This said, it is probably more difficult to adduce evidence to support a defence of provocation or self-defence than it is to adduce evidence for diminished responsibility. This can be attributed to the ideology and history behind the ordinary person (or reasonable man) test which invokes an impossible standard of reasonableness against which a battered woman is judged. In most cases, a reasonable man or ordinary person is not equal to the different, subjective characteristics which shape the reasonable battered woman.[102]

Courts traditionally view provocation, for example, as a concession to human frailty, and as a legal recourse for certain categories of people who are placed by society in situations in which they well might be provoked to kill. The major problem with this approach is that the traditional categories of social problems

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[100] See: The FLAG Report (1982), p 311; Bacon and Lansdowne (1982), p. 91.

[101] Bacon and Lansdowne (1982), p. 90.

[102] For further discussion of this point see Chapters Five, Six, Eight, Nine and Ten.

which the court will consider with respect to provocation have emerged from male experience. As mentioned previously, provocation was available as a defence to murder only if there was a direct and immediate confrontation between killer and victim. The defence rested on the idea of mitigating the 'passion of the moment', but was applied by the courts in such a way that was alien to much female experience. An insult to honour, an invasion of property, were concepts familiar to male judges and male counsel in the seventeenth, eighteenth and nineteenth centuries. An accused placed in such a situation, and provoked by such actions, could be expected to react with immediate violence, even to the point of causing death. The fact that women often waited for an opportune time to kill when provoked traditionally meant that the provocation defence was closed to them. The courts did not view a woman killing a man in such situations as provoked. They held that no concession to human frailty needed to be made. They did not consider that the instantaneous response to provocation that the defence required was often physically impossible for women.[103] As Lord Justice Devlin stated in *R v Duffy* (a case where a woman killed her sleeping husband with a hatchet after a violent argument):

> [C]ircumstances which merely predispose to a violent act are not enough. Severe nervous exasperation or a long course of conduct causing suffering...are not by themselves sufficient to constitute provocation at law...What matters is whether this girl had the time to say: 'Whatever I have suffered, whatever I have endured, I know that Thou shalt not kill.'[104]

The elements of the plea as it stands today (which could have been applied in Violet Roberts' case) reflect the historical model from which it emerged. Provocation has three major elements. The first is that there must be some provocative conduct (be it actions or words) by the deceased in the presence of the killer. Secondly, there must be an element of suddenness. If any anterior intent exists, provocation bears no relevance, and the crime is considered pre-meditated

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103 Many feminist writers have identified that women lack the physical strength to retaliate on an equal basis to an abusive spouse. See for example: Bacon and Lansdowne (1982); Scutt (1983).

104 [1949] 1 All ER 932 at 933-934.

murder.[105] The third element is the objective assessment of the reasonableness of the accused's actions, the invocation of the Reasonable Man in the guise of the Ordinary Person Test. The Ordinary Person test requires that the provocation in issue must have actually deprived the defendant of his or her power of self-control and that it also must have been sufficient to have deprived an 'ordinary person' of this power, such that the ordinary person would be moved to kill.[106] There has been significant academic and judicial commentary on the nature of the test as 'objective', in particular the extent it can be 'subjectivised' by incorporating characteristics of the particular defendant.[107] In many older cases there has been no judicial recognition of the subjective element at all.[108] This has been mitigated by a number of subsequent cases, notably the UK case *DPP v Camplin,*[109] and in Australia by the judgement of Justice Murphy in *Moffa v The Queen,*[110] which allow characteristics of the defendant to be taken into account when considering the reasonableness of loss of self-control.[111] An examination of the relaxation, of the immediacy element in provocation through these cases, and through the anomaly of *The Queen v R,*[112] will be discussed in Chapters Six and Ten. However, it is important to note here that the test for provocation as it stood in 1976, when Violet Roberts was tried, was unsympathetic to an introduction of both the subjective experience and characteristics of a battered woman who killed.

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105 *R v Johnson* (1976) 136 CLR 619.

106 See generally Waller and Williams (1989), pp. 205-251.

107 See for example the judgement of Murphy J in *Moffa v R*; David Weisbrot (1982), 'Homicide Law Reform in New South Wales', 6 *Criminal Law Journal* 248; Stanley Yeo (1992), 'Power of self-control in provocation and self-defence', 14 *Sydney Law Review* 3; New South Wales Law Reform Commission (1993).

108 See for example *Bedder v DPP* [1954] 2 All ER 801.

109 [1978] A.C. 705 (H L).

110 (1977) 138 CLR 601.

111 The judgement of Justice Murphy in *Moffa* will be discussed later in this thesis as a ground on which the liberalisation of provocation, and the relaxation of the objective/subjective distinction could act as grounds for reconsideration of the necessity of BWS as a separate evidentiary test.

112 (1981) SASR 321. As mentioned previously, this case is anomalous: she was acquitted, yet provocation was denied at first instance

The strict interpretation of reasonableness implied by the case law on provocation, contemporaneous with Violet Roberts' case at least,[113] also prevented a suitable application of self-defence. A successful plea of self-defence acts as a legal acknowledgement that the defendant acted in a manner which was justifiable, and results in a complete acquittal.[114] The defence requires a number of elements to be present. The accused must have been acting against an imminent threat of a serious harm; must be aware of their duty to retreat from that harm that ensures that all other avenues of self-help have been exhausted; and the action chosen to counter the harm faced must be necessary to avert that harm. Most importantly, the accused must have used no greater force than an ordinary person would have regarded as necessary in the situation. The first cluster of grounds on which to establish self-defence is assessed subjectively: that is, the questions posed by the Court regarding necessity - are measured solely against the accused's own belief of danger in the fatal situation.[115] It is the last requirement - that of reasonable belief of force, of proportionality - that is judged objectively, and judged against the history of the juridical subject, and the reasonable man, that poses the biggest difficulty to a successful use of self-defence by a battered woman who kills.[116]

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113 Reform to the *Crimes Act* 1900 (NSW) following the Violet Roberts campaign which highlighted the inadequacy of the provisions relating to mandatory life sentencing and provocation will be dealt with in the following chapters of this thesis. However, for a foreshadowing of these issues see Weisbrot (1982), and The FLAG Report (1981), p. 323. Julie Stubbs (1991), 'Battered Woman Syndrome: An advance for women or further evidence of the legal system's inability to comprehend women's experience?', 3 *Current Issues in Criminal Justice* 267, p. 268 notes the problem of feminist reforms of the 1980s being directed only toward provocation and self-defence, which may have alleviated the need for an introduction of the BWS. This issue will be discussed critically in Chapter Nine.

114 See Leader-Elliot (1993) for discussion on the distinctions between justification and excuse outlined by comparing Australian and US jurisdictions.

115 Waller and Williams (1989). para 5.69, p. 182.

116 There has been significant judicial comment over the situation of the accused who satisfies the subjective conditions, but fails to satisfy the objective test of reasonableness. The situation at law has fluctuated over the years: in *R v Howe* (1958) 100 CLR 448 it was held that such an accused would be found guilty of manslaughter. This was affirmed by the High Court in *Viro v R* (1977) 18 ALR 257. Although the Privy Council in *Palmer v R* [1971] AC 814 took the view that the defence would have failed altogether, and the accused would be guilty of murder. The law as it now stands is supported by *Zecevic v DPP* (1987) 71 ALR 641, in which the High Court upheld *Palmer*. Waller and Williams (1989) have said of this case: 'It is not, overall, a splendid

Since the requirements of imminent attack and proportional response are particularly difficult for women defendants to meet, self-defence, like provocation, reflects an entrenchment in criminal law doctrine of male experience, and presumes a conflict between male equals.[117] Being less socially conditioned to engage in physical aggression, and less physically able to defend themselves against a proven violent partner, women will invariably resort to killing a spouse when they are in some way incapacitated, and always with a weapon.[118] As such, their actions are likely to be judged as premeditated, disproportionate, and executed in a vacuum of resentment, as opposed to a response to an imminent threat. Some commentators have argued that recent shifts in formulations of self-defence in Australia have rendered the defence flexible enough to incorporate the subjective experience of the battered women who kill.[119] However, in light of the strict interpretation of self-defence set forth in the leading Australian case of *Zecevic v DPP*[120], and in light of a general judicial reluctance or inability to understand fully the implications of a life lived in violence, other avenues of establishing a new standard against which the battered woman who kills can be assessed have been invoked. For example, the evidentiary use of expert witnesses to explain the subjective experience of battered women through the Battered Woman Syndrome (BWS) has been increasingly used in Australian courts as such a method of establishing this new standard.[121]

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example of the genius of the common law in relation to a subject of great importance in the administration of criminal justice', p. 182.

117 Stubbs (1991), p. 268.

118 See for example Easteal (1996), p. 7.

119 Leader-Elliot (1993) contends that Australian courts have always been capable of 'discriminating and compassionate justice in cases of self-defence against intimate aggressors and provocation by intimate aggressors', p. 406. See also Stubbs (1991), p. 269 quoting Julia Tolmie (1991), 'Add Women and Stir: An Australian Perspective on Defence to Murder for Women Who Kill Their Violent Husbands', (paper presented at the Law and Society Conference, Amsterdam, June).

120 See n. 116. It is also important to note the potential relaxation of the objective test for reasonableness offered by Deane J in minority

121 *R v Kontinnen; R v Taylor*,unreported, Supreme Court of South Australia, February 1994; *R v Woolsey*, unreported, Supreme Court of New South Wales, 19 August 1993; *R v Gilbert*, unreported, Supreme Court of Western Australia, 4 November 1993; *R v Muy Ky Chhay*, unreported, Supreme Court of New South Wales, 8 September 1992; *R*

Debate around the BWS, which will be discussed in Chapters Nine and Ten, is, however, grounded within broader feminist challenges to the public sphere's recognition of the experience of domestic violence. The events, ideas and campaigns that allowed a critical perspective on liberal law and its exclusion of women from the universal standards of the 'reasonable man', need to be made transparent. Before the BWS (as a response by the law to include an experience of domestic violence as the basis for a defence to murder) can be investigated, it is necessary to examine the development of legal and public thinking which constructed domestic violence itself.

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*v Buzzacott*, unreported, Supreme Court of South Australia, 12 July 1993. These cases will be discussed in Chapter Nine.

*Chapter Two*

# THE BATTERED WIFE

> Men inflicted beatings upon women primarily as discipline for a variety of everyday transgressions. In 1882, Mary I- , wife of a Redfern butcher, took too long, in her husband's opinion, to open the front door when he returned home from an evening's drinking. He struck her across the face, knocking her to the ground, then preceded to kick her, calling her a 'whore' and a 'faggot'.[1]

Whereas the previous chapter considered the history, and the philosophical underpinnings of criminal law doctrine, and the law of homicide as it relates to battered women who kill, this chapter considers the historical pre-conditions of the phenomenon of wife-beating itself. The 1970s feminist naming of and campaigning against 'domestic violence', which will be discussed in Chapter Four, were of crucial importance in delineating a philosophical and political foundation on which to address the legal treatment of the battered woman who kills. However, although the Women's Liberation Movement defined and identified 'wife-beating' in a powerful new way, there had been feminist responses to the insidious abuses of women by men within the home long before the 1970s. This chapter therefore examines the ways in which the battered wife was judged, and identified, by a liberal state and liberal law before the 1970s, as well the feminist response to them. It argues that despite important challenges to women's role in the public sphere between the 1890s and the 1960s, feminism's own equivocal relationship with liberal concepts of independence and equality prevented a specific and sustained attack on the abuses and vagaries of private institutions like marriage.

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1 Judith Allen (1982), 'The Invention of the Pathological Family: a historical study of family violence in New South Wales', in Carol O'Donnell and Jan Craney (eds.), *Family Violence in Australia*, Longman and Cheshire, pp. 1-27, p. 4.

## A Man's Home Is His Castle[2]/ A Woman's Place Is In The Home

Law must be seen as a connected yet singularly self-enclosed strand of the multifarious 'public' that feminism since the 1890s has, in various ways, attempted to challenge. And it is the law, as the flagship of a liberal framework, that has increasingly shown itself to be epistemologically incapable of easily allowing any subject except the universalised 'reasonable man' as the subject of its own system of order and rationality.[3] As Margaret Thornton notes, it is '[t]he public sphere mediated through law, [that] has enabled benchmark men to construct normativity, like God, in their own image.'[4] Before the impact of feminist interventions on behalf of the battered wife can be understood, it is necessary that the law's role in determining the assumption of that subject's location within the home be examined.

At the heart of domestic violence (or wife bashing, cruelty, violence against women) is a rhetorical reliance on its existence as, and within, the domestic. Assault, whether occasioning actual bodily harm or not, has long been recognized as a serious criminal act, attracting imprisonment.[5] However, because of the legal underpinnings of the husband/wife relation (in essence, its very constitution), the criminal law has traditionally held little sway in an assault (or battery) scenario between spouses. The differentiation between violence 'on the streets' and violence 'behind closed doors' rests on legal decisions expressing the idea that a wife is subjugated by, and subjected to, the rule of her husband.[6] In short, a wife - in

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2 anon. Margaret Thornton notes of this aphorism: '[it] encapsulated the metaphysical duality of private and public that translated into a materialist reality once the door was bolted. The most humble dwelling became as impregnable as a castle, permitting the law no right of entry': Margaret Thornton (1995), 'The Cartography of Public and Private'. in Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates*, Oxford University Press, Melbourne, pp. 2-16, p. 11.

3 See for example Marie Ashe (1995), 'Mind's Opportunity: Birthing a feminist poststructuralist jurisprudence' in Jerry Leonard (ed.), *Legal Studies as Cultural Studies: a reader in (post)modern critical theory*, State University of New York Press, New York, pp. 85- 132; Ngaire Naffine (1995), 'Sexing the Subject (of Law)', in Thornton (ed.), pp. 18-39.

4 Thornton (1995), p. 13.

5 As evidenced for example by sections 59 and 61 *Crimes Act* 1900 (NSW)

6 For a specific legal history focus see for example: Jocelynne Scutt (1978), 'Spouse Assault: Closing the Door on Criminal Acts', paper presented at Australian Women

traditional legal rhetoric - had no valid recourse to external agencies and rules for dealing with violence as a criminal act. A husband, on the other hand, had the right to determine his relations with his wife as he saw fit, within a privacy condoned and supported by law in its role of providing protection for the person; that person being traditionally male.

Marriage, as the procedure which binds men and women together as husband and wife before the law, is prima facie the supreme recognition of civil society's championship of equality, via the notion of contractual relations. However, as Carole Pateman has argued, the marriage contract was a fraternal contract between men (the wife's father and prospective husband respectively) to protect male sex rights, and was therefore not an equal contractual relationship between the man and woman per se.[7] As such, at common law (via the process of coverture) it was considered that upon marriage, husband and wife became one; that one being the husband. This 'state of civil death'[8] ensured that whatever rights a woman possessed as an individual were subsumed and subverted to the rights of her husband upon marriage.[9] This meant, in practical terms, that a wife had no power herself to make any contract, and was obligated to live with her husband wherever, and in whatever manner, he should choose.[10] In *Re Cochrane* it was said: 'The husband has by law power and dominion over his wife and may keep her *by force*

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and the Law Conference, University of Sydney, 25-26 August (FTYC); Janey Greene (1989), 'A Provocation Defence for Battered Women Who Kill?', 12 *Adelaide Law Review* 145.

7 Carole Pateman (1991), *The Sexual Contract*, Polity Press, London, especially Chapter Six 'Feminism and the Marriage Contract', pp. 154- 188.

8 Thornton (1995), p. 10.

9 Amendment to these general principles via the *Family Law Act* 1975 (Cth) must be acknowledged. The Act removed the ground of fault for divorce (as was the case in all Australian jurisdictions, albeit with different emphasis on grounds, up to and including the *Matrimonial Causes Act* 1959 (Cth)), and the explicit consideration of the wife's contribution to the marriage in property settlements (be that in or outside of the home-s79(4)). For general discussion of the operation of the *Family Law Act* 1975 (Cth) see for example Anthony Dickey (1990), *Family Law* (second edition), Law Book Company, Sydney. For critical feminist commentary on the Act see Regina Graycar and Jenny Morgan (1990), *The Hidden Gender of Law*, Federation Press, Sydney, pp. 113-133; Jocelynne Scutt and Di Graheme (1984), *For Richer, For Poorer: Money, Marriage, Property Rights*, Penguin, Ringwood Victoria.

10 Scutt (1978), p 4., emphasis added.

within the bounds of duty, and may beat her, but not in a cruel or violent fashion.'[11] In short, a man's home (his 'dominion') was legally controlled by him, and was to all intents and purposes a castle, a fortress, in which his wife was effectively his subject, his prisoner.

The idea in law therefore that a husband could beat his wife emerged from an over extension of the principles of legal rationalism, and was entrenched (albeit supposedly regulated) by the common law rule that 'a husband was allowed to beat his wife *so long as* he did it with a stick no bigger than his thumb.'[12] Lord Denning in *Davis v Johnson,*[13] discussing the 'rule of thumb' as presented by Blackstone in his *Commentaries*, made the point that '...by his time this power of correction began to be doubted: Yet the lower rank of people, who were always fond of the old common law, still claim and exert their privilege.'[14] This awareness by Blackstone of an element of doubt as to the efficacy of the rule of thumb was echoed in *The Queen v Jackson* (1891)[15] in which Lord Halsbury LC commented:

> More than a century ago it was boldly contended that slavery existed in England, but if anyone were to set up such a contention now, it would be regarded as ridiculous. In the same way, such quaint and absurd dicta as are to be found in the books as the right of a husband over his wife in respect of personal chastisement are not, I think, now capable of being cited as authority in a court of justice in this or any civilised jurisdiction.[16]

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11 (1840) 8 Dowl. 630, quoted by Scutt (1978), p 4.

12 Morgan and Greycar (1990), p. 277 note that this is believed to be the origin of the phrase 'rule of thumb'.

13 [1979] AC 264

14 ibid., at 270-271. Blackstone is quoted from *Commentaries: Vol. 1*, 8th edition, (1775) p. 445. The comments made by Lord Denning tap into one of the myths about domestic violence confronted by feminists during the 1970s and 1980s, the myth that it was a crime perpetuated only by working class men against their wives, and as such linked to single causative factors such as unemployment, alcoholism etc. For critique of this class based presumption of domestic violence see for example Jocelynne Scutt (1984), *Even in the Best of Homes: Violence in the Family,* Penguin, Ringwood Victoria, pp. 106-119; Carol O'Donnell and Jan Craney (1982), 'Introduction', in O'Donnell and Craney (1982), pp. vii-xii; and Erin Pizzey (1977), *Scream Quietly or the Neighbours Will Hear* (first published 1974), Ridley Enslow, New Jersey.

15 [1891] 1 QB 671.

16 ibid., per Lord Halsbury L C at 678-679.

It must be noted, however, that despite the recognition of the notion of the free subject (as represented through the slavery metaphor), and the acceptability of this rhetoric within classic liberal discourse, judges continued to interpret the common law so as to give approval to men to 'admonish' their wives under certain circumstances. In *The King v Lister,*[17] for example, it was held that '...where it is said that the husband may restrain the wife on certain grounds, such as she was spending his estate and consorting with lewd company.'[18] Lord Fry in *Lister's* case, Scutt argues, even went so far as to support a principle that husbands within these, and other unspecified circumstances, could rightfully beat their wives. [19]

The problem was, therefore, that despite any principle of freedom of the individual, legal liberalism did not in any real sense seem capable of extending to the wife a protection of the person.[20] However, it was precisely this inability of the law, and correlatively the state, to recognise the reality of the situation of women within their own homes that galvanised reformist and feminist agendas in the 1890s.

This said, it is important to recognise that these attempts were assisted, by and large, by a reliance on a chivalrous liberalism; what Margaret Thornton has called the 'good graces of a masculinist public.'[21] The reforms won by feminists in the 1890s, although affecting women in their daily lives in a positive manner generally did not address their distinct subjectivity as women, and more importantly as battered women. It is this notion of the battered woman as a subject controlled by *the law* that served to constantly undermine and complicate the bravery of battered women themselves in their struggle for a place to be and be heard. It also made difficult the task of any feminist movement which similarly displayed bravery in its

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17 1 Str. 478., quoted in *R v Jackson* at 676

18 ibid.

19 ibid.

20 This principle can be traced philosophically to Locke's moral claims about the state of nature, as a state of perfect freedom, equality and bound by a law of nature (a natural law). See John Locke (1990) *Two Treatises of Government,* (first published 1690), Everyman Press, London.

21 Thornton (1995), p. 7.

attempts to achieve recognition of domestic violence as a public problem while also identifying its nature as a political, personal struggle.

## Feminism and The 1890s

*'We hear more women crying in the night here than birds singing in the woods during the day'.* [22]

The 1890s was a period of intensified focus on women,[23] especially in terms of their claims for enfranchisement. The vote – as a practical and symbolic representation of the state's acknowledgement of women as equal citizens - was a specific and important campaign embedded within a general re-thinking by feminists of the period of the need for women's independence. By the last decades of the nineteenth century, women had begun to identify the family, and their position in the family as wife and mother, as their 'destroyer.'[24]

The sexual division of labour, which relegated women permanently to the home, and to the burdens of housework and child rearing, were based on the organisation of production and reproduction.[25] Women's inability to control their own fertility,[26] combined with material and legal barriers to their independence within the labour market, produced a situation of wagelessness and dependence on their husbands. Even if an ideological or cultural climate existed in which women were encouraged by men or the state to participate fully in the public sphere, they confronted legal

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22 Marilyn Lake (1988), 'Intimate Strangers', in Verity Burgmann and Jenny Lee (eds.), *Making a Life: A People's History of Australia,* McPhee Gribble/Penguin, Ringwood Victoria, pp. 152-165, p. 158. Lake quotes French-Canadian Francois-Maurice Lepailleur, exiled in Parramatta, NSW in the 1890s.

23 See John Docker (1991), 'Men and Drink: Louisa Lawson's *The Dawn* (1888-1905)', *The Nervous Nineties,* Oxford University Press, Melbourne, pp. 3-15; and more generally Susan Magarey, Sue Rowley and Susan Sheridan (eds.) (1993), *Debutante Nation: Feminism Contests the 1890s,* Allen and Unwin, Sydney.

24 Lake (1988), p. 160.

25 ibid., p. 155.

26 Pat Grimshaw, Marilyn Lake, Ann McGrath and Marian Quartly (1994), *Creating A Nation,* McPhee Gribble/Penguin, Ringwood Victoria, p. 191. Grimshaw et al note the difficulties for women in controlling their fertility as a result of contemporary notions of the sanctity and political importance of children. They contend that contraception struck 'a foul blow at the instincts of motherhood and paternity: it would transform marriage literally into sanctified prostitution, and undermine and destroy the sacred institution of the Family forever.'

and material barriers to independence. Women were excluded from most trades by custom and trade union practice, until the 1880s they could not enroll at university and were therefore excluded from the professions, and they were similarly excluded from public office.[27] This situation was exacerbated by a state focus on women's responsibilities as mothers. The fate of the nation was said to depend on its children, and as Marilyn Lake notes, 'the restriction of child labour and the introduction of compulsory schooling both served to make childhood a time of dependence [on their mothers.]'[28]

For these reasons, underscored by the legal recognition of a woman as her husband's chattel, women were bound to the private sphere. For women who attempted to supplement the family income with paid employment, the restrictions of child care, and the need to maintain a 'home' (the 'core ingredient of the dominant familial ideology'[29]) ensured that their paid work was predominantly done in or from the home.[30] However, the work available to most women, such as taking in laundry or ironing, piecework for the clothing industry, or even prostitution, were never paid at the same rate as men's work.[31] In this way, women were dependent on the male wage to maintain the family - their role supplementing, and supplemented by the legal and public primacy of men.

The situation of women when the intended complementarity of the public and private spheres, institutionalised by marriage, broke down was therefore diabolical. As Grimshaw et al note, 'where husbands failed to provide, where they deserted families, or were verbally or physically abusive, wives were trapped in appalling

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27 Lake (1988), p. 160.

28 ibid.

29 Kereen M. Reiger (1985), *The disenchantment of the home: Modernizing the Australian family 1880-1940*, Oxford University Press, Melbourne, p. 38.

30 Lake (1988), p. 160; Susan Magarey (1993), 'Sexual labour: Australia 1880-1910', in Magarey et al (eds.), pp. 91-99, p. 94.

31 However, women were also employed (due to the lesser rate of pay legally determined for women's wages) in industry as it developed in the early twentieth century, and also in the rural sector: Grimshaw et al (1994), pp. 175, 209; Norman MacKenzie (1962), *Women In Australia*, F.W. Cheshire, Melbourne, pp. 135-136; Jenny Lee (1993), 'A redivision of labour: Women and wage regulation in Victoria 1896-1903', in Magarey et al (eds.), pp. 27-37.

situations.'[32] In seeking an end to their plight, women were constrained by the existing legal sanctioning of their subjectivity through marriage, as well as by their inability to find alternative financial support for themselves or their children.[33]

For these reasons, feminists such as Rose Scott and Lousia Lawson began to define men's behaviour as the cause of women's oppression, and to recognise that action taken against this behaviour was achievable through collective, rather than individual, protest.[34] Attention was therefore drawn to ways in which male control of women sexually, physically, and economically, could be challenged. The male consciousness required transformation in order to allow women to escape from male domination.'[35]

Feminists agreed that wife-beating, 'one of women's commonest occupational hazards,'[36] was attributable to alcohol, which led in turn to economic deprivation for families. This identification caused Bessie Lee in 1887 to establish the Women's Christian Temperance Union (WCTU), which 'swiftly connected this male drug abuse with a range of anomalies in the relationship between men and women.'[37] The WCTU's understanding of the causes of women's oppression was mirrored in broader feminist activity during the 1890s. Organisations like the Womenhood Suffrage League wanted to change society organised on male terms, and to make it safer for women and children.[38]

The recognition that women's powerlessness began at home therefore began to translate to a recognition that women's independence depended on their public acknowledgment. In this way, a range of different campaigns which focussed on

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32 Grimshaw et al (1994), p. 173.

33 ibid.

34 Lake (1988), p. 160.

35 Grimshaw et al (1994), p. 173.

36 Lake (1988), p. 158 notes that wife-beating was 'widespread in the nineteenth century.'

37 Grimshaw et al (1994), p. 174. Note that the WCTU in Australia was based on the US organisation of the same name. See also Mackenzie (1962), p. 47.

38 Mackenzie (1962), pp. 29-59; pp. 40-41; Judith Allen (1994), *Rose Scott: Vision and Revision in Feminism,* Oxford University Press, Melbourne, p. 145.

the harms caused to women by men converged in the demand for women's suffrage, and their citizenship.[39]

This campaign rested on and revealed an equivocal relationship with the liberal state that feminists wished to challenge. Although the right to vote was a measure of women's equality with men in the public sphere, the feminist concern which gave momentum to that campaign was with domestic issues, ' [from] an elimination of the double standards of sexual morality, to compulsory (hetero) sex and child bearing in marriage.'[40] Although feminism of the 1890s articulated the need for women's' equality, it was as Marilyn Lake notes, 'taken for granted that men and women were different and the same, at the same time.'[41] Feminism therefore became focussed on discovering how to secure independence for women, while also protecting them from being violated by men.'[42]

## Feminism, the State, and 'The Animal in Man'

> ...Will it be believed, a hundred years hence, that such a state of things existed?[43]

A *prima facie* recognition of wife-beating - as both a crime and a social problem explicitly affecting women - was therefore evident, and evidenced in an historical legal sense. This can be seen through cases like previously mentioned *The Queen v Jackson*[44], and by the fact that women in the 1880s-90s in Australia for example, were able to take out a summons against their husbands for detected instances of assault occasioned in the home.[45] However, there were problems for individual

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39 Lake (1988), p. 161; Allen (1994), pp. 95-135.

40 Susan Magarey (1997), 'The Politics of Passion: Sex and Race in the New Australian Body Politic', *Australian Feminist Studies*, vol. 12, no. 25, pp. 29-42, p. 29.

41 Marilyn Lake (1997), 'The inviolable woman: Feminist conceptions of citizenship in Australia, 1900-1945', in Jane Long, Jan Gothard and Helen Brash (eds.), *Forging Identities: bodies, gender and feminist history*, University Of Western Australia Press, Nedlands, pp. 228-247, p. 238.

42 ibid.

43 Louisa Lawson per Olive Lawson (ed) (1990), *The First Voice Of Australian Feminism: Excerpts From Louisa Lawson's The Dawn 1888-1895*, Simon and Schuster, Brookvale NSW.

44 *The Queen v Jackson* [1891] 1 QB 671

45 Allen (1982), p 8. However, as Allen notes, this did come at a price. With little help for women in terms of places to escape to, and economic support, such action would

survivors of wife-beating in attempting to enforce the available legal restraints on violent husband. As Judith Allen argues:

> [[T]he lack of social welfare alternatives made any victory pyrrhic indeed for wives and children. The case was similar with regard to drunkenness and inebriate legislation for which feminists were enthusiastic advocates. If the husband was classed as an inebriate, and gaoled or institutionalised, the family was without a breadwinner. On the basis then, of the grievances they did select, feminists argued that women and children had special problems that only women could represent in the public sphere [the polity] and which only women were capable of solving.[46]

The nascent recognition of, and campaigning with regard to, legal and state remedies for wife-beating in this period was directly attributable to a raised consciousness of the role of women as political citizens.[47] However, the philosophical terrain around those feminist responses - no matter how essential or ground breaking - was not separate from other political rhetorics and ideologies of the period. Just as early second wave feminists can be argued to be both emergent from, and embedded within, New Left culture and theory (a point discussed in the next chapter) the pioneering work of this earlier generation of feminists (in their attempts to form pathways for women into the public sphere) were infused by a liberalism committed to evolutionary progress.[48]

The state's responses to domestic violence during this period demonstrate the difficulty of bringing it discursively into the realm of the public, and of recognising women, as survivors of domestic violence and as subjects more generally, visible within the confines of law. To some extent, domestic violence *was* recognised as a form of criminal behaviour, with associated partial remedies like the summons.[49]

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inevitably result in a re-directed focus of harm by the husband, as well as economic deprivation.

46 Judith Allen (1978), 'Breaking into the public sphere: the struggle for women's citizenship in New South Wales 1890-1920', paper presented at Australian Women and the Law Conference, 25-26 August, University of Sydney, (FTYC), p. 2.

47 Magarey (1997), p. 29.

48 Docker (1991), p. 11.

49 It must be noted that this course of action itself was difficult to realise for most women. As Allen (1982) notes: 'A working-class woman had to find 6s 6d to take out a summons in late nineteenth-century Sydney- half the weekly wages of a domestic servant', p. 2.

As Allen has noted, the 1880s saw debate around a raft of legislative reform designed to address the 'social problem' of wife beating. In New South Wales for example, in 1883, during debate on a Criminal Law Consolidation Bill, an attempt was made to raise the penalty for assaults made by men on 'defenceless' women and children.[50] The predominant argument against increased penalties (as evidenced in debates around similar British legislation in 1861) was the economic cost to families, of the forced removal of the (male) breadwinner.[51] The ethic of liberal reformism, which pervaded both intellectual elites and less directly the Parliament during this period, attempted to ignore this argument. But the proposed legislation failed, owing to a fear that 'the spirit of British liberty would be seriously imperilled if magistrates were empowered to imprison subjects for as long as a year without reference to jury deliberation.'[52] The reformist tug of war, then, was about liberal ideas on freedom and the subject; despite an awareness of social costs to women, the dominant subject to be protected was male.[53]

Liberal reformism consequently attempted to understand wife-beating as criminal behaviour. Despite the popular press of the time like *The Bulletin* trivialising (indeed, lampooning) domestic violence, the amount of copy devoted to it highlights its visibility as a social issue.[54] Public discussion was concerned with domestic violence as an 'exploitation of a defenceless dependant by one [the husband] entrusted with care and support.'[55] The dominance of Social Darwinism, with its commitment to the notion of a progressive human evolution of society,

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50 Allen (1982), p. 9.

51 ibid.

52 ibid.

53 Allen (1982), p. 9 also notes that in New South Wales, in 1889, an attempt was made to improve remedies at criminal law. The Wife Beater's Punishment Bill was tabled, but suspended due to prorogation at the House before it was scheduled for debate. However, the fact that the Bill existed showed a level of instrumental concern for the battered woman.

54 Allen (1982), p. 10. See also Marilyn Lake (1986), 'The Politics of respectability: identifying the masculinist context', *Historical Studies,* vol. 22, no. 86, pp. 116-131 for a discussion of the struggle for cultural control exacted by men through *The Bulletin.* See also Docker (1991), pp. 33-64 for a nuanced reading of the role and cultural function of *The Bulletin;* and John Docker (1993), 'The Feminist Legend: A new Historicism?', Magarey et al (eds.), pp. 16-26, for a critique of Lake.

55 Allen (1982), p. 8.

ensured, as Allen notes, that wife-beating came under the microscope of the liberal intelligentsia.[56] It stood for a regression to a state of barbarism beyond civil mores and rhetorics (a state personified, for early wave Australian feminists, as the 'Animal in Man'.)[57] Feminists, like Rose Scott, suggested that the progressive evolution of society necessitated the demise of the 'animal' components of male nature and value systems, with a focus on the ennobling qualities of the 'spiritual' ('New') woman influencing, and hastening, a reformed civil order. [58] Wife-beating thus attracted feminist attention. Some socialists linked the position of women to that of bond slaves, arguing that the economic dependence of women on male breadwinners enabled the continuation and location of violence in the home.[59]

Recognition that the home (and its division of labour) was a site for violence came also from evangelical social reformers, albeit from a refracted angle. The emphasis by groups like the WCTU on alcohol and drunkenness ('inebriation') in men as the cause for the unravelling of civilised society, ensured that a rationale existed for the removal of women from the home. This task was taken up by philanthropic organisations like the Benevolent Asylum, which believed that battered wives were in a situation of 'moral' (and physical) danger if they remained with their husbands.[60] The search for an alternative solution for battered wives (and also for ways to maintain a particular vision of moral sobriety) led these groups to operate alternative accommodation or shelter for women forced from their homes by habitually violent men.[61] The conflation of evangelical, socialist and feminist concerns around the domestic violence issue can be seen in Louisa Lawson's *The Dawn,* which argued strenuously for extended government provision for these alternative institutions, enabling women to live independently from violent spouses.[62] Yet despite the efforts of feminists like Louisa Lawson to secure a

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56 ibid.

57 See generally Judith Allen (1990), 'The Animal in Man', *Sex and Secrets: Crimes Involving Australian Women Since 1880,* Oxford University Press, Melbourne, pp. 45-64.

58 Allen (1994), pp. 85-86.

59 *The Dawn,* 3 August 1889.

60 Allen (1982), p. 10 notes that these services were partly funded by the state.

61 *The Dawn,* 1 September 1892.

62 Allen (1982), p. 11.

location for women to realise their independence, the refuges for women of the 1880s and 1890s were overwhelmingly charitable institutions, not feminist spaces.[63]

Liberal reformism, aided by an Australian state with a commitment to social welfarism, [64] viewed domestic violence through its tripartite belief in progressive evolution. Despite an explanation for the social foundations for domestic violence (economics, alcoholism, and increasingly pathology) and the tentative provision of the means to remove women from domestic danger, the proportions of the problem remained unrecognised. There was no systematic campaigning on behalf of the battered woman as a *distinct* politico-legal subject. Her circumstances, in short, were tied to the raft of oppressions and ideologies which kept women insidiously committed as the subject of a man's home, his castle. Therefore, despite the efforts of feminists like Louisa Lawson, and despite the significant feminist attention to wife-beating as a symptom of women's subjugation through marriage, the equivocal relationship between feminism and liberal reformism ensured that a language and discourse specifically devoted to the eradication of wife-beating did not emerge in its own right.

Although wife-beating was primarily understood as criminal behaviour by late nineteenth century legislators and administrators, the fact remained that it was a crime committed in private. As such, attention was directed by the state, and by feminists like Louisa Lawson, to an improvement of the circumstances of the battered wife before the civil law.[65] In this way, there was a slow re-ordering of the legal nature and understanding of wife-beating; it was transformed from the realm of criminal to divorce law. For example, in 1892 'cruelty' was included as a ground for divorce in its own right as a response to the difficulties in actually gaining

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63 See Chapter Four for an examination of the rise of the specifically feminist refuge, especially, 'Elsie' Australia's first feminist refuge in 1974.

64 Marian Sawer (1993), 'Reclaiming social liberalism: the women's movement and the state', in Renate Howe (ed.), *Women and The State: Australian Perspectives*, A Special Edition of the Journal of Australian Studies, La Trobe University Press, in Association with the Centre for Australian Studies Deakin University, and the Ideas for Australia Program, Bundoora Victoria, pp. 1-21.

65 Grimshaw et al (1994), pp. 172-173.

convictions for batterers.[66] However, in many respects, civil law's recognition of wife-beating again acted as a form of chivalrous liberalism which did not undermine the theoretical and legal underpinnings of the husband/wife relationship. As Margaret James notes: 'The motives of the reformers were not to make women equal with men, nor to reduce their dependence on the institution of marriage, but to relieve them of the more extreme abuses of that institution.'[67]

Although discussed (and included) as grounds for divorce, the *Matrimonial Causes Act* 1873 (NSW) ensured that cruelty was a collateral (and not distinct) factor in cases brought on adultery grounds. In this sense, then, the only real 'remedy' for wife-beating was judicial separation, in a civil jurisdiction. The fact that the *Divorce Extension Act* 1892 (NSW) allowed divorce on the grounds of cruelty (a situation more or less sustained until the passage of the 'no fault' *Family Law Act* 1975 (Cth)),[68] did not materially alter the policy presumption that violence was not a significant factor in the breakdown of the home. Although in some senses an advance for women, recognising a gendered aspect of their marital dissatisfaction, the cost of divorce (between 60 and 100 pounds in the 1890s)[69] prevented many women, especially working class women, from pursuing the legal options available to them. Furthermore, the divorce law reforms which recognised cruelty or constructive desertion as a ground for the dissolution of marriage could be cynically assessed as the most economically viable option for a liberal state to provide for battered women. [70] Battered separated wives inevitably turned to charitable institutions for help in the likely circumstances of their husband's non-

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66 Judith Allen (1985), 'Desperately Seeking Solutions: Changing Battered Women's Options Since 1880', in Suzanne Hatty (ed.), *National Conference on Domestic Violence: Proceedings*, (vol. 1, 11-15 November), Australian Institute of Criminology, Canberra, pp. 119-133, p. 122; Allen (1982), p 15.

67 Margaret James (1978), 'The Grounds For Divorce in Victoria 1890-1960', paper presented at the Australian Women and The Law Conference, August 25-26, University of Sydney, (FTYC), p 3.

68 See generally Scutt (1983), pp. 25-33.

69 Hilary Golder (1985), *Divorce in 19th Century New South Wales*, UNSW Press, Kensington, pp. 234-237.

70 Allen (1985), p. 123.

compliance with maintenance orders.[71] Such orders were easily overturned by the male party in response to suggestions of 'any blemish on the woman's virtue or the slightest change in her child-care arrangements, accommodation, miscellaneous expenses, or sources of income.'[72] Furthermore, as Hilary Golder has noted, the state, in response to the alleged 'shortage' of marriageable women in the nineteenth century, considered it much better to reintroduce the separated battered woman back into the 'marriage market', forcing her economic reliance on a new husband, and as such, easing state and charitable resources.[73]

The rise of divorce law as a means of regulating the extremities of wife-beating ensured that few remedies were open to survivors of violence who wished to permanently remove themselves form the home, and sever ties with their spouses. Despite a reduced burden of proof in civil matters, the potential advantages for women were offset by the cost of proceedings, the absence of guaranteed economic and physical safety, and a lack of punitive recourse.[74] The relegation of wife-beating to the sphere of civil law ensured that as the twentieth century was born, battered women remained a shadowy legal subject, and that wife-beating maintained no discursive power of its own.

## Post-Suffrage Feminisms: The Quest For Independence

By 1902, all Australian states had granted women the right to vote[75], and the feminist agendas of the 1890s, which had identified so clearly that a woman's independence was stifled by her subjugation in the home, began to be re-interpreted. The fact that women's degradation had been made possible by their economic dependence on men, became the central plank of diffuse feminist attempts in the post-suffrage years to fully realise women's independence.

Rose Scott observed in a lecture to the WPEL (Women's Political Electoral League) in 1903 that 'many women submitted to the most degrading and tyrannous

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71 Golder (1985), pp. 234-237.

72 Allen (1985), p. 124.

73 Golder (1985), pp. 225-226.

74 Allen (1982), p. 20.

75 Magarey (1997), p. 29.

conditions, because they and their children were economically dependent on their husbands.'[76] In a general sense, however, post-suffrage feminism became less invested in the degradations occasioned in the home, as it became more invested in challenging the barriers in the public realm which prevented women from claiming an independent life, despite their roles as wife and mother. The recognition of women as citizens through suffrage, and the birth of Federation in 1901, resulted in a close identification by feminists of the turn of the century with the new nation state. This encouraged them, as Lake notes, 'to formulate their claims as claims to the State, as rights now owed to women in their identity as (public) citizens, in their new relationship as individuals with the state.'[77] From this perspective, the feminist activity that existed between 1901 and the 1970s in Australia can be clearly identified as political action designed to fulfill the independence that suffrage promised, and to challenge the public's perception of women as anything other than full, equal citizens.

The majority of feminist activity between the 1890s and the 1970s emerged primarily from non-party aligned women's rights and reform organisations, such as the Women's Political Electoral League (WPEL), the Women's Political Association (WPA), the National Council of Women (NCW), the Australian Federation of Women Voters (AFWV), and the Country Women's Association (CWA).[78] Groups like these, and like the Australian Women's National League (AWNL) (which was the largest women's organisation in Australia during the 1920s),[79] were conservative when compared with the explosion of groups based on the ideas of Women's Liberation in the 1970s.[80] For example, conservative Prime Minister Robert Menzies was successful in convincing the previously non-aligned AWNL to lend their support to the Liberal Party in the 1940s, on the basis of a

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76 Lake (1997), p. 230.

77 Lake (1997), p. 231.

78 Lake (1997), p. 229; Mackenzie (1962), pp. 206, 305-306.

79 Grimshaw et al (1994), pp. 220, 266.

80 See the following chapter for a discussion of these groups and ideas.

campaign against the perceived threats of communism and socialism to the nation, and the safety of women, children and the institution of the family.[81]

In this way there was a political disjuncture between most women's organisations and left agendas. Groups like the Union of Australian Women (UAW) which emerged in 1950 from a coalition of women interested in specifically women's issues involved in the Communist Party of Australia (CPA), the labour movement and less conservative non-party aligned women, did have a more radical perspective on the ways in which women's independence could be realised while still perceiving themselves as a women's interest group.[82] However, by and large, for women on the radical left, there was an inherent suspicion of 'feminist' groups. In 1934, the CPA paper *Working Woman* argued that 'feminism' flourished 'among bourgeois and petit-bourgeois women who are not concerned with the emancipation of the working-class, which is essential to establish equality for women, but are content to improve their own status as women within the existing capitalist system.'[83] Despite this criticism of 'feminism' *per se*, there was still a left demand for attention to be drawn to securing women's equality, especially around the issues of work and peace.[84] Importantly moreover, as Lake notes, women across party lines did share a temporal and cultural understanding of the need to realise women's full citizenship.[85]

It has been argued that there were several distinct policy directions formulated by feminists in the post-suffrage decades to entrench women's independence. These were, primarily, a concentration on reforms that would 'desexualize' relations between men and women; and a multifaceted campaign to secure women's

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81 Grimshaw et al (1994), p. 267.

82 Barbara Curthoys and Audrey McDonald (1996), *More Than a Hat and Glove Brigade: The Story of the Union of Australian Women*, Bookpress, Sydney, pp. 1-2. Note the agenda of the UAW involved campaigning for equal pay, consumer rights, equal opportunity legislation and childcare, and was significant in challenging the union movement from within to support such measures.

83 Joy Damousi (1994), *Women Come Rally: Socialism, Communism and Gender in Australia 1890-1955*, Oxford University Press, Melbourne, p. 153.

84 See generally: Damousi (1994); Curthoys and McDonald (1996); Joyce Stevens (1987), *Taking The Revolution Home: Work Among Women in the Communist Party of Australia: 1920-1945*, Sybylla Coopertaive Press and Publications, Melbourne.

economic independence, through challenging the status of women's pay rates, as well as access to education and professional and labour organisations which would allow women's equal representation in the labour market in the first place,[86] and their formal involvement in politics.[87]

It was the first of these, the need to 'desexualise' male/female relations that ironically de-emphasised the situation of violence in the home. Feminist organisations such as the AFWV, the UAW and the British Commonwealth League (BCL) believed that women's rights of citizenship were not compatible with a sexual identity. The access by men to women's bodies not only prevented them from enjoying their newly won status as equal political citizens, but it also undermined women's capacity to participate in public life. For example, in 1924, labor activist Jean Daley not only believed that economic dependence 'bred a spirit of servility in women inimical to the experience of independent citizenship', but also that dependent women 'moulded [themselves] to men's desire.'[88] It was therefore felt that true independence for women would result only from an actual equality between the sexes, which could only be achieved by advocating a protection of women as sexual subjects. Groups like the conservative BCL and the left UAW believed, for example, that feminists should place their hope 'in a higher future for both men and women', by removing the segregation of the sexes, 'which

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85 Lake (1997), p. 229.

86 Lake (1997), p. 237. The other major policy direction of feminism of this period were campaigns to achieve status for Aboriginal women, and to 'rescue' them from (white) male sexual abuse, Grimshaw et al (1994), p 250; Curthoys and McDonald (1996), pp. 65-69; Lake (1997), pp. 240-241. For a discussion of the campaigns to secure equal pay for equal work, and thus to overcome the legal restraints imposed by the Conciliation and Arbitration Commission in *The Harvester Judgement* (1907), see generally Edna Ryan and Anne Conlon (1975), *Gentle Invaders: Australian Women at Work, 1788-1974*, Nelson, Melbourne. For a discussion of the movement into and influence of women in labour organisations see Curthoys and McDonald (1996), pp. 20-24; Grimshaw et al (1994), pp. 200, 210. For a discussion of women's campaigning for and entrance to the professions and higher education see MacKenzie (1962) pp. 118-133; 197-122.

87 The first woman, Dorothy Tangey, was elected to Federal Parliament in 1943. For a discussion of women's movement into public and formalised politics see: Grimshaw et al (1994), pp. 249, 263; MacKenzie (1962), pp. 262-291.

88 Lake (1997), p. 237.

was the undesirable result of an emphasis on sex.'[89] The challenge for post-suffrage feminism was therefore 'how to make men and women moral'[90] which could lead to both sexes' concentration on higher issues of public merit, like women's independence.

This relative conservatism of post-suffrage feminism, which can be argued to dominate feminist agendas until the late 1960s, was evident in diverse ways, and produced some important political outcomes. For example, feminist organisations lobbied for the appointment of women to all public offices and agencies that dealt with the welfare of women and girls. In order to prevent female subjects from being sexually objectified by men, feminists were successful in arguing for the appointment of female doctors, factory inspectors, gaol warders, magistrates, welfare officers and police.[91] They opposed, in the 1910s and 1920s, leisure activity which sexualised male/female relations, such as moving pictures, or mixed bathing.[92] They successfully advocated raising the age of consent to sixteen to 'protect' young people from the temptations of the flesh, which would result in their 'degradation.'[93] They supported sex education to promote 'respect for purity and restraint.'[94] This concentration on desexualising relations between men and women in order to allow women the freedom to pursue other challenges, such as the right to work and the right to claim equal pay,[95] did not, however, include sexual freedom as part of its agenda. As Lake notes: 'premarital continence and post-marital monogamy or chastity were the ideals. Freedom was freedom from promiscuous intercourse.'[96] Thus contraception was not advocated as feminist

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89 Lake (1997), pp. 236-237; Grimshaw et al (1994), p. 217.

90 Lake (1997), p. 236.

91 Grimshaw et al (1994), p. 217; Lake (1997), p. 238; and MacKenzie (1962), pp. 195-196 regarding women and trade unions.

92 Lake (1997), pp. 231. 238.

93 ibid., p. 231.

94 ibid.; Grimshaw (1994), p. 262. Lake (1997) also notes that feminist of the period opposed legislation that allowed for the regulation and surveillance of prostitutes and women thought to be suffering from venereal disease, p. 231.

95 See n. 86; and Grimshaw et al (1994) for the changes in women's campaigning around these issues in the context of the Depression and World War Two, pp. 257, 260.

96 Lake (1997), p. 237.

policy. The rise of Family Planning clinics in the 1930s, were rather the result of the work of eugenicists, who were 'more interested in guarding the racial stock...than in women's emancipation.'[97]

Importantly, feminism was not internally divided over these issues. Although non-party feminists rallied in opposition to communism, calling for the party to be banned in the 1950s[98], radical and conservative feminist groups shared a commitment to upholding equal, and idealised, non-sexualised relationships with men. What the concentration on desexualisation in order to promote women's independence entailed, however, was an identification that marriage itself, although in need of a public rethinking in terms of women's role in it, and their contribution to the public through it,[99] was not an institution that was itself to be condemned. As Jean Daley noted as early as 1925, 'the truly happy marriage is the one in which both the husband and wife are wage earners and share the household income in proportion to their income.'[100] By the end of the Second World War marriage (as the bedrock of the 'family', the postwar world's 'discovery'[101]), was predominantly discussed as 'the mutuality of women's and men's interests and needs.'[102]

A preclusion of any feminist discussion of the private vagaries of marriage, or the worst excesses of sexualized violence, therefore occurred in both party and non-

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97 Grimshaw et al (1994), p. 246. However, it must be noted that during the Depression, abortion rates rose significantly, as women could see no way of providing for children. In terms of contraceptive methods, withdrawal and abstinence were commonplace. However the emergence of Family Planning clinics increased the use of diaphragms and pessaries, which were 'hailed by many women as the answer to their needs', Grimshaw et al (1994), p. 246. Abortion during these decades was illegal, however women like Millicent Preston Stanley did campaign for better services for women seeking abortion: Grimshaw et al (1994), pp. 235-236.

98 Grimshaw et al (1994), p. 267.

99 For example, by attempting to secure a public recognition of women's role as mother through motherhood and child endowment schemes. As Lake (1997) notes: 'The framework of citizen's rights enabled activists to demand motherhood endowment as a reward for service to the State, and as the basic right of the citizen to be treated as an individual', p. 239. See also Grimshaw et al (1994), pp. 229, 237.

100 Lake (1997), p. 239.

101 Grimshaw et al (1994), p. 270.

102 ibid.

party women's groups, as 'talk of human freedom and equal rights'[103] and the 'partnership' of marriage replaced references to women's special interest or gendered harms. In the ALP, for example, a commitment to women's independence was seen as productive in the context of furthering equal marriage 'partnerships' and coherent party policy. Labor women were important in lobbying for a state funded child-endowment scheme, for as they argued in 1928, the (male) breadwinner's wage 'did not recognise women and children as individuals at all...endowment would recognise the woman citizen.'[104] However, they were cautious, apprehensive of being judged by male party members as interfering with the male income. In this way, the need for motherhood and child endowment was argued to be an addition to the basic wage, rather than a legislative means for requiring men to share income equally with their wives.[105] Groups like the UAW similarly argued that the state should remunerate mothers for their contribution to society, and that correlatively, 'marriage should be reconstituted as a legal and economic, partnership.'[106]

For many other women the focus on the equalisation of marriage combined with an extant conservatism about the dangers of sexual relations also resulted in a movement away from critical discussion of issues like wife-beating. For example, women in the Communist Party of Australia, although committed to a radical restructuring of society in order to release the working-class from the excesses of capitalism, were restrained in their discussion of sexual relations and sexualised harms. As Joy Damousi notes, the CPA 'adopted a strict puritan position on sexual relationships and often gave stern warnings to members of infidelity or behaviour unbecoming to a comrade.'[107] The 'proletariat morality'[108] however was often a double-standard. Damousi notes that rape, adultery and sexual harassment inflicted

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103 Lake (1997)., p. 247.

104 Lake (1997), p. 239.

105 Grimshaw et al (1994), p. 222.

106 Lake (1997), p. 239.

107 Damousi (1994), p 135

108 ibid.

by some men towards some women in the party were common place.[109] However, there was no opportunity for CPA women with a commitment to 'higher issues' and a notion of party unity to voice their complaints legitimately, or articulate the sexual or physical violation of women as an issue in itself. Many women had joined the party because of a desire to improve women's plight as workers, identified through their inclusion in the disenfranchised class caused by the Depression.[110] However, they found themselves, despite the opportunity to learn valuable political skills, and to determine a public political life, with no outlet for criticism of men. From the outset, 'the working-class was male, and it made the main drive for better conditions, more militancy, a revolutionary party; whereas women, the wives of the workers, supported their husbands.'[111]

The feminist concentration on desexualizing male/female relations was therefore linked, in a non-partisan way in the post-suffrage decades, with a commitment to realising women's full independence. The energy and commitment towards women's public recognition, and the focus on creating equal partnerships with men, shifted the emphasis of 1890s feminism on the specific injustices within the home that rendered women so inviolable, and needing of protection from being sexualised, in the first place.

The irony was, however, as Lake notes, that: '...feminist interventions [during the post-suffrage period]...served to endorse the masculinist definition of men as sexual subjects and women as passive objects.'[112] In this way, the brave steps taken by feminism in the 1890s in their attempts to gain protection from the law and the state for women who were the subjects of wife-beating, became subsumed in the public battle by feminisms after they received the vote for women's equality, and their public independence. The emphasis on desexualisng male/female relations in

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109 ibid., pp. 136-139.

110 Damousi (1994) quotes one woman's reasons for joining the CPA: 'I was interested in this idea of socialism being a society in which women had more equality. [This] was the decisive reason that made me join', p. 136. See also Grimshaw et al (1994), p. 242.

111 Damousi (1994), p. 136.

112 Lake (1997), p. 243.

the public realm ironically turned attention away from the complexity of sex, violence and power as it was enacted in private.

## The De-Politicisation of The Battered Wife

The issue of wife-beating or family violence (as it came to be known arguably because of the postwar emphasis on the 'family' as a social unit[113]) was not absent from public debate. Perversely, as feminist attention moved so markedly to women's role and status as public citizens, family violence or wife-beating was increasingly transferred by the state to the realms of civil law, and more dangerously, and clinically, to the new emerging disciplines of psychology and psychiatry. Because of a commitment to a notion of social progress embedded within *fin de siecle* feminism, and because of a de-emphasis on sex (and correlatively violence) in the campaigns of post-suffrage feminists, 'wife beating' no longer presented itself as an issue to be assessed and controlled by the criminal law, as it had been in the 1890s. However, throughout the twentieth century, state policy and new disciplines saw it become increasingly submerged within other languages, and dispersed between spheres of public reckoning.

Despite recognition by liberal legislators at the turn of the century of the problems and inadequacies of criminal law solutions for battered women, and the reform of divorce law to bring about a system of provision for them, the policy direction occasioned by such legal changes did little for survivors of domestic violence. Applications for divorce on the putative 'cruelty' ground increased to nearly 35 000 by the 1930s.[114] However the reality behind these applications, marriages destroyed by family violence, became hidden in a language of civil impartiality. Wife beating, in the jurisdiction of divorce law, therefore became increasingly enveloped by the concept of a marriage's 'irretrievable breakdown.'[115] The relegation of the legal regulation of family violence from a criminal to a civil jurisdiction ensured that the battered woman remained technically hidden as a legal subject.

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113 Grimshaw et al (1994), p. 270.

114 Allen (1985), p. 124.

115 See generally Scutt (1978), pp. 25-33.

In addition, the acknowledgment of wife beating as a criminal act attracting penalties (however inadequate), was by the 1920s and 1930s seriously undermined by other discursive arenas and technological arms that controlled the person, such as medicine and psychology. Medical and psychological testimony became increasingly admissible as evidence in court, displaying a paradigm shift in the way that family violence was understood. Judith Allen has argued that the medical profession in the twentieth century redefined criminal behaviour as either biologically determined, or as the inevitable response of environmental factors (in the case of violence, alcoholism, class and employment patterns.) Medical expertise and testimony frequently urged the removal of offenders, complainants and families to psychiatric and other forms of counselling, rather than to a process of assessment by the courts. The effect of this 'psychologisation' of everyday life had wider implications and repercussions for any public discussion of family violence, pertaining to survivors as well as offenders.[116]

By the 1940s, psychiatrists stressed the idea of 'psychosomatic illness' to argue that many patients consulting general practitioners had mental, not physical or social, problems. They also argued that many forms of social behaviour were really the product of 'mass neurosis'.[117] In 1948, for example, prominent Melbourne psychiatrist Allan Stellar suggested that the manifestations of neurosis could be seen in 'family disruption, crime, sex disorder, alcoholism and social neuroses...poor housing [and] aggression.'[118] For these reasons, persons committing violence could be individualised, and isolated as pathological, when their behaviour was found to be socially disruptive.[119] Furthermore, the siphoning of violence into the discursive realms of psychology and medicine reinforced the batterer's often hidden violent tendencies, which had the adverse effect of categorising the proven (or identified) violent man as 'abnormal.'[120]

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116 Allen (1985), p. 127.

117 Stephen Garton (1990), *Out Of Luck: Poor Australians and Social Welfare*, Allen and Unwin, Sydney, p. 144.

118 ibid.

119 Allen (1982), p. 27.

120. See Heather McGregor and Andrew Hopkins (1991), *Working For Change: The Movement Against Domestic Violence*, Allen and Unwin, Sydney, pp. 100-102; Australian

A woman's tendency to stay in violent relationships rather than choosing to separate or divorce began to be seen as 'masochism' by psychiatrists and psychologists, especially those who identified as Freudians,[121] and as evidence of her 'subliminal enjoyment of rape and violence.'[122] These theories were popularised and transmitted to the community by the health and mental health professions during the 1940s, 50s and 60s, and were built into complex models and empirical studies 'purporting to prove female predisposition to choose violent men to fulfill their violent fantasies.'[123] It was this identification of the subjects of family violence as masochists by the state-condoned policy of relegating violence, as a social welfare issue, to the realm of health and social 'counselling', that exacerbated the myths about violence already present in the community.

For many feminists from the 1930s to the 1960s, the concentration on issues of private welfare by the mental health professions did not automatically raise any suspicion. Their efforts to introduce a model of responsible, rational sexual behaviour were 'scientifically' carried out and expanded by psychological theories, which led to an emphasis on professional guidance to 'cope with abnormal development' and to develop 'a public responsibility of rationally managed sexuality.'[124] In this way, with no obvious place on a critical feminist agenda, the myths about family violence perpetuated by psychiatric and psychological discourse

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Law Reform Commission (1986) *Domestic Violence,* Discussion Paper 30, para 18. The tendency of domestic violence programs and policies from the mid 1980s to concentrate attention on the psychology of the batterer, and to recommend programs for their rehabilitation has also under gone criticism from feminist commentators who felt this process undermined the reality of the domestic violence survivors injuries and circumstances. See for example Ludo McFerran (1993), 'Domestic Violence- Stories, Scandals and Serious Analysis', in Refractory Girl Collective (1993), *Refracting Voices: Feminist Perspectives from Refractory Girl,* Southwood Press, Sydney, pp. 152-159; Sabine Erika (1990), 'Break the Silence: The State and Violence Against Women', *Refractory Girl,* No. 36, August, pp. 13- 16.

121 Allen (1982), p. 21.

122 ibid.

123 ibid., p. 22.

124 Reiger (1985), p. 202. Reiger notes that this position developed from the policy of eugenics. See also Grimshaw et al (1994), p. 246.

provided the primary public discussion or recognition of its incidence until the early 1970s.[125]

Family violence, or wife beating, was no longer acknowledged as a crime,[126] as it had been, albeit precariously, in the 1890s. Social attitudes centred instead on a belief that the battered woman, because she did not leave the relationship, had only herself to blame. Fostered by psychological discourse, the understanding of women who remained in violent relationships was that family violence was not occasioned by women's subjugation in marriage and her dependence on her husband (as had been recognised by feminists like Lousia Lawson), but was instead a result of her personal failings. In this way, it was publicly accepted, as Jocelynne Scutt argues, that 'wives provoked husbands into beating them; [they] are pre-disposed to being beaten [and] deliberately set out to marry an abuser, and when they do, delight in their beatings.'[127]

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125 Reiger (1985) argues that this form of regulation of subject's sexuality reinforces Michel Foucault's thesis of the development of the modern discourse of sex, which was no longer seen only as matter of overt behaviour or of social regulation, but as central to the meaning of the individual. See Michel Foucault (1978) *The History of Sexuality, volume 1: An Introduction* (first published 1976), Random House, New York.

126 The debate about the recognition of domestic violence as a crime continued in the 1970s and 1980s. See for example the discussion around the recommendations of the New South Wales Domestic Task Force (1981) in Chapter Six. Note that the phrase 'Breaking the Silence' formed the media/public awareness arm of the National Domestic Violence Education Program (NDVEP), a federal initiative funded between 1987 and 1990. The slogan was used in April 1989 to launch 'Break the Silence', a national domestic violence awareness month, that has now become an annual Stop Domestic Violence Day (April 26): Marian Sawer and Abigail Groves (1994), *Working From Inside: Twenty Year of the Office of the Status of Women*, Australian Government Printing Service, Canberra, p. 76. The campaign, in a public consciousness sense, can therefore be assessed as a successful initiative. However, the language used- despite its links to mythology around the private- has been problematic for some commentators in terms of its whitewashing of domestic violence's criminal nature. For example, Earle et al have noted: 'We are conscious that the campaign focus on "breaking the silence" rather than advocating particular strategies or solutions can be seen as weak and intellectual. Inevitably, perhaps, it bears the hallmarks of political compromises and pragmatism. A more vigorous slogan highlighting the consequences for perpetrators- such as "Bash your wife, Go to Jail" may have had more impact on men as perpetrators, a greater deterrent effect...': Jenny Earle, Alex Herron, Linell Secomb, and Julie Stubbs (1990), 'The National Domestic Violence Education Program – A Commentary', *Refractory Girl*, no. 36, pp. 3-6; p. 4.

127 Scutt (1978), p. 97.

When external factors were identified as causing violence in the home, they too mirrored the mental health profession's emphasis on 'social neuroses', which were fundamentally associated with poverty.[128] External causes such as alcohol, the entrenchment of the family within the working class, and sometimes the family's ethnic background[129], were therefore identified as 'reasons' for violence. However, the justification for these reasons through individualised, 'scientific' explanation, left little room for either a state, or reformist feminist, identification of a need to develop policy which considered other causative factors such as fear, economic necessity, or housing needs.[130]

Violence against women perpetuated by their spouses was therefore, by the 1960s, a problem that had no specific name, and no position on public feminist or state agendas. The emphasis on psychiatric and 'victomological'[131] perspectives on violence made it possible for the law and the state to deny its origins. It also made it difficult for feminism of the period to put forward sexual inequality within heterosexual conjugal relationships as an explanation of violence against women.[132] In this way, violence in the home, or wife beating, underwent a process of de-politicisation between the 1890s and the 1970s. The tragedy was, however, that women's experience of violent relationships, and the social and material reasons for why they did not leave, had not substantially changed since Louisa Lawson wondered in the 1890s: 'Will it be believed, a hundred years hence, that such a state of things existed?'[133]

The most common reason for women not leaving violent relationships, for example, was the fear that children would suffer if the family was not kept

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128 Garton (1990), p. 142; Allen (1982), p. 21

129 Scutt (1978), p. 97.

130 The ways in which the Women's Liberation Movement addressed these other causative factors. Addressed in the naming of domestic violence will be discussed in Chapter Four. The effects of 'pathologising' the family will also be reconsidered in chapters Five and Nine in relation to diminished responsibility and Battered Woman Syndrome as defence options for battered women who kill.

131 Allen (1982), p. 22.

132 ibid.

133 See n. 43.

together.[134] To leave without the children was viewed by most mothers as an unnecessary risk to their physical and emotional well being; to take the children was also a risk as it may have incurred legal costs and consequences before the courts over custody.[135] Even more problematically, to take the children with them when they left a violent relationship was to exacerbate one of the real difficulties in deciding to leave: economic deprivation. For many women, the choice was stark: stay and risk physical threat to themselves, yet ensure food, clothing and shelter for the children; or leave and face the risk of living below the poverty line (if entirely dependent in social security benefits), or having to yield their children to charitable insititutions.[136] It was more difficult for women to get housing (as single mothers) because of inbuilt prejudices towards women, and towards low income earners generally; and it was more difficult for most women to get a job to alleviate this situation as they tended to be less qualified, less able to work full time because of child care responsibilities, and were paid less than men for the same work.[137] In practice, women who did leave with their children were forced to place them in an orphanage or home to enable the woman herself to earn a living.[138]

Associated with the problem of the economic dependence of women on their violent spouse was the class bias in identifying violence in the first place. As argued by Scutt, violence was not the scourge of the working class, but a social problem that spanned class barriers and appearances.[139] Many batterers, as well as holding down professional jobs, and not evidencing any signs of alcoholism or psychotic predilection, presented a charming and acceptable face to the world. The

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134 Nicholas Seddon (1993), *Domestic Violence in Australia: The Legal Response,* (second edition), Federation Press, Sydney, pp. 10-11; Vivien Johnson (1977), *The Last Resort: A Women's Refuge*, Penguin, Ringwood Victoria, pp. 116-119.

135 ibid.; Heather Saville (1982), 'Refuges: a new beginning to the struggle', in O'Donnell and Craney (eds.), pp. 95-109, p. 107.

136 See for example Earle, Herron, Secomb and Stubbs (1990), p. 5.

137 New South Wales Domestic Violence Task Force (1981), *Report of the New South Wales Domestic Violence Task Force,* NSW Women's Coordination Unit, Sydney, pp. 37-38.

138 Garton (1990), p. 116.

139 Scutt (1984), pp. 106-114.

appearance or social status of the batterer therefore reinforced the disbelief of women's articulation of the violence directed toward them. [140]

Another cogent reason for women's unwillingness to leave violent relationships was fear. Leaving the home did not equate with an end to the violence in all cases. For many women, threatening to leave the relationship, or actually leaving an abusive partner precipitated an increased level of violence, often accompanied by death threats.[141] For many agencies (most notably police and welfare) these reasons for women remaining in violent relationships tapped into the prevailing attitudes around domestic violence that had been established and circulated since the 1890s: an ideology around domestic violence that equated it with the private sphere, and an instrumental reliance on the notion of the 'pathologised' family.[142]

The rise of family pathology therefore ensured that few remedies were open to survivors of domestic violence who wished to permanently remove themselves from the home, and sever ties with their spouses. Furthermore, in the post-suffrage decades, feminist attention shifted from the personal and private struggles within marriage (a process initiated in the 1890s), to the ways in which marriage and women's role as equal citizens could be publicly transformed. This meant that there was no sustained feminist intervention on behalf of the battered woman for the majority of the twentieth century. The identification of the battered wife as a specific subject, controlled by discourses of liberalism acted out by the state and the law, and condemned by new disciplines like psychology, ensured that her experience and harms had neither a public name, nor a public voice.

It was to be the re-invigoration of the equivocal feminist relationship with the notion of women's independence in the 1970s, articulated through a rhetoric of collective action, and a desire to render the 'personal as political', that exploded the

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140 D. Wehner (1985), 'Working With Violent Men, Issues, Programs, and Training', in Hatty (1985), p. 313.

141 D. Chappell and H. Strong (1990), 'Domestic Violence- Findings and Recommendations of National Committee On Violence', 4 *Australian Journal of Family Studies* 211, pp. 213-214; Nanette Rogers (1996), 'To Save Her Life: Gender, Justice, and Battered Women Who Kill', in Kerry Greenwood (ed.), *The Thing She Loves: Why Women Kill*, Allen and Unwin, Sydney, pp. 73-93.

142 Allen (1985).

mythologies of battering, and the relegation of the battered wife to the insidious shadows of the private sphere. 'Liberation', and more specifically women's liberation, as discussed in the next chapter, provided a radical re-birth of the commitment to rescuing women from the bonds of slavery in marriage, and provided a foundation for the articulation of a new identity for the battered wife through a discourse of 'domestic violence'.[143]

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143 For a discussion of 'domestic violence' as a discourse see Introduction. For a discussion of how this was materially and historically achieved see Chapter Four.

*Chapter Three*

# THE WOMEN'S LIBERATION MOVEMENT

> ...to represent the world as a knot, a tangled skein of yarn; to represent it without in the least diminishing the inextricable complexity or, to put it better, the simultaneous presence of the most disparate elements that converge to determine every event. [1]

Wife-beating has a long history that is contained within a discourse, as it is now understood, of 'domestic violence.' This discourse was articulated by Women's Liberationists in the 1970s and 1980s through their critique of the family as a site of control of women generally, and given a rhetoric through the refuge movement and its interactions with the state. Consequently, a discursive engagement with domestic violence is one of the most obviously feminist initiatives of recent times, forcing public recognition and accountability for specific problems facing women *as women.*[2] This chapter investigates the nature of the multifarious Women's Movement of the 1970s and early 1980s, especially in Sydney: its character, precursors, and the interconnectedness of groups existing within its umbrella. [3] It

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1 Italo Calvino (1988), *Six Memos for the Next Millennium*, Cambridge University Press, Cambridge, p. 106. Calvino is reflecting on the work and interpretation of multiplicity by Italian novelist Carlo Emilio Gadda. Referred to by Gill Bottomley (1994), 'Living Across Difference: Connecting, Gender, Ethnicity, Class and Ageing in Australia', in Norma Grieves and Ailsa Burns (eds.), *Australian Women: Contemporary Feminist Thought,* Oxford University Press, Melbourne, pp. 59-69.

2 These specific problems, or harms (which include rape, anti-discrimination laws, reformed divorce laws, as well as domestic violence) have been called 'gendered harms': Regina Graycar and Jenny Morgan (1990), *The Hidden Gender of Law*, Federation Press, Sydney, pp. 272-3. For an analysis of the jurisprudential utility of a concept of reform via the notion of gender specific injury see Adrian Howe (1987), '"Social Injury" Revisited: Towards a Feminist Theory of Social Justice', 15 *International Journal of the Sociology of Law* 423.

3 See generally: Cora Baldock and Bettina Cass (eds.) (1983), *Women, Social Welfare and the State in Australia*, Allen and Unwin, Sydney; Sophie Watson (ed.) (1990), *Playing the State: Australian Feminist Interventions*, Allen and Unwin, Sydney; Hester Eisenstein

begins by describing the era, and the counter cultural/political movements that gave voice to Australian second wave feminism. Taking into account major differences (such as location, sexuality, race and class) it discusses the things that the Women's Movement held in common: the thematic, textual and discursive links that guided a uniquely Australian feminism of this period to a particular relationship, with the state and, more obliquely, with the law.[4] This analysis provides the foundation for the discussion of the engagement of feminism in the 1970s with a process of 'naming' domestic violence, especially through the establishment of Australia's first feminist refuge.

## The Women's Movement and the 1970s

The Women's Movement emerged from a number of contexts. Most important for this discussion were the New Left, and the counter-cultural libertarians, the remnants of the Push.[5] Each of these helped determine the particular character of

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(1996), *Inside Agitators: Australian Femocrats and the State*, Allen and Unwin, Sydney; Ann Curthoys (1988), *For and Against Feminism: A Personal Journey into Feminist Theory and History*, Allen and Unwin, Sydney; Refractory Girl Collective (1993), *Refracting Voices: Feminist Perspectives from Refractory Girl*, Southwood Press, Sydney.

4 Note that the transition of these ideas into legal doctrine, reform and practice will be discussed in Chapters Five and Six

5 This picture must itself be complicated. By the nature of this project - which is a history of the battered body through the perspective of 1970s feminist politics - the influence of women emerging from the New Left and Libertarian circles must be privileged. (That is, I can not disguise the foreshadowing of following chapters which include detailed examination of Elsie refuge and Women Behind Bars, both of which emerged from these scenes.)This is not to suggest, however, that this chapter offers a full story of the Women's Movement from 1970. Feminist influences, activisms and politics preceding and coinciding with the emergence of the Women's Liberation Movement must be acknowledged: it can not be assumed that the whole Movement was, is, or has been, singularly middle class, university based or young. Women of the Old Left - centred around the CPA - may not have identified as 'feminists' as such, but their hard work and political vigilance for the decades preceding the 70s moment have wide repercussions. Focussed mainly in the CPA (and other groups and organisations like the Union of Australian Women (UAW), Australian Labor Party (ALP), Council of Action for Equal Pay etc ) women like Edna Ryan, Marie Gollan, and Flo Davis were working hard to improve women's working conditions, and struggling for equal pay for equal work. As Joyce Stevens notes of these women and this period: 'Generally, communist women - at least until the second wave of feminism in the 1960s - did not describe themselves as feminists. However, they did take up and act on a range of issues that were vital to women's interests', Joyce Stevens (1987), *Taking The Revolution Home: Work Among Women in the Communist Party*

Women's Liberation in Australia, especially Sydney, and therefore of its eventual take on questions of domestic violence.

The Australian New Left was initially used as a term to signify various groupings of ex-Communist Party members, disillusioned by events in the Soviet Union, especially the Russian invasion of Hungary in 1956. The Old Left came to signify the established CPA, while the moniker 'New Left' came to describe any group with a socialist/social democratic flavour, that placed itself in opposition to conservative Prime Minister Robert Menzies' mainstream Australia.[6] John Docker has discussed some of these issues, with a specific focus on student populations of the 1960s as a breeding ground of new ideas, and as the vanguard of political challenge to an old epoch of conservatism, sexual stultification, racism and an ignorance of the importance of citizenship in its widest sense for women. [7] The students of the late 1960s/early 1970s, reinterpreted Old Left ideology and applied it as a radical vision for their own changing circumstances. With the introduction of conscription to a war in Vietnam that many viewed as symbolic of the United States' imperialism, and standing well outside of Australia's interests, it was not surprising that on university campuses across the country there was a surge of resentment and activism. The birthing of new socialist/social democratic ideologies would incite those likely to become involved by default in the Vietnam War to reject the previous epoch that was delivering what was seen as coercive and

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*of Australia: 1920-1945*, Sybylla Cooperative Press and Publications, Melbourne, p. 10. It must also be noted that there were other groups besides the class identified Old Left interested in women's rights and protections, such as the Country Women's Association (CWA), League of Women Voters etc. The point is, that the Old Left had a long and consistent role in the 'hidden' women's movement of the 30s-60s, which existed alongside conservative groups like the CWA. See also Barbara Curthoys and Audrey McDonald (1996), *More than a Hat and Glove Brigade: The story of the Union of Australian Women*, Bookpress, Sydney. See general discussion of this period in Chapter Two. Also see Sue Wills, (1981) *The Politics of Sexual Liberation*, Thesis submitted for the degree of the Doctor of Philosophy, University of Sydney, p. 41 for breakdown of the demographics of early participants of Women's Liberation in Sydney in the 70s.

6 This has been referred to as 'an exodus of intellectuals' by John Chesterman (1995), 'The Making of the Australian New Left Lawyer', 1 *Australian Journal of Legal History* 37, p. 39.

7 John Docker (1988), 'The Moment of the New Left', in *Intellectual Movements and Australian Society*, Brian Head and James Walter (eds.), Oxford University Press, Melbourne, pp. 289-307, p. 290.

imperialist/racist policies, not only upon the students themselves, but upon the Vietnamese people overseas, and the Aboriginal people at home.[8]

Coinciding with this site specific and intellectual refocusing of political and societal norms was a counter-cultural critique of western rationality, and subsequently an interest in and embracing of other forms of social organisation and living. Drawing on the ever present, albeit specifically Sydney-identified anarchist-libertarian tradition, there was a re-thinking of individual self-expression. The nuclear family began to be viewed as something to be resisted, there was a re-grounding of self expression through sexualities, especially lesbianism and homosexuality; and there was an interest in Eastern philosophy and religion, that aided a critique of competitive, technological, rational 'civilisation.' The opposition, therefore, to racism and other normative political values translated into a widening sense of the acceptance of a variety of different cultures and rationales. This in turn generated a practical interest in the notion of collectivity. Inclusion not only symbolised collective-decision making in the universities, but a personal commitment to communal living, to introducing the concept of an equal (albeit not traditionally acceptable) voice to political subjects at a range of sites across the social canvas.[9]

The Push - a loose social and intellectual cohesion that had its theoretical roots in anarchism and the ideas of University of Sydney based philosopher John Anderson - slightly pre-dated the New Left. Politically coaligned as libertarians, members of the Push, largely university based and middle class, were a break away group from Anderson's Free Thought Society. First meeting to discuss philosophy and to develop their own in 1952 at Sydney University, the Libertarians were never a purely theoretical cluster of individuals. Their position - emergent from Marx, Pareto and Michels - but relying heavily on Max Nomad's theory of 'permanent protest' - became important in the way members of The Push (the social configurations existing around the theories of libertarianism) developed their attitudes. Anne Coombs summarises these as: 'tolerance and appreciation of human variance;...disgust at calls for social unity;...belief in the inevitability of social

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8 Docker (1988), p. 291.

9 ibid, p 292.

struggle and...cynicism about so-called solutions to such struggles.'[10] Highly critical of what was considered the utopian socialism of Marx, there was a reluctance to believe in a notion of revolutionary change. The Push, then, despite an interest in theories of the Left were more interested in translating these ideas into lifestyle.[11] The newsletter *Broadsheet* discusses the theoretical positioning of the Libertarians at length,[12] but the Push, genuinely counter-cultural before the term gained any ascendancy, was more often than not reinterpreting the theory. As Coombs notes:

> [A] lot of the people down at the pub never got much beyond the slogans. "Permanent Protest" became a term that many of them emptied of Nomad's original ideas, pouring in their own interpretations instead. To some it came to mean constant opposition to just about everything; to others it meant that they could not take a positive position on anything.[13]

In practical terms, this meant an adherence to a quasi-bohemian lifestyle, a rejection of regular relationships and career options, which based its character firmly in the Australian psyche. Going to the pub, the races, parties, and playing cards coincided with and complemented a belief in freedom of existence and equality (for its loosely aligned membership) of sexual expression. For women in the 1950s and 1960s, then, the Push, with its anarchistic ideas, and studied belief in Freud and Reich, was in some senses liberating. These women were able, and encouraged, to sleep with whomever (albeit within the Push) and whenever they liked: a lifestyle option standing far outside the social norms of the post-war, 1950s wife and mother roles that were generally the only options available.

The Libertarians and the New Left are both important to the story of feminist campaigning on law and state related issues for several reasons. The New Left took up and transformed Old Left ideological axes: namely, a belief in and adherence to

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10 Anne Coombs (1996), *Sex and Anarchy*, Viking Penguin, Melbourne, p. 53.

11 As Coombs (1996) notes: 'Essentially, the Push was a leftist movement that did not believe in the goals of the left', p. 54.

12 See Cam Perry (1974), 'A Tourist's View of Libertarianism', *Broadsheet* No. 78, May, pp. 6- 8; AJ Baker (1975), 'Sydney Libertarianism and the Push', *Broadsheet*, No.81, March, pp. 5-10. See also John Docker (1972), 'Sydney intellectual history and libertarianism', *Australian Political Studies Association Journal*, vol. 7, no. 1, May, pp. 42-47; and AJ Baker (1973), 'Sydney Libertarianism - A Reply', *Broadsheet* , No 75, August, pp. 7-9.

13 Coombs (1996), pp. 56-57.

class principles, notions of oppression, struggle and revolution, in both rhetorical and theoretical senses. Concomitant with this was the developing notion of collectivity, that was to have particular significance to Women's Liberation as a tool of both organisation and consciousness-raising. The second reason why the New Left can be viewed as an integral causative factor of the birth of 1970s Women's Liberation was that it was seized by a changing tertiary student population of the 1960s as a way forward.[14] However, despite an increasing global focus, and widening of the traditional concept of class to incorporate racial oppression (most notably through the Vietnam Moratoriums as organised demonstrations against, and critiques of, the Government) it was the inability to recognise women as a subordinated class group within the confines of the left that led to the 'revolution' of Women's Liberation.

In 1969 in Balmain, what can arguably be called the first Sydney Women's Liberation Group, began. Initially, ten to twelve women, disillusioned with treatment by men within Left circles (both New Left, and libertarian) began to reflect on their own experiences, within political circles and in society at large, and to share and compare these experiences with each other. As Wills writes:

> They discussed their position, the position of women in a male dominated society, particularly as that was reflected in sex role stereotyping and relationships within the family. They were mostly under 30, from middle class backgrounds, well educated, politically left of centre to varying degrees, and most had histories of political activism in one or other of the movements of the 1960s.[15]

Integral to this first group were Coonie Sandford and Margaret Greenland, recently returned from visits to the United States, and Martha Kay (Ansara), an American resident in Australia. Through these women, the group had access to American Women's Liberation literature and ideas. The group met several times, and drafted a leaflet, 'Only the Chains Have Changed', which outlined their thoughts on

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14 There was for example, as Ann Curthoys notes, a rapid growth of women attending university from the 1960s onwards, changing the social mix and conservatism of the institutions. See: Ann Curthoys (1996), 'Visions, Nightmares, Dreams: Women's History, 1975', *Australian Historical Studies* No. 106, April, pp. 1- 13, p. 2.

15 Wills (1981), p. 20.

Women's Liberation and women's position in society generally, and organised a meeting to be held on January 14, 1970. [16]

The text of 'Only the Chains' could be argued to have been influential for both its public posing of the question 'Why Women's Liberation?', and the theoretical nature of the answers it gave: answers shaped by both radical left sentiment and socialism. The text read:

> We, like the Vietnamese people, can only be free of oppression when the profit makers no longer have the power to determine our lives...Any movement seeking a change in women's roles attacks the family structure upon which capitalism rests and poses demands which capitalism cannot meet...The struggle for Women's Liberation is revolutionary because of this.[17]

Although the connections between the struggle of the Vietnamese under an imperial war, and women under capitalism and patriarchy, were powerfully made, the notion of collectivity between these groups had a much deeper source of resentment in traditional Left circles. That is, these women (and others like them), disillusioned with being relegated to the tea-makers in traditional Left organisations[18] and familiar with ideas about equal/collective decision making, realised that these organisational courtesies and practices were not extended to them as women. As such, it could be argued that inclusion and cohesion - an awareness of their position as a downtrodden 'class' within active Left circles - prompted their 'awakening' to Women's Liberation. Furthermore, the initial ways in which the Balmain group operated reflected not only this awareness, but also reflected the procedures followed by Women's Liberation as a Movement, organisationally and to greater and lesser degrees, theoretically, for the years to come. As Wills, again, notes:

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16 ibid.

17 'Only the Chains Have Changed', pamphlet, 15 December 1969, (FTYC).

18 See for example: Joy Damousi (1994), *Women Come Rally: Socialism, Communism, and Gender in Australia, 1890-1955,* Oxford University Press, melbourne, pp. 133-134; 'Open Letter' (1972), *Brisbane Women's Liberation Newsletter,* June, p. 2, (FTYC) for an airing of the views of older left women in response to Women's Liberation generally, and a description of the nature of their involvement in old left/trade union organisations and political circles.

> [A] strong element of spontaneity; the admixture of personal experience and political ideas, not only independently important but also essentially inseparable; the lack of adherence to formal meeting procedures and structure, and the chaos, sometimes productive, sometimes not, in which that can end; the emphasis on working collectively and co-operatively within the group rather than in competition with one another, on having many women speak rather than a single spokeswoman; a personal enthusiasm and commitment that can come only from a sense of fighting for your own Liberation, not somebody else's; and a streak of evangelistic euphoria which produced a conviction that if other women were simply 'told', they too would experience a 'conversion.'[19]

In other words, early Women's Liberation, in its aims and practices, driven by the educated New Left university women, could be argued to take the principles of that intellectual Movement seriously: The New Left critique and suspicion of rational, Western civilisation spilled over to a critique of this way of thinking as constitutive of male power and domination. If collectivity and inclusion of diversity were to matter, it became important to recognise these things as tools of freeing women from the political, social, legal, economic, and ultimately philosophical subordination that they slowly began to recognise as dominating the entire structure of normative rules and values. If women in the New Left felt subordinated and unheard, the implications for the rest of the women in society in which men were not so sympathetic or critical of status quo positions began to have deepening resonance. The rhetoric of the Old Left - of women as a class, of the need for revolution through liberation - began to take on more than a conceptual framework discussed in a Balmain pub: it began to mean something far more significant.

'Chains' was handed out at an anti-Vietnam demonstration on December 15, 1969, and achieved its desired effect of attracting like-minded women of as the Balmain group to the issues/causes it discussed. The public meeting advertised in the

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19 Wills (1981), p. 20. Wills refers to the following to ground this analysis of the organisational nature and collectivity of early Women's Liberation groups in Australia: Carol Hanisch 'Hard Knocks: Working For Women's Liberation in a Mixed Male-Female Movement Group' in Shulamith Firestone, *Notes From the Second Year: Women's Liberation* 1970, New York pp. 59-63; also Martha Kay in transcript *Mother I Can See A Light, ABC Coming Out,* May 1977.

pamphlet for Wednesday 14 January 1970, at 64a Druitt Street Sydney, was attended by over ninety women. Several women spoke on why they were involved in Women's Liberation, and why others should join. The proliferation of Women's Liberation ideas immediately following this meeting can be well testified by the birth and expansion of groups like that in Balmain: the University of Sydney, Macquarie, University of New South Wales and Glebe Group (at 67 Glebe Point Road) were all formed within the next three months. As a direct result of the political awakening of many women to the ideas of Women's Liberation through these groups and through the discourse that was created around them, other external happenings started to shape the public face and practical organisation of Women's Liberation.

The events, campaigns, arguments, demonstrations and publications that defined this early moment of 1970s feminism are too numerous to detail in this context. However, the following examples of the kind of activities Women's Liberation organised and participated in during the period of 1970-72 give an indication of the strength of collective organisation and consciousness raising amongst those women attracted to Women's Liberation: the first National Conference of Women's Liberation was held in Melbourne in May 1970; public organisation of the fight to gain legal and safe abortions was organised around the raiding of Heatherbrae clinic in Sydney; the public campaign for legal abortion and organisation of the working women's group occurred in July 1970, as did the first edition of the Sydney Women's Liberation newsletter. In September of that year, demonstrations for legal abortion were organised to coincide with the Heatherbrae trials, and University student and Women's Liberationist Kate Jennings directly attacked the male left at a Vietnam Moratorium held at the University of Sydney. A motorcade and petition campaign for legal abortion occurred in October; and the first general meeting of the Women's Liberation Movement was held at the Trade Union club in December. In 1971, the Gay Liberation group of Sydney Women's Liberation first met in January; a North Sydney Group was formed in February, and *MeJane* - a Women's Liberation newspaper - was launched in March. *What Every Woman Should Know*, a booklet discussing contraception, abortion and other health and legal issues relating to women, was launched by the Socialist Worker's Party in July; and the

first Women at Work and Women in the Trade Unions Conference was held in August. 1972 brought the launch of the Women's Electoral Lobby (WEL) in July; and in December, the first edition of the women's studies/academic journal *Refractory Girl*, as well as the philosophy strike at the University of Sydney, which heralded the challenge to intellectual orthodoxies for courses and theories relating to women, and their 'liberation' from 'the chains' of capitalism, patriarchy, and conventional binding norms. [20]

Women gathered together during this period as a result of common-held beliefs, and awakenings that the different milieus they inhabited were doing them a disservice. For example, women in the Sydney Push - even before the advent of the contraceptive pill - were encouraged to be sexually equal to men,[21] and were genuinely included in the traditional male oriented activities of the group. However, the emphasis on sex (including its theoretical rationale within the Push via Freud and Reich, and the myth of the vaginal orgasm) to some extent disadvantaged these women.[22] As Coombs notes:

> They wanted sexual relationships. Numbers of them are to this day thankful to the Push for giving them a sexual education. But for many, maybe even most of them, it wasn't just the sex they wanted but what they believed it would lead to: the right to exist in the world on an equal footing with men, not just sexually, but socially, and intellectually.[23]

By the early 1970s, the 'new breed' of Push Women, like Wendy Bacon and Liz Fell, began to realise that sexual liberation was not leading to sexual equality.[24] The intermixing of Libertarian practice and Women's Liberation theory began to occur

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20 Wills (1981), pp. 16-19.

21 See generally Coombs (1996), p. 71.

22 'These women' refers to, for example, Lilian Roxon, Roseanne Bonney, and other women who 'joined' the Push during the 1950s/early 60s, Coombs (1996).

23 Coombs (1996), p. 76.

24 See for example: Wendy Bacon and Ken Maddock (1971), 'Symposium: Does Women's Liberation Conflict with Human Liberation?', *Broadsheet*, No. 66, p. 12; J R Maze (1972), 'Germaine Greer's Misinterpretations of Freud', *Broadsheet*, No. 67, pp. 1- 5; and in reply, Sue Robertson (1972), 'Maze's Misinterpretations of Greer', *Broadsheet*, No. 70, pp. 1- 2.

- a practice that would, through groups like Women Behind Bars, change permanently the nature of both.[25]

What linked the Old Left, New Left, Libertarian and other Women's Liberation women were notions of commonality *as women.* Differences such as race, sexuality, ethnicity were, for the time being, present but submerged. One of the central, driving concerns of these women was a quest for theory - an intellectual framework that would not only explain why women in all spheres of society were treated as second class citizens, but *how* this could be grounded in a way that made sense of the relationships between lived experience, theory and praxis.

The Marxist inclination of the New Left women provided a focus for this search for an intellectual framework throughout the early 1970s. Ideas were transmitted between different groups and different women not only through the practice of translating the personal into the political in consciousness raising groups, but through the written word. *Words for Women*, for example, was an early collective committed to reprinting overseas material to broaden its audience - the 1970s providing the moment of the technological primacy of the Gestetner in the absence of books, pamphlets and a general Australian industry devoted to feminist ideas and feminist practices.[26]

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25 By this I mean the libertarian idea of permanent protest took on a new complexity, and were given teeth through campaigns like the Green Bans, Victoria Street, and the prison reform movement, in which women like Bacon were integral participants. Similarly, the libertarian notion of women working with men- even if those women identified as lesbian- was not altered by the separatist sensibilities which prospered during the 1980s -albeit it was tension over this issue which caused a public reckoning amongst feminists at the Mary Daly 'event' in Sydney in 1981. see n. 88, and the discussion of the prison reform movement, especially Women Behind Bars, in Chapter Five.

26 Words For Women were part of the Glebe Women's Liberation group. See, for example. *Brisbane Women's Liberation Newsletter*, 1972-74 (FTYC) where constant reference to requests to Sydney Women's Liberation Groups were made for access to materials and books. Note also the growth of Australian produced material during this period, such as the early articles by Ann Curthoys (1970), 'Women's Liberation and Historiography', *Arena,* no. 22, pp. 35-40; and Anna Yeatman (1970), 'The Liberation of Women', *Arena* no. 21, pp. 19-25. See generally Ann Curthoys, Marilyn Lake and Susan Magarey (1997), *The International and Local in Women's Liberation: Reading Metropolitan Texts in Australia, 1970-71*, unpublished manuscript, for discussion of the development and reading of feminist texts in Australia during this period. Note also the commencement of production of Women's Liberation newsletters, journals

However, this situation began to change rapidly. The first Women's Liberation conference, held in May 1970, saw the explosive production of locally written material; on topics such as 'Women and Education', 'Factors affecting women in the workforce', 'The Family' and 'Women and the Left.'[27] These first steps were followed by a rush of commentary and criticism on major academic texts - emerging form the US and the UK - on the search for a 'theory' of Women's Liberation. These texts, Germaine Greer's *The Female Eunuch*, Kate Millet's *Sexual Politics*, Shulamith Firestone's *The Dialectic of Sex* and Juliet Mitchell's *Woman's Estate*, linked Australian women through debate. As Curthoys, Lake and Magarey argue, there was no consensus on or around these books.[28] (Indeed, *The Female Eunuch*, widely read in Australia, and the 'means' by which many women came into contact with feminist ideas, was, unlike the other texts mentioned above, little used in foundational women's studies programmes and academic discourse.[29] These programmes and this discourse, dominated to a certain degree by New Left women with a commitment to Marxist analyses based on the determination of women as a 'sex class',[30] were vaguely antagonistic to Greer's Libertarian ideas.)[31]

The contradictions between cross insemination of intellectual ideas and practical organisation of the Women's Movement had a cogent effect. Embedded within the early discourse of revolution and 'women's' (an uncontested term at this stage) liberation, were tensions over *how* a political movement dedicated to the claiming of a *female* political space - via notions of rights and political citizenship - was to

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and newspapers that began to flourish by demand: for example, *Sydney Women's Liberation Newsletter* in July 1970; *MeJane* in March 1971; *Virago* in October 1971; *Refractory Girl* in December 1972.

27 See generally: Curthoys et al (1997), p. 7. See also Anne Summers (1975), 'Where's the Women's Movement Moving To?' in Jan Mercer (ed.) *The Other Half: Women in Australian Society*, Penguin, Victoria, pp. 405-419, p. 408, for a reflective comment on this conference.

28 Curthoys et al (1997).

29 ibid., p 9.

30 And as such, more influenced by Millet and Mitchell.

31 Germaine Greer was a one time member of the Sydney Push, and Curthoys et al note that: 'Greer's libertarian individualism, and her opposition to organised movements, did not endear her to the organisational part of Australian Women's Liberation, still very much influenced by a New Left desire for political action and social change.', ibid., p. 9.

occur.[32] The divergent historicised political backgrounds of many women involved in early Women's Liberation ensured that from the notion of collectivity came the collective use of tools and texts, the collective commitment to early issues like abortion, work, child care, contraception and equal pay, with different ideas on how these issues and texts should be acted upon, translated and organised.[33]

For example, campaigns ranged from the 'traditional' forms of political protest such as the petitions and marches involved in the pro-abortion focus by Women's Liberation on the Heatherbrae trials,[34] to the *MeJane* initiated Kentucky Fried Chicken campaign. This involved the *MeJane* collective sending a letter to Kentucky Fried Chicken management complaining about their 'Kentucky Fried Chicken for Women's Liberation' billboard/bus advertisement campaign. The collective sarcastically commended the management on their support of the aims of Women's Liberation which meant, therefore, that their female employees received equal pay, free child care, free contraception, and abortion on demand.[35]

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32 An example of such a 'tension' over organisational and theoretical perspectives within early WLM can be provided by the discussion of the 'birth' and 'birth pains' of the Sydney Socialist Feminist Group (a collective disrupted by conflicting ideas and input from both the Socialist Worker Party and the Scarlet Woman collective.) see: 'Socialist Feminist Groups', pamphlet, July-August 1978, (FTYC).

33 The New Left commitment to Marxist analyses, which investigated links between sex oppression and capitalism, ensured that the family- and concomitant issues like abortion, childcare, and contraception, were early sites of resistance and investigation. However, libertarian-anarchists women had similar concerns, from a different, albeit intermingled, perspective- the politics of sexual autonomy. Resultantly, campaigns and energies were paralleled. For example, the Women's Liberation Working Women's Group produced *What Every Woman Should Know* in July 1971 (FTYC) a booklet on methods of contraception. Wendy Bacon and other Push members produced *The Little Red School Book*, which contained information for teenagers on sex, student rights, contraception and drugs, around the same period, Coombs (1996), p. 255.

34 For an elaboration of this, and other campaigns around the abortion issue see Wills (1981), pp. 22- 27.

35 Angel (1972), 'Get stuffed you chooks', *MeJane*, no. 9, November, p. 4.

## 'Fandango With The State'[36]

Running parallel with the need to transform radically society, a central imperative within Women's Liberationists' quest to assert aggressively female rights and female sexuality,[37] was a recognition of the need for reform within, and reform of, the state. Reform based campaigns were successfully used in the cases of abortion law reform (in New South Wales, at least) and equal pay: tactics like the petition and lobbying were recognised as important processes of engagement. In fact, the enthusiasm and euphoria of the early successes put many Women's Liberation women on a steep learning curve. The establishment of Elsie, Australia's first feminist refuge, provides a good example. What began as an exercise in disrupting the state to achieve a desired goal (the squatting of Elsie to realise a gap in state protection of abused women), became an exercise for the Elsie collective to learn very quickly the benefits of funding - both how to get it, and how it could be maximised.[38]

These processes therefore entailed a recognition of a relationship with the state, albeit a relationship that was fraught: antagonistic and mutually beneficial, complex and complicated, embraced and resisted, what Sara Dowse has described as 'The Women's Movement's Fandango with the State.'[39] Marian Sawer has argued, like many others, that Australian feminism maintained a unique relationship with the state in comparison to women's movements in other (specifically western democratic) countries.[40] The primary reason offered for this is that the height of

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36 Sara Dowse (1983), 'The women's movement's fandango with the state: The Movement's role in public policy since 1972', in Cora Baldock and Bettina Cass (eds.), *Woman, social welfare and the State in Australia,* Allen and Unwin, Sydney, pp. 205-226.

37 Curthoys et al (1997), p. 9.

38 See for example, Elsie Women's Refuge Collective (1978), 'Statement: Funding cuts', pamphlet, Women's Refuges (FTYC); Elsie Women's Refuge Collective (1975) 'Report on the activities being carried out and the services being provided with Commonwealth funds by Elsie Women's Refuge, to the Health Commission of New South Wales, inner region', (FTYC).

39 Dowse (1983).

40 Marian Sawer (1993), 'Reclaiming social liberalism: the women's movement and the state', in Renate Howe (ed.) *Women and The State: Australian Perspectives,* A Special Edition of the Journal of Australian Studies, La Trobe University Press, in Association with the Centre for Australian Studies Deakin University, and the Ideas

Women's Liberation's political energies coincided with the election of reforming governments (at both state and federal levels), with the most influential being the election of the federal Whitlam Labor Government in 1972.

In October 1969, when still in Opposition, Gough Whitlam delivered an election speech that echoed the tumult of activism circulating around Left and minority circles after twenty years of conservative rule under Menzies. He promised that the ALP campaign to win office would have:

> [O]ne dominant theme - the theme of opportunities, the taking of opportunities, the making of opportunities...We of the Labor party have an enduring commitment to a view about society. It is this: in modern countries, opportunity for all citizens...can be provided only if governments, the community itself acting through its elected representatives, will provide them. And increasingly, in Australia, the national government must initiate those opportunities.[41]

For the Women's Movement, this commitment to political opportunity came at a time when highly educated and politicised women were still largely shut out of academic and bureaucratic careers. Underemployed and available for political action, the relationship between a state committed to a creation of opportunities, and women attempting to create their own, was fortuitous.[42]

Whitlam narrowly lost the 1969 election. In 1972, however, the year that heralded the ALP to power, non-party aligned women attempted for the first time to place their belief that non-violent political protest could be effective into action on a large scale. In February 1972, two Melbourne Women's Liberation groups held a joint meeting to consider forming political action groups.[43] The Melbourne

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for Australia Program, Bundoora Victoria, pp. 1-21; Marian Sawer (1990), *Sisters in Suits: Women and Public Policy in Australia*, Allen and Unwin, Sydney; Baldock and Cass (eds.) (1983); Watson (ed.) (1990); Gisela Kaplan (1996), *The Meagre Harvest: The Australian Women's Movement 1950s-1990s*, Allen and Unwin, Sydney; Eisenstein (1996); Hester Eisenstein (1991), *Gender Shock: Practising Feminism on Two Continents*, Beacon Press, Boston.

41 1969 Election Speech quoted in transcript of Gough Whitlam's inaugural speech at the launch of the Trade Unction Education Foundation, 9 February, 1997, p. 1.

42 Sawer (1993), p. 3.

43 Jan Mercer notes that at this meeting Beatrice Faust circulated an article from *Ms.* magazine (a US publication) detailing a survey of American presidential candidates by American women. The emphasis of the questions in the *Ms.* survey were: how did the candidates feel and think about women? How far did their behaviour rely on

meeting, under Beatrice Faust's directive, developed a strategy to discover the attitudes of all candidates in the Australian federal election over women's issues.[44] The final strategy involved campaigning for the candidate who was not only the most sympathetic to women's issues, but who was also the most likely to effect the social reforms needed by women. The numbers within WEL, as the group came to be known, increased rapidly, echoing WEL's fundamental objective: social protest, on a large, and effective scale.[45] The exertion of political pressure on existing major parties had a direct emphasis and a direct result (in the 1972 election campaign, at least.) As Ann Curthoys notes, the Whitlam Labour Government was elected in December 1972 'for all sorts of reasons, but it was clear that, once in power, it needed to take on board the demands WEL had made during the campaign.'[46]

From the very beginning of the Whitlam administration, the convergence of a politically responsive and reactive women's movement and a government committed to 'making opportunities' produced substantial outcomes. Feminist groups took advantage of the Whitlam Government's policy to provide funds for 'community initiative', and women's health centres, refuges, and rape crisis centres began to emerge throughout the country.[47] The Equal Pay case, in which women's groups such as the UAW, collectives within trade unions and the ACTU, and various branches of women's liberation had long been campaigning was reopened,

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traditional masculine roles? It was a development of these ideas that formed the basis of the WEL campaign. See Jan Mercer (1975), 'The Women's Electoral Lobby and the Women's Liberation Movement: The History of WEL'. in Mercer (ed.), pp. 395-404, p. 396.

44 This strategy had two stages which precede the final campaign: provision of a 'form guide' derived from a *Ms.*-style questionnaire supplemented with information from interviews with the candidates; publication of the guide through the Women's Movement and local and national media., Mercer (1975), pp. 396-7.

45 ibid., pp. 396-7.

46 Ann Curthoys (1993), 'Feminism, citizenship and national identity', *Feminist Review*, no. 44, pp. 19-38, p. 27. Note also the cross-overs between Women's Liberation and WEL: despite the reform/revolution distinction, in practice many women belonged to both groups, and saw their different focuses as part of the same project of contemporary feminism. See: Juliet Richter (1975), 'Reflections on WEL's Third National Conference: Women in Politics', *Refractory Girl*, Winter, pp. 35-39, p. 36.

47 Meg Smith (1984), 'The Struggle for Women's Health Centres in NSW', *Refractory Girl*, May, pp. 3- 6.

and decided favourably, in 1972.[48] Government funded child care was consolidated and extended, and sales tax was lifted off the contraceptive pill.[49] Most importantly, Whitlam appointed Elizabeth Reid to assist on women's issues, 'and with this appointment, the modern femocrat was born.'[50]

The reaction to Reid's appointment in 1973 is a micro example of the 'slow fandango' feminism danced with the state, as well as the foundation block upon which the subsequent institutionalisation of the femocracy was based. Despite acting, in some respects, as the landmark voice for women within government - and privy to the Department of Prime Minister and Cabinet more explicitly - Reid's appointment was hardly universally applauded. To begin with, there was the expected disapprobation of the male vanguard which dominated both the legislature and the bureaucracy.[51] Pilloried by the press,[52] Reid's transition to power was precarious. Although encouraged by Whitlam to have access and influence across portfolios, the present and ever increasing problem of sidelining women's issues (drawing attention away from defence, treasury and encouraged grudgingly in family services and health)[53] was exacerbated by the struggle to set in place a

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48 *Equal Pay Case* 1972, 147 CAR 177. See Stephen Deery and David Plowman (1991), *Australian Industrial Relations* (Third edition), McGraw-Hill, Sydney, pp. 366-367 for discussion of the legal implications and history of this case, especially its distinction form the *Equal Pay Case* 1969, 127 CAR 1159. See also Edna Ryan and Anne Conlon (1975) *Gentle Invaders: Australian women at work, 1788-1974,* Nelson, Melbourne, for a discussion of the changes fought for and experienced by women in the labour market.

49 Marian Sawer and Abigail Groves (1994), *Working From Inside: Twenty Years of the Office of the Status of Women*, Australian Government Printing Service, Canberra, p. 4.

50 Curthoys (1993), p. 27. See Sawer and Groves (1994), p. 8 for definitions of the term 'femocracy'. See also as general commentary on the femocracy's 'birth' and politics of practice in Lyndall Ryan (1990), 'Feminism and Federal Bureaucracy 1972-1983' in Watson (1983), pp. 71-84; Eisenstein (1996), pp. 15-27; and Lesley Lynch (1984,) 'Bossism and Beige Suits', *Refractory Girl*, May, pp. 38-44.

51 Sawer and Groves (1994), p. 11.

52 The campaign to find an adviser to the Prime Minister on women's affairs had already been treated by the press as a circus. Labelled the 'Supergirl Contest', media responses ranged from 'trivialisation and distortions of [Reid's] ideas to highly personal attacks': Sawer and Groves (1994), p. 5. For example, when Reid was appointed, the headline in the *Daily Mirror* ran: 'PMs Supergirl says "Legalise Pot, Abortion"', *Daily Mirror*, 9 April 1973.

53 Anne Summers, head of the Office of the Status of Women (OSW) from 1983-86 has commented on this issue: 'I was asking for some defence things and being told it was

policy machinery that would 'take every woman seriously'[54] and 'institutionalise women's concerns.'[55] In short, it was one thing for women to have a 'voice' in Government that claimed to be their own: it was a very different matter for that voice to have volume, and exert the influence necessary to change the institutionalised male power models to the more conciliatory, collectivist forms developed inside the women's movement.

However, there was another, and in some respects, more problematic, opposition to Reid's appointment. The editorial collective of *MeJane* circulated this critique of Reid as 'SuperFem' in March 1973:

> No woman chosen by men to advise upon us will be acceptable to us. We believe that it is not your right to choose for us our spokeswoman, any more than it is any woman's right to act as the single spokeswoman for the rest of us.[56]

For women in WEL, and for those with long time party affiliations, Reid's appointment could be considered a success.[57] However, for those women who had come to Women's Liberation from Old and New Left, not to mention anarchist-libertarian backgrounds (as well as those whose political engagement began with women's liberation itself), the Reid appointment was a difficult pill to swallow. The conciliatory nature of the appointment could not, by default of the nature of the state as an oppressive form of machinery, guarantee women the gamut of change they desired, and that revolution would ultimately bring. As Curthoys has summarised, the objections were cogent and real:

> One might be sacrificing long-term independence and critique for short-term gain; one might be 'co-opted', made too moderate and prepared to compromise, by absorption into the functions of the

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none of my bloody business. If it was welfare, fine. But I had no need to know about defence. And I said: "Au contraire"', quoted in Sawer and Groves (1994), p. 11.

54 ibid., p. 6.

55 Eisenstein (1996), p. 25. Eisenstein also notes the influence of WEL on the formulation of a 'model' of feminist bureaucracy in which a central body was turned and maintained by outlying grass roots groups and voices (the 'wheel' model in which Reid, and ultimately the OSW, was the 'hub' and the multiplicity of feminist groups and organisations outside government represented the 'spokes').

56 26 March, 1973, quoted by Sawer and Groves (1994), p. 7. The collective also pointed out that all candidates for the position were white, well educated and heterosexual.

57 Mercer (1975), p. 398.

> state. Worse still, there was the danger that, in the feminist refuges and health centres that sprang up all over the country, feminists were providing cheap or even free dedicated labour for services that ought to be fully government funded.[58]

The debates within feminist academic/political circles around the nature of state agency and the political citizenship of women have, since Reid's appointment and the creation of a femocratic system within Australian government, raged fiercely.[59] These debates, to greater and lesser degrees, have revolved around the issue of feminisms relationship to liberalism (as embodied in the social contractualist models dominant in modern western democracies). An engagement with the state, as Carole Pateman argues, cannot be *prima facie* successful for women, based as it is in a notion of fraternal order, with equality measured against an historicised, economic male.[60] However, to *not* engage with the state, in the context of Australian political history, seems foolhardy. Marian Sawer has argued that the Australian state model is not of the same contractarian/rights based makeup as that of, for example, the United States. In Sawer's opinion, there has been an historical reliance on the state in this country influenced by both utilitarian philosophy, social liberalism and 'a tradition of political pragmatism and a lack of ideological purism on the part of radical social movements.'[61] For these reasons, earlier waves of Australian feminism (especially in the 1880s-90s, as discussed in Chapter Two) had sought state intervention to achieve political equity for women.

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58 Curthoys (1993), p. 27. This sentiment was present even in WEL: Mercer (1975), p. 395. See also Diane Hague (1984), 'The State and Reformism: One Step Forward, Two Steps Back- A Public Service Union Response', *Refractory Girl*, May, pp. 22.

59 See for example Rosemary Pringle and Sophie Watson (1992), '"Women's Interests" and the post structuralist state" in Michelle Barret and Anne Phillips (eds.), *Destabilizing Theory: Contemporary Feminist Debates*, Polity Press, Cambridge, pp. 53-75; Suzanne Franzway, Di Court and Robert Connell (1989), *Staking a Claim: Feminism, Bureaucracy and the State*, Allen and Unwin, Sydney; Judith Allen (1990), 'Does feminism need a theory of the state?' in Watson (ed.), pp. 21-38; Anna Yeatman (1990) *Bureaucrats, Technocrats, Femocrats: Essays on the Contempoirary Australian State*, Allen and Unwin, Sydney; Refractory Girl Collective (1984) 'Editorial', *Refractory Girl*, May, p. 1.

60 Carole Pateman (1991), *The Sexual Contract*, Polity Press, Cambridge.

61 Sawer (1993), pp. 2-3.

As Sawer again notes, '[b]oth social liberals and the women's movement frequently expressed the belief that while men had their unions, women had the state.'[62]

For these reasons, in Sawer's thesis, it would seem pointless to argue that Australian feminisms have suffered, or more explicitly need suffer, any cleavage over issues like individual autonomy versus the ethic of care, equal rights versus recognition of special need, as the Australian notion of social liberalism has contained all of these elements, which the women's movement (at different times) has been able to draw upon for strategic ends.[63]

On an extrapolation of Sawer's reckoning, then, the antipathy to Reid's appointment (and the growth of the femocracy in general) seems incongruous. However, what this particular account of feminist state theory does not consider is the shifting variable of the nuanced and precarious alliances based within other social movements, and influenced by the social changes of a certain temporal period. The scenario Sawer argues for is logical and theoretically sound: a notion of Australian liberalism in which its romantic/rational elements are equally embedded. However, the extent to which these ideals change, or are pitted against one another, only started to become evident for the Women's Movement in the period of the early 1970s.

Within the quest for a theory of the state that made sense to the Australian feminist experience, and a changing evaluation of what Australian feminism meant at a grass roots level, the myth of the happily married ideological subtleties of the Movement began to be challenged. The notion of sisterhood had achieved much: women had genuinely worked together to realise gains. However, beneath the New Left/counter cultural embrace of collectivity lurked another: diversity, or

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62 ibid., p. 3.

63 For example, Marian Sawer notes that earlier in this century the women's movement pursued both equal legal status and maternity allowances: Sawer (1993), p. 3. More recently, ambivalence from some sectors of the women's movement to state funding for women's services was challenged, and repositioned; as under the Fraser Government, and the policy of cutting funds to services like refuges, women had to fight to maintain what they were once wary to accept. See for example Girl's Own Collective (1981), 'Sparks fly in Canberra', *Girls' Own*, no.3, July/August, pp. 15-16; and International Women's Day Broadsheet Collective (1982) *International Women's Day 1982*, broadsheet, p. 3 (FTYC).

difference. Collectivity in some sense incorporates difference implicitly: there is no need to promote a policy of collective decision making, living, collaboration but for the inherent differences that exist between groups and individual women. These differences - already ever-present, but submerged by the axis of power between some women's groups and the state - began to reveal themselves increasingly throughout the late 1970s and early 1980s.

## Collectivity/Diversity

As has already been indicated in the Introduction, there is a stream of thought within feminist theory that argues that feminism is both a form of liberal theory, and simultaneously a method of its critique. For example, Pauline Johnson describes feminism as placed in 'a complex double relation to liberal thought.'[64] This means, simply, that the rationalist/liberal ideal of equality - championed by reformist groups like WEL to include women as well as men - co exists alongside a romanticist critique, which argues that liberal theory has no social theory to explain the sexual inequality and oppressions that do arise.[65] Romanticism, then, which emphasises the particular over the universal, constitutes the ideological basis for some theories of feminist experience - especially those that promote the lived. As such, the claims to difference that began challenging the collective identity of Women's Liberation in the 1970s had an historical/theoretical basis in romanticism, disrupting the rational, albeit feminised, power of sisterhood. In short, questions which pre-existed the rise of Women's Liberation (such as: Is there a universal woman? Are women's needs equal, both to men and to each other?) shaped both theories of women's relationship to the state, and the relationships between women inside the 'umbrella' of the women's movement.

From its earliest moments, the 1970s wave of Australian feminism - with its organisational and theoretical reliance on collectivity - was ruffled by a range of

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64 Pauline Johnson (1991), 'Feminism and Liberalism', *Australian Feminist Studies*, no.14, Summer, p. 67. See also Ursula Vogel (1986), 'Rationalism and Romanticism: two strategies for Women's Liberation', in Judith Evans et al (eds.), *Feminism and Political Theory*, Sage Publications, London and Beverley Hills, pp. 17-45. Note the discussion of this point in relation to feminist jurisprudence in Chapter Eight.

65 See for example Franzway, Court and Connell (1983).

questions of difference. From early debates around the meaning of class (emergent form the Marxist/socialist perspectives of the New Left) which attempted to link gender and capitalism as grounding a specific oppressed group,[66] there stemmed another more instrumental debate. If women were - as a group - class disadvantaged, how did a Marxist analysis account for the class segregation that occurred within the women's movement itself?[67] The discrepancies that occurred when white, middle-class and highly educated young women 'spoke for' sisters who were disadvantaged for more insidious economic reasons, was theoretically complicated by an increasing critique of determinist theory, (which seemed incapable of solving the practical problems of day to day organisation within groups and collectives.)[68]

Age was also a factor little considered in any systematic way in the rush to harness the sisterhood to Revolution. Despite some inter-generational exchange of political agendas and initiatives,[69] there was an arguable blindness of many of the young women involved in Women's Liberation to the struggles of Australian feminism that had preceded them.[70] However, this could be viewed as a form of historical ignorance, as opposed to willful neglect. The rash of Australian feminist historical texts in the mid 1970s,[71] in some respects, could be perceived as influential

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66 See for example Juliet Mitchell (1977), *Woman's Estate,* Penguin, Harmondsworth, UK (first published 1971); Michele Barrett (1980), *Women's Oppression Today: Problems in Marxist Feminist Analysis,* Verso, London.

67 See for example Anna-Maria Martell (1982), 'WLM and Working Class Women', *Girls Own,* No. 11, May/June, p. 21.

68 See for example: Heidi Hartmann (1981), 'The Unhappy Marriage of Marxism and Feminism: Towards a more progressive union', in Lydia Sargent (ed.), *Women and Revolution: A Discussion of the Unhappy Marriage of Marxism and Feminism,* Southend Press, Boston, pp. 1-33.

69 See Wills (1981), pp. 30-31 on the influence of Bessie Guthrie in the campaign to close the Paramatta Girls Training School in 1974, a campaign which opened up debate and examination of sex role stereotyping in education.. See also Susan Eade (1977), 'And Now We Are Six: a plea for women's liberation', *Refractory Girl,* March, pp. 3-11, in which she acknowledges that 'The Women's Liberation Group in Canberra always had some things in common with other, older women's groups which drew together people with similar interests', p. 3.

70 The claim that 'younger women' dominated the Movement during this period can be sustained from the demographic breakdown carried out by Wills (1981), p. 41.

71 These texts were: Miriam Dixson (1976), *The Real Matilda: Women and Identity in Australia 1788 to 1975,* Penguin, Melbourne; Anne Summers (1975), *Damned Whores*

consciousness-raising tools for the Movement as a whole: a means for grounding the present in the struggles of the past, and slowly coming to terms with the political heroism of many older women. However, the understanding given within the Movement to ageing *per se* was given little attention. Despite the specific feminist nature of the health and economic issues facing older women,[72] their automatic invisibility as 'older' citizens removed them from the vanguard issues of material production and femocratisation occurring during the 1970s and 1980s.[73]

In attempting to unravel a theoretical framework for a feminism which 'starts from difference, and which is equally concerned about racial, class and women's oppression',[74] Gill Bottomley[75] makes the point that the differences within the women's movement - like class, age and ethnicity - could not, or should not, be analytically separate. There exists between them a relational, albeit subjective, connection: an interweaving of axes of oppression and identity which 'converge to determine every event.'[76] As such, it is possible to determine how an early emphasis of Women's Liberation, women and work (with its related class analysis) spilled over into an increasing recognition of issues of ethnic diversity. Bottomley notes, in reflection upon her own work for example, how an investigation of women as workers revealed not only the 'profound significance' of kinship and cultural practices in the determination of work segregation, but also that a focus on 'ethnicity' in most respects depended on an understanding of the relevance of class.[77] The point, ultimately, for sociological and political analysis, was not only

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*and God's Police: The Colonisation of Women in Australia*, Penguin, Melbourne; Ryan and Conlon (1975); Beverley Kingston (1975), *My Wife, My Daughter, and Poor Mary Ann*, Nelson, Melbourne.

72 Bottomley (1994), p. 68.

73 This is not to suggest that older feminist women did not begin to organize their own groups and agendas. The Older Women's Group, Sydney was apparent in the community as early as 1982. See Older Women's Group (1982), 'Where Do Older Women Fit In?', *Girls' Own*, no. 7, May/June, p. 24.

74 Margaret Jolly (1991), 'The Politics of Difference: Feminism, Colonialism and Decolonisation in Vanuatu', in Gill Bottomley, Marie de Lepervanche and Jeannie Martin (eds.), *Intersexions: Gender/Culture/Class/Ethnicity*, Allen and Unwin, Sydney, pp. 75-91, p. 75.

75 Bottomley (1994).

76 Calvino (1988) in Bottomley (1994), p. 62.

77 ibid., pp. 60-61.

that gender and ethnicity mattered in a class reading of work and society, but that the distinction between women of diverse ethnic backgrounds and cultures needed to be taken into account across the gamut of the anglo-dominated perspective of Australian feminisms.[78]

The bias of an anglo-centric focus of early women's liberation activity is nowhere more evident than in relation to Aboriginal women, and Aboriginal women's activism. Jackie Huggins, in tracing the relationship between black and white women in Australia (a relationship that is still fraught, sometimes conciliatory, yet often racist) has noted that the focus has been on 'women as an entity constituting the oppressed. Yet this literature has never raised the question of whether women themselves are oppressors.'[79] Huggins notes the intense period of political activity within the Aboriginal community which coincided with the 1967 referendum, a source of pressure which merged with policy commitments within the Whitlam Government to land rights, and which ensured that the Aboriginal Movement maintained a visible position on the political scene by the early 1970s. It was, as Huggins notes, under these circumstances that Women's Liberation met the Aboriginal movement.[80]

The enthusiasm of the New Left commitment to cross-cultural inclusion and collectivity meant that Aboriginal women were readily invited to join Women's Liberation activities. However, this enthusiasm did not acknowledge the

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78 For example, Bottomley refers to her own chapter in Bottomley, de Lepervanche and Martin (eds.) (1994) in which she takes up the debate about NESB women in political activity. In a response to three Italian women from FILEF (Federation of Italian Workers and their Families) in which they countered claims that Italian women were apolitical and defined by the patriarchal oppression linked and mythologised by their religion and culture, Bottomley noted the comparative frameworks of their own political feminist heritage in Italy, and the lack of equivalent frameworks in Australia preventing them from articulating a voice in the same way. Not also the formation of groups by NESB women themselves to address their own particular issues- the Migrant Women's Association NSW was formed in 1973. (See: Franca Arena (1987), 'No More Crumbs' in Jocelynne Scutt (ed.) (1982) *Different Lives*, Penguin, Ringwood, Victoria., pp. 32-42).

79 Jackie Huggins (1994), 'Aboriginal women and the white women's movement', in Norma Grieves and AilsaBurns (eds.), pp. 70-79, p. 72.

80 ibid., p. 71.

oppression of Aboriginal women as Aboriginal primarily.[81] For example, expecting Aboriginal women to view their men as patriarchal, and the source of oppression against them, was, as Huggins notes, 'perhaps unconsciously repeating the attempts to separate Aboriginal women and use them against their communities.'[82] This notion of community, then, lay at the foundation of much of the misunderstanding, thwarted conversation and silencing of Aboriginal women with and by white women. Much of the public dissatisfaction with white women came over issues of representation, both the claim by white women to represent black sisters, and the stymieing of black sisters' opportunities to represent themselves.[83] Huggins argues that this impasse continues to based on the intellectual colonialism of white feminists: the inability to respect the cohesion of network, and responsibility to speak, that exists within Aboriginal women's culture. In short, white women - with their blanket and univocal (albeit, fragile) commitment to unity of sisterhood, ignored the differences of race and culture that collectivity, in its real sense, demanded. The irony, as Huggins notes, is that:

> Aboriginal women put into practice the ideal which white feminists refer to as 'sisterhood'. This concept was borrowed by feminists from the Black civil rights movement in america [sic], and is yet to be fully understood by white women who still suffer the legacy of a patriarchal culture which divides them.[84]

This 'legacy of patriarchal culture' can be argued to incorporate the epistemological undercurrents within contemporary western feminism generally: the previously discussed rational/romantic divide. The strands of these political philosophy

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81 Bobbi Sykes (1975), 'Black Women in Australia: A History', in Mercer (ed.), pp. 313-322.

82 Huggins (1994), p. 71. In terms of the issues campaigned for and against by the Women's Liberation Movement, there was a similar lack of understanding of Aboriginal women's difference to their white counterparts. For example, Huggins notes at p. 71: 'The whole women's movement was at that time concerned with sexuality and the right to say "yes", to be sexually active without condemnation. For Aboriginal women, fighting denigratory stereotypes and exploitation by white men, the issue more often than not was the right to say "no".'

83 See for example 'Uma' (1982), 'no blacks need apply', *Girls' Own*, no. 8, July/August, p. 21, in which she facetiously begins: 'Are you female, single (without children) anglo, between 19-35 middle class with aspirations of a working class veneer and willing to conform to restrictive styles of clothing and behaviour...then the Australian WLM is for you!'

undercurrents constituting, and illustrating, difference, under the umbrella of Australian feminism can be well documented by the crisis over sexuality.[85] Early Women's Liberation collective debates over the role, and inclusion, of men within their groups and activities were not easily resolved.[86] Many women (especially those within the changing libertarian-anarchist scene),[87] despite claiming a lesbian identity, were committed to working on a continuing basis with men in political formations existing outside of women's liberation or feminist groups themselves.[88] For other women, influenced by an escalating critique of men - *vis a vis* complex determinations of patriarchy - separatist politics seemed, both organisationally and philosophically, the logical and more politicised perspective for feminism to take.

These tensions were performed and articulated publicly in Sydney in 1981 during Mary Daly's visit to promote her book *Gyn/Ecology.*[89] For many women, Daly provided a romantic/philosophical/linguistic journey through the alienation of female identified space and sexuality. However, for many other women, the text was perceived as biologically essentialist, even racist, and was strongly critiqued for its resistance to feminist reforms within, and with, a state that was viewed by Daly as 'co-opting' and 'harnessing' a female essence.[90] The record of the public

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84 Huggins (1994), p. 75.

85 See generally: Susan Tiffin (1993), 'Lesbianism- an early controversy', in Refractory Girl Collective (eds.), pp. 76-84.

86 Wills (1981), pp. 34-37.

87 Coombs (1996), pp. 14-15.

88 See for example, Julie McCrossin (1981), *Women, Wimmin, Womyn, Womin, Whippets* ,pamphlet, (FTYC). This pamphlet was produced to coincide with Mary Daly's visit to Australia in 1981, and successfully parodied the language and extreme radical feminist politics espoused by Daly (and her followers) both during that visit and within her text *Gyn/Ecology.* McCrossin, who identified as a lesbian, yet had cogent and continuing links to libertarian politics and political collaborations with both men and heterosexual women, explained her position: 'I am concerned about the implications...of things I've heard or seen written such as men are mutants, it's no use putting energy into men, can heterosexual women be feminists, porn is violence against women...castrate all rapists, dead men don't rape, kill them in their cots etc...I decided to write an open article to spell out my misgivings...*my aim is to initiate written and open debate of ideas, not to have a go at anyone.*', p. 2.

89 Mary Daly (1991), *Gyn/Ecology: The Metaethics of Radical Feminism,* (first published 1978), The Women's Press, London.

90 See generally Ann Genovese (1996), 'Unravelling Identities: Performance and Criticism in Australian Feminism', *Feminist Review*, No. 52, Spring, pp. 135-151.

meeting, and subsequent correspondence in newspapers like *Girls' Own* reveals the levels of tension between women over sexual identity and notions of what feminism meant and to whom it belonged.[91] Claims to difference, then, increasingly began to erupt the seemingly indomitably smooth surface of Australian feminism.[92]

What must be re articulated in this history of the Sydney Women's Liberation Movement is the ever-present, yet shifting, subtleties of political and philosophical identity and experience that shaped our understanding of 'a feminist' Movement. That Movement - never static, never monolithic - was historically constituted through a range of ideas: liberalism, social contracturalism, Marxism, romanticism, anarchism, anti-colonialism, which were linked by shared texts and shared experiences.

Despite the reliance on collectivity as a tool (via New Left theory) to galvanise women into a semblance of solidarity to confront their 'common' oppressions, and to claim the political rights that were their due, that collectivity was always precarious. The realisation that no experience was 'common'; that class, race, sex, ethnicity, location and age mattered, was present from the very beginning. Yet the need to harness state agency - to institutionalise and realise some goals of society's transformation - ensured that strategic alliances formed by women of all backgrounds and political persuasions, with men, and through the state, were safeguarded by an understanding of sisterhood, collective action and the validation of personal experience through these. For Women's Liberationists of the 1970s, unlike any feminists activists who precede them, the personal was identified as truly political. However, because of the diversity of experience itself, there could never be a single, unified response by Australian women to any issue, or any problem, that faced them; and resultantly any policy intervention, activism, vision for the

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91 ibid.

92 Note also other claims to difference which became increasingly at the forefront of feminist thinking and organisational, politics during this period, such as location. The distinctions between states of different political history and experience of coercion - as for example Queensland under Bjelke-Petersen, and New South Wales under Wran; and the differences in societal response and attitude to women in rural and urban areas - created marked discrepancies in forms of political activism, and access to funding and services. (For a general overview, comparisons between the *Brisbane Women's Liberation Newsletter* and the *Sydney Women's Liberation Newsletter*, 1972-74).

future in any of the areas fought for by women's groups in the early 1970s were, on a continuing basis, not likely to be realised quietly.

*Section Two*

# HISTORY

*Chapter Four*

# NAMING DOMESTIC VIOLENCE

> I never really felt like I had any independence. I used to think, 'Well, what's the use of me trying with four kids, its impossible.' So I used to just spring back to my husband - I thought that might have been the better alternative of the two! I knew in my own mind I was really finished with him...when he tried to kill me...It was pay night and I had no food in the house. He came home drunk...I ran around the house and he caught me, really bashing into me, he said 'I'm going to kill you, you bastard!' They're the exact words he said and he got his hands around me [sic] neck. Somehow or other I got strength and pushed him away and headed for the door...I wasn't even game enough to grab the...children, I had to leave them there. And as I was going out the door he grabbed me hair, I wouldn't stop I was that scared...I just kept on going...[1]

The 1970s wave of feminist activity, as outlined in the previous chapter, was committed to collective action, and to attacking directly (albeit from a range of differing political perspectives) identifiable causes of women's oppression in society. It is not surprising that with a focus on issues of equal pay, child care, abortion, contraception - issues directed at freeing women's passage into the public realm - that a concentrated feminist attack on violence in the home would become an integral, indeed flagship, issue of Women's Liberation specifically, and a pluralist feminism more generally. It is similarly not surprising that the feminist activists of this period - with their relatively slow readiness to focus on feminist activisms of earlier periods[2] - did not reflect upon the campaigns around domestic violence (and

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1 Resident, Marrickville Women's Refuge, c. 1978. Narrative included in Vivien Johnson (1981), *The Last Resort: A Woman's Refuge*, Penguin, Ringwood Victoria, p. 31.

2 John Docker, in reflection on *The Dawn*, has noted that early 1970s Australian feminism was well aware of the debt to the past. He quotes Sue B[ellamy] from the first edition of the Women's Liberation newspaper *MeJane* (no. 1, March 1971, p 4): 'Women's liberation in Australia is not a freakish child of America. We have our own

related divorce law reform) that had preceded them. The submerged and dispersed nature of 'the problem' within civil jurisdictions, and the lack of policy directives towards domestic violence, the result, perhaps, of an over reliant faith in the principles of natural social evolution, therefore shielded the 1970s wave of feminist activists from the epistemological context of the struggle to kill the 'Animal in Man'[3] that had shaped the feminist focus of *fin de siecle* feminism.

Despite this dispersed public nature of domestic violence (in all the fragmented meanings that the 'public' connotes), the Women's Liberation Movement, with its attention strenuously directed toward the personal as political, quickly began to out domestic violence, and more importantly to smash the causative myths that surrounded it. Women' Liberation's early focus was on reform of the public, seeking a broadened concept of citizenship for women. The early campaigns - equal pay, abortion on demand, free child care and so on - were centrally about changing the perception of women in the public sphere, seeking to free them (if they chose) from the constraints of the home, and to realise their ability to work alongside and equally with men in non-traditional occupations. In this way, they extended the political and philosophical agendas of feminist activism which had preceded them.

Some issues affecting women in the private realm did not, however, have a political bridge (via the organising conceit of labour relations and opportunity) to a public sphere. I would include here domestic violence, rape, incest and sexual assault. These issues[4] required the formation of a discourse, a language, and a place for debate that was different from other campaigns such as equal pay, which involved

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traditions': Docker (1991), *The Nervous Nineties*, Oxford University Press, Melbourne, p. 4. However, despite this literary awareness, I would argue that the 1970s feminist moment did not automatically identify or link their own struggles with those of the past, that this itself required a rethinking of notions of history and historiography that were not substantially undertaken until the spate of specifically Australian feminist historical texts published in 1975.

3 See Chapter Two; Judith Allen (1990) *Sex and Secrets: Crimes Involving Australian Women Since 1880*, Oxford University Press, Melbourne, pp. 45-64.

4 See for example of the debates surrounding these issues in terms of feminist activism, legal reform and the state: Suzanne Franzway, Dianne Court and RW Connell (1989) 'Sexual Violence', in *Staking A Claim: Feminism, bureaucracy and the state,* Allen and Unwin, Sydney, pp. 104-129.

changes and challenges to societal attitudes and norms, yet could use existing rhetoric and agendas, like those of the Labour Movement to assist them in the struggle.[5] Andrew Hopkins and Heather McGregor, in reflection on this entrenched 'otherness' of domestic violence as a nascent discourse, concede that: '...change in the private sphere is altogether more difficult to achieve.'[6] They go on to argue that:

> What is needed... is value change and changes in the dynamics of personal relationships. This involves challenging the very essence of patriarchy, and not just the modification of some of its, arguably, more peripheral manifestations. Such changes cannot be readily brought about by legislation, although legislation does have its part to play. They depend, rather, upon the whole range of projects in which the Women's Movement [was] engaged [.][7]

This analysis, which hinges upon the recognition of the role of the Women's Liberation Movement forcing a general (as well as politico-juridical) awareness of domestic violence's existence, as well as its entrenched norms, is valuable. It acknowledges the crucial role played by a range of feminist activities in attaining a space for a discourse about battered women. Similarly, it acknowledges that legislation (or instrumental law) can not *in isolation* effect real change for women subjected to assault within the home.[8]

The role played by consciousness-raising groups is important in this context. Although domestic violence may not have been part of the initial agendas of Women's Liberation before 1974, the function of small discussion groups to examine the personal experience of women, and the 'collective nature of privately

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5 See Chapter Two for comments about the nature of post-suffrage feminism prior to Women's Liberation and its investment in achieving equal, public citizenship, a process implicated by working alongside traditional male organisations.

6 Heather McGregor and Andrew Hopkins (1991), *Working For Change: The Movement Against Domestic Violence*, Allen and Unwin, Sydney, p. 6.

7 ibid. By placing primary focus for effecting such change on alteration of 'the dynamics of personal relationships', McGregor and Hopkins are unable to give a nuanced reading of the constitution of those relationships in their *public* sense, or to recognise fully the role law - and legal liberalism-play in governing (and therefore controlling) the operation of those very relationships, p. 6.

8 See generally Margaret Thornton (1991) 'Feminism and Contradictions of Law Reform' 19 *International Journal of Sociology of Law* 45.

experienced pain'[9] played a crucial function in securing its visibility. Once women began to realise that their personal experiences were part of a wider pattern, part of 'something big and shared'[10] - like gender - those experiences could be formulated as political issues, and as such take a more formalised position on reactive feminist (and subsequently wider) political agendas.[11] The slow emergence of domestic violence into a public sphere, already undergoing a radical reckoning as a result of Women's Liberation politics, relied heavily on the ideology of collectivity, as both a tool of identification, as well as one of organisation.

It is important to note, from this perspective, the role that the refuge movement played in dragging domestic violence into a public consciousness, and into a public discursive space. Consciousness-raising may have provided an internalised *feminist* space for the initiation of a discussion around domestic violence, but an organised movement aimed at its harming effects against women required an understanding not only of the problem's social insidiousness, but also of the disparate elements of its constitution which required reform or recognition, elements that were controlled by already present discourses and values like law, policing, housing and welfare. In this sense, the Women's Liberation Movement's identification of women's oppression as a result of violence in the home necessitated a symbiotic relationship with organisational action both directed at, and increasingly problematised by, the public sphere.

## The Birth Of Elsie

Anne Summers, one of the founders of Australia's first feminist refuge, Elsie, has reflected on the collective awakening of a young political movement to the age old problem of violence in the home, and the dawning of the need to galvanise action against its submerged social identity:

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9 Marian Sawer and Marian Simms (1984), *A Woman's Place: Women and Politics in Australia*, George Allen and Unwin, Sydney, p. 178.

10 Catharine MacKinnon (1987), *Feminism Unmodified: Discourses on Life and Law*, Harvard University Press, Cambridge, (Mass.), p. 106.

11 McGregor and Hopkins (1991), p. 8.

> Early in March [1974], to mark International Women's Day, a huge two-day speak-out on violence was held at the Teacher's Federation Auditorium in Sussex Street [Sydney]. It was an emotionally wrenching experience to listen as woman after woman stood up and told of being raped, of being beaten, of being intimidated, of living in fear. Many of these women were telling their stories for the first time, finally able to reveal what had been a shameful secret. By the end of the first day, there was not a woman present who was not weeping in empathy and seething with rage: we had to *do* something.[12]

By March 14 1974, Summers, with Carole Baker and Jennifer Dakers, set in train a meeting to discuss the problem of homelessness for women, and as such set in train what was to become the Australian refuge movement. That meeting was advertised by a letter circulated through the Sydney Women's Liberation Movement. Beginning 'Dear Sisters', the authors described the bureaucratic slowness and unsympathetic responses of property developers and government agencies in lending their support for a night shelter for women in need of emergency housing.[13] This group of women[14] had in fact been approaching, amongst others, the Church of England - a slumlord owning literally hundreds of properties, many unoccupied, in inner city Glebe - for a premises in which to set up their 'night shelter.'[15] The project, in a feminist sense, was seen as sustainable,

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12 Anne Summers (1994), *Damned Whores and God's Police: The Colonisation of Women in Australia*, (first published 1975), Penguin, Ringwood Victoria, p. 518.

13 Carole Baker, Jennifer Dakers and Anne Summers (1974) 'The Women's Shelter', leaflet, March. (FTYC).

14 Other women involved in the establishment of Elsie included Di Beaton, Kris Melmouth, Lina Clayton, and Margaret Power. Clayton and Power , with Jennifer Dakers and Anne Summers were at the first meeting to work towards the establishment of a night shelter for women and children (what was to become Elsie. ) The minutes of the meeting, held on November 10, 1973, are recorded on a file card (held FTYC.) The notes establish for the record the division of duties, and reads: 'premises- Anne Summers, finance- Jennifer Dakers, welfare- Lina Clayton, Equip[ment] and food- Margaret Power'.

15 The collective had also tried other channels in order to provide accommodation for a shelter for women. A property developer called IB Kiernan had offered the collective the use of a small terrace house in Albion Street Surry Hills for a period of six months for one dollar a week, with an option to buy. The offer was refused, as the house was too small, and in such bad repair that the project would have become unviable. The Broughton Migrant Hostel in Burwood was also sought as a possible site. Fred Daly, Minister for Services and Property, was unaware that the property was vacant until alerted by the collective, at which point Broughton became a highly sought after site from other departments and the collective lost their claim. Margaret Whitlam, as a

despite the lack of response, and opposition, by a hierarchical institution which condoned domestic violence by remaining silent. Erin Pizzey, an English feminist integral in setting up the first refuge in the United Kingdom, had written a book on the experience called *Scream Quietly or the Neighbours Will Hear.*[16] Published in 1974, Pizzey's accounts of the Chiswick Centre struck a resonance in the Australian feminist community.[17] Although recounting the personal narratives of many women (and children) who had suffered horrific abuse within the home, the aims of the Chiswick group were broader (or perhaps more ill defined) than acting as a reform/lobby group for domestic violence. The reality of women's lives pointed to systematic difficulties in escaping the home situation, such as inadequate policing of 'domestics', economic reliance on the male breadwinner, and unsympathetic medical and welfare practitioners who more often than not advised women to 'stick it out', reinforcing the private context of domestic violence, and the normative legal and social reading of women's place being in the home. [18]

The focus on the home therefore was more than a focus on the site of the violence, the actual physical assault. Yet the location and nature of domestic violence was important. As Jocelynne Scutt in her study of violence in the family has noted, the weaponry of the domestic battlefield - the means by which women were abused - was startlingly private, and fittingly home related.[19] As well as the

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Board Member of Commonwealth Hostels Limited, was asked if she could use her influence to help the collective gain access to the property. She replied that "she approved of the plan but that ...as one board member she would be unable to influence a decision", 'Women adrift: Strange Lack of Samaritanism', *Nation Review*, March 1974. See also: correspondence between Anne Summers and Fred Daly, January 1, 1974, (FTYC).

16 Erin Pizzey (1977), *Scream Quietly or the Neighbours Will Hear*, (first published 1974), Ridley Enslow Publishers, New Jersey.

17 Anne Summers recollects ringing and writing to Erin Pizzey in early 1974: 'I phoned Erin to talk to her about how she got started. It was not an especially satisfying conversation as she was obviously stressed, babies were screaming in the background, and there was not a lot of relevant advice she could provide. Just do it, she said, and that was really all we needed', Summers (1994), p. 517.

18 See for example the inclusion of personal narratives of survivors of domestic violence in Pizzey (1977), and Johnson (1981).

19 Jocelynne Scutt (1984), *Even in the Best of Homes: Violence in the Family*, Penguin, Ringwood Victoria, p. 99; Royal Commission on Human Relationships (1977), *Final Report*, vol. 4, Australian Government Publishing Service, Canberra, p. 138.

guns, knives, cricket bats, body blows, door slamming, slapping, kicking, punching and shouting that men inflicted upon their spouses, Scutt's survey illuminated that:

> [W]omen were hit with an object, ranging from steel rule and hockey stick, through frying pan, chairs, small dustbin...an ironing board, brooms, an electric cord...had various items thrown at them- including a garden fork, a spade, hammers...ashtrays...empty cups and plates, plates full of food, books, bottles...a spanner and glasses[.][20]

In response to such assaults being so physically actionable *in* the domestic, was a feminist commitment to a provision of alternative accommodation for battered women, which brought with it a commitment to the problem of homelessness more generally.[21] In this sense the call in 1974 for women to lend their support to setting up 'an emergency housing' service for women provided a focus on domestic violence, and yet also entailed other agendas, and already present radical political strategies.

In 1973, the Sydney Push - allied with radical trade unions like the BLF, and local residents - became engaged in a battle to protect heritage low cost housing in Victoria Street Darlinghurst. Along with the pioneering of the Green Ban, one of the tactics used to best effect in Victoria Street was the squatting of empty buildings to prevent vandalisation by Frank Theeman (the property developer initiating the Victoria Street project, and accustomed to employing dangerous stand-over tactics to prevent opposition.)[22] The anarchistic nature of squatting, not unique to Sydney and with a history as a political strategy of the disadvantaged and dispossessed, was therefore not an alien concept to Sydney Women's Liberation with its cross-overs to the Push, and anarchist-libertarian politics. [23] Summers,

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20 Scutt (1984), p. 99.

21 See for example Elsie Women's Refuge Collective (1978), *Houses For Womin*, November, leaflet, (FTYC). It is important to note that the issue of housing and homelessness for women was originally perceived to include the problems of alcoholic, and mentally ill women without shelter, as well as domestic violence survivors needing somewhere to escape. See correspondence from Anne Summers to Les Johnson (Minister for Housing and Construction), December 2, 1974, (FTYC).

22 Anne Coombs (1996), *Sex and Anarchy*, Viking/Penguin, Melbourne, p. 296.

23 For general comments on the relationship between the Sydney Libertarians and feminism, see Chapter Five. For more specific commentary on the politics of squatting in Sydney during this period see Andrew Jakubowicz (1984), 'The Green

Dakers and Baker, with the support drawn from the March 14 meeting and local residents,[24] and in response to the lack of response from legitimated channels, squatted two Church of England houses in Westmoreland Street Glebe (one of which was name plated 'Elsie') and as such claimed a spatial location for the beginning of the feminist struggle against domestic violence. [25]

The initial squatting and establishment of Elsie said much for the enthusiasm and commitment of the women involved. The houses were in a derelict condition, necessitating a cleaning and painting job that pushed the process of possession beyond merely changing the locks on the doors. When the houses were as ready (or as habitable) as volunteer labour and donations would allow, Summers called the press to announce Elsie open. Three days later, their first resident arrived. Within six weeks, 48 women and 35 children had passed through Elsie, and it was constantly full to capacity.[26]

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Ban Movement: Urban Struggles and Class Politics' in John Halligan and Chris Paris (eds. ) *Australian Urban Politics*, Longman Cheshire, Melbourne, pp. 149-166. It is important to note that the crisis around public housing was a political struggle in which the Elsie collective continued to participate, especially over plans of the Fraser Government to redevelop the Glebe Project, which was perceived as eliminating low cost housing for inner city residents, see Glebe Residents Group (1978), *Residents Meeting: Important Notice to all Glebe Residents,* August, leaflet (FTYC). The participation of the Collective in the fight against the Glebe Project caused some state agencies to dismiss their tactics as 'anarchistic'. The tensions between the political strategies of anarchism and feminism were complex, as Pam Stein and Terri Bear articulated in 1979: '...Elsie got shat [sic] on by sundry bureaucracies because the Glebe Project thought we were anarchists. Not realising of course that Anarchy and feminism have their similarities BUT we're feminists first and not aligned to any male left groups', *Rampant Non Involvement*, February, unpublished article, (FTYC).

24 Summers (1994), p. 516 has noted that approximately 100 women helped set up Elsie over the course of a weekend. Residents of Westmoreland Street, Glebe (where Elsie was initially located, until receiving improved government provided accommodation in Derwent Street Glebe in 1976) also participated in the process: '[they] brought bundles of bedding and household utensils and by nightfall the women's refuge was a reality', *Nation Review*, March 1974.

25 The 'coincidence' (or serendipity) of the houses squatted already possessing a woman's name ('Elsie') was to start a tradition amongst feminist refuges generally. In the years following the birth of Elsie, new refuges included Naomi in Adelaide, Bonnie at Liverpool, and Delvena in Chatswood. See for example: Refractory Girl Collective (1977) 'Women's Refuges', *Refractory Girl*, September, p. 18.

26 'Elsie' (1996) *Timeframe,* ABC Television. It is important to note that although the focus on the refuge movement and its role in contributing to a discourse on domestic violence is centred in this chapter around Elsie, the proliferation of feminist refuges

In accordance with the principles of collectivity that shaped Women's Liberation itself, the vision for Elsie[27] was clear: a holistic approach to foster women's independence from men, and an actualisation of the ways in which various agencies prevented and controlled that independence. [28] However, the idea of a shelter for women was not new. Since the 1890s, shelter for homeless women, including those whose state of homelessness was caused by violence, had been provided by benevolent groups and charities,[29] and this means of aiding women had continued unabated throughout the twentieth century. For example, an ex-resident of the Marrickville Women's Refuge, in a personal recollection, has noted her experiences of seeking help from both the Traveller's Aid Society, and the Salvation Army, in the late 1950s. [30] The difference of the growth of refuges in the 1970s was that they were specifically *feminist* places, derived from the energy and ideals of Women's Liberation. As Anne Summers has reflected:

> We resolved that *our* refuges (and we chose that name deliberately to differentiate them from shelters run by...[other] organisations) would provide women with total psychological, physical and economic support.[31]

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after its establishment can not be glossed. The Melbourne Half-Way house (in Kew) began soon after, by 1979 there 93 refuges receiving federal funding and 100 in operation, and by 1987 the federal government was funding 163 women's refuges, and a further 20 non-accommodation support services. McGregor and Hopkins (1991), p. 11.

27 'The vision for Elsie' can be extrapolated to other refuges, although operational directives sometimes differed: see Refractory Girl Collective (1977).

28 Elsie Women's Refuge Collective (1975), *Submission to the Women's Commission*, (FTYC). The collective argued that: 'attitudes to women and violence have not been changed by the men who perpetrate the violence- the bureaucracy- the cost of living has risen and welfare assistance hasn't. Housing is more expensive, and harder to find, job opportunities are limited, retraining and child care has been cut.' Some of the ideas for Elsie highlighted the independence factor: 'a self-help food co-op for women who have left Elsie; the return of the house management to women who are staying there and an extension of as much of the administration as possible to the women at Elsie; more structured CR meetings and a general process that allows women to become aware of themselves as their own people and not the property or pawn of someone else.', p. 40.

29 See discussion in Chapter Two on the provision of shelter for women in the 1890s.

30 Johnson (1981), pp. 17-26.

31 Summers (1994), p. 519.

The means by such a holistic enterprise was to be run was also based on collective principles, as Vivien Johnson (who worked at the Marrickville Women's Refuge, which began in 1976) noted: 'The Refuge would be a living and working community based in autonomy and self-management.'[32] However issues of difference, which disrupted claims to collectivity within the Women's Liberation Movement at large, also disrupted the refuges as a microcosm of the ideals and practices of the broader feminist community.[33]

The commitment of refuges to a politics of collectivity, in organisation and practice, meant a provision of non-professional, non-institutional accommodation; and as such provision of an environment where women could develop a common understanding both of their position as a group, and how society contributed to their situation as individuals.[34] As Heather Saville notes: '[if] workers are able to sit around the kitchen table over a cup of coffee, rather than behind an office desk, their responses and life experiences are instantly recognisable as similar to one's own.'[35] However, the workers, drawn from a movement that undoubtedly had its strongest support base in a middle class, young, and educated demographic,[36] although aware of the implications of class in a theoretical sense, had a hazy awareness of its practical significance. Pam Stein and Terri Bear, in reflecting on the Elsie collective, noted: 'This is certainly a middle-class movement! What happened to discussion about class and race? Discussion shouldn't be about the working class out there - but our relationships with the very women around us!'[37] Although it was not just working class women who sought accommodation and assistance in refuges (indeed the refuge movement helped identify the cross-class nature of the problem) it could not be denied that working-class women, with the

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32 Johnson (1981), p. 3.

33 See comments in Chapter Three regarding difference/collectivity in the Australian Women's Liberation Movement in the 1970s.

34 Heather Saville (1982), 'Refuges: a new beginning to the struggle', in Carol O'Donnell and Jan Craney (eds.) *Family Violence in Australia,* Longman Cheshire, Melbourne, pp. 95-109, p. 104.

35 ibid.

36 See comments in Chapter Three, and Wills (1981), p. 20.

37 Stein and Bear (1979).

least access to alternative forms of help, suffered a 'double-oppression.'[38] Despite tension over how collectives were run, and who got to speak (a difficult process without traditional hierarchical structures),[39] the awareness of class,[40] and other significant issues of difference such as race and ethnicity, were constantly drawn into question by the fact of so many different women living and working together. The Elsie Collective noted the nature of these issues in their submission to the Women's Commission in 1975:

> The ways in which race and class cut across sexism must be faced both within Elsie and the entire Women's Movement if change is to be effected. The inherent white middle class nature of the...collective must work not to become irrelevant to the women who stay at Elsie. Unless Elsie is a voice for the women who stay there and not a collective deciding what is best for women, Elsie will become patronage. If Elsie is to find its potential as a feminist refuge these issues must be faced and incorporated in our struggle for change.[41]

The implications of this growing awareness of women's differences, despite their commonality, was not in itself an easy or straightforward process, with the difficult terrain of white refuge workers and femocrats coming to terms with the unique situation of Aboriginal battered women, and as such their own internalised racism, perhaps providing the most telling example.[42] However, despite the difficulty in

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38 Saville (1982), p. 104.

39 See generally Johnson (1981), pp. 154-169, which documents (from transcripts of Workers and General Collective Meetings at the Marrickville Women's Refuge) the tensions and daily problems faced when working collectively.

40 The class issue can be evidenced over issues like what food to buy cooperatively. The 'educated' middle class workers, with a privileged reading of, and preference for, nutritional and 'healthy' food caused some conflicts with the taste and preferences of some working class residents. See: Johnson (1981), p. 39; and *Timeframe* (1996).

41 Elsie Women's Refuge Collective (1975), p. 40.

42 See Tikka Jan Wilson (1996), 'Feminism and Institutionalised Racism: Inclusion and Exclusion at an Australian Feminist Refuge', *Feminist Review*, no. 52, Spring, pp. 1-26. See also the recommendations of the New South Wales Domestic Violence Task Force Committee (1981), *Report of New South Wales Task Force on Domestic Violence*, NSW Women's Coordination Unit, Sydney, 'Appendix Three: Report on Aboriginal Women and Domestic Violence', pp. 99-120 (herein referred to as The DVTF Report). See especially the recommendations for the establishment of refuges for Aboriginal women run by Aboriginal women in rural areas of need. See also Judy Atkinson (1990), 'Violence in Aboriginal Australia', *Refractory Girl*, no. 36, August, pp. 21-24, especially comments about 'Men's Business/Women's Business', p 21. Note also the difficulties faced by NESB women, both in terms of immigration policy,

incorporating differences between women into a political organisation based on collectivity, the refuges provided a unique spatial location for the potential for women to understand what it meant to *be* a woman, and a mother, in a society which discriminated against all women legally, socially and economically,[43] but against some women in more insidious ways.

**Breaking The Silence**

In tandem with the problem of how to realise a collective approach within the refuges, which illuminated such great differences between women, was the almost insurmountable problem of how to translate that approach into the maze of public agencies that had traditionally controlled them. The realisation by women working in the refuges of the shared reality of women as *battered* women increasingly shaped their perceptions about domestic violence itself. The nature of the refuge as community and collective - despite the simmering differences - ensured that the women involved, both workers and residents, constantly communicated their experiences and lived realities of violence.[44] The result was a heightened awareness of the public myths that surrounded domestic violence (or 'wife-beating'). These myths perpetuated not only a silence around domestic violence as a crime,[45] but

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language and cultural difficulties. See Johnson (1981), pp. 181-192, for narratives of migrant women who escaped to Marrickville Women's Refuge in the 1970s. See also Marian Sawer and Abigail Groves (1994), *Working From the Inside: Twenty Tears of the Office of the Status of Women*, Australian Government Printing Service, Canberra, p. 76 regarding NSW Women's Coordination Unit 'Wife Bashing is a crime-you don't have to put it up with it' poster campaign, which was published in ten languages. Regarding immigration law and policy see Jenny Earle, Alex Herron, Linell Secomb and Julie Stubbs (1990), 'The National Domestic Violence Education Program-A Commentary', *Refractory Girl*, No. 36, pp. 3-6, p. 5.

43 Saville (1982), p. 104.

44 Elsie Women's Refuge Collective (1974), *We Are Rising- Elsie Women Speak*, August, pamphlet (FTYC). See also Johnson (1981), pp. 128-175.

45 Note that the phrase 'Breaking the Silence' formed the media/public awareness arm of the National Domestic Violence Education Program (NDVEP), a federal initiative funded between 1987 and 1990. The slogan was used in April 1989 to launch 'Break the Silence', a national domestic violence awareness month, that has now become an annual Stop Domestic Violence Day (April 26). Sawer and Groves (1994), p. 76. The campaign, in a public consciousness sense, can therefore be assessed as a successful initiative. However, the language used- despite its links to mythology around the private- has been problematic for some commentators in terms of its whitewashing of

exacerbated the attitudes of psychiatrists and psychologists which had labelled the battered woman masochistic because she did not leave her husband or her home.[46] One of the factors contributing to the battered woman's reluctance to leave the site of violence- her need to be housed - had of course already been recognised by the establishment of the refuges in the first place. However, the associated and collateral myths that surrounded the shelter issue were increasingly identified, and tapped into the already present agendas of the burgeoning Women's Liberation Movement.[47] For example, the Marxist-feminist analysis of the interrelated problems incurred by women as a result of the nuclear family, and unequal access to work and pay, were given real meaning through the lives of women escaping to refuges. It was more difficult for women to get housing (as single mothers) because of inbuilt prejudices towards women, and towards low income earners generally; and it was more difficult for most women to get a job to alleviate this situation as they tended to be less qualified, less able to work full time because of child care responsibilities, and were paid less than men for the same work.[48]

The task facing the refuges in dismantling the many myths surrounding domestic violence was subsequently enormous. While seeking to act as a consciousness raising experience for battered women themselves, the realisation and provision of a place to go to escape domestic violence had wider implications.[49] Fighting for recognition that a woman could be homeless while she still had a house to go to involved an ever-expanding understanding that there was a sense of homelessness beyond a woman's control. The refuges therefore had to deal with the matrix of

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domestic violence's criminal nature. For example, Earle, Herron, Secomb, Stubbs (1990) have noted: 'We are conscious that the campaign focus on "breaking the silence" rather than advocating particular strategies or solutions can be seen as weak and intellectual. Inevitably, perhaps, it bears the hallmarks of political compromises and pragmatism. A more vigorous slogan highlighting the consequences for perpetrators- such as "Bash your wife, Go to Jail" may have had more impact on men as perpetrators, a greater deterrent effect.', p. 4.

46 This notion of a battered woman's 'masochism' in her inability to leave reinforces the argument in Chapter Two about the 'pathologised' family in state policy.

47 See Chapter Two for a discussion of the public mythologies which surrounded domestic violence.

48 DVTF Report (1981), pp. 37-38.

circumstances, agencies and myths around violence that constituted that lack of control and inevitability.[50] In short, while understanding the ways in which the refuge could remain a base of social support, friendship and companionship, there existed a need to intervene in some of the 'hassles'[51] that made up the 'wider world that still discriminat[ed] and exploit[ed] women.'[52] Elsie, for example, acted as an intermediary between residents and the Department of Social Security and Youth and Community Services (to gain child support and benefits); the Department of Housing (to help women find accommodation they could afford, and to help them save for bond money by allowing them to stay at Elsie for longer periods); provided access to legal services, Legal Aid (to assists in divorce and custody proceedings, and into the 1980s with the provision of Apprehended Violence Orders); worked with Women's Health Centres; and acted as community liaison officers speaking to service clubs, police, government departments and voluntary agencies 'just making [domestic violence] real to them'.[53]

The recognition of the magnitude of the need for intervention by the nascent feminist refuge movement brought into sharp relief two intertwined problems for the movement itself. The first was funding, and the second was the difficulty in attempting to forge a relationship with the state (already held suspiciously at arms length, often with contempt) which could guarantee that funding. These issues emerged quickly, with Elsie again leading the way into the murky waters of theorising about domestic violence, feminist agency and state relief. As Ludo McFerran has noted:

> The needs of Elsie quickly outstripped the resources of voluntary woman hours, donated food and furniture. Pandora's box was open, and the reality of the scale of domestic violence and women's

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49 Elsie Women's Refuge Collective (1974), *We Are Rising- Elsie Women Speak*, August, pamphlet, (FTYC).

50 Johnson (1981), p. 13.

51 ibid., p. 130.

52 ibid.

53 Elsie Women's Refuge Collective (1974), *Elsie Women's Refuge: Report*, December, unpublished report, (FTYC); Johnson (1981), p. 131.

> homelessness shocked even feminists who had been theoretically prepared.[54]

Despite volumes of correspondence and a difficult initiation into the process and procedures of writing submissions for Government funding,[55] Elsie did exist for nine months on its own. The collective found themselves, despite their shock and theoretical awareness, in a double bind. They were considered 'ratbag', middle class feminists (or worse, probably lesbians) by agencies and therefore not deserving of government monies;[56] and accused by other feminists of 'being reckless with these women's emotional lives by failing to provide them with privacy and stability.'[57] The gap between the continuous private actions of Elsie workers and state public recognition and support was breached only after Bill Hayden (Federal Minister for Social Security) accepted a personal invitation to visit Elsie. What he saw reportedly shocked and appalled him: from the derelict conditions of the houses to the overcrowding, which could not help but suggest the lengths battered women would go to in order to escape their domestic abuse. After his return to Canberra, Elsie immediately received funding.[58]

## Opening Pandora's Box

The new relationship between the state and feminism signified by the founding of refuges was mutually beneficial, and for both, extremely ambivalent.[59] Neither was sure it wanted to have much to do with the other, and in this difficult relationship the new breed of Femocrats became the intermediaries.

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54 Ludo McFerran (1990). 'Interpretation of a Frontline State: Australian Women's Refuges and the State', in Sophie Watson (ed.) *Playing The State: Feminist Interventions*, Allen and Unwin, Sydney, pp. 191- 205, p. 191.

55 This issue can also be evidenced in terms of other refuges, such as the Marrickville Women's Refuge: see Johnson (1981), p. 131.

56 *Timeframe* (1996); 'Project Office pours thousands of dollars into new Elsie's', *The Glebe*, 15 October 1975.

57 Summers (1994), p. 519.

58 Ludo McFerran (1991), *Elsie and The Women's Refuge Movement*, unpublished manuscript, (FTYC), p. 14; *Timeframe* (1996).

59 See discussion of the relationship between 1970s feminism and the state in Chapter Three.

In 1975, International Women's Year (IWY), one year after the initial establishment of Elsie, the Whitlam Government set up an IWY Secretariat. Operated by feminists, the Secretariat's jobs included distributing and managing one-off grants to women's groups throughout the year: an opportunity to which the refuges were quick to respond.[60] The Secretariat's brief, however, also included initiating policy reform for the benefit of women across government departments. One of the initial stumbling blocks to the state's recognition of Elsie and other refuges (and domestic violence more generally) was the juggling of the funding issue between portfolios: that is, who was to be responsible for opening the door for the instrumental entry of domestic violence to the public sphere?

The Federal Government, despite feminist support for an association with the Department of Housing, had been leaning toward the Department Social Security (DSS.) The DSS, however, had exhibited hostility to the general proposition, and had displayed 'anti-feminist tendencies'.[61] The Secretariat believed that by funding refuges with IWY funds, the DSS would be relieved of the problems associated with reversing its position. The compromise of a one-off grant in lieu of sustainable funding was not well received by the refuges themselves. As Ludo McFerran notes: 'These were niceties of pawn broking which activists found hard to appreciate from the squalid and overcrowded circumstances of the refuges, and there were some angry meetings between IWY representatives and front line feminists.'[62] However, the IWY incident did not anger the refuge movement enough to bite the hand that was uncomfortably beginning to feed it. The relationship between the grass roots feminists and Femocrats, despite its tensions, was not hostile: there were still shared notions of collective action and feminist

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60 McGregor and Hopkins (1991), pp. 36-38.

61 McFerran (1990), p. 192.

62 ibid. Ludo McFerran also comments on the light hearted aspects of problems between grass roots activists and bureaucrats: 'The problems...occurred on a more daily basis, with entire collectives turning up for meetings, or displaying even stranger quirks. At one time, most of the Elsie collective adopted the surname Egg. A member of the Marrickville Women's Refuge Collective commonly attended meetings with a bureaucrat in a tuxedo', McFerran (1991), p. 18.

identity[63] (although what that meant, and to whom it belonged, was increasingly unclear.)

The IWY Secretariat, for example, helped to break the Government deadlock on recognition of funding for refuges. In mid 1975, under ever mounting electoral pressure, the ALP Government faced a crucial by-election. As the women's vote had been proven to be such a decisive factor in 1972 (due largely to the efforts of WEL), by 1975, with an increased awareness of the role of women's citizenship, that vote became crucial. A Secretariat member was sent around the country to discover what Australian women wanted from their government. The response was overwhelming evidence of the currents Elsie had tapped: across the political spectrum, women's refuges were considered the highest priority of need.[64] Consequently, on the Secretariat's advice, Prime Minister Whitlam established a national refuge programme, fully funded by the Commonwealth, and vetoed the DSS as the administrator of domestic violence's public face in preference for the more willing Department of Health.[65]

In a single year, the refuge movement had seen extraordinary success, in terms of public recognition. The bravery and initiatives shown by Women's Liberation in regard to other gendered harms did not inspire this kind of recognition from Australian women across the board (that is, not just those who identified with Women's Liberation), men and state agencies in general. Rape Crisis and Women's Health Centres, for example, had emerged throughout this same period, and had also lobbied successfully for funding (and therefore a concomitant sense of public identity.)[66] However, the problems they identified and worked through did not

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63 As McGregor and Hopkins (1991) note: 'It is clear that the dynamism of the movement against domestic violence has come from the refuge workers. Femocrats have played a vital support role. [T]his is not to be read as belittling their involvement; it has of course been invaluable. It is the collaboration between women inside and outside the bureaucracy which has enabled the movement against domestic violence to make the progress it has.', p 43; Sawer and Groves (1994), pp. 75-79.

64 McFerran (1990), p. 192.

65 ibid.

66 Gisela Kaplan (1996), *The Meagre Harvest: The Australian Women's Movement 1950s-1990s,* Allen and Unwin, Sydney, p. 100; Hester Eisenstein (1996), *Inside Agitators: Australian Femocrats and the State,* Allen and Unwin, Sydney, p. 26.

engage the community as strongly, or set the public sphere ablaze with feminist idealism as quickly, as did domestic violence. McFerran has suggested that this was 'an indication that the victims of domestic violence were perceived as less blameworthy than rape victims.'[67]

It would be incorrect to extrapolate, from the response of the Whitlam Government to the issue of domestic violence, a suggestion that the state (and the Australian people at large) endorsed wholeheartedly the openly radical agenda of the feminist refuge movement. This was, after all, a movement that articulated the theory that domestic violence is a manifestation of patriarchy, of that is, systematic male supremacy, whereby men exert authority by violence to maintain their legally legitimated position of hierarchy within the home; a theory that necessitated exposing the myths that surrounded both the family and family violence.[68] The harnessing of public emotion around domestic violence could be credited to the media 'savvy' of the refuge workers, and the generally sympathetic projection of the refuges by the media itself. For example, the immediate response of Anne Summers (a journalist) on the establishment of Elsie, was to call the press to initiate publicity and awareness of the refuge and reasons for existence, and the media continued to oblige the refuge movement with sympathetic portrayals. [69] Despite some lampooning of the refuge collectives as radical lesbian anti-establishment 'ratbags',[70] the overwhelming response was a focus on the plight of the battered women themselves, though often unwittingly reiterating the myths around domestic violence that the Women's Movement wished to dismantle. The battered

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67 McFerran (1990), p. 193.

68 Elsie Women's Refuge Collective (1979), *The Elsie Women's Refuge*, pamphlet, (FTYC).

69 *Timeframe* (1996); 'Sydney-Elsie Women's Refuge', *The Tribune*, 19 August 1975; 'Elsie- a refuge away from home', *Sydney Morning Herald*, 3 March 1975; 'Refuge for battered women', *Sunday Telegraph*, 24 March 1974.

70 'Project office pours thousand of dollars into Elsie', *The Glebe*, 15 October 1975. This article provided a damning portrayal of Elsie and its workers. The article begins: 'This refuge- purportedly a centre for battered women but in reality a half-way home for female homosexuals.' The ensuing argument (and accompanying cartoon) discuss the alleged waste of public money to house and improve conditions for battered women, and depicts the Elsie collective as drug addicts, zealous lesbian separatists, filthy in their personal habits and environment, and taking advantage of the funding conditions made available by the Whitlam Government.

woman in 1975 was perceived by the media as a 'faultless working-class wife and mother, trying to protect herself and her brood from the psychotic and inebriated batterer - later to be known as "the beast of suburbia" syndrome.'[71] 'The Animal in Man' was therefore still prowling the public/private divide. Yet despite its increasingly identified inaccuracies, the sympathetic media portrayal of the battered woman was exploited by a Movement seeking community support and public recognition. By insisting on the identification of domestic violence as a moral social issue, by naming it 'domestic violence' (a language benign enough to attract government support), the Women's Movement dragged domestic violence into the public consciousness with the willing help of a modernised Fourth Estate.[72]

As the state began to fulfil its moral obligation to domestic violence survivors, the grass roots refuge movement articulated the implications for broader feminist concerns. Of the public image of the battered woman (in the early 1970s at least) the collective of Melbourne's Women's Liberation Half Way House said this in 1975:

> One is left to wonder how much of this image is true (since it is so acceptable) and how relevant it is to what we are actually doing. Is it helping to increase public awareness of the oppression of women as we hoped it would, or just serving to label oppression in a way that most women can avoid relating personally to, and seem to deal with it so that problems appear to be solved?[73]

The initial government response to the domestic violence issue, prepared by Health and feminist bureaucrats, was to follow the initiatives of the collectives themselves. In the process of distributing one-off grants to women's groups throughout IWY, they recognised the communal, non-institutionalised self-help model of the refuges,

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71 McFerran (1990), p. 193.

72 The complexities of the relationship between media, state and feminism during this period are deserving of closer analysis than can be provided in this context. The tensions between differing perceptions of this relationship have been articulated by Jocelynne Scutt in these terms: 'The 1970s saw a reorganisation of political protest on the part of women- or perhaps a willingness on the part of the media and the authorities to acknowledge that feminist protest was real, and must be taken into account.', Jocelynne Scutt (1988), 'Legislating for the right to be equal: women, the law and social policy', in Cora Baldock and Bettina Cass (eds.) *Women, Social Welfare and the State in Australia,* Allen and Unwin, Sydney, pp. 227-248, p. 227.

73 Melbourne Women's Liberation Halfway House Collective (1975), 'Half Way Where?', *Scarlet Woman,* September, p, 12.

which used the experiences of battered women to help identify the root causes of violence and homelessness, which the broader (feminist) community then worked to eradicate.[74] The theory was to directly attack the neo-liberal, laissez-faire ideologies that had been directed toward family violence in the past; to attract and increase state intervention (despite the theoretical problems associated with doing so); and to draw together the dispersed technologies and discourses like medicine and psychology which had controlled the battered woman, in the aim that by treating them *collectively* they could be reformed.

For the woman working on a day-to-day level, in still inadequate conditions despite the funding increases, the guidelines adopted by the IWY Secretariat were welcomed, albeit with reservations. The Elsie Collective, in their submission to the Women's Commission in 1975 canvassed some of these concerns:

> Elsie can have feminist significance only if is part of the Movement to eradicate the causes of violence against women. If Elsie merely becomes an agency for rescuing battered women we may as well pack up and hand over to the Salvation Army. We don't think that Elsie has become a mere welfare agency, but it will if it remains in isolation. It must be seen in different terms and operate in different ways so that it isn't welfare work, but part of the struggle for the liberation of women, part of the struggle to destroy the causes of violence and sexism, part of women's revolt.[75]

This revolt - in essence a claim for the autonomy of feminist philosophy and collectivist politics within a public sphere - was in response to suggestions from a Cassandra-like femocracy that the refuge Movement create for themselves a more organised - and permanent - structure.[76] In 1975, Femocrats had advised the

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74 McFerran (1990), p. 193.

75 Elsie Women's Refuge Collective (1975), p. 40.

76 I use 'Cassandra' in this context, as the fears of the femocrats in 1975 as to the potential problems to be incurred under a revised federalism were, by 1977-78, fully realised. The changes and cuts made to women's services under the Fraser Government resulted in responsibility for funding being left to the states, and the development of policy and provision of services to refuges (and other feminist initiated services, such as Women's Health Centres) were left to run on a loose ad hoc basis until the NDVEP was launched in 1987. see: McFerran (1990), Saville (1982), Meg Smith (1984), 'The Struggle for Women's Health Centres', *Refractory Girl*, May, pp. 3- 6; Girls' Own Collective (1983), 'NSW Women's Services herstory', *Girls' Own*, November/December, p. 30; McGregor and Hopkins (1991), pp. 36-38.

refuges to form themselves into a national confederation in order to maintain a sustainable voice in Canberra, as they were well aware that a federalist approach could result in the domestic violence issue being pursued at an *ad hoc* state by state level.[77] To maintain and develop a national policy on domestic violence, one which took into account federal issues like housing, family law, and welfare which affected battered women, refuges had to campaign nationally. Despite steps taken toward a national conference and newsletter,[78] leading to a *loose* confederation, many refuges (especially the 'more vocal' from Sydney and Melbourne)[79] perceived the Femocrats' proposal as a bureaucratic *qua* masculinist co option of feminist principles and philosophies, a substitution of a peak 'dictatorial'[80] body for the community collectives committed to developing autonomy for the individual refuges and their individual residents. As such, the refuges made a stand for revolutionary politics, and took their chances bravely in what was perceived to be a hostile public sphere.

The role of 1970s feminism, and of the Women's Liberation Movement specifically, in the birthing of a discourse on domestic violence can not be underestimated. The importance of traces to a radical New Left identified themselves through what Sawer and Groves have articulated as 'the collective naming of sources of oppression, and the use of new words such as sexism and

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77 The refuges rejected this plan in 1975, causing Sara Dowse to comment: 'the plan was defeated, largely through the refuges' suspicion of the bureaucracy and the inability of many of them to look beyond the immediate needs of their individual collectives.', quoted by McFerran (1990), p. 195. Despite this initial reticence and despite the fight of the refuges themselves to collectively organise to maintain women's services under Fraser, the movement toward a formalised national policy on domestic violence was initiated in 1979, by femocrats. See Maria Girdler (1979), *Women's Adviser's Conference: Domestic Violence - Toward a National Strategy*, press release, 8 November, (FTYC)

78 By 1978, Halfway House in Melbourne had organised the first National Refuge Conference,

'in recognition of the necessity for the communication and sharing of knowledge and ideas on a wide scale.', Saville (1982), p. 103.

79 McFerran (1990), p. 174.

80 ibid.

male chauvinism, and the urging of social transformation."[81] What the collectivist approach therefore achieved for the problem of family violence was an awakening of battered women themselves to the commonality of their predicament, and an awakening of the wider feminist community to the need to target and *name* domestic violence as a particular, and insidious, form of male suppression of women's autonomy, as well as a threat to their safety.

Despite the tensions within the Women's Liberation Movement, and subsequently the microcosmic refuge movement, over how to deal adequately with domestic violence, what set the 1970s feminist activity around the problem apart from that of, for example, the 1890s, was a concrete recognition of the need to smash the rhetoric and ideology of privacy which engulfed it. Grass roots feminist activists, and indeed battered women themselves had difficulty with and suspicion of a state that had evidenced itself as traditionally wavering between impartiality and hostility as far as domestic violence was concerned. However, the dispersal of technologies which dealt with the battered woman in the decades, and centuries, preceding the 1970s had proved that the consequences of domestic violence for women in effect breached the public/private divide. Domestic violence may have been contained within the domestic realm: legally incorporated as a male dominion requiring a woman's civil subordination, and as such a man's criminal immunity if he exerted his authority over her by violence. Domestic violence may have also been - in a discursive sense - hidden from normative cultural values by its solid immersion in the mythology of civil order, with its notions of public and private spheres. However, domestic violence, as the Women's Liberation Movement learned through consciousness raising exercises and collectivist refuge communities, was also about housing, equal pay, child care, divorce, custody and ultimately criminal law: in short, the myriad of feminist identified social and political realms which subordinated women, even if they were not also victims of criminal assault in their own homes. This range of issues did not provide reasons for women being beaten by their spouses, but it did provide reasons for their difficulty in escaping their private horror. The break-down of the causative myths around domestic violence

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[81] Sawer and Groves (1994), p. 3.

by Women's Liberation tapped into existing campaigns and strategies based on equality, liberation and autonomy for women, such as the struggle for equal pay, which had already begun to disseminate what the 'public' meant for feminism, as well as how feminism could transform the public. As an Elsie worker noted in 1975: 'The mere existence of a refuge, offering to give women shelter and protection from violent husbands and the opportunity to begin a new life, is an implicit proclamation that women need not exist as dominated creatures, that they have the right to define their own lives.'[82]

Despite the initial ambivalence of some feminists to a formalised relationship between feminism and state agency, the recognition that a discourse around domestic violence needed the state to guarantee its place in the public sphere could not be negated.[83] The central issue after the initial successes of the birth of Elsie was therefore *how* the public conceived of, and perceived, domestic violence, and how a pluralist feminist movement could maintain a role in its organisation and policy development. [84]

Domestic violence may have entered 'the public' by a concerted effort of Women's Liberationists to secure economic provision for refuges, but the nature of that

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82 Elsie Women's Refuge Collective (1974).

83 The cuts to women's services made under Fraser's federalism, and the impassioned campaign by many in the refuge movement to protect domestic violence's funding and public position testify to this point. See Girls' Own Collective (1981), 'Latest on the Womin's Services Campaign', *Girls' Own*, no. 4, September- October. The editorial commented on an aspect of the campaign in which an effigy of Fraser was dropped from a height and splattered with tomato sauce. The 'murder' of Fraser made the Channel Ten news that night, and the incident was reported as 'marked by a sense of unity which has become characteristic of the campaign, with feminists with very different politics working closely together - an unusual and refreshing phenomenon.', p. 3. see also Girls' Own Collective (1981), 'Sparks fly in Canberra', *Girls' Own*, no. 3, July-August, p. 15.

84 McGregor and Hopkins (1991) note at p. 22 that by 1982 'refuges had become thoroughly embedded in the community and thoroughly enmeshed in the welfare and industrial relations systems [refuge workers went on strike in 1982.] These myriad points of contact between the refuges and the society ensured that the issue of violence against women would move increasingly onto the public agenda.' However, it must be reiterated that this was not an easy process. A stark distinction existed between state provision of services for refuges (and their workers) and a state initiated national policy on domestic violence per se. See National Committee on Violence Against Women (1991), *National Committee on Violence Against Women: Position Paper*, Australian Government Printing Service, Canberra.

public had not significantly altered since Louisa Lawson despaired of the (as yet unnamed) problem of violence in the home in the 1890s. The correlation between Bill Hayden's visit to Elsie in 1974, his emotional reaction, and subsequent guarantee of funding, demonstrates that the noblesse oblige of a masculinist state toward the battered body had not changed. As Helen L'Orange has noted: 'I think it was easier to get progress on areas where male politicians felt chivalrous. Domestic violence, child sexual assault...'[85] Consequently, despite the importance, and success, of the feminist refuge movement and the nascent femocracy in forging a pathway for domestic violence into 'the public', feminism itself was still hamstrung and problematised by an philosophical context imbued by liberalism and correlatively (as far as issues like domestic violence were concerned) a chivalrous liberalism, capable of misreading the aims of feminism while delivering state support.[86]

The extent to which domestic violence succeeded as a discourse in the 1970s therefore has a great deal to do with not just accepting 'the good graces of a masculinist public',[87] but doing so knowingly. As Hester Eisenstein has noted, 'through an effective alliance between activists and government-based feminists, the principle was established early on that the federal government was an appropriate source for funding openly feminist activist projects at the grassroots.'[88] This is not to undermine the tensions and dissensions within the Movement itself as to how this process could be reconciled. The politics of naming domestic violence with a signifier as benign as 'domestic violence' (as opposed to something more violently descriptive and descriptive of violence such as 'criminal assault in

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85 Helen L'Orange , head of the NSW Women's Coordination Unit 1980-88, and head of OSW 1988-93, quoted in Sawer and Groves (1994), p. 12.

86 As McFerran (1990) notes : '[Helen L'Orange] recognised that support for refuges was often based on a misreading of their role as defined by feminist, and that many of the Catholic Labor men [in NSW] who made up the backbone of the administration would see refuges not as an exposure of the structural inequality of women, but as a temporary safe places for working-class women and children to stay in while the husband sobered up after a drinking bout.' ( p. 196).

87 Margaret Thornton (1995), 'The cartography of public and private', in Thornton (ed.), *Public and Private: Feminist Legal Debates,* Oxford University Press, Melbourne, pp. 2-16, p. 7.

88 Eisenstein (1996), p. 26.

the home' or 'wife beating'[89]) acts as the discursive embodiment of the issue. As Sabine Erika has noted: '[t]he very definition of the problem...was mutilated. Feminists have been unhappy for a long time with the somewhat cosy term 'domestic violence'. But that was the safe term [would not offend male sensibilities] so it was retained.'[90]

The Femocrats of the 1970s therefore specifically realised the construction of the subject in the public sphere as male, and consciously contracted with that notion of subjectivity to gain compromised benefits for battered women. A recognition of the battered woman - albeit exercised through 'the good graces of a masculinist public' - was by 1975, successfully placed on a *state* agenda. Despite the tensions between feminist perspectives over the directions that public recognition could follow, there was, by the will and tenacity of the Women's Liberation Movement, a power behind the discursive battered body.

For other arms of the public sphere, like the law, however, the notion of a particular sexed subject – a battered woman - had not yet been fully encountered.[91]

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89 Scutt (1978) notes the politics of moving from 'battered wives' and 'wife beating' to 'domestic violence': 'Battered wives is so clearly a degrading label, in what is at issue is a *person* who has been the subject of violence. To term her a "wife" is to give her no identity beyond that of being attached to a male person who commits acts of aggression that are directed toward her.' : p. 13.

90 Sabine Erika (1990), 'Break the Silence: The State and Violence Against Women', *Refractory Girl,* No. 36, August, pp. 13- 16, p. 14. See also Julie Stubbs (1990), 'The Domestic Violence Reforms in New South Wales How Effective?', *Refractory Girl,* no. 36, August, pp. 17-19. Stubbs discusses the amendments made to the *Crimes (Domestic Violence) Amendment Act* 1983 (NSW), in which Apprehended Domestic Violence Orders (legitimated protection for battered women) were technically changed to Apprehended Violence Orders. The removal of the term 'domestic' from the statutory provisions (an amendment introduced in February 1990 without prior consultation with the NSW Domestic Violence Committee) was problematic. Despite the significant effect of the orders themselves for women, the amendment opened the floodgates to other claims, diminishing the potential effects of the legislation as part of a campaign to reform domestic violence itself. As Stubbs notes: 'There is much concern amongst those working in the area of domestic violence that this might have been a retrograde step when so much effort had been put into community education and the training of criminal justice personnel concerning domestic violence.', p. 19.

91 I acknowledge the concerted and holistic attempts to gain the law's protection of the battered woman that began to occur in the early 1980s. However, the point I am making here is that the battered woman had not yet come on trial within the context of the nascent feminist discourse on domestic violence, both metaphorically and in real terms. The situation of the battered woman who kills, and the consequences in

If, as Naffine notes, 'the law fails women because it has never had to deal with them as women (even though it has always constituted them as such)'[92] the battered woman was to provide both a threat and a challenge. Law, as will be discussed in Section Three of this thesis, is epistemologically constrained by its own systems of rationality and coherence, and has great difficulty accepting a differentiated subject, especially if that subject is a woman, and more specifically when she is a battered woman. As the feminist campaigns of the 1890s had demonstrated, challenging the law to identify wife-beating as a crime and a social problem had been difficult despite the assurances given by a chivalrous liberalism.[93] For the feminist campaigns of the 1970s, with a collective power behind the discourse of domestic violence, challenges to the law promised to be more vociferous in their demand for a recognition of the battered woman's experience as a personal and political issue.

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terms of legal reform and feminist activism around the issue of battered woman as a legal subject will be discussed in Chapters Five and Six in relation to the Violet and Bruce Roberts case.

92 Ngaire Naffine (1995), 'Sexing the Subject (of Law)', in Thornton (ed.), pp. 18-39, p. 20.

93 See Chapter Two.

*Chapter Five*

# FEMINISM AND THE CRIMINAL JUSTICE SYSTEM

> ...in the end, we have come up against the structure of poverty which sends people to prison and the apparatus of the state with all its manifestations – police verbals, authoritarian judges, lazy lawyers and patriarchal laws. Then there is the prison system itself, with its secrecy and inefficient bureaucracy and prison officer aristocracy. Its all so inter-related, it is difficult to partition off one bit at a time, it often rebounds on you. Even more importantly for women, inside this monolith lies a structure of power which dominates the relations between the sexes, and is always on the verge of erupting into violence.[1]

When the Women's Liberation Movement recognised women as victims of domestic violence, they responded with the provision of refuges, providing a place to which women could escape the insidious rituals of physical, emotional and economic abuse. This response embodied the process of politicising women's private experience, and private harms, demanding a recognition by the public sphere as constituted by the state. However, when the pluralist politics which constituted the Women's Liberation Movement of the 1970s encountered women who had killed an abusive spouse in order to be free, they faced an entirely new set of questions. They were brought into contact with the law, not significantly changed in its conception of domestic violence since the insidious 'rule of thumb'[2] had been conceived centuries before, and wary of notions of a differentiated subject, especially a sexed subject.

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1 Liz Fell (1983), 'Introduction', *Proceedings of the Anne Conlon Memorial Lecture,* (11 August, Sydney), New South Wales Women's Advisory Council to the Premier, pp. 3-7, p. 6,

2 Regina Graycar and Jenny Morgan (1990), *The Hidden Gender of Law*, The Federation Press, Sydney, p. 277. See also the discussion of the law's understanding of the battered wife in Chapter Two.

This chapter investigates the strategic alliances forged between feminist political perspectives as the criminal justice system became a focus for critique, reform and direct action. During the late 1970s and early 1980s, a vigorous analysis of the operation of the criminal justice system – a system delineated by the interactions of law, prison services, and the state - emerged as a dominant part of anti-authoritarian politics in New South Wales. As a result of events such as the Bathurst Gaol Riots in 1974, and the initiation of abolitionist groups like Women Behind Bars and the Prisoner's Action Group, a unique and distinct culture of critical prison reform grew in Sydney. The interaction between this political movement, and that of Women's Liberation, resulted in an intense cross-fertilisation of ideas, energy and commitment to the securing of justice for groups and individuals, marginalised by class, race or gender, and denied adequate protection by the law, and within prison.

The story of Violet Roberts, a woman who murdered her abusive spouse in order to free herself from a life of violence, and who was imprisoned for life, provided a significant and crucial narrative through which this critique could be developed. Through Violet Roberts, in many respects an ordinary woman with a chillingly ordinary experience of violence, the feminist engagement with the state over the domestic violence issue was given a new theoretical and practical perspective. The inadequacies of defences like provocation and self-defence were identified by a watershed academic research project into female homicide offenders in New South Wales, undertaken by the multi-perspectived Feminist Legal Action Group. This project provided a text which identified specific legal injustices encountered by battered women who kill because of their subjective experiences, their difference from the standard legal subject. It also provided a foundation for a campaign to draw attention to the situation of Violet Roberts as a domestic violence survivor and as a subject mistreated by the criminal justice system, and to generate a critical public voice to secure for her, and women like her, better access to justice.

The campaign to release Violet Roberts, and her jointly-accused son, Bruce, was therefore significant, for it evidenced the ways in which a critical perspective on the (criminal) law began to be developed by feminists. It also demonstrated that the unique confluence of perspectives drawn from a pluralist feminist movement and

the wider culture of Left, Sydney politics, were capable of working collectively to name and identify the unjust treatment of the battered woman who kills, by both the state, and of increasing importance, by the law. This chapter investigates the foundations for this campaign through the diversity of ideas, individuals, groups, and politics which constructed the energetic, and in some senses, maverick, engagement by feminisms with the criminal justice system in the late 1970s.

## Women and The Law

The campaign to reform the law as it related to battered women who kill, however, was by no means the Women's Liberation Movement's first encounter with the law. Indeed campaigns against the operation of the law had hallmarked some of the Women's Liberation Movement's early successes. For example, the raids on the Heatherbrae abortion clinic in 1971, the subsequent demonstrations and organised collective action by women around the issue of legalised abortion, and the Levine ruling, directly involved a critique on existing prevention by the law on women's rights to control their own bodies.[3]

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3 The 'Levine Ruling' refers to the judgement of Justice Levine of the District Court of New South Wales in the case of *R v Wald* (1971) 3 DCR (NSW) 25. The decision, which followed that in Victoria of Justice Menhennit in *R v Davidson* [1969] VR 667, was that abortion could be legally performed if there was a danger to the woman's life, as well as her physical and mental well-being. A doctor could also take into account economic and social grounds in assessing danger to a woman's physical or mental health. For a discussion of the law relating to abortion in Australia see generally Graycar and Morgan (1990), pp. 198-203. For a indication of how abortion was viewed as an aspect of the law's treatment of women in the context of the 1970s see: Control (1974), 'Abortion- a woman's right to choose, a child's right to be wanted...The Law and Abortion', pamphlet, (FTYC). For an account of how the Levine ruling impacted on woman's lives, and on feminist struggles to improve services for women, see: Anne Coombs (1996) *Sex and Anarchy*, Viking Penguin, pp. 256-258; Betty Pybus (1974), 'The Control Abortion Referral Service', unpublished article, (FTYC); Sue Wills (1981), *The Politics of Sexual Liberation*, Thesis submitted for the degree of the Doctor of Philosophy, University of Sydney, pp. 22-27. Equal Pay was also an important and high profile issue for legal reform from the feminist community in this period: see generally Edna Ryan and Anne Conlon (1975), *Gentle Invaders: Australian Women at Work, 1788-1974*. Nelson, Melbourne; Graycar and Morgan (1990), pp. 91-92. For an excellent contextual summary of the legal issues as identified by women in 1975, see: Margaret Hogg and AnneMaree Lanteri (1975), 'Women and The Law', in Jan Mercer (ed.) *The Other Half: Women in Australian Society*, Penguin, Melbourne, pp. 95-115.

The Women's Liberation Movement also recognised the importance of an interaction with the law on other more diffused issues. In 1975, for example, the Women's Health and Resources Foundation put in a funding submission to the New South Wales Health Commission for a women's legal advice service,[4] envisaged as an integrated arm of the Community Health Services at Leichhardt and Liverpool, the Sydney Rape Crisis Centre, and Elsie Refuge. It was to be a service to cope with the legal face of domestic violence, divorce, abortion, custody and rape. Judith McLean, in the initial submission, noted the role that the law played in the provision of these services, and suggested that holistic, collective action between professional agencies could be reinterpreted to aid women's concerns. As she noted:

> We consider that an integrated supportive legal advice service within the context of Women's Health Centres would eliminate the need for referral to outside agencies and give users of the health services a greater confidence...The availability of legal advice within the health centres would do much to lessen the anxiety of women undergoing stress in [for example] matrimonial problems. The staff of health centres are repeatedly faced with medico-legal problems and consider that the mental health and well-being of the women would be greatly enhanced by the availability of legal assistance.[5]

Helen Coonan and Susan Armstrong, the lawyers who had actively participated in the legal organisation of various Women's Liberation groups and centres, had already appealed to Senator Lionel Murphy (then federal Attorney-General) for legal centres directly focussed on the growing and identified needs of women.[6] In a

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4 Women's Health and Resource Foundation Ltd. (1975), *Submission to NSW Community Health Program: Application for Grant from Women's Health and Resources Foundation: Project Women's Legal Aid and Community Service*, April, (FTYC).

5 Women's Health and Resource Foundation (1975), Judith Mclean to W. Tweedie, Community Health Services, pp. 1-2.

6 The submission notes that Helen Coonan, through her practice Coonan and Hughes, had represented and assisted the Leichhardt Women's Community Health Centre, Elsie Women's Refuge, WEL, and Preterm (an abortion referral service). Armstrong had served on the Management Committee of the New South Wales Aboriginal Legal Service, and at the time of the submission was employed by the Australian Government's Commission of Inquiry into Poverty: Women's Health and Resource Foundation (1975), appendix: Helen Coonan and Susan Armstrong to The Hon. Lionel Murphy, Q.C., Attorney-General, p. 12.

detailed letter to Murphy[7], Coonan and Armstrong applauded him for his recognition of the needs, and lack of access to legal advice and representation, of the disadvantaged in his inauguration of the Australian Legal Aid Office.[8] Coonan and Armstrong recognised that many of the functions of Legal Aid were ultimately to benefit women. There was, to some extent, a gender-neutral face to legal disputes arising from hire purchase, consumer credit and interaction with the administrative and government bodies with which the office was designed to deal.[9] However, Coonan and Armstrong subsequently impressed upon Murphy the ways in which the law instrumentally discriminated against women in terms of their earning power, social status, and educational attainment. As they argued: 'Under the common law, lack of access to courts has resulted in a case law that substantially ignores women's particular social, economic and legal problems.'[10] Although it appears the submission was ultimately rejected[11], it clearly demonstrated an awareness of the role that the law played in both contributing to, and alleviating, the problems faced by women.

This kind of attention, however, to the instrumental function of the law as it directly translated to a control of women's physical autonomy, or to the organisation of holistic legal services, no matter how crucial, did not automatically produce an analysis of the law's epistemological construction of women as legal subjects. The New Left/Marxist intellectual perspective of early second wave feminism identified notions of women's oppression in terms of a sexual division of labour, a subversion of their sexuality. Considerable energy and commitment was therefore devoted to an agitation of the law by feminists attempting to render women's status equal to that of men.[12] However there was not yet a feminist

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7 ibid.

8 ibid., p. 1.

9 ibid.

10 ibid., p. 2.

11 The conclusion that the submission was rejected can be drawn from the fact that the Centre never materialized.

12 Jenny Morgan notes that 'the meaning of equality has been one of the most contested notions in feminist legal work over the last twenty years.', Morgan (1993), 'Women and The Law', in Refractory Girl Collective (eds.), *Refracting Voices: Feminist Perspectives From Refractory Girl*, Southwood Press, Sydney, pp. 116- 129, p. 117. Her analysis of

intellectual position or language from which to discuss women's jurisprudential status. Despite successes such as the Levine ruling, or maybe because of them, there had not been time to reflect on the possibility of a feminist identification of women as a diverse jurisgenerative group.[13]

Kathleen Lahey has noted of American feminist theorising about the law in the 1970s that it was 'an uncatalogued item, a yet to be recognised experience.'[14] It could be argued that this experience was mirrored, to greater and lesser degrees, in the Australian context during the same period. Where there was theoretical analysis of the operation of the law, it was most often expressed in the context of its discriminatory effects, within a Marxist framework. As Deirdre O'Connor explained in a paper to the Sydney Women's Commission in 1975:

> The legal system reflects and reinforces the social system in which it operates. Marx went so far as to assert that as law was a reflection of the economic base of society, it was incapable of being innovative except to the extent that laws could react back on the base, and impede change and/or progress. Even without a total adoption of the Marxian view, it must be conceded that in every

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*Refractory Girl* articles discussing the impact of law, and the fundamental disadvantage caused to women by the processes of law, is useful for a general overview of the trajectory of theoretical and substantive change caused by feminisms' engagement with the law from the 1970s to the late 1980s. Importantly, Morgan identifies the issue of anti-discrimination as central to the theoretical development of a position on women's legal equality, and indicates that there were critical perspectives of the assumption that legislation based on an identification of women's *prima facie* equality was going to be an unbridled success. In the context of Morgan's historical overview, she attributes this position to Margaret Thornton who wrote '...in view of the male-dominated political and legal structures, within which legislation is conceived, any hope that it should effect radical change is clearly misplaced.' (*Refractory Girl*, no. 17, p 35). Morgan significantly goes on to note, however, that 'I doubt Thornton's conclusions would be shared by any of the other writers on equal opportunity [during this period]', p. 118. For an extended analysis of the contradictions of liberalism for a feminist conception of equality, illuminated via the anti-discrimination question, as well as the practical effect of anti-discrimination legislation, see Margaret Thornton (1990), *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne.

13 This term is derived from Robert Cover (1983), 'The Supreme Court Foreword: Nomos and Narrative', vol. 97 *Harvard Law Review* 4, pp.33-35, and refers to the power to challenge the law through narrative by marginalised groups, like women. This term, and the implications that can be drawn from Cover's argument generally, will be discussed in Chapter Seven

14 Kathleen Lahey (1985), 'Until Women Themselves Have Told All That They Have To Tell' 23 *Osgoode Hall Law Journal* 519.

> area legal change has followed rather than promoted social and economic change.[15]

From this perspective, O'Connor went on to problematise the question of a reliance by the Women's Liberation Movement on law reform as a 'major weapon in their struggle.'[16] In an indirect fashion, by recognising the operation of laws in Australia which used sex as the basis for their determination, on matters such as the right to a minimum wage, custody of children or legal abortion, O'Connor made a claim for women's legal equality and consequently their autonomy. She envisaged this process through direct agitation by women, in terms of campaigning against directly discriminatory legislation, and campaigning for sex discrimination laws 'either as basic constitutional guarantee or as a normal legislative enactment.'[17]

O'Connor's argument indicates that in 1975, for women involved in both the legal profession and Women's Liberation more generally, there was some recognition of the theoretical barriers preventing the emergence of a legal identity for women, and tentative steps to articulate and problematise a jurisprudential framework which invariably cast the law as gender neutral. An incipient Marxist feminism provided the basis for a critique of law as a product of liberalism, that was allegedly committed to equality for all, yet which operated overtly to prevent women from enjoying equitable protection for their legal injuries and of their legal entitlements.

Yet these steps were preliminary indeed; and an independent feminist legal theory, which asked questions about 'how the law comes to know about women, and what women know'[18] took at least another decade to emerge.[19] If the number of women

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15 Deirdre O'Connor (1975), 'Should The Women's Movement Rely On Law Reform As a Major Weapon In Their Struggle?', unpublished paper, Women's Commission 1975, Sydney, (FTYC), p. 41.

16 O'Connor (1975). See also Margaret Thornton (1991), 'Feminism and the Contradictions of Law Reform' 19 *International Journal of the Sociology of Law* 453. Thornton extends theoretically O'Connor's point, and argues that the implication of feminism within liberalism, and within liberal law, and also within its critique, makes any reliance on its protections or in processes of its reform ambivalent.

17 ibid.

18 Morgan (1993), p. 116.

19 The kind of questions Morgan is referring to, which involved feminist legal thinkers in more epistemological conceptions of the ways in which the law constructed women, as well as controlled them, began to gain prominence in the late 198Os and early 1990s. Texts such as Ngaire Naffine (1990), *Law and the Sexes: Explorations in*

actually participating in the law professionally in the early 1970s is acknowledged, however, the slow development of the law identifying its role within a more diversely constituted public sphere is understandable. As Jane Mathews has noted:

> When I went to law school at the end of the fifties and early sixties, there were very few female students indeed. In fact I was one of only two who started and finished at the same time, in a class of some two hundred people. The situation improved only gradually during the 1960s. But the 1970s saw a steady and ultimately dramatic increase in the number of women law students.[20]

Subsequent research assessing women's impact within the legal profession (as students, practitioners, academics, and albeit, in fewer cases, as judges and magistrates)[21] indicates that women's increased involvement in the law coincided

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*feminist jurisprudence*, Allen and Unwin, Sydney; Graycar and Morgan (1990); and Thornton (1990) began to question the theoretical, as opposed to merely substantive, ways in which liberal law was built on claims to objectivity, neutrality and truth which denied recognition of women as a subject differentiated from the rational, benchmark, 'reasonable man' The questions raised in these texts therefore acted as the 'next phase' of feminist legal thinking, building on the foundations of the focus on the fight for equal recognition which dominated the feminist legal agendas of the early 1970s. They began to ask question which attempted to understand women's difference as a tool for critique, even when this critique was inscribed upon the binary conceptions of women which underpinned legal doctrine. For an analysis of this theoretical progression, see Ngaire Naffine (1993), 'Assimilating Feminist Jurisprudence', 11 *Law in Context*, 78; and more generally Elizabeth Grosz (1988), 'The in(ter)vention of feminist knowledges', in Barbara Caine, E.A. Grosz and Marie de Lepervanche (eds.), *Crossing Boundaries: Feminisms and the Critique of Knowledges*, Allen and Unwin, Sydney, pp. 92-104, p. 92. For a discussion of the 'difference dilemma' as it relates to feminist jurisprudence, see discussion in Chapter Eight, which examines the ideas mentioned here in the context of postmodern legal challenges. The movement towards this theoretical position is also historically invested in the struggles for the recognition of women's subjectivity and experience, as argued later in this Chapter in relation to the FLAG research into women homicide offenders in New South Wales; and in Chapter Six in relation to feminist challenges to reforming the provocation defence in 1981-82.

20 Jane Mathews (1991), 'Women in the Law', *Refractory Girl*, no. 41, p. 27.

21 See generally Rosemary Pringle (1994), 'Ladies to Women: Women and The Professions', in Norma Grieves and Ailsa Burns (eds.), *Australian Women: Contemporary Feminist Thought*, Oxford University Press, Melbourne, pp. 202-214; Margaret Thornton (1996), *Dissonance and Distrust: Women in the Legal Profession*, Oxford University Press, Melbourne. Thornton argues that women's entry into the legal profession is demarcated by liberal legalism, and by the resistance of the law to feminist challenge, especially when arising from large increases of women in the legal profession. Lorraine Elliot (1975), 'Inequalities in the Australian Education System: Part 2: Women in the Professions', in Mercer (ed.), pp. 139-154, gives an indication of the participation rate of women in the legal profession, and in law school, during the

with, and was perhaps indirectly stimulated by, second wave feminist attention to women's equity, in terms of both educational and professional advancement and achievement.

This is not to suggest that the increase of women in law schools during the 1970s necessarily meant that all female law students identified as feminists, or were involved in associated Women's Liberation campaigns in the same ways as women who worked in grass roots organisations like refuges, or who emerged from other disciplines like education or history. The spheres of feminist intellectual critique of prevailing normative order, be it in terms of the law, state or other forms of governance, did not develop together, or at the same time. As will be discussed in Chapter Seven, there were, and continue to be, significant barriers to interdiscursive conversation between law and history, a discipline from which many Women's Liberation activists had emerged, and which had proved influential in shaping an incipient theoretical position on feminism itself.[22]

The conversation between feminist history and law began, perhaps, with the first Australian Women and the Law Conference in August 1978. Hosted by Sydney University, the Conference drew participants from history, sociology, and law. The conference itself covered a wide range of topics, from domestic violence, lesbian custody cases, and a discussion of the recently introduced *Family Law Act* 1975 (Cth.), to more historically grounded analyses of citizenship, professional legal participation and colonial law.[23] It was the first conscious attempt within the

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period of the early 1970s. For a historical analysis of the statistical breakdown of women enrolling in law degrees in the 1950s, see Norman MacKenzie (1962), *Women in Australia,* F.W. Cheshire, Melbourne, Table 11, p. 124.

22 The number of women involved in early Women's Liberation campaigns, who were historians, or post-graduate students in history, was considerable. These women included Anne Summers, Ann Curthoys, Lyndall Ryan, Sue Bellamy, Rosemary Pringle, Lesley Lynch, Susan Magarey and Kay Daniels. It was these women who instigated journals and newspapers such as *Refractory Girl* and *MeJane*, and who were influential in developing a burgeoning academic/theoretical focus on the nature of Women's Liberation itself. See Ann Curthoys (1996), 'Visions, Nightmares, Dreams: Women's History, 1975', *Australian Historical Studies*, vol. 27, no.; 106, April, pp.1-13 for a discussion of the intellectual implications for history emergent from this period.

23 Some of he Conference papers were published as an edited collection: Judy Mackinolty and Heather Radi (1979), *In Pursuit of Justice: Australian Women and The Law*, Hale and Iremonger, Sydney.

academic arm of the Women's Liberation Movement to conduct an interdisciplinary forum on the development, and operation, of law as it affected women in contemporary Australian society, and it offered the first evidence of how the diverse methodological approaches of the conference participants could operate together.

Lesley Lynch, in reviewing the conference in the women's studies journal *Refractory Girl* in March 1979, noted with interest, and a clear sense of theoretical separation, the focus and visibility of 'the new breed of feminist legal women.'[24] Her reaction to them as a group was ambivalent:

> [O]n the one hand I was admiring, even envious, of the talent, energy and more particularly of the confident optimism; on the other I was uneasy about what *appeared* to be the prevailing world view. It might just be the hoary old tension between the pragmatism of reform and revolution making, but I detected an unhealthy respect for the overall legal system...[T]hey seemed to regard the structure itself too reverentially...I worry about all that talent and energy being diverted into exclusively reformist struggles and wonder whether in twenty years or so the legal structure will still be the instrument of class and patriarchal power that it is now.[25]

Yet the talented young women starting to emerge within the legal profession, and as such becoming inculcated into the procedural language and practice of the law, were not without theoretical or critical voice. As Deirdre O'Connor's submission to the Sydney Women's Commission in 1975 indicates, there was an awareness of the *form* of disadvantage imposed upon women as legal subjects by the law's instrumental bias and lack of recognition of their political equality, and of their claims to entrench that equality within other spheres. Nevertheless, O'Connor's paper and Lynch's observations of the 1978 Women and Law Conference suggest that the theorising about the law by 'legal women' remained entrenched within the law's own discursive parameters. There was, in short, a traditional reliance on an Austinian jurisprudence which placed the law centrally in a system of social governance. Feminist legal thinking, and action, remained focussed on a critique of

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24 Lesley Lynch (1979), 'Women and Law Conference', *Refractory Girl,* March, pp. 35-36, p. 35.

25 ibid.

black-letter law, and the specific instances in which it discriminated against women directly. This ensured that the kind of theorising about the Women's Liberation Movement's relationship with the state (drawn from the divergent bases of Marxism, liberal reformism, and complicated by an anarchist/libertarian tradition)[26] which had already manifested itself, had not yet been articulated within the framework of the law.[27]

The exchange between legal feminists, and feminists engaged in other discursive arenas was, in 1978 at least, still cautious. As Lynch observed of the 1978 Conference:

> A non-legal feminist manifested...unease by throwing in the not-so-innocent observation that it must be difficult being both a lawyer and a feminist. That she did not pursue her observation indicated an awareness that it [the conference] was not the appropriate place in which to initiate discussion of such basic issues.[28]

Despite this reading of the conference in situ, the inaugural interactions between different methodological and political perspectives had one important outcome: the formation of the reactive, multi-perspectived Feminist Legal Action Group, or FLAG.[29]

## The Feminist Legal Action Group

In July 1978, a month before the watershed Women and Law Conference, Margaret Thornton, a recent graduate of the new and progressive law school at the University of New South Wales, and Joan Bielski of the Women's Electoral Lobby, sent a joint circular letter to call together a meeting of women interested in the law.[30] Despite the existence of a professional body for female practitioners (the

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26 See comments in this Chapter and in Chapter Three regarding the political and cultural perspective of libertarianism.

27 See Chapters Three and Four for an analysis of the complex reaction by a pluralist Women's Liberation Movement to an engagement with the state.

28 Lynch (1979), p. 35.

29 FLAG announced its formation at the conference: Lynch (1979), p. 36.

30 Kim Ross (1979), 'F.L.A.G.', *Legal Service Bulletin*, vol. 4, no.3, June, p. 123. The characterisation of the Law Faculty of the University of New South Wales as 'progressive' during this period is attributable to Robyn Lansdowne (per Interview with Robyn Lansdowne, Newcastle, 23 August 1995.)

mainstream Women Lawyer's association), Thornton and Bielski saw the need for a collective and organised group which 'did something for women in general'[31] as opposed to a group mainly concerned more narrowly with the position of women in the legal profession and as such directing attention to a narrower set of interests. The US group WEAL (Women's Equity Action Lobby) provided both a framework and an inspiration as a feminist group committed to researching and proposing legislation that affected women, and developing test cases on women's rights.[32] From the beginning, Bielski and Thornton perceived their group to be inclusive of a wide range of women, not merely those within the legal profession, and directed their original circular to students and non-lawyers as well as practitioners. In keeping with the open spirit of the group, and the recognition of the need to draw together women with a wide range of perspectives and skills, the word 'lawyers' was carefully avoided in the process of naming the group. In this way, the Feminist Legal Action Group (or FLAG) was born. The ethic of inclusion and collectivity, drawn from the Women's Liberation Movement as a whole, behind the politics of naming provided the foundation for the interdisciplinary nature of FLAG as it developed.[33] By 1979, it was noted that membership was drawn from a minority of practitioners, many legally qualified but non-practicing women, a number of law students, and many other women drawn from education, sociology, counselling and social work.[34]

In these terms, FLAG addressed the concerns expressed by Lesley Lynch at the 1978 Women and Law Conference[35] around the need to question and understand what law meant to feminism and to Women's Liberation, as well as its effects on women. It consciously constituted itself as a reactive body committed to investigating and researching from a multi-perspectived basis what the law meant

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31 Margaret Thornton to Sue Wills, 7 August 1991, FLAG, (FTYC).

32 Ross (1979), p. 123.

33 Margaret Thornton also noted: 'I do remember an early meeting involving a ubiquitous discussion (maybe less so now) as to whether the word 'feminist' should be included in the title or not. Some were opposed as would be "too threatening" to the law reform bodies etc to which we proposed to make submissions.': Thornton to Wills, 7 August 1991.

34 Ross (1979), p. 123.

to women, and how it controlled them. From the first meeting of FLAG (held in the boardroom of Coonan and Hughes) it was evident that this range of perspectives on the law, and its social function, meant that the group's aims and objectives stretched beyond ad hoc, issue by issue campaigns directed toward instrumental law reform.[36] In a general sense, the fundamental role FLAG constituted for itself was 'raising the general level of awareness and improving the quality and quantity of information available to the community on issues of women and the law.'[37] This was to be achieved practically through a range of actions, both legalistic and educative. For example, FLAG perceived some of its short term aims to be giving expert evidence at public hearings which related to women, commenting on legislation under consideration,[38] and compiling a directory of lawyers sympathetic to women.[39]

FLAG's primary undertaking, however, was to conduct research into women's treatment by the law. Between July 1978 and June 1979, FLAG worked on a number of small projects focussing on child welfare, family law and anti-discrimination.[40] The major project initiated by the group, and the one that was to raise FLAG's profile within both the community of lawyers and legal reformers and the broader public, was research on women convicted of homicide in New

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35 Lynch (1979).

36 It must be noted, however, that FLAG did perceive itself as a reformist organisation: Thornton to Wills, 7 August 1991.

37 Ross (1979), p. 123.

38 ibid., the *Anti-Discrimination Act* (1977) NSW was specifically mentioned by Ross in this context.

39 As FLAG noted in an information sheet in 1979: 'an incipient directory exists but suffers from a dearth of lawyers with feminist sympathies.': FLAG (1979) *Information Sheet*, (FTYC).

40 Ross (1979), p. 123. These concerns mirrored the general issues targeted and championed by feminist lawyers and feminists interested in the law during this period. Jocelynne Scutt has named this 'phase' of feminist thinking about the law, in Australia at least, as 'legislating for the right to be equal': Jocelynne Scutt (1988), 'Legislating for the right to be equal: women, the law and social policy', in Cora Baldock and Bettina Cass (eds.), *Women, social welfare and the state*, Allen and Unwin, Sydney, pp. 227- 248. See generally comments made about the emerging theoretical relationship between feminism and the law in Chapter Five.

South Wales. The objective behind the homicide project was to 'build up the presently deficient body of research relating to women and the law.'[41]

### The FLAG Report: Women Homicide Offenders in New South Wales

Interestingly, and perhaps reflective of the major successes of the refuge movement in entering a discourse on domestic violence onto public, state agendas, FLAG felt that there was a great need for 'more systematic information about the social and legal factors involved in crimes such as infanticide and murder or manslaughter which frequently are committed in a context of prolonged domestic violence.'[42] Funding for the project, which was ultimately entitled *Women Homicide Offenders in New South Wales* was obtained primarily from the Criminology Research Council, with an extension of funding granted by the Law Foundation of New South Wales.[43]

Reflecting the pluralist makeup of the group, the FLAG homicide project was to be supervised by Roslyn Omodei, a sociologist at Sydney University and committee member of FLAG. Research was undertaken by Robyn Lansdowne, a recent law graduate from the University of New South Wales, and Wendy Bacon, 'a sociology graduate undertaking a law degree'[44] at the time that the homicide project commenced.

The FLAG homicide project was a watershed in research into the law's treatment of women for several reasons. It was the first academic research in the field that undertook to engage with domestic violence as a critical area of feminist legal

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41 FLAG (1979).

42 Ross (1979), p. 123. The FLAG Report concentrated overwhelmingly on the incidence of women killing their husbands (17 from 35 in the study sample), however, the cases in which women killed or attempted to kill their own child (4 from 35), as well as cases in which they killed non-family members (12 from 35) were also assessed. The remainder were convicted for killing other family members (predominantly their fathers): see Wendy Bacon and Robyn Lansdowne (1982), *Feminist Legal Action Group report: Women Homicide Offenders in NSW*. FLAG, Sydney (cited from now on as The FLAG Report), pp. 44-45.

43 The FLAG Report (1982), Acknowledgements.

44 Ross (1979), p. 123.

analysis.[45] It eschewed traditional criminological readings of offending women (analyses based objectively on their biology and psychology) preferring to investigate the subjective characteristics of the women themselves. In accord with the political ethic of articulating the personal as political drawn from the Women's Liberation Movement, female homicide offenders were interviewed by Lansdowne and Bacon to ascertain the personal histories which precipitated their crimes.[46] Their view was that 'more insight is to be gained by seeing these women's acts as explicable in the light of their social and family situations than as expressions of individual deviance.'[47] Overwhelmingly, the hidden experience of domestic violence, and women's inability to access avenues of assistance to free themselves, dominated the findings.[48] As the researchers stated:

> In a domestic killing the woman herself may well be the only person who can say what life in the home had been like for her in the months or years before the homicide. Often there are no other witnesses to violence the women had suffered at the hands of the husband she eventually killed... In homicide with its legal emphasis on intent and the offender's state of mind at the time of the homicide it is crucial to know what the offender was feeling and thinking and often only she can say.[49]

This approach resulted in a critical feminist assessment of the operation of the defences to murder, and the empirically based conclusions that the law of homicide

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45 Research undertaken prior to the FLAG Report on Homicide in New South Wales followed a traditional statistical sociology/criminology methodology. From this perspective, the FLAG Report was groundbreaking for it concentrated for the first time on the social factors which contributed to the crimes, as well as placing emphasis, through the interview technique, on the perceptions of the women themselves. See: RW McKenzie (1961), *Murder and the social process in New South Wales 1933-1957*, Thesis submitted for the degree of Doctor of Philosophy, University of Sydney; Therese Rod (1979), *Murder in the Family in New South Wales 1958-1967*, Thesis submitted for the degree of Master of Arts (Hons.), University of Sydney, for example of the work undertaken in the field prior to the FLAG report. For an explanation of the FLAG agenda and methodology, see The FLAG Report (1982), pp. 8, 11-13, 26-28.

46 ibid., pp. 8-13.

47 The FLAG Report (1982), p. 27.

48 For a valuable summary and assessment of the FLAG Report (1982) see: Wendy Bacon and Robyn Lansdowne (1982), 'Women who kill husbands: the battered wife on trial', in Carol O'Donnell and Jan Craney (eds.), *Family Violence in Australia*, Longman and Cheshire, Melbourne, pp. 67-93.

49 The FLAG Report (1982), p. 11.

denied battered women the same access to justice as other offenders. In thirteen of the sixteen cases analysed in the report, violence was the direct and immediate reason that the homicide occurred. Taking this into account, it seemed incongruous that in only six cases[50] did the defence place emphasis on the victim's circumstances (as distinct from her mental condition) as justification for the killing.[51] In three cases, the only defence raised at trial was diminished responsibility, not withstanding that the accused in these cases had been victims of repeated violent assaults over a prolonged period of time.[52] In the context of the methodology of the Report, diminished responsibility was criticised as it presented a way for the law to discount the accused's experience, and as such, to perpetuate the mythologies of domestic violence.[53] Diminished responsibility provided a convenient means by which the actions of a battered woman who kills could be read by the law as the product of a sick mind, as opposed to the response of a rational person in the circumstances of ongoing, life-threatening violence.[54]

Provocation and self-defence, as defences to murder which prima facie could have contextualised the battered woman's actions, and judged her mental state in accordance with her fear of abuse, and inability to escape, were also identified in the FLAG Report as substantively denying justice in domestic homicide cases.[55] In all cases where provocation was argued, the alleged provocation consisted of a physical assault or a threat to kill. However, the counsel in these cases did not view the circumstances of domestic violence as extending to a situation justifying the use

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50 Bacon and Lansdowne (1982), p. 89 note that this was half of the total number where women killed in response to an assault.

51 The FLAG Report (1982), p. 312.

52 ibid. As discussed in Chapter One, diminished responsibility is a defence which reduces murder to manslaughter, and constructs the accused as not fully responsible for the homicide because they were suffering from an 'abnormality of mind' at the time of the killing.

53 The FLAG Report (1982), p. 314. These mythologies about domestic violence included, for example, that a woman who did not leave a violent relationship was masochistic, that women invite violence, and that women who display signs of aggression in response to violence are potentially unstable. See discussion of the mythologies of domestic violence in Chapter Two.

54 The FLAG Report (1982), p. 314.

55 In the cases assessed in the FLAG Report, provocation was raised five times, and self-defence only twice: The FLAG Report (1982), p. 312.

of force by way of self-defence. In this way, the accused's actions were assessed as neither reasonable or necessary in response to a situation of violence within the home.[56] The implication drawn by the Report regarding the lawyers (and the law's) choice of defence was that it conflicted with the pre-conditions of the crime: most killings had occurred in a context of self-preservation, and as a response to either immediate or long term threats and assaults. The Report argued that this situation was caused not only by inappropriate assessment of the facts in issue by counsel,[57] but by flaws within the elements of the defences themselves which prevented a reading of the accused's *mens rea*, or mental state, in the context of her experience as a domestic violence survivor.

A successful adduction of provocation, for example,[58] requires that the accused's fatal action be an immediate response to the perceived threat, and that this threat was sufficient to have caused an opportunity to have lost the power of self-control. The immediacy requirement however was impossible for many women to meet. In the cases studied in the Report, six of the thirteen cases in which a woman killed her violent spouse occurred when he was asleep or in some way incapacitated, and always with a weapon.[59] The FLAG Report concluded that women, because of their social conditioning and (generally) smaller physical stature, were incapable of facing their violent spouse as an equal in an immediate confrontation, and killing him, as required by section 23 (2) (c) of the *Crimes Act* 1900 (NSW) 'suddenly...in

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56 See Chapter One for a discussion of the elements of self-defence. Bacon and Lansdowne (1982), p. 89 note that defence counsel in cases of battered women who killed were prepared to concede that women lost their power of self-control, and that an ordinary person in the circumstances would do so, which was the basis of provocation. However, they were not prepared to acknowledge that the accused's' acts were a 'reasonable' or 'necessary' response to a situation of violence, which is the test for self-defence. The preparedness of some defence counsel to argue provocation, however, did not necessarily mean that all battered women who killed would be able to meet the requirements of the defence. See discussion of this issue in relation to reform of the law of provocation in Chapter Six.

57 The FLAG Report (1982), pp. 314, 316, 322.

58 Weighting was given to assessment and ideas for reform of this defence, as opposed to provocation, as it was the one predominantly used instead of diminished responsibility (which the FLAG Report (1982) seriously discredits).

59 The FLAG Report (1982), pp. 156-157; Bacon and Lansdowne (1982), p. 90.

the heat of passion.'[60] As a result, many women in the FLAG case studies had not been able to meet the requirements of proportionality and immediacy and were denied access to the defence of provocation. As such they were convicted of murder instead of manslaughter, and subjected to a mandatory life sentence (codified by section 19 *Crimes Act* 1900 (NSW)).[61]

The Report also criticised the 'ordinary person' test: the objective standard against which an accused's actions, and their loss of self-control, were measured.[62] The Report contended that the objective requirement of the test ran 'counter to the spirit of the criminal law, which is generally concerned with the actual "subjective" state of mind of the person charged, not what the "objective" ordinary person would have intended.'[63] This jurisprudential flaw was compounded when applied to the situation of the battered woman who kills. The Report argued that the reality and subjective experience of the domestic violence survivor were not sufficiently entrenched within the public consciousness to dispel myths about violent relationships, such as why the women did not leave.[64] As such, juries would be able to discredit the battered woman's reliance on a provocation defence, as her behaviour did not meet the required objective standard. The Report recommended that:

> [I]t is crucial for the defence to make positive and extensive efforts to present the woman's perspective and to overcome the myths and ignorance that shroud everyday perceptions of domestic violence.[65]

Overall, the FLAG Report articulated that the ideologies and myths surrounding domestic violence, which had been challenged by the Women's Liberation Movement, also 'pervad[ed] the criminal justice system and prevented the actual

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60 The complete wording of this section was that the retaliatory act was 'done suddenly, in the heat of passion caused by such provocation, without intent to take life.'

61 See the FLAG Report (1982), pp. 101-106 for a discussion of the life-sentence to murder; and pp. 112-118 regarding the murder/manslaughter distinction, and the motivation behind plea-bargaining which bears influence on the charge. See also Chapter One, and Chapter Six for a discussion of the reform of section 19.

62 See discussion of the 'ordinary person' test and the reasonable man in Chapter One

63 The FLAG Report (1982), p. 320.

64 ibid. See also n. 52.

65 ibid.

circumstances of these homicides emerging in the court processes which judged and sentenced them.'[66]

The FLAG Report was therefore of crucial importance in a developing feminist legal theory, as it pushed the boundary of a Marxist analysis of the law (where women were constituted as a single, albeit disadvantaged class) to an understanding of the means by which the law exerts power over women by silencing more diversely constituted, and subjective experiences. The extension of this theoretical position was undoubtedly initiated by the pluralist philosophy of FLAG. But the project itself brought together, through the political backgrounds and perspectives of its researchers Wendy Bacon and Robyn Lansdowne, a unique combination of reformist and activist skills, and humanitarian/liberal and libertarian/anarchist philosophies. This combination was to have significant consequences, not only for broadening the parameters of feminist critical thinking about the law, but for bringing the plight of the battered woman who kills to the attention of the wider public, and the public sphere as manifested through the criminal justice system.

Robyn Lansdowne and Wendy Bacon's personal connections, and interconnections with broader facets of Left Sydney politics, provided a unique opportunity for the FLAG research to be translated from a significant academic project into the catalyst for a wider and more forceful campaign for the legal recognition of the battered woman who kills.

## Wendy Bacon and The Kensington Libertarians

Although Wendy Bacon was described in a *Legal Service Bulletin* article on FLAG as 'a sociology graduate studying law',[67] her personal and political background was far more complex. Bacon had arrived in Sydney from Melbourne in 1966 to study sociology under Sol Encel at the University of New South Wales. Through initial contacts made at the Forth and Clyde (a renowned Push pub at Balmain), she had become familiar with members of the Sydney Push, and started several

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66 Bacon and Lansdowne (1982), p. 92.

67 Ross (1979), p. 123.

relationships with Push men.[68] For Bacon, the Push provided a 'warm, secure and good-humoured environment where people were intent on having a good time.'[69] However, she has also remembered that 'maybe on another level it wasn't so secure...if as a woman your entrée depended on a man.'[70]

Through her social contact with the Push, Bacon initiated her own education program on libertarianism as a philosophy. Prior to moving to Sydney, she had never heard of John Anderson, or been engaged with the ideas of permanent protest which had so significantly shaped the Push into a cultural, quasi-political Left enclave.[71] However, she rapidly learnt, and became invested within the framework provided by libertarianism: a framework which critiqued traditional notions of morality, was analytically provoking, and provided a basis for challenging entrenched Left politics. The Libertarian intellectual program was appealing to young, radical thinkers committed to critiquing the suppression of internal dissent, and to confronting difficult and contradictory aspect of more mainstream Marxist platforms.[72] Yet for Bacon, the traditional Push environment was stultifying. As she commented in an interview with Anne Coombs:

> Sydney Libertariansim was pessimistic. You couldn't hope for fundamental social change...domination by class and ideology would continue to exist and so the best you could do was critique and direct action. They weren't anti-direct action. But the times we were living in were full of hope and change and revolution.[73]

For younger members of the Push, the Vietnam War provided a significant break with the ethic of permanent protest as lifestyle, embodied by the Push generation of the 1950s.[74] In 1968, the site of Sydney Libertarianism shifted, both geographically and intellectually. Younger Libertarians like Bacon, Liz Fell and Ric Mohr, all engaged as students or tutors at the University of New South Wales,

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68 Anne Coombs (1996), *Sex and Anarchy*, Viking/Penguin, Ringwood Victoria, pp. 232-23.

69 ibid., p. 232.

70 ibid.

71 Coombs (1996), p, 231. See also: John Docker (1974), *Australian Cultural Elites*, Angus and Robertson, Sydney; and discussion of the Push in Chapter Four.

72 Coombs (1996), p. 233.

73 ibid., pp. 223-237.

formed an offshoot group originally called the Kensington Futilitarians. The name was soon changed to the Kensington Libertarians when it became evident that they believed that social change was not only possible, but necessary.[75] The new group, described by Bacon as 'the critical youth edge', was less devoted to the philosophical ramparts of the old Push (Reich, Nomad, Pareto) than to an intellectual movement known as 'situtationalism' then emerging in France. A combination of Dadaism and Surrealism, the situationalists believed in 'subverting accepted norms, in spontaneous and haphazard anarchism, in using art to turn society on its head to reveal the emptiness of public rhetoric.'[76]

Although the Kensington Libertarians were to extend this project, marrying the ethic of haphazard performative anarchism to more concrete struggles (such as the battle to save Victoria Street in Kings Cross from re-development)[77], their initial activist focus was freedom of expression, and correlatively, anti-censorship.[78] In 1970, Bacon, with Val Hodgson and Alan Rees[79] won the editorship of the University of New South Wales student newspaper, *Tharunka.* Under their editorship, *Tharunka* was transmogrified from a university newspaper into an underground publication, sexually explicit, overtly political, and continuously under scrutiny from anti-censorship forces and publishers who refused to allow some of the more inflammatory pieces into print.[80] In June 1970, the editors published the

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74 ibid.

75 Interview with Wendy Bacon, 7 March 1995, Sydney.

76 Coombs (1996), p. 247. See also Interview with Toni Robertson, 3 December 1995; Fell (1983), p 4.

77 See generally, Coombs (1996), p. 296. For more specific commentary on the politics of squatting in this period see Andrew Jakubowicz (1984), 'The Green Ban Movement: Urban Struggles and Class Politics', in John Halligan and Chris Paris (eds.), *Australian Urban Politics,* Longman and Cheshire, Melbourne, pp. 149-166. For a discussion of the connections between the struggle for Victoria Street, and the squatting of Elsie, see Chapter Four.

78 Bacon Interview, 1995.

79 Hodgson and Rees were actually members of the ALP Club, as opposed to the Kensington Libertarians, Coombs (1996), p. 240.

80 In the third issue, the editors attempted to include the lyrics form the ballad 'Eskimo Nell.' Publishers refused to print the edition on account of the song's lurid language. This refusal galvanized anti-censorship forces both at the University and outside. The point of the song's inclusion, according to Bacon, was to 'be outrageous and challenge authority...[to] attack hypocrisy.': Coombs (1996), p. 240. Note also the

poem 'Cunt is a Christian Word.' Val Hodgson, amongst others, was charged with printing obscene material. As a form of protest, on 17 August 1970, Bacon and Liz Fell arrived at court wearing habits printed with lines from the offending poem: 'A dry cunt is a safe cunt', and 'I've been fucked by God's steel prick.'[81] Bacon was subsequently charged for exhibiting an obscene publication. By early 1971, there were 41 accumulated charges pending against the editors of *Tharunka,* who had become publicly identified as the protagonists of a censorship battle.[82]

Concomitant with this situationalist attack against morality and authority, Wendy Bacon and Liz Fell were involved in a burgeoning internal conflict within the Push itself. As discussed in Chapter Four, Bacon and Fell were part of a new vanguard of younger women who began to challenge the male domination of the Push. Although the Push appeared to accord women a sense of sexual freedom, and through this an identity that existed outside of the cultural constraints imposed upon the 1950s and 1960s woman, this freedom was extracted at a price. Being able to engage in sex freely and to drink in pubs alongside men did not necessarily mean equality between men and women. Women like Bacon and Fell began to question the terms on which their freedom was granted.[83] Their engagement with theories of Women's Liberation challenged the inherent misogyny of the Push, and proceeded to irrevocably change its nature.[84]

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paper went underground in 1971, and its name was transmogrified from *Thorunka* to *Thor.*

81 Coombs (1996), p. 245; Bacon Interview, 1995.

82 However, Val Hodgson noted at the time: 'our efforts have been misconstrued by the general public and more so by left-wing liberals to be a challenge against censorship laws, and on a broader level, against outmoded puritanical virtues...we see Tharunka as a means of direct action...it is a challenge to the authority of all laws.': Coombs (1996), p. 242.

83 See Coombs (1996), p. 266 for a discussion of the influence of ex-Push member Germaine Greer's *The Female Eunuch* (1970) on the development of a feminist/libertarian perspective.

84 See for example: Wendy Bacon and Ken Maddock (1971), 'Symposium on Does Women's Liberation Conflict with Human Liberation?', *Broadsheet,* No. 66, p 12; J R Maze (1972), 'Germaine Greer's Misinterpretations of Freud', *Broadsheet,* No. 67, pp. 1- 5; and in reply, Sue Robertson (1972), 'Maze's Misinterpretations of Greer', *Broadsheet,* No. 70, pp. 1- 2.

It was a combination of feminism with the anarchist ethic drawn from situationalism that created a new critical perspective for women like Wendy Bacon, a perspective that demanded constant and continuous opposition to authority as well as a broad need for social change. When she was put on trial for obscenity charges relating to *Tharunka* in February 1972, Bacon (still a sociology student) chose to defend herself in 'an attempt to cut across accepted legal notions of what might be acceptable to an "average man".'[85] Despite her efforts, she lost the case, and was sentenced to Mulawa Women's Detention Centre for eight days.[86] The experience of being in gaol undeniably sharpened Bacon's political focus, and formed the experiential basis for her unfolding commitment to challenging and confronting the operation of the criminal justice system in New South Wales.[87]

## 'The Prison Struggle'[88]

As a middle-class woman, with a sophisticated analysis of the exercise of authority, the conditions in Mulawa shocked Bacon. [89] Referring to her experiences in a lecture delivered in 1983, Bacon argued that most women, despite the attempts by the criminal justice system to control them, and the efforts of the medical and psychiatric professions to diagnose their behaviour as 'criminal', were in gaol 'because of the restrictions on their lives as working-class women.'[90] Most of these women were no different from Bacon herself, as 'the perceptions and controls on

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85 Coombs (1996), p. 245.

86 Wendy Bacon was sentenced to eight days imprisonment because she would give no details of herself to the court. This period of detention gave the court time to investigate Bacon further. On her release she was fined $100 and bound over on a $100 two-year good behaviour bond: Coombs (1996), pp. 245-246. See also Wendy Bacon (1983), *The Anne Conlon Memorial Lecture*, pp. 8-30, pp. 17-18 for insight into Bacon's experience at Mulawa during this period.

87 This commitment evidenced itself in 1979 through the FLAG report, and in 1975 through the formation of Women Behind Bars.

88 'The Prison Struggle' is the title of a 1982 book investigating the theoretical and activist incursions into the critique of the New South Wales criminal justice system in the late 1970s and early 1980s: George Zdenkowski and David Brown (1982), *The Prison Struggle: Changing Australia's Penal System*, Penguin, Ringwood Victoria.

89 As Anne Coombs has noted: '...her first reaction on going in was shock that a nice middle-class, private-school girl like her should be in such a place', Coombs (1996), p. 246.

90 Bacon (1983), p. 9.

all of us as women play an essential part in the processes by which they have reached prison.'[91] Inmates of Mulawa, in other words, were predominantly in prison because of crimes associated with a feminisation of poverty, for example, fine default, petty theft, drug charges and prostitution. For those women incarcerated in Mulawa for more serious offences, such as murder, manslaughter or infanticide, their crimes were precipitated by a history of violence and abuse, which in the face of a lack of other community resources, were played out to tragic ends in an effort to free themselves.[92]

Mulawa ('place of shadows') had opened in 1969 at Silverwater to much fanfare as a modern 'rehabilitative' complex for women.[93] Yet it was in reality, as Sandra Willson has argued, a revision of the traditional, coercive environment of all prisons,[94] maintaining the same staff, trained by the same methods, as the old Women's complex at Long Bay.[95] The philosophy behind Mulawa, in Bacon's terms, reflected the nineteenth century liberal-reformist ideas about women's prisons, where 'femininity and domesticity' were identified as the highest ideals for re-socialising female offenders.[96] Classes provided for women when the complex first opened included such 'feminine arts' as domestic science, needlework, hairdressing and makeup lessons, and pottery.[97] These activities were described in

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91 ibid.

92 Sandra Willson (1979), 'Behind Bars' in Judy Mackinolty and Heather Radi (eds.), *In Pursuit of Justice: Australian Women and the Law 1788-1979*, Hale and Iremonger, Sydney, pp. 171-179, pp. 173-176; Women Behind Bars (1983), 'Who is in Gaol and Why are they There?', in *Women Behind Bars*, (a summary of activities), (FTYC), pp. 3-4; The FLAG Report (1982).

93 Willson (1979), p. 171; The article 'Women's Angle' quoted from *The Sun* in Bacon (1983), p. 14.

94 Willson's account of the transition from the old women's complex at Long Bay Gaol to Mulawa at Silverwater is important, due to her experience as an ex-prisoner: Willson (1979), pp. 171-172.

95 ibid.

96 Wendy Bacon (1985), 'Women in Prisons', *Refractory Girl*, May, pp. 2-10, p. 5. For a brief historical overview of the policies and practices of nineteenth century feminist prison reformers, such as Rose Scott, see Bacon (1983), pp. 25-27. For a brief description of the correctional institutions for women in New South Wales since the turn of the century see Willson (1979), p. 171.

97 Quoted by Bacon (1983), p. 14. It is interesting to note that the pottery classes were cancelled 'after one woman made a piece of pottery that resembled a dildo' Bacon

the *Sun* in 1969 by the Mulawa Activities Officer as 'necessary': '...the women know that they must not swear in my classes, they must be well groomed and well mannered. I hope to make them better wives and mothers.'[98] Bacon noted in 1983 the complete inadequacy of such unrealistic activities for women dealing with drug addiction, ill health, absent children and poor educational skills, as well as the mythology that such classes were in fact available:

> [Classes] operated irregularly and the real routine was...[that] those with jobs worked for a few cigarettes and toiletries each week in the laundry, the kitchen, and the needlework room. It was a privilege to work in the garden. No one strolled the lawns and for those of us on remand, the daily work consisted of scrubbing and polishing floors as well as washing the walls each day. Over the years since 1970, there has been a lessening emphasis on social graces and femininity at Mulawa...The mood has now become much more one of hopelessness.[99]

Sandra Willson, an ex-inmate of Mulawa, described this hopelessness at the 1978 Women and Law Conference. In her account, women were locked up if charged with offences 'against prison regulations.'[100] For such disciplinary offences, prisoners were put in the back cells of dormitories where the windows were boarded up. Water, when it came, was in bottles. Meals arrived cold. Only a coir mat and blanket was allowed as bedding.[101] It was conditions like these, not to mention the lack of legal representation,[102] separation from children, and poor health facilities,[103] that motivated Bacon on her release to take action.

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(1983), p 14. Also note the sarcastic piece 'Things you learn in jail' (1977), *Sydney Women's Liberation Newsletter*, May, (WBB edition), p. 8.

98 Bacon (1985), p. 5.

99 ibid.

100 Willson (1979), p. 171. See also Anonymous (1977a), 'Prison Justice', *The Sydney Women's Liberation Newsletter*, May, p. 7.

101 Willson (1979), p. 172.

102 ibid.; Women Behind Bars (1977a), 'Legal Visits to Mulawa', *The Sydney Women's Liberation Newsletter*, May, p. 3.

103 See generally Women Behind Bars (1977b), 'Mulawa Jail Makes Women Sick', *The Sydney Women's Liberation Newsletter*, May, pp. 6-7; Anonymous (1980a), 'Mothers in Prison', *The Sydney Women's Liberation Newsletter*, April, not paginated; Anonymous (1980b), 'Preface: One Woman's Experience in Mulawa', *The Sydney Women's Liberation Newsletter*, April, not paginated.

Wendy Bacon's initial involvement in attempting to change the criminal justice system in New South Wales was through the Prisoners Action group (PAG.)[104] The PAG formed in 1973 at the instigation of Tony Green, Liz Fell, Matt Peacock, and Bacon after a split in the Penal Reform Council, an off-shoot of the New South Wales Council of Civil Liberties.[105] The PAG membership was significantly drawn initially from the Kensington Libertarians (although Green was an ex-inmate of Bathurst Gaol). [106] Although the Kensington Libertarians themselves had split over the issue of Women's Liberation,[107]women like Bacon and Fell were accustomed to working politically with men, and continued to do so: 'we did not practise separatist politics in any sense.'[108] Bacon and Fell's involvement however in the PAG, predominantly a group committed to a radical critique of men's prisons, evidenced their commitment to prison reform. The attraction of libertarian-anarchists in general to the issue must be read in the context of the heated public dissent over prison conditions that exploded in New South Wales in 1970.[109] Bacon's political epiphany at Mulawa was a reactive, personalised and feminist response to dissent occurring on a much larger scale.

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104 Bacon Interview, 1995.

105 Green was an ex-inmate of Bathurst Gaol. The PAG represented a shift away from a traditional civil liberties perspective to something far more anarchical. The initial objectives of the PAG included: education programs for the community, free access to information, the removal of correspondence and visiting restrictions, and making sure prisoner's work was meaningful: Zdenkowski and Brown (1982), p. 81.

106 ibid.

107 Bacon Interview, 1995.

108 ibid. This perspective is interesting considering that many women involved in libertarian politics at this time identified as lesbians, yet were never invested in the separatist politics of more radical lesbian-feminist projects: see generally Coombs (1996), p 275; and Julie McCrossin (1981), *Women, Wimmin, Womyn, Wimin, Whippets*, pamphlet, (FTYC). McCrossin's pamphlet was produced as a response to the debate within the Sydney Feminist community in 1981 caused by the visit of Mary Daly.

109 The violence and dissent existing within New South Wales prisons which exploded in the 1970s can be traced back to the intolerable conditions which had existed at least since the 1940s. The Royal Commission into prison conditions noted that ongoing brutal treatment carried out by prison officers in, for example, the Grafton 'tracs' (section for 'intractable prisoners) contributed to an sense of unease and rebellion: J. F. Nagle (commissioner) (1978), *Report of the Royal Commission into New South Wales Prisons, vols. I, II and III*, 4 April, Government Printer, New South Wales, p. 14. (This report referred to herein as *The Nagle Report* (1978)).

In October 1970, following a sit-in for minor demands at Bathurst Gaol, prison officers systematically flogged 'a large number, if not all'[110] of the inmates. This action was carried out under the leadership and control of the superintendent and 'was regarded by the officials as representing official policy.'[111] The continuing policy and regime of violence, surrounded by silence from prison officials over the 1970 incident, erupted in riots at Bathurst Gaol in February 1974. During the riot, in which the gaol was burnt down, more than fifty prisoners were injured, either by shooting or being beaten with batons, and in most cases the injuries were inflicted by prison officers illegally using unreasonable and unnecessary force.[112] The factors contributing to the riot, which were finally recognised by the state through a Royal Commission into New South Wales Prisons in 1978,[113] included the oppressive and unjust day-to-day procedures employed by officials; untrained, unsuitable and incompetent prison officers, and the failure of the superintendent and senior administration of the Department of Corrective Services to give clear and effective leadership either before or during the riot.[114] It was these factors, and the generally intolerable conditions faced by prisoners in New South Wales that formed the abolitionist focus for the PAG's action and philosophy.[115]

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110 *The Nagle Report* (1978), p. 16.

111 ibid.

112 ibid., p. 17.

113 *The Nagle Report* was handed down on 4 April 1978, but the Commission had heard evidence since 1976.

114 *The Nagle Report* (1978), p. 17.

115 Unlike other reformist groups that had preceded them (for example, the Council for Civil Liberties' Penal Reform Council) the PAG were committed to an abolitionist politics. They included this treatise of their philosophy in each issue of *Jail News* (which they also published): 'The PAG is a group of ex-prisoners and sympathisers whose long-term goal is the abolition of prison. Realising that this goal, while absolutely necessary, is one that cannot be achieved in the short-term the PAG works on a day-to-day basis for the improvement of prison conditions, for changes in prison life and routine which will both ease the intolerable and brutal burden of prisoners and lead the way to the eventual abolition of the institution itself.': Zdenkowski and Brown (1982), p. 83. It is also important to note that there were significant cross-overs between the libertarian base of the PAG and later WBB, and the Council for Civil Liberties: see: Coombs (1996), pp. 186-187; Ken Buckley (1978), 'Our Meeting With The Premier: The Nagle Report on Prisons', *Civil Liberty*, no. 79, July/August, pp. 6-7; George Zdenkowski (1976), 'Civil Liberty', *Civil Liberty*, no. 68, August/September, pp. 4- 6.

It was this mixture of anarchist disregard for traditional Left reform, libertarian commitment to permanent protest, and awareness of the need for incremental change in the face of class based prejudice[116] towards prisoners, that ensured the PAG had a diverse membership. Ex-prisoners like Tony Green and Brett Collins, and committed libertarians like Fell and Bacon, were increasingly joined by Left lawyers like George Zdenkowski and Dave Brown. Brown and Zdenkowski, who taught at the University of New South Wales Law School, initiated a level of theoretical activity and direction into the PAG.[117] This combination of perspectives ensured that from its initiation in 1973, the PAG were a vital element in creating a multi-faceted cultural and political environment from which the critique on New South Wales prisons could be mounted. As Zdenkowski and Brown noted in 1982, what the PAG accomplished was the divesting of the members' different ideological or intellectual backgrounds in the name of a common cause. As a theoretical proposition, the PAG advocated 'breaking through categorisations of "practitioners", "theoreticians", "political activists" and also acknowledging the different contributions that organisations and individuals can make and the alliances that can be formed around specific issues.'[118]

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116 Zdenkowski and Brown (1982), p. 83.

117 See generally Zdenkowski and Brown (1982), pp. 3-68. From a criminology/penology perspective, Zdenkowski and Brown began to refer to the work of Michel Foucault, especially *Discipline and Punish* (1977) in order to explain the regime of regulation which gave the criminal justice system its sense of authority. Jim Staples, a New South Wales judge, must also be recognised as an important part of the bridging between protest action and theoretical, legal re-thinking of the transformation of prisons. Staples had been involved for some time in the Council of Civil Liberties, and had been involved peripherally in Push activity around these issues. See generally: Justice Staples (1975), 'Prisons- A Legal Vacuum', *Alternative Criminology Journal*, vol. 1, no. 1, September/December, pp. 10-15; Coombs (1996), pp. 248, 250.

118 Zdenkowski and Brown (1982), p. 83. The PAG were not only crucial in agitating for and presenting submissions to the New South Wales Royal Commission Into Prisons (the Nagle Royal Commission) but significantly initiated a range of other protests illuminating the conditions endured by prisoners in New South Wales (see generally: Prisoners' Action Group (1977), 'Bathurst Gaol and the Royal Commission into Prisons- A summary by the PAG', *Alternative Criminology Journal*, vol. 2, no. 3, pp. 1-42). There were attempts to discredit the PAG as a 'terrorist organisation' (*Sydney Morning Herald*, 10 July 1980). However, it maintained purposive action. This included broadcasting over prison walls; setting up and managing a half-way house for ex-prisoners at Glebe; publishing prison diaries and newsletters through their publishing arm 'Breakout' liasing with trade unions to stop the construction of the maximum

**Women Behind Bars**

By 1975 the specific issues facing women in prisons began to be more vocally articulated by PAG members like Wendy Bacon and Liz Fell.[119] The Bathurst Riots illuminated the culture of violence and coercion horrifically enacted upon the male prisoner through his body. For women, this level of violence was more insidiously inflicted upon their bodies by a withholding of services, as opposed to daily beatings or floggings (although these also occurred).[120]

Wendy Bacon has argued that:

> Women in prison as elsewhere are controlled through their bodies in a very real way. The trivilisation and the lack of respect for women prisoners as people reflects the total prison environment.[121]

In October 1975, Michelle House, a prisoner in Mulawa who was pregnant, had been kneed in the stomach by an officer at the prison. She signed an affidavit to the effect that prisoners' babies, both born and unborn, were being used as a form of emotional blackmail if they didn't respond to other coercive measures. On her release, House contacted the media to protest against her assault and to draw attention to the refusal of then Minister of Corrective Services, Mr Waddy, to

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security complex Katingal; and protesting the draconian and vicious imperatives behind the complex itself in the ultimately succesful 'Close Katingal Campaign': see generally: Editorial (1978), *Jail News*, vol. 1, no. 9, quoted by Zdenkowski and Brown (1982), p. 83. Katingal was the super-maximum security complex which *The Nagle Report* (1978) called 'an electronic zoo' (p. 122). The Report also noted that 'the cost of Katingal is too high in human terms.' (p. 133.) The Report recommended that Katingal be closed, a recommendation that was upheld and activated by Premier Neville Wran. Wran's promise to close Katingal resulted in industrial action by prison officers, and the 'Close Katingal Campaign' was solely about ensuring that the Government fulfilled its commitment to do so: see generally Zdenkowski and Brown (1982), pp. 88-90; George Zdenkowski (1979), 'Katingal- To Be or Not To Be?', *Legal Service Bulletin*, vol. 4, no. 5, October, pp. 220-221. The PAG also set up organisations in Victoria, Western Australia, The A.C.T, Queensland, and South Australia: Zdenkowski and Brown (1982), p. 85.

119 Fell (1983), pp. 4-5; Bacon Interview, 1995.

120 Interview with Julie Bishop, 15 November 1995, Sydney.

121 Bacon (1983), p. 18.

investigate her case. As a direct result of Michelle's case, played out against a wider drama of prisoner abuse, Women Behind Bars (or WBB) was formed.[122]

Amongst the original members (of whom only two had never been, or were not, in gaol or girls' homes) were Wendy Bacon, Liz Fell, Pam Blacker and Beryl Christian.[123] These women reported Michelle House's case, and the formation of WBB in *Mabel* (a feminist newspaper) in December 1975, and the *Alternative Criminology Journal* (produced by the PAG) in the March-June edition of 1976. The identification of WBB with both the Women's Liberation and prison reform movements was therefore evident from the start, and the group's aims, in 1975 at least, were modestly expressed as: 'to produce evidence of mistreatment and discrimination against women in prisons; to give full support to women coming out of prison in their efforts to adjust; to help women still inside by pressing for more humane conditions.'[124]

The first action taken by WBB after pressing for an inquiry into the House case, was to hold a protest and carol service outside Mulawa at Christmas 1975. WBB were joined by about thirty other women from the Sydney Women's Liberation Movement. They hired loud speakers and sang carols, with the words adapted, over the gaol fence. Dominated by a large banner produced by the Tin Sheds Group at Sydney University[125] depicting the Women's Liberation symbol, a repeated graphic of a woman's face behind bars and the slogan 'The Jails Are The Crime', WBB announced themselves publicly:

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122 Women Behind Bars (1976a), 'Women Behind Bars', *Alternative Criminology Journal*, vol. 1, no. 3, March-June, pp. 21- 22 (reprinted from *Mabel*, December 1975); Women Behind Bars (1977c) 'Women Behind Bars', *Sydney Women's Liberation Newsletter*, May, pp. 1-2. The original press release was signed by Michelle House, Kay Hancox, Beryl Christian, Wendy Bacon, Pam Blacker, Kris Melmouth, Liz Fell, Vicky Hunter, Colleen Vandergeest and Dianne Pritchard: Zdenkowski and Brown (1982), p. 389. See also Liz Fell (1975), 'Women Behind Bars', unpublished paper, Women's Commission, October, Sydney (FTYC). Fell's paper was arguably the first time that the name 'Women Behind Bars' was used publicly. Women Behind Bars also had a sister organisation in Queensland, although it was formed later and because of the NSW group: Women Behind Bars (Qld.) (1979), *Jail News*, vol. 2, no. 7, July, p. 5, quoted by Zdenkowski and Brown (1982), p. 389.

123 Women Behind Bars (1976a), p. 22.

124 ibid.

125 See n. 146.

Joy to the world, WBB has come
Let prisoners hear our cry
We'll not move back a pace
Till they open up the gates
And set our sisters free, and set our sisters free
And set, and set, our sisters free.[126]

Inside, the women cheered and sang back.[127]

In May 1976, WBB applied for and were granted Legal Aid for representation at the Nagle Royal Commission into New South Wales prisons. Pat O'Shane and Gay O'Connor were employed to present the group's case.[128] The main focus of the WBB submission was the inadequate medical treatment available to women in Mulawa. In July 1976, WBB held a demonstration outside the gaol to highlight the nature of the complaints being prepared for the Commission.[129] A long banner with the words 'Mulawa Jail makes women sick' was stretched along the fence, and a tape of medical information was broadcast for the benefit of the women inside.[130] The range of difficulties facing women in Mulawa when seeking medical attention was vast. Prison staff upheld the practice of withholding and administering drugs as a form of punishment. Wendy Bacon has commented that this was an inappropriate practice for an institution in which between 70 and 80% of the women were in prison because of drug addiction.[131] No drug rehabilitation program was provided,[132] the prison doctors (when actually available) preferred to administer large amounts of tranquilisers to offset the more recalcitrant

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126 Women Behind Bars (1977c), p. 1; Mackinolty and Radi (1979), p. 170 (quoted from *Womanspeak* vol. 2 no.1). Other 'abridged' carols included 'Away in a Manger', and 'Joy to the World'.

127 Women Behind Bars (1977c) , p. 1.

128 ibid.

129 *The Nagle Report* (1978), recommendations 187-199 p. 390. These included: the provision of ante-natal and gynaecological treatment for all women prisoners; the relaxation of the practice of forcing mothers to surrender infants on their first birthday; the improvement of medical services at Mulawa; the movement of psychiatric patients to ore appropriate facilities. Women Behind Bars (1976b), 'Demonstration at Mulawa', *Alternative Criminology Journal*, vol. 1, no. 4, pp. 71-72.

130 ibid; Women Behind Bars (1977c), p 2.

131 Bacon (1985), p. 7.

behaviourial problems brought on by withdrawal.[133] Pregnancy testing facilities were inadequate. Often women who were pregnant were told that they were not.[134] The gynecologist visited the prisoners once a month. Women who wished to have abortions, by this time legally and easily obtainable outside the prison, were forced to continue their pregnancies, even when they had been, or were, heavy drug users.[135] Other well-documented cases of medical ill treatment included misprescribing drugs, or withholding treatment to psychiatric patients. Between 1976 and 1977 three women died in Mulawa as a direct result of inadequate or non-existent medical treatment.[136]

In 1976 WBB were successful in having their submission to the Nagle Royal Commission accepted as the basis for recommendations for reform.[137] However, the campaign to improve medical treatment for women prisoners in New South Wales illuminated the distinct and somewhat contradictory character of WBB. WBB, by their own admission, did not have a defined program or set of policies.[138] By 1976, the group had changed its composition, and included women who had themselves not been in gaol (although they maintained a steady policy of visiting women who did remain inside.)[139] Described by Zdenkowski and Brown as the only organisation other than the PAG dedicated to a radical critique of the criminal justice system,[140] the incursion of women from outside the original libertarian

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132 Wendy Bacon and Denise Beale (1977), 'Drugs and Women in Prison', *Alternative Criminology Journal*, vol. 2, no. 3, p. 29.

133 Bacon (1985), p. 7.

134 Women Behind Bars (1976b), p. 72.

135 ibid.

136 These women were Carol Rutley, Rowena Newell and Sue Bourke. For a narrative discussion of the circumsatnces of their deaths see Anonymous (1977c) 'Dying Behind Bars', *Sydney Women's Liberation Newsletter*, May, pp. 5-6.

137 *The Nagle Report* (1978), p. 390. In an immediate sense, they were also successful in securing medical staff, Pearl North and Dr Jean Edwards from the Liverpool Women's Health Centre, to run a gynecological clinic open day a week in the jail hospital. The service was however decommissioned in 1983: Bacon (1985), p. 7.

138 Women Behind Bars (1977c), p. 2.

139 ibid. These women who joined Women Behind Bars after 1975, and had not necessarily been in jail, included Julie Bishop, Jenny Neale, Jenny Coopes, Julie McCrossin, Janet Walquist: Bacon Interview 1995; Bishop Interview 1995.

140 Zdenkowski and Brown (1982), p. 84.

membership ensured that the group began to have a reformist agenda inscribed upon an anarchist foundation.

The original and primary objective behind WBB was to critique the imprisonment of women for a large range of crimes which were, they believed, the result of class circumstances. In Wendy Bacon's terms, WBB was 'in essence anarchist and therefore in principle opposed to imprisonment per se. [Yet] the group in practice was reformist, therefore from day one, WBB was characterised by serious contradictions.'[141] Although Bacon identifies these contradictions as contributing to WBB's demise 'after a period of social usefulness'[142], the increasingly complex construction of the group gave WBB a sense of energy around a single, identifiable issue that was significant to the political and cultural milieu of Sydney in the late 1970s.

As well as maintaining a sense of accord with the PAG[143] WBB drew their membership increasingly from the Sydney Women's Liberation Movement. Wendy Bacon herself characterised the momentum of WBB and their ability to achieve action as 'a combination of social activity and personal relationships which created a lot of energy.'[144] The connections between women resulting from shared houses, shared relationships and sexual identity (many women involved in WBB during the early 1980s identified as lesbians),[145] and shared membership of collectives, provided WBB with a broader and more diverse focus. For example, Toni Robertson, an artist involved in the Tin Sheds and the Women's Art Movement, became involved in WBB around 1980, and lent her support to subsequent campaigns by realising the situationalist perspective through art work and

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141 Bacon Interview, 1995. Wendy Bacon also noted that WBB tried to emulate the 'Close Katingal' campaign and have Mulawa closed: The campaign was, however, unsuccessful: Bishop Interview 1995.

142 Bacon Interview, 1995.

143 WBB and the PAG collaborated on many campaigns, including: 'Close Katingal', and the campaigns to free Joy Thomas, Violet Roberts, Sandra Willson, and Ray Denning: see generally Women Behind Bars (1983).

144 Bacon Interview, 1995.

145 See n. 108.

banners.[146] Kris Melmouth, a veteran of the campaign for Elsie, became an early member, and through the cross-fertilisation of social and political activity of feminism drew in other women like Julie Bishop, who had also been involved in the grass roots refuge movement.[147] Jeune Pritchard, Jenny Coopes and Jenny Neale were drawn in from the younger end of the old libertarian network.[148] Others still emerged from the Sydney Women's Film Co-op, and were instrumental in making and producing films which highlighted the conditions of women in prison, and gave WBB a cultural and visual voice.[149] WBB therefore maintained its original focus as an abolitionist and anarchist group, while becoming increasingly influenced by different cultural and political perspectives drawn from the larger Women's Liberation Movement

The major public campaigns undertaken by WBB between 1975 and 1980 involved attempts to release individual women from prison, and by doing so, to highlight the inadequacies of the prison system more generally. Most successful in this respect were the campaigns to free Joy Thomas,[150] and significantly, Sandra

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146 Interview with Toni Robertson, 3 December 1995, Sydney. The Tin Sheds was a studio attached to the University of Sydney. The name was also attributable to the poltical focus of artists in residence at the studio. Work emerging from the Tin Sheds during this period included the prints used for protests banners, posters etc. Toni Robertson places this aspect of the Sydney art movement squarely within the influences of situtationalism: Robertson Interview, 1995. For an overview of the objectives of the Women's Art Movement, or WAM, of which Robertson was also a member, see: WAM Collective (1976), *WAM Submission to Community Arts Board, Australia Council, March 1976*, (FTYC).

147 Bishop Interview, 1995.

148 Bacon Interview, 1995.

149 Sydney Filmmakers' Co-operative (1978), 'Prison Films', pamphlet, (FTYC). Films described as available for showing included 'Not Guilty But Insane', by Jeune Pritchard (a film about Sandra Willson, 1977); 'Saint Therese', by Daniela Torsh (a fictional account of women in Mulawa, 1978); 'In Moral Danger' by Jenny Neale and Jeune Pritchard (a film about girls' homes, 1977).

150 Joy Thomas was a woman who was released on license in 1978 after serving ten years of a life sentence (for a murder committed during an armed robbery). The conditions of release on license mirror those of parole. Joy left New South Wales to rejoin her family in Queensland, and was arrested on charges of harbouring an escaped prisoner. The charges against Joy, which also included break and enter and possession of a firearm, were fabricated, based on a verbal confession that was never made. Thomas was re-arrested, and her release on license revoked. WBB, with the PAG, initiated a campaign to have Thomas re-released. The campaign was successful, and Thomas was freed on March 16 1980. See Women Behind Bars (1979), 'Release Joy Thomas',

Willson. Willson had shot a stranger dead in 1959 when she was twenty years old. The killing in Sandra's own account, was a revengeful act against a society that had judged and treated her prejudicially.[151] Sandra, a lesbian, had been placed in a psychiatric institution and given aversion therapy from the age of fifteen to try and 'cure' her. At twenty, she began as a trainee psychiatric nurse at Rydalemere hospital in Sydney, where she fell in love with another trainee. Pressure was put on Sandra's lover to break up the relationship, which she did, considering their circumstances to be 'unnatural and perverted'.[152] For Sandra, an out lesbian and proud of her sexuality during a time in which lesbianism remained, in general, hidden from public scrutiny, the demise of the relationship and the interference of others who perceived her behaviour as non-conformist and dangerous, produced an intense reaction.[153] As Sandra herself described:

> I felt like killing myself on the spot...By a long train of events I decided that killing myself alone was no good - people would be glad to see me gone - so if I killed one of 'them'/society, someone would cry and possibly be sorry that they had interfered in my life and my right to live.[154]

She chose her victim, a taxi-driver, at random.[155] Deemed psychologically unfit to stand trial at first instance, then insane, Willson was detained under the Governor's Pleasure in a psychiatric institution until she was considered to have regained her

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pamphlet, (published in *Sydney Women's Liberation Newsletter*, April 1980). See also Women Behind Bars (1980c), 'Joy Thomas Released', *Sydney Women's Liberation Newsletter*, April, not paginated.

151 Women Behind Bars (1977d), 'Women Behind Bars', *Alternative Criminology Journal*, vol. 2, no. 2, pp. 71-81, p. 72.

152 ibid., p. 73.

153 Women Behind Bars (1977f), 'Who is Sandra Willson and Why is She in Jail?', pamphlet, (FTYC). The pamphlet gives emphasis to Sandra's identity as a lesbian: 'She often wore drag...she maintained that she had been born a lesbian, that she was happy to be one, and that since female homosexuality has never been illegal in this country, she could see no reason why she should not advertise her love for other women. She had, in the late 1950s, no other model of homosexual relations than the stereotyped "butch" and "femme" roles which parodied a heterosexual couple. She was male-identified in as much as she adopted a protective and dominant attitude towards the women she loved, and she tried to emulate masculine toughness. She learned how to handle a gun.'

154 Women Behind Bars (1977d), p. 74.

155 ibid. p. 75.

sanity, at which time she was to be released.[156] Although declared sane in 1971, she was transferred from the institution in which she had lived since 1959 to Mulawa.[157] The New South Wales Parole Board consistently refused to recommend that she be released on license (an avenue of freedom for life-sentence prisoners governed by the state).[158] WBB, believing that 'ultimately [it is] her jailers rather than Sandra herself who are responsible for her still being in prison',[159] initiated a major campaign to secure her release.

The Free Sandra Willson Campaign was significant for many reasons. The nature of Sandra's prejudicial treatment by legal and medical discourses because of her lesbianism, drew attention from the Gay Liberation Movement, and especially lesbian groups and individuals within the Women's Liberation Movement itself.[160] From this perspective, the campaign can be characterised as not only an attack upon the Department of Corrective Services' treatment of female prisoners, but of the legal policing of women's sexuality, and the indirect legal discrimination against lesbians.[161] It can also be characterised as an important step in raising the profile of WBB amongst the community of Sydney feminists. A special edition of the *Sydney Women's Liberation Newsletter* produced by the group in May 1977 included not only Sandra Willson's press statement, and a report on the campaign, but a self-parodied recruitment profile for future WBB members:

> If you're over 18, with a taste for adventure, a desire to travel all over the state...then YOU are the girl for us! ...Every WBB girl is

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156 See the FLAG Report (1982), pp. 106-112. The implicit reasoning behind a Governor's Pleasure sentence is that it recognises diminished responsibility for criminal liability because a person is temporarily or permanently insane, and it acquits the person for these reasons. In practice, however, the Governor's Pleasure is often treated as if the person had been convicted, and as if they were responsible for their actions. Sandra Willson found herself in this situation.

157 The problem facing Sandra was that if she behaved in a subservient fashion, she was considered institutionalized and incapable of surviving in the outside world. If she articulated anger at the reality of her situation she was judged 'incapable of suppressing her violent ways.': Women Behind Bars (1977d), p. 75.

158 See discussion of the requirements for a release on license in relation to Bruce and Violet Roberts in Chapter Six.

159 Women Behind Bars (1977d), p. 75.

160 Women Behind Bars (1977f).

161 ibid.

> issued FREE of charge with a set of attractive Feminist Green Overalls, combat-style woolen beanie and a 'free Sandra Willson' undershirt...As a WBB urban activist you will learn to handle the most up to date equipment...from...small nozzled spray paint tins to fast and efficient get-away vehicles.[162]

The Free Sandra Willson Campaign was also significant because of its grounding within the broader foundations of Sydney's Left, political movements. The campaign was not the sole initiative of WBB or Women's Liberation. The 'Free Sandra Willson Support Group'[163] drew membership and activist inspiration from the PAG, and because of the decisively legal nature of the case, membership and interest was also drawn from the developing political face of Left Legal practitioners.[164] A further reason the Sandra Willson campaign was to be an important moment in the micro-history of WBB was the nature of the campaign itself. Despite the interest and skill of lawyers and legal academics involved in the Free Sandra Willson Group, the group's challenge to the validity of the New South Wales Parole Board's refusal to recommend Sandra's release on license did not involve the courts. Zdenkowski and Brown, who were involved in the campaign, have argued that this was because of the time and money involved in legal proceedings, and the probability of failure.[165] Instead, an intensive and ultimately successful public campaign was initiated,[166] the aims of which included not just

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162 Women Behind Bars (1977), *Sydney Women's Liberation Newsletter*, p. 14.

163 Zdenkowski and Brown (1982), p. 86.

164 Helen Golding (1977), 'Sandra Willson', *Civil Liberty*, no. 72, May/June, pp. 3-4. (Golding was both a lawyer, part of the Redfern Legal Centre Collective, and a member of WBB). A discussion of the Redfern Legal Centre, and the emergence of a distinct left legal profile in Sydney is forthcoming in this chapter.

165 Zdenkowski and Brown (1982), p. 86.

166 The campaign, which began in January 1977, was multi-faceted in approach, and reflected the political backgrounds of its participants. A round-the-clock- vigil was set up in Chifley Square in central Sydney (renamed 'Prison Square'), and a fifty metre banner ('Free Sandra Willson NOW!') was draped from the top of the QANTAS building facing onto the square. A demonstration was organised to coincide with the official opening of the new Supreme Court building in Queens Square. Delegations were sent to Premier Neville Wran and Ron Mulock (Minister of Correctvie Services) requesting immediate action. Eight women occupied Mulock's office and were forcibly ejected. A demonstration in Chifley Square following the occupancy resulted in thirteen arrests. Seven women who were arrested declined the offered release on their own sureties and furthered their protest by being placed in Mulawa. A mass of telegrams to the Department of Corrective Services were delivered from all over

securing Willson's freedom, but drawing attention to the powers of the Parole Board and to reform of the Governor's Pleasure sentence.[167]

Three weeks into the campaign, William Haigh (a newly appointed Minister for Corrective Services) announced the Government's decision: Sandra Willson would be transferred to a half-way house, where she would be on work release, and her case would be reviewed in six months.[168]

Although not a complete victory (the Governor's Pleasure sentence was not reviewed when Willson was released from Mulawa), the Sandra Willson campaign demonstrated that a combination of critical legal reformism, situationalist-libertarian activism and feminist ideas focussing on the discriminatory treatment of women in all spheres (including the criminal justice system) had a particular potency. In this sense, women like Wendy Bacon, who had never perceived WBB or themselves to be implicated in reformist practices, could see the collective energy to be drawn from collaboration with a range of men and women with different informing perspectives. The profile of the prison reform struggle, and the release of women like Sandra Willson, were small, undulating steps towards the larger goal (for WBB at least) of dismantling prisons for women altogether. WBB's catchcry, after all, was 'Jails are the crime'. Wendy Bacon, 18 years after the Sandra Willson campaign, saw the seeds of WBB's demise in reformist practices embedded within a libertarian-anarchist philosophy, yet she also acknowledged the energy such an uneasy reconciliation of difference produced.[169] Wendy Bacon, as a libertarian, may have initially gone to gaol, and been awakened to the injustice of the criminal justice system, because of an anti-authoritarian act which implicitly

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Australia. See: Zdenkowski and Brown (1982), pp. 87-88; Golding (1977); Anne Summers and Wendy Bacon to Sandra Willson Support Group, January 1977, (FTYC); Women Behind Bars (1977f).

167 Zdenkowski and Brown (1982), p. 86.

168 Women Behind Bars (1977e), 'Sandra Willson- 3 Months Later', *Sydney Women's Liberation Newsletter,* May, pp. 11-12. Willson appeared before the Royal Commission into New South Wales Prisons in 1978 to comment on her experience as part of a work release program, and became heavily involved in Women Behind Bars and prison reform generally. For an assessment of Willson's own views on her experience with the criminal justice system see: Sandra Willson (1977), 'Once You're in, you're in", *Alternative Criminology Journal,* vol. 2, no. 3, pp. 22- 28; and Willson (1979).

169 Bacon Interview, 1995.

critiqued the practices of the law. However, her journey, in some senses the journey of many women with radical political perspectives writ small, led her to a dissonant engagement with another intellectual project: liberal reformism.

## Robyn Lansdowne and The Redfern Legal Centre

By the time Robyn Lansdowne met Wendy Bacon, Bacon was a law student at the University of New South Wales, where Lansdowne had just completed a law degree.[170] The conflation of activism in all sectors of Left politics had produced a defining interest in the law. John Chesterman has argued that the amorphous nature of Left political cultures in Australia in the 1970s were linked by one common theme: the 'rejection, or at least the appearance of rejection, of mainstream culture.'[171] As such, mainstream culture itself became a site of protest, and for young legal academics and law students, such protest - or confrontation - was manifested through a critique of the manipulation of people by authority, and the lack of access to the law for those on low incomes.[172]

In some respects, the birth of the New Left lawyer reflected the embryonic engagement of law and feminisms discussed earlier in this chapter. Groups like FLAG, and individuals who had assisted in Women's Liberation campaigns for legal abortion or equal pay, were invested primarily in the law's treatment of women. The New Left lawyers, as demonstrated through the establishment of

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170 Wendy Bacon was herself to become the focus for a campaign when in 1981 she was refused admission to the New South Wales bar as a result of an alleged absence of 'good faith and character' (this was based on her involvement in Victoria Street, and her imprisonment over the *Tharunka* charges. For a discussion of the issue see Women Behind Bars (1981), 'The Bacon Case: Phillip Street Unearths "Standards"', pamphlet, (FTYC); Anonymous (1981c), 'Wendy Bacon and the Bar', *Legal Service Bulletin*, vol. 6, no. 1, February, p. 1.

171 John Chesterman (1995), 'The Making of the Australian new Left Lawyer', 1 *Australian Journal of Legal History* 37, p. 43.

172 ibid. See also John Basten (1980), 'Legal Sevices: Looking into the 1980s', *Legal Service Bulletin*, vol. 5, no. 6, December, pp. 282-285. Basten's article is an overview of a public meeting held at the Redfern Town Hall on 1 October 1980, organised by the Australian Legal Worker's Group, on the topic 'Legal Services in the Eighties'. The panel consisted of Justice Lionel Murphy, who initiated the Australian system of Legal Aid in 1972, when he was then Attorney-General of Australia; Mary Gaudron, Chairperson of the NSW Legal Services Commission and Paul Coe, Chairperson of the NSW Aboriginal Legal Service.

community legal centres, were more broadly interested in the provision of legal services to all citizens denied fair and equal access to its protection. The New Left framework, which recognised liberal law's contradictions, its claims to provide equal treatment and protection for all and its different standard of delivery of services to different citizens, was always present. However, despite constructing themselves in opposition to mainstream legal practice and culture, the lawyers active in the critical rethinking of how to provide better services for those alienated by the law, were implicated in the process of liberal reformism. Like the feminists beginning to find a critical engagement with legal doctrine and practice, the Left legal community had to engage with the law to attempt to transform its operation. Correlatively, their efforts prevented a broader epistemological understanding of how the law constructed some subjects as disadvantaged to begin with.

New Left lawyers, in both Melbourne and Sydney during this period, may not have been directly involved in developing a critical jurisprudential perspective, but they were involved in radical and practical action to improve the availability of protections for citizens dispossessed by race, gender and most importantly class, and to demythologise the law for such citizens.[173] One of the most significant actions taken by lawyers identifying themselves politically as left was the foundation of legal centres to provide free and accessible legal services for people marginalised by the legal system. The Fitzroy Legal Service was established in Melbourne in December 1972 to provide such a service, and became the first non-Aboriginal community legal centre to begin operation in Australia.[174] The Fitzroy Legal Service perceived itself to be an organisation which could engage people to

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173 Chesterman (1995), p. 47. The implication that the Left legal community of the 1980s was 'non-theoretical' is made contextually. In comparison to the nature of theoretical and critical jurisprudence in the 1990s, the emphasis in the 1980s was placed heavily on securing actionable methods by which citizens could receive access to justice. However, as the conference papers to a 1982 conference organised by the Australian Legal Workers Group indicates, a theoretical perspective on these issues was evident. See: John Basten, Mark Richardson, Chris Ronalds, George Zdenkowski (1982), *The Criminal Injustice System*, The AWLG and Legal Service Bulletin, with the Law Foundation of New South Wales, Sydney. In fact, Robyn Lansdowne recalled solicitor Virginia Bell complaining of this conference that it was 'too theoretical', Interview with Robyn Lansdowne, 23 August 1995, Newcastle.

174 Chesterman (1995), p. 37.

work collectively and actively, through community education as well as the provision of legal services, to alter their society.[175]

The introduction of a community legal service did not occur in Sydney until late 1976,[176] when the Redfern Legal Centre opened its doors in Pitt Street Redfern, a lower-class suburb with a high proportion of Aboriginal residents.[177] Robyn Lansdowne, reflecting on the initial organisation of that centre, characterised the informing perspectives of its original membership as products of a political climate of 'expansion and optimism'.[178] For younger members like herself, volunteers still in law school or having just completed their law degrees, these sentiments were connected to a post-Whitlam Government political environment. There was a sense of energy to harness the changes to Legal Aid and law reform that had occurred under that administration.[179] For other members, practicing solicitors like John Terry, or University of New South Wales legal academics (and PAG members) like George Zdenkowski and Dave Brown, the political consciousness developed from New Left and libertarian politics were more complex. These different perspectives ensured that the Redfern Legal Centre became a 'hub'[180] for a range of Left legal groups and individuals with similar commitments to demythologise the law, yet with different focuses on how such a process was to be executed. For some, like Robyn Lansdowne, social worker Claire Petrie, and solicitors like John Basten and Terry Budden, the Redfern Legal Centre was not a radical group: '...it was integrated...rather than instituted with the Legal Aid

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175 ibid., p 46. See also John Evans (1981), 'Legal Services Research', *Legal Service Bulletin*, vol. 6, no. 1, February, pp. 2-3; See also John Basten and Robyn Lansdowne (1980), 'Community Legal Centres: Who's in Charge?', *Legal Service Bulletin*, vol. 5, no. 2, April, pp. 52-57.

176 Lansdowne Interview, 1995.

177 Lansdowne recalled that the premises were provided courtesy of South Sydney Council, Lansdowne Interview, 1995.

178 Lansdowne Interview 1995. See also Basten (1980) for a discussion of the connections between Legal Aid and social change, and also the political limits of Legal Aid in terms of the charter the community legal centres envisaged for themselves.

179 ibid.; Chesterman, pp. 43-45.

180 Lansdowne Interview, 1995.

Commission, and we dealt with day to day problems...people coming in from the street.'[181]

However, other members of the original Redfern Legal Centre Collective had different expectations and interests in the quest to grant accessible legal services for those who generally fell outside of the law's protection. John Basten, Chris Ronalds and Greg Woods, part of a group known as the Australian Legal Workers' Group (ALWG) extended their practical legal service into organising conferences on the Criminal Justice System[182] in order to articulate theoretically and politically critical new ways forward for the law. The ALWG was a loose organisation itself. As Robyn Lansdowne recalled, 'anyone could say they were a member. If you were an activist advancing legal rights for the underprivileged you were in.'[183] The ALWG as in the other groups (like the Legal Services Bulletin collective) were 'a small nucleus involved in lots of different things'[184] which found a collective representation through the Redfern Legal Centre.

The pluralist foundation of the Redfern Legal Centre was mirrored in the legal work it attracted and carried out. Legal issues ranged from representing people charged with serious criminal offences, to tenants seeking to fight eviction.[185] Volunteers found that the legal establishment was wary of their activities, believing that a free legal service would take work away from private practice.[186] However, one of the initial and ongoing services provided by the Redfern Legal Centre, and unlikely to encroach upon established client bases in private firms, was the

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181 ibid.

182 Basten et al (1982).

183 Lansdowne Interview, 1995. See also George Zdenkowski (1979), 'Formation of the Australian Legal Workers Group', *Legal Service Bulletin*, vol. 4, no. 6, pp. 260-261; Michael Salvaris (1980), 'Why we need the Australian Workers Group', *Legal Service Bulletin*, vol. 5, no. 7, August, pp. 145-146.

184 Lansdowne Interview, 1995.

185 ibid.; Chesterman (1995), p. 37.

186 Lansdowne Interview, 1995; See also Stan Ross (1979), 'Australian Legal Workers Group Replies', *Legal Service Bulletin*, vol. 4, no. 6 December, p. 253, responds to the criticism that 'radical lawyers of the left...take the easy way out [by] withdrawal to the safety of a self-made institution'.

representation of prisoners.[187] The involvement of people like Brown and Zdenkowski implicated the PAG, and by virtue of association WBB, in the reformist legal practice undertaken at the Redfern Legal Centre.[188] Although there was a distinction between theoreticians, practitioners and activists, a shared commitment to improving the criminal justice system in New South Wales gave the Redfern Legal Centre, and the New Left lawyers, a sense of energy and commitment that drew them into the broader canvas of critical Left Sydney political activity.

**Revisiting Violet Roberts**

The combination of Robyn Lansdowne and Wendy Bacon as researchers on the FLAG homicide project provides a key to unravelling the power and political potency of the campaign to release Violet and Bruce Roberts that exploded in 1980. As individuals, Bacon and Lansdowne's political positions and experience were quite distinct. Robyn Lansdowne, although a graduate of the University of New South Wales, had never been involved in the Kensington Libertarians, and did not meet Wendy Bacon until the project began. She was, however, aware of Bacon's profile. Lansdowne recalled meeting Wendy Bacon for the first time:

> I met Wendy initially through John [Basten]. She was a very glamorous figure. Not glamorous in the appearance sense, although she has always been striking, no...she had been so publicly active...Victoria Street, Women Behind Bars...[189]

Twenty-one when the homicide research began, Lansdowne was younger than Wendy Bacon, had just finished law school, and was waiting to begin College of Law, and to take up a job at the commercial law firm Freehill Hollingdale and Page.[190] However, her involvement in the politics of the criminal justice system,

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187 John Basten and George Zdenkowski (1981), 'Prisoners' Legal Service', *Civil Liberty*, no. 95, March/April, p. 2.

188 Robyn Lansdowne characterised the influences on and within the Redfern Legal Centre by reference to the following individuals: 'Dave Brown was theoretical not practical; John Basten: was involved with 'mechanics'; and George Zdenkowski was more of a tactical activist.': Lansdowne Interview, 1995.

189 Lansdowne Interview, 1995

190 ibid.

through the Redfern Legal Centre and John Basten, attracted her to a job as researcher on the FLAG project, placing her more conventional career plans into temporary hiatus.[191] In terms of her own political perspective at this time, Lansdowne described herself as possessing a 'more humanitarian consciousness than a political one. I didn't have a developed position...my interest was as more of a desire to do good rather than as a political philosophy.'[192]

Wendy Bacon's involvement in the homicide project, on the other hand, evidenced her continuing political commitment to exposing the injustice of the criminal justice system, and attempting to find new methods for attacking the prisons which, in a libertarian sense, inappropriately incarcerated women for crimes derived from their own social dislocation.[193] It was Bacon who, according to Lansdowne, 'came up with the idea' behind the FLAG project, although the two women jointly initiated the process of securing funding to carry out their research.[194]

The final conclusions of the FLAG report reflected the operation of criminal law defences to murder as denying recognition of women's difference from legal subjects, traditionally perceived as male, especially when women were the survivors of domestic violence.[195] It was the combination of these conclusions with the pre-existing feminist generated discourse on domestic violence and an exuberant prison reform movement that pushed the FLAG project beyond a basis for educative research and reform. Through their connections with women in Mulawa, forged

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191 Lansdowne was not involved in the project from its inception. She applied for the job as researcher on John Basten's recommendation: Lansdowne Interview, 1995.

192 ibid.

193 Bacon Interview, 1995.

194 Lansdowne Interview, 1995. This recollection of Lansdowne's is contested to some degree by Margaret Thornton, who remembered the initiative for the project, and the initial securing of funds from the Criminology Research Council, as attributable to herself, Roslyn Omodei, and Liz Pemberton: Margaret Thornton to Sue Wills, 7 August 1995.

195 As Robyn Lansdowne wrote: 'It is arguable that the use of the defence of diminished responsibility [for example] perpetuates the view that to kill a brutal husband against whom the law provides no protection is not a valid response but rather the product of a sick mind', Robyn Lansdowne (1980), 'Violet Roberts- Justifiable Homicide?', *Sydney Women's Liberation Newsletter*, March, pp. 2-3; The FLAG Report (1982), pp. 309-324.

during the interview process and Bacon's involvement in Women Behind Bars, and their own particular skills, Lansdowne and Bacon were in a unique position to place their findings into a broader political context. The FLAG homicide project therefore became a means to connect the inadequacies of existing criminal law defences for battered women who kill to a public discussion of how to serve justice to women as domestic violence survivors. By initiating a campaign for the release of a woman jailed because she killed a violent spouse, Lansdowne's and Bacons's identification of the need to reform the law would be given a public voice and power that few academic research projects could emulate. In this way, the initial objectives of FLAG, to locate and challenge the places where the law failed adequately to recognise and protect women, were given an opportunity to be voiced across the wider community, and to be heard by a state slowly coming to terms with its obligations to women identified by the feminist politics of the 1970s.

The reasons Violet Roberts became the woman at the centre of such a public campaign are varied, and reflect the pluralist perspectives of the movements against domestic violence and for reform of the criminal justice system. From the very beginning, because of Bacon's involvement, Women Behind Bars was a driving force in the campaign. Julie Bishop, a member of the group, recalls that the primary objective behind the campaign was 'to get someone out of gaol....our philosophy was, at heart, abolitionist. We were interested in clearing the gaols [to highlight] the deprivation of liberty...and to change the focus to freedom and socialisation rather than coercion and punishment.'[196] Wendy Bacon recalls that there was a need to focus on the conditions in Mulawa, as well as the reasons women were incarcerated there in the first place. Conditions had not been improving, despite the recommendations of the Nagle Royal Commission, and the imperative to illuminate the inadequacies of the system was intensifying rather than dissipating.[197]

However, the complex interplay of personal and political relationships between Women Behind Bars and the Sydney Women's Liberation Movement sharpened

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196 Bishop Interview, 1995.

197 Bacon Interview, 1995.

the broad desire to just 'get someone out of gaol.' The FLAG report symbolised the textual convergence of a domestic violence discourse with those of legal and prison reform. As a result, the campaign was to be tailored around an individual who had suffered at the hands of each of these. From Robyn Lansdowne's perspective, it was the specific nature of the class and legal issues in Violet and Bruce Roberts' case that resulted in their public championing. There were other women interviewed for the FLAG project that were serving sentences for murder because they had killed violent spouses.[198] However, these women had provocation or self-defence raised at their trials. Although their sentencing and incarceration still reflected the inadequacies of these defences in terms of the inability to interpret provocation liberally, and thus to take into account factors such as women's failure to respond immediately to a life-threatening situation,[199] elements of their experience as domestic violence survivors had been superficially recognised by their counsel.[200] The legal issues and avenues for appeal in their cases were therefore more 'clear cut.'[201]

There were also other cases decided around the same time as the campaign for the Roberts' release in which victims of family violence had been sympathetically treated by the courts. The Krope and Calleja cases,[202] with similar factual bases to the Roberts' case, resulted in acquittals for the co-accused in the first instance, and a five-year good behaviour bond for those in the second. The accused in both of these cases received more initially favorable press, and as a result, greater jury (public) sympathy. (In the Krope case, the daughter and sister of the co-accused mother and son was the reigning Miss Australia.) They were also able to afford

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198 The FLAG Report (1982), pp. 44-45; 311-314.

199 See discussion of the traditional interpretation of provocation in Chapter Two; FLAG Report (1982), pp. 314-323.

200 ibid.

201 Bacon Interview, 1995.

202 The Krope case was decided in 1978, and the Calleja case in 1979. See Lansdowne (1980), pp. 2-3; *Sydney Morning Herald*, 4 September 1980, p. 2; *Daily Mirror*, 28 October 1981, p. 4.

202 ibid.

private legal representation, which resulted in a more assiduous adduction of the history of violence.[203]

As more disadvantaged subjects, the Roberts' were perceived by Bacon and Lansdowne as less able to engage with the network of disciplinary systems which constructed them. The (unsuccessful) use of a diminished responsibility defence, the failure of the Director of Public Prosecutions to adduce the history of violence and to contest its relevance, the failure to attempt to mount a successful defence via provocation or self-defence, and the subsequent mandatory life sentence penalty for Violet ensured that the Roberts were the 'perfect candidates'[204] through which a campaign for justice and reform could be launched.[205]

In Wendy Bacon's estimation, Violet Roberts was also 'desperate' to get out.[206] She felt an increasing sense of injustice at her circumstances, which was exacerbated by her increasingly bad health, shamefully unattended to in the primitive health facilities available at Mulawa.[207] As Violet herself explained to the media during the campaign:

> I knew nothing of court procedure...I'd never been in a court room in my life. I never considered I'd get a life sentence. I wasn't worried. I thought once the jury heard of the terrible things Eric had done to us, they'd understand...I'd like to know how come some get acquitted. Some get short times, well just us that we know of, and this other lady has got to do life sentences and long years. You know its all just so very unfair. Where is justice. Is there any such thing as justice?[208]

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203 Lansdowne Interview, 1995.

204 ibid.

205 See discussion of the Roberts' case in the Prologue.

206 Bacon Interview, 1995.

207 Violet Roberts had two heart attacks while incarcerated in Mulawa. She also had deteriorating eyesight that was unattended, and arthritis: 'Vi Roberts: will death be her reprieve?', *Woman's Day*, 6 August 1980, p. 8. See also Robyn Lansdowne to The Hon, L.J. Ferguson (Deputy Premier of New South Wales), 28 July 1980, (RL/WB), in which Lansdowne noted: 'We stress again that Mrs. Roberts is not in good health. She suffers from angina and was recently hospitalised in intensive care. She is not in a state of health to endure a protracted examination of her case.'

208 2 SER-FM, Interview with Bruce and Violet Roberts (transcript), Annie Bremmer and Chris Deegan, 25 October 1980, (RL/WB); *Woman's Day* (1980), p 8; Lansdowne (1980), p. 3 notes that the 'other lady' was Betty Murray.

Although Julie Bishop remembers Violet as 'no saint',[209] her story touched a chord with the wider Women's Liberation Movement because of the history of terrible violence she had suffered in her marriage. Her case was 'clearly unjust'.[210] Bruce and Violet embodied the law's difficulty in accepting and taking into account the conditions of family violence. Wendy Bacon, and, more especially Robyn Lansdowne who had completed the interviews with Violet and was more familiar with her personally,[211] knew they could help Violet and Bruce if Violet gave her permission.[212] But Violet wasn't ready. She wouldn't proceed without Bruce[213] and she would not be involved in a public campaign until her mother died, as her mother did not know that she and Bruce were in gaol.[214]

Violet Roberts was the most unlikely catalyst and active participant in the emergence of a discursive engagement by the law with domestic violence. She was not a political player; she had her own beliefs and principles, her own understanding of retribution and justice that had been entirely subsumed by the public discourse in, of and around the New South Wales criminal justice system. She would wait. And the set stage would have to wait with her.

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209 Bishop Interview, 1995.

210 ibid.

211 The FLAG Report (1982) noted the state backlash against Wendy Bacon, which prevented her from carrying out interviews with offenders for the project: 'It is significant that Wendy Bacon was not permitted to interview women in gaol, ostensibly because her presence would anger prison officers. As far as we are aware they were not actually consulted with regard to their attitude towards her conducting interviews inside gaol for the research. It is somewhat anomalous that the very people who, like Wendy, have both the trust of prisoners and substantial academic and practical knowledge of prison issues should be prevented in such a way from applying that knowledge.': The FLAG Report (1982), p. 4. Robyn Lansdowne, from her personal interaction with Violet Roberts, recalled her as: ' an intense person, not particularly well educated I don't think...but a very strong native intelligence, and very intuitive.': Lansdowne Interview, 1995.

212 Lansdowne Interview, 1995.

213 *Sydney Morning Herald,* 17 October 1980, p. 2.

214 ibid.

*Chapter Six*

# POLITICISING THE BATTERED WOMAN WHO KILLS

> Why are some people considered on the things surrounding their crimes and others just aren't?...really, I've tried to work it out, tried every day to work out why most people do get the consideration of the courts while a small minority like us...There is no doubt it has happened to others. I suppose it will happen to others to come. But why is it like this?[1]

The politicisation of Violet Roberts as the battered body who kills was a process initiated by the complex interrelationship between the prison reform movement and a pluralist feminist identification of the need to expose the experience of domestic violence. The concerns of a feminist engagement with the criminal justice system demonstrated by groups such as Women Behind Bars, the Feminist Legal Action Group, and also by women working within the left legal community, provided a dynamic base from which a campaign to free a woman, gaoled for life in response to years of living with brutality, could be communicated to a wider public audience. This campaign - the Release Violet and Bruce Roberts Campaign - was the first stage in a broad agenda to force legal recognition of the battered woman who kills as a distinct legal subject, who was systematically and unjustly treated by the substantive requirements of the criminal law.

This chapter investigates the nature and consequences of that campaign, and argues that the naming of domestic violence by the Women's Liberation Movement in the 1970s resulted in an invigorated focus on her circumstances by the law and the state in the early 1980s. The process of review and reform of the law of homicide, and of the sentencing requirements for murder, that occurred in

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1 2 SER-FM, Interview with Bruce and Violet Roberts (transcript), Annie Bremmer and Chris Deegan, 25 October 1980, p. 5.(RL/WB).

this State in 1981 and 1982, were a direct result of Violet Roberts' politicisation as the battered woman who kills. However, the engagement by a multifarious public sphere with the issue of the subjective experience of domestic violence survivors appearing before the law, was complicated by both the implication of that public sphere in the philosophy of liberalism, and also by the diverse reading of its operation within a pluralist feminist movement itself.

## *Part One*

### CAMPAIGN

Once Violet's mother died in early 1980, the campaign for release was launched in earnest. And as Julie Bishop recalls, after the opening of Elsie, Australia's first feminist refuge, the Free Bruce and Violet Campaign was the 'next big thing'[2] in terms of placing domestic violence onto a public agenda.

The Free Sandra Willson campaign three years earlier provided Women Behind Bars with the basic training needed to protest against the Roberts' imprisonment: public criticism of the Government and the Department of Corrective Services, demonstrations, heavy media coverage, ministerial delegations. Like the Sandra Willson campaign, the campaign to release the Roberts accommodated a diversity of methods for forcing political and social recognition of the injustices of the criminal justice system. However, the Free Violet and Bruce Roberts campaign came to signify something greater. Rather than eschewing legal avenues for drawing attention to the inadequacy of defences for battered women who kill, the campaign was a conscious amalgamation of influences and directives from Left legalism, situationalist-libertarianism and the broader Sydney Women's Liberation Movement.

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2 Interview with Julie Bishop, Sydney, 15 November, 1995.

## The Release Violet and Bruce Roberts Campaign

From the beginning of the campaign, Robyn Lansdowne saw herself as the 'straight legal face' and Wendy Bacon as 'the senior tactician.'[3] By March 1980, Lansdowne was working at commercial law firm Freehill Hollingdale and Page with one day spent organising the legal face of the Roberts' campaign from the Redfern Legal Centre.[4] Lansdowne's argument focussed on two interrelated issues, both of which had been researched during the FLAG project.[5] The first was that the defences to murder (provocation, self-defence, diminished responsibility) which could reduce a charge of murder to manslaughter (or in the case of self-defence, result in an acquittal) operated to deny the experience of the battered woman who kills. The second was that the mandatory life sentence for murder was discriminatory when enforced in these cases.[6] Lansdowne's objective was therefore to secure Violet and Bruce's release from gaol on license, and in the process to draw attention to the legal difficulties they faced as survivors of family violence in the first place.[7] A release on license was an executive act of the Governor under section 463 *Crimes Act* 1900 (NSW), and the only means of release (other than re-trial) for life-sentence prisoners like Violet Roberts. The Governor in granting a license acts on the recommendations of the Government, or more specifically, the Minister for Corrective Services, who in turn acts upon the recommendation of his Departmental officers or the Parole Board. The ultimate power to recommend a release on license, however, resides with the Cabinet.[8]

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3 Interview with Robyn Lansdowne, Newcastle, 23 August, 1995.

4 Robyn Lansdowne recalls that her work at Freehill Hollingdale and Page was designed to act as the firm's pro-bono contribution to Legal Services, but she spent most of her time, despite this condition of her employment, doing work for the campaign: Lansdowne Interview, 1995.

5 See discussion in Chapter Five.

6 See discussion in Chapter Five and Chapter One.

7 See generally: Robyn Lansdowne (1980), 'Violet Roberts- Justifiable Homicide?' *Sydney Women's Liberation Newsletter*, March, pp. 2-3; Lansdowne Interview, 1995; Correspondence from Robyn Lansdowne to The Hon. L. J. Ferguson, The Hon. W.M. Haigh, 1980, (RL/WB).

8 Women Behind Bars (1980a) 'Violet and Bruce Roberts: The Campaign for Release', *Legal Service Bulletin*, vol. 5, no. 5, October, pp. 240-241, p. 241.

Lansdowne's approach to securing the Roberts' release on license was exhaustive. In February 1980, she had assisted Violet in writing to the Chief Administrative Officer of the Department of Corrective Services, P F Crombie, requesting that Violet be considered for such a release.[9] However, as Crombie noted in reply, such applications were a matter strictly reserved for recommendation by the Minister, William Haigh. He went on to say:

> The Minister for some time now has adopted the view that a life sentence prisoner must serve a minimum length of sentence before the question of release can be initially considered. In your particular case, the question of releases is due to be initially considered by the Minister in September 1982, when you will have been in custody for a period of six years nine months.[10]

Bruce Roberts, because he was a minor at the time of his conviction, had been sentenced to fifteen years with a six-year non-parole period as opposed to a life sentence. In theory, this made any attempt to secure his release on license problematic. The ministerial attitude that prevented a consideration of Violet's release also worked against his favour. Furthermore, it was unusual for a prisoner not committed to a life-sentence, but with an extensive non-parole period, to be released before that period had expired. However, a release on license for such a prisoner was not unheard of: Peter Huxley, former secretary of the Rural Bank of New South Wales, had been convicted in 1970 of fraud, and sentenced to twenty years with a non-parole period of twelve years. He was released by the Governor on the recommendation of Cabinet after serving less than three-quarters of his non-parole period.[11] The hypocrisy of the ministerial attitude was not lost on Lansdowne, or WBB. As they commented in the *Legal Service Bulletin*: 'Bruce Roberts has already served that proportion of his non-parole period, but unlike Peter Huxley, he is not a member of the same social circles as influential members of Government.'[12]

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9 P. F. Crombie, Chief Administrative Officer Department of Corrective Services to Violet Roberts, 6 February, 1980 ,(RL/WB).

10 ibid.

11 Women Behind Bars (1980b), *Release Violet and Bruce Roberts Campaign,* (original pamphlet), Liverpool Women's Health Centre, (RL/WB), p. 4; Women Behind Bars (1980a), p. 241.

12 Women Behind Bars (1980a), p. 241.

Due to the stalling of the Department of Corrective Services regarding the Roberts' applications for release, Robyn Lansdowne entered into a strenuous correspondence with Haigh, and Attorney-General Frank Walker. The bureaucratic procedure behind an executive release on license ensured that there was a constant transferral of responsibility for the decision itself. Under pressure from Lansdowne and WBB, Haigh requested a review of the case from Walker.[13] Although Walker's review did draw attention to the paucity of the Roberts' legal representation at trial, and provided a tentative opportunity to illuminate the inappropriateness of the existing defences to murder for battered women who kill, there was little logic in the official buck-passing between the Departments of Attorney-General and Corrective Services.[14] Even if the Roberts should have been convicted only of manslaughter, as the Attorney-General's review suggested, they had already served far longer than any other prisoner convicted of a domestic homicide during the period.[15] However, Walker did indicate that the Roberts' situation was an appropriate case in which to consider release on license. As such, the Department of Corrective Services could no longer evade the issue. Yet Haigh maintained his policy, and refused both Bruce and Violet's applications in June, without waiting for the parole report commissioned by his Department.[16]

As a result of Minister Haigh's attitude, Lansdowne began securing evidence which was not discovered at their trial.[17] This evidence was slowly built into a narrative which argued that Violet and Bruce were individuals deserving of justice: that their circumstances had indicated motivating factors behind their crime (fear, a desire

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13 ibid.

14 ibid.

15 ibid.; *Daily Mirror*, 28 October 1981, p. 4.

16 Women Behind Bars (1980a), p. 241. Violet was not told of the decision because she was in hospital recovering from an angina attack.

17 For example, Lansdowne appended to a letter sent to Haigh a copy of the Roberts' family doctor's opinion of the case: 'I was surprised when I heard their trial was over and I had not been called to give evidence which may have shown mitigating circumstances and even more surprised when I heard the penalties imposed. It came as considerable relief to me when approached by people with the means to air the matter in a forceful way when I as an individual could do little if anything to remedy what I felt was an injustice.': Robyn Lansdowne to Hon. W.M. Haigh, Minister for Corrective Services, 8 July 1980 (RL/WB).

for freedom) which had not been told when they appeared before the Court in 1976.

Concomitant with Lansdowne's preparation of a case for the Roberts, an activist campaign driven by Wendy Bacon was initiated to force a sense of public outrage over Violet and Bruce's circumstances, and as a result to force the State into action which would secure their release. The focus for this campaign was organised on a number of fronts. Robyn Lansdowne had helped prepare extensive new statutory declarations for Bruce and Violet, which were used by her to draft the Roberts' applications for release, and by WBB to develop a pamphlet for public dispersal.[18] This pamphlet - *Free Bruce and Violet Roberts* - detailed in a first person narrative the terror of Violet and Bruce's lives at the hands of their husband and father, and made public the inadequacy of their treatment by the legal system. The pamphlet concluded with an editorial vehemence:

> Violet and Bruce Roberts should never have been convicted of murder. Probably, if the trial was held today, only four years later, they would not be - the private suffering of the brutalized wife and the abused child having received considerable public attention in recent years. *The fact is, however, they remain in jail.* The Minister for Corrective Services *has the power to recommend [a] release on license at any time...why not Bruce and Violet Roberts?*[19]

The pamphlet also detailed for the reader 'What you can do.' The public were encouraged to obtain and complete a petition (available from the Release Violet and Bruce Roberts Campaign headquarters at the Liverpool Women's Health Centre or from a stall in Martin Place)[20]; to write to Premier Neville Wran and Haigh, demanding the immediate release of Violet and Bruce; and to encourage further circulation of the pamphlet to let as many people as possible know of the Roberts' circumstances.

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18 Application for Release: Violet Roberts, Bruce Roberts, 20 April, 1980 (RL/WB); Women Behind Bars (1980b). The copy of the application for release contained in Lansdowne's private papers is annotated, and edited to match the text in the Women Behind Bars pamphlet.

19 Women Behind Bars (1980b), p. 4.

20 Women Behind Bars (1980a), p. 241. Martin Place is the centre of the business and shopping district in central Sydney.

The Release Bruce and Violet Roberts Campaign also sought other avenues through which to disseminate the Roberts' story. The campaign was being built around both the story of Violet and Bruce as survivors of domestic violence and the story of the legal system's inability to allow this material to constitute their defence. This engagement of the injustices of the legal system with a discourse on domestic violence was groundbreaking and powerful, and WBB (through Bacon) skillfully commanded significant media attention.[21] In March 1980, Wendy Bacon (who 'had contacts at Channel Nine')[22] encouraged '60 Minutes' to film Bruce and Violet. The segment, screened on March 9, was an important means by which a wide cross-section of the Australian public could be alerted to the Roberts' story. The segment, 'Justifiable Homicide?', included sympathetic interviews with Violet and Bruce, who told their experiences emotively, and gave publicity to the campaign for their release.[23] Violet's story was also written up for an article in the mainstream women's magazine *Woman's Day*. The story: 'Violet Roberts: Will death be her reprieve?' was an overwhelmingly sympathetic portrayal of Violet's history of abuse, designed to strike a chord in women with similar experiences, and women who may not have had access to the processes of politicisation around domestic violence directly evidenced within the Women's Liberation Movement. The article focussed on Haigh's refusal to consider Violet's release until 1982, and brought the efforts of a non-conservative group like WBB to a new audience:

> To the growing number of Australians working for [Violet's] release - they include WBB, Christian Women concerned and the PAG - the Minister's decision is mystifying. Fighting back tears, Jennifer Neale of WBB, who visits Vi regularly, said: 'Attitudes toward women who have suffered the brutality of a husband as Vi did have changed so much in four years that we're convinced that if she had a re-trial she'd get off.'[24]

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21 For examples of positive mainstream media representation of the Roberts see: *Woman's Day* (1980); *Daily Mirror*, 18 March 1980, p. 5; *Sydney Morning Herald*, 4 September 1980, p. 2; *Sydney Morning Herald*, 5 September 1980, p. 2; 2 SER-FM (1980).

22 Bishop Interview, 1995.

23 Channel Nine, 'Justifiable Homicide?', *60 Minutes* (transcript), 9 March 1980 (RL/WB).

24 *Woman's Day* (1980), p. 8.

Alongside the mainstream coverage of the campaign, WBB continued to alert the wider Women's Liberation Movement of the dual abuses, by the law and within their own home, suffered by Bruce and Violet. In March 1980 WBB were guest editors of a special edition of the *Sydney Women's Liberation Newsletter.* Robyn Lansdowne's editorial on the case was designed to galvanise the feminist community, already implicated in naming and demythologising domestic violence, into action. She wrote: 'Many times Violet left her brutal husband but on each occasion she was forced to go back. She, like so many other battered women then and now, had nowhere to go and no money and couldn't leave the children with a father who neglected and abused them.'[25] The editorial concluded by exhorting feminists to become involved and to attend a public meeting at the Redfern Town Hall to 'discuss possible avenues for getting her released.'[26]

The courting of the community of Sydney feminists, and the wider Sydney community, evidenced in the approach to media during the campaign would suggest that WBB were adopting a gently persuasive position. In some respects, the growing articulation of the nature and incidence of domestic violence ensured that the campaign to secure the Roberts' release needed only to harness a groundswell of anger about domestic violence already present in the community. However, the libertarian and activist base of both WBB and the diverse array of feminist and left activists involved in the campaign ensured that it would never remain a uni-dimensional, and politely reformist, exercise. As Robyn Lansdowne recalls, the campaign was always multi-focussed, and expressed the variety of informing perspectives constituting the Left Sydney cultural milieu.[27] Her efforts to build a legal case for the Roberts co-existed with a variety of confrontationalist responses, a vigil, occupation of government offices and demonstrations organised by Wendy Bacon and WBB to draw attention to the growing public cries of justice for Violet and Bruce. Lansdowne recalls no animosity between the various arms of the campaign. The subjective politics of the campaign's membership seemed to arrange

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25 Lansdowne (1980), p 2.

26 ibid. The meeting was held at the Redfern Town Hall on 23 June 1980: Women Behind Bars (1980a), p. 241.

27 Lansdowne Interview, 1995.

themselves harmoniously around the need to highlight both the brutality of the law and of domestic violence itself. As Lansdowne noted in reflection:

> I was never an active member [of WBB] because they were too radical for me. For example, when we had the sit-in, I didn't go there, I walked past and talked to them but I never stayed out because I didn't feel comfortable with that. So that was an interesting thing about the campaign I think, that it was multi-faceted, and that people participated at a level they felt comfortable with.[28]

After the March meeting advertised in the *Sydney Women's Liberation Newsletter,* and after the '60 Minutes' report on Violet and Bruce, the public campaign for their release gained momentum.[29] People were drawn to protest who hadn't been involved in groups like WBB before. Alongside the prison reform activists and Left lawyers like Lansdowne were some women from the refuge movement who had been previously suspicious of WBB's activities because of their involvement with the male dominated PAG.[30] Other groups, nurses, *Sydney Morning Herald* journalists and printers, who stood outside of the hybrid Women's Movement, were attracted to the cause because of its implicit concentration on the domestic violence issue.[31] Members of ALP branches also lent public support, which was important in terms of influencing a State Labor Government.[32] Overall, the focus on Violet and Bruce Roberts as survivors of domestic violence was crucial, and gave to the campaign a sense of collective identity and intense energy.

The physical connection point for the diversity of people committed to securing justice for the Roberts' was the vigil. This began on July 8 and ran for 101 days, outside the Roden Cutler Building in Campbell Street, Sydney, where the

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28 Lansdowne Interview, 1995. Julie Bishop, a WBB member agreed with this analysis. From her perspective, organising and maintaining the activist face of the campaign, Lansdowne's role was critical. The lessons learned from the Katingal and Sandra Willson campaigns had educated WBB to the need to maintain a campaign that worked on all planes, 'it was truly collective.': Bishop Interview, 1995.

29 Bishop Interview, 1995.

30 ibid.

31 Bishop Interview, 1995.

32 ibid., and Lansdowne Interview, 1995. This support base was drawn from and extended when the campaign to reform the law of homicide began in earnest after the Roberts' release: Robyn Lansdowne to ALP Branch Secretaries, 13 August 1981 (RL/WB.)

Department of Corrective Services and the Parole Board were located.[33] On July 7, members of the campaign had met with Haigh, and at their insistence, he had agreed to refer the case back to the Parole Board for re-consideration.[34] It was the intention that a constant physical presence would embarrass Haigh and the Board into taking definitive action to release Bruce and Violet from gaol. Toni Roberston, another member of the campaign recalled that, 'the vigil was about putting our bodies on the line...[I]t was about embodied politics.'[35] Volunteers were organized to sit at tables, armed with the petition advertised in the pamphlet, and on radio, television, magazines and newspapers.[36] Julie Bishop remembers so many women identified with Violet - the particular story of trying to leave, being coerced back into the relationship, the isolation - that they drove from all over Sydney to sign the petition.[37] At the vigil, 'there was an exchange of stories, of personal experiences, as domestic violence survivors met and intermingled with activists.'[38] Toni Robertson identified the groundswell of public identification with the Roberts' as 'amazing.'[39] Women arrived in Campbell Street prepared to donate a little money to aid the campaign. Others brought cakes to sustain the volunteers who slept at the vigil every night for 101 nights. In Robertson's perception, these women were bearing witness to the events of Violet's lives, and also to those of their own lives.[40]

Men also identified with the Roberts, especially it seems, with Bruce. Robertson remembered 'one young bloke who saw himself in Bruce...[H]e came to the vigil to bring croissants to nourish the kids who were there with their mothers.'[41] Julie

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33 Bishop Interview, 1995; Robertson Interview, 1995; Women Behind Bars (1980a), p. 241.

34 Women Behind Bars (1980a), p. 241.

35 Interview with Toni Robertson, 3 December 1995, Sydney.

36 Notice of the petition appeared variously in *Sydney Women's Liberation Newsletter*, May 1980; 2 SER-FM (1980); '60 Minutes' (1980); *Woman's Day* (1980); *Legal Service Bulletin* (1980) October.

37 Bishop Interview, 1995.

38 ibid.

39 Robertson Interview, 1995.

40 ibid.

41 ibid. Concern for Bruce was also expressed in the 'Letters to the Editor' in the *Sydney Morning Herald* in terms of the lack of state resources for victims of child abuse:

Bishop perceived the reaction from men as less dramatic, but still implicated by their concern. While at the vigil, she was approached by professional men, commercial lawyers, accountants, some of whom left cards in case the protesters needed help; others who just wished them well in the campaign.[42]

The vigil was a mix of frontline protest and a sense of collectivity: a microcosmic reflection of the politics of early second wave feminism itself. There was a domestication of the vigil space that transformed it into a community. Sleeping bags covered the entrance to the building. Homeless people would visit, and exchange tips about living amongst the elements. People constantly brought food or relieved women from their positions to enable them to get a cup of coffee, or to attend strategy meetings at the nearby Café Roma, next door to the Capitol Theatre.[43] Women knitted during the 'freezing cold' winter, draped in huge overcoats.[44] Entertainment was provided by a television plugged into a powerpoint found in an adjacent public toilet,[45] or by women playing their guitars.[46]

In conjunction with this face of enduring physical protest, more confrontational actions were organised by WBB.[47] Toni Robertson places the campaign back into the context of the Kensington Libertarians' investment in situationalism. The idea that protest and social change required 'both spectacle and visual consumption'[48] was interpreted by Robertson herself, as 'resident artist'[49] in various ways. She made and designed several banners which articulated boldly the major concerns of the campaign: 'People say let them go', 'Justice for Violet Roberts', 'Release Violet

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Richard Chisholm (1980), 'Jailing of Bruce and Violet Roberts', *Sydney Morning Herald*, 13 October, p. 6.

42 Bishop Interview, 1995.

43 Robertson Interview, 1995. Toni Robertson also commented about the influence of feminist politics on the organisation of the vigil: 'it was something about the women's movement...When the PAG manned the vigil, they turned it into a demo, rather than a domestic protest, they were belligerent and heroic...they had no style'

44 Bishop Interview, 1995.

45 Robertson Interview, 1995.

46 Bishop Interview, 1995.

47 Bacon Interview, 1995.

48 Robertson Interview, 1995.

49 ibid. Robertson was an artist, and a member of the Sydney Women's Art Movement, or WAM. See n. 146, Chapter Five.

and Bruce Roberts: Why are they still in jail?' and 'Jails are the crime: Women Behind Bars.'[50] These banners were draped outside the Department of Corrective Services, and carried down Martin Place during demonstrations.[51] A camper van was obtained by protestors, to give shelter at the vigil during the worst excesses of winter, which was painted with signs and slogans demanding the Roberts' freedom. A plane and sky writer were hired, lettering the skies above Sydney with the slogan 'Let them go.'[52] It was, as Toni Robertson describes, 'part of the politics of spectacle. It was about creating something that the public could visually identify, the creation of a symbolic...[and was also about] attracting police and media attention.'[53]

The embodied politics of the campaign had another, more dangerous, face which coexisted with the domesticity of the vigil. From the time the campaign began in earnest in March 1980 when protestors occupied the Department of Corrective Services offices, arrests became commonplace.[54] However, from July 18, when the Parole Board considered the Roberts' case, the interaction between protestors and police escalated. It became evident that the decision regarding their release was not going to be favourable, when during that week women at the vigil began to be ejected by police, and the site itself was hosed down to prevent their return.[55] Toni Robertson remembers confrontation with the police as 'awful...but we knew nothing terrible would happen to us, as we had power in a group. The police recognised Women Behind Bars. Nevertheless, I tried to dress well and behave in a dignified manner to shame the police into treating us well.'[56] Despite this optimism

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50 Robertson Interview, 1995.

51 ibid. Toni Robertson recalled Gill Leahy, amongst others, being arrested on this demonstration.

52 Robertson Interview, 1995; Bishop Interview, 1995.

53 Robertson Interview, 1995.

54 Julie Bishop remembers that the Department of Corrective Services staff had actually left for the day when the occupation occurred, and the protestors had to call the police themselves: Bishop Interview, 1995; *Daily Mirror,* 18 March 1980, p. 5.

55 Women Behind Bars (1980a), p. 241.

56 Robertson Interview, 1995

in the power of confrontation, from July to October 1980 100 arrests were made in conjunction with the campaign.[57]

Confrontation with the police, however, was a form of protest action encouraged, rather than avoided, by the more radical members of Women Behind Bars.[58] On July 24, Minister Haigh made public the fact he again refused the Roberts' applications for release, on the basis of the Parole Board's recommendations. He also released a press statement obliquely criticising the decision to press for the Roberts' release on license in the first place:

> If the prisoners or their legal representative wished to raise any doubt as to the guilt of either Bruce or Violet Roberts, it was competent for them to approach the Attorney-General's department [for an inquiry into their conviction or the problems with existing defences like provocation]. I find it difficult to understand why these avenues have not been thoroughly pursued.[59]

Robyn Lansdowne responded to this criticism by writing directly to Deputy Premier Jack Ferguson. Her argument was persuasive:

> The question of release on license depends on whether the prisoner concerned should in justice remain in jail and this question can be determined independent of the question of whether he or she should have been convicted at all. Clearly, if the Roberts were not properly convicted of murder they should not be in jail, but even if in the view of the law they were not properly convicted there are other telling considerations why they should now be released...[including] the fact that the homicide in question is a domestic one.[60]

The reaction by the frontline protest face of the campaign to Haigh's continued stonewalling of the Roberts' case was also strong. Stink bombs were activated in the lifts in the Roden Cutler Building (where the Department of Corrective

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57 Women Behind Bars (1980a), p. 241. The first case heard in connection with these arrests, however, resulted in an acquittal on a trespass charge, on the ground that the police officer involved allowed insufficient time for the woman concerned to move before arrest.

58 Bishop Interview, 1995.

59 News Release, The Hon. W.M. Haigh, Minister for Corrective Services, 24 July 1980, (RL/WB).

60 Robyn Lansdowne to The Hon. L.J. Ferguson, Deputy Premier, 28 July 1980, (RL/WB).

Services was housed.) Twenty-seven buses at the Leichhardt depot[61] and the facade of the Roden Cutler Building itself, were spray painted with the words 'let them go.'[62] Members of the campaign marched from the Roden Cutler Building to the State Office Block in Chifley Square, carrying with them the petitions for the Roberts' release, which were inscribed by almost 35 000 signatures.[63] The Cabinet room at Parliament house was spray painted.[64] A conscious action to attract police and media attention, Robertson has described this incident as 'the turning point' of the campaign.[65]

## 'By Reason, Free'[66]

Deputy Premier Jack Ferguson,[67] when faced with the overwhelming public support for the Roberts,[68] and the escalating political stakes for the Government, agreed to call a meeting between himself, Haigh, and Walker to discuss the case. That meeting, held on August 6, resulted in the referral of the case to Cabinet as a whole. However, Cabinet, in a tantalising display of bureaucratic obstruction, referred the issue, on August 7, back to the Parole Board for 'reconsideration of

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61 Women Behind Bars (1980a), p. 241.

62 Toni Robertson recalled that during these protest activities 'we dressed up as proper women...we wore stockings etc so as not to attract attention...', Robertson Interview, 1995.

63 *Sydney Morning Herald,* 15 October 1980, p. 3.

64 Robertson Interview, 1995; Bishop Interview, 1995. The Cabinet incident, in Bishop's recollection involved the more radical members of WBB, such as Jeune Pritchard, Jenny Neale, and Wendy Bacon. Women sympathetic to the cause working inside the Parliament were told of the incident before it occurred and the WBB activists 'dressed properly' in order to intermingle and remain unobserved amongst Parliament staff. Toni Robertson, who did not participate, remembers being told that the Minister hid in a stationery cupboard.

65 Robertson Interview, 1995.

66 'By reason, free', Editorial, *Sydney Morning Herald,* 15 October 1980, p. 6.

67 Deputy Premier Ferguson was acting Premier during these negotiations, due to the Premier, Neville Wran, being admitted to hospital: Robertson Interview, 1995; Women Behind Bars (1980a), p. 241.

68 The petition had been presented in Parliament by Hon. Delcia Kite L.C, *Hansard* (NSW), Third Session 1980-81 (46th Parliament), vol. 3, p. 655.

the situation in light of extra material to be presented by the Attorney-General's Department concerning similar decisions in marital homicides.'[69]

In September 1980, the vigil was transferred to Parliament House, to directly place pressure on Cabinet.[70] In an action symbolic of the struggles for women's suffrage, protestors chained themselves to the fence of Parliament House, which was draped with protest banners.[71] The press began to portray the hesitation of the Government to act not as an administrative failing (a problem for the Parole Board) but as a political one:

> Cabinet is divided on the question of release. In a way that becomes increasingly inappropriate as time goes by it has adopted the position of seeking reassurance from the Parole Board. Cabinet's hesitation is partly due to the fear that releasing Violet and Bruce Roberts would open the floodgates to other applications by 'lifers' for release on license. Such fears seem groundless.[72]

On October 13, a half page advertisement appeared in the *Sydney Morning Herald* demanding 'We don't want special treatment for Bruce and Violet Roberts - We want justice.'[73] Above hundreds of names of concerned groups and individuals – cited as representative of the 35 000 people who signed the petition for the Roberts' release - the text declared:

> For nine months we have watched the buck being passed from official to official. We don't want to see it passed any further. While the Government vacillates, Violet and Bruce stay in jail. The Government can order their immediate release on license. The money currently being spent on keeping Bruce and Violet in jail

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69 Women Behind Bars (1980a), p. 241; *Sydney Morning Herald*, 15 October 1980, p. 3.

70 Bishop Interview, 1995; Robertson Interview, 1995.

71 Toni Robertson recalls causing police confusion, when some women unchained themselves at regular intervals in order to walk around and relieve symptoms of period pain: Robertson Interview, 1995.

72 *Sydney Morning Herald*, 5 September, p. 11. There was public dissent to this position that must also be noted. After the Roberts' release, there were several letters to the editor of the *Sydney Morning Herald* disputing the method by which the Roberts were freed. In general, these opinions followed an adherence to 'the rule of law', believing, for example, that the Attorney-General had obliquely criticised the process of trial by jury in his decision to recommend the Robert's release on the basis of a 'miscarriage of justice': 'Letters to the Editor', *Sydney Morning Herald*, 22 October 1980, p. 6.

73 *Sydney Morning Herald*, 13 October 1980, p. 10.

> could be used to fund women's refuges - this would present some attempt to overcome the problems of domestic violence.[74]

Two days later on October 15, State Cabinet held a meeting. Attorney-General Walker, after taking volumes of evidence from senior legal advisors regarding the operation of provocation, had come to the conclusion that the law had unjustly prevented a reliance on the defence by the Roberts in the circumstances of domestic homicide. He stated: 'Based on the advice I have received, it is now clear that there was a miscarriage of justice in this aspect of the law.'[75]

After three hours deliberation, William Haigh agreed to Walker's recommendation that Bruce and Violet Roberts be released on license. The decision, announced by Haigh and Walker at 4.30 pm on the steps of Parliament House, was greeted by cheers from the women involved in the campaign.[76] Violet and Bruce, on hearing the news, were reported as 'trembling with excitement' and 'overcome with joy.'[77] A spokesman for the Department of Corrective Services reported that 'they were so emotional they became worked up and distressed and just could not talk to anyone.'[78]

The *Sydney Women's Liberation Newsletter* announced the decision as 'Wonderful Heroic Tenacious Victorious.'[79] And in the mainstream press, the *Sydney Morning Herald* editorial, went so far as to comment:

> The Executive order for the release on license of Violet and Bruce Roberts....is welcome and should not be mistaken as a political interference in the judicial process...It can be assumed that Cabinet...did so...because of the force of the arguments put by the women lawyers who took the case. They argued that because of the court's failure to consider fully the defences, especially provocation, available to the Roberts, their trial produced sentences

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74 ibid.

75 *The Australian*, 15 October 1980, p. 1.

76 ibid.; *Sydney Morning Herald*, 15 October 1980, pp. 1, 3.

77 *The Australian*, 15 October 1980, p. 1.

78 *Sydney Morning Herald*, 15 October 1980, p. 3. The Roberts, on release, celebrated at a party held by WBB: Bishop Interview, 1995; *Sydney Morning Herald*, 17 October 1980, p. 2.

79 Anonymous (1980c), 'Wonderful Heroic Tenacious Victorious', *Sydney Women's Liberation Newsletter*, November, p. 1.

> that were unusually harsh...In a difficult case, Cabinet has acted responsibly.[80]

The release of Violet and Bruce Roberts was a significant victory for them as individuals. However, their release also represented a significant shift in how the public sphere engaged with a feminist-generated discourse of domestic violence. The pluralist feminist energies that directed the campaign to release the Roberts, and indeed directed the naming of domestic violence itself, were able, despite their differences, to collectively unite around the issue of justice for battered women who kill. Through a multi-faceted campaign, the Roberts' became politicised bodies, challenging the public, and the public sphere's, recognition of the experience of domestic violence.

What is significant is that before Violet and Bruce's crime, conviction, and release, there was an awareness of situations, horrors, and histories like theirs, but no charts of locations where they could be mapped or targeted. Or at least, they or their elements were thought and described quite differently. The discursive body, like the women themselves, was battered, struggling, but silenced, hidden. As a result of the campaign to release the Roberts, the theoretical engagement by Sydney feminisms with the state - an engagement which was ambivalent, yet which secured real benefits for battered women - became a project extended to the law. The identification by FLAG that domestic violence survivors were treated differently by the criminal justice system when they resorted to killing their spouses to free themselves, was given momentum and force through the libertarian/anarchist and legal reformist face of the campaign to release the Roberts. The realisation that the law could be challenged through reform *and* direct action began to bear a new potency. The politicisation of Violet Roberts as the battered body who kills opened the door to a critical feminist engagement with the criminal law's understanding of the female subject - an engagement that was to be shaped by the diversity of feminism itself.

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80 'By reason, free', Editorial, *Sydney Morning Herald,* 15 October 1980, p. 6.

## *Part Two*

## REFORM

The Release Violet and Bruce Roberts Campaign had created a climate of public opinion in which a range of issues pertaining to the administration of the criminal justice system and the extant standards of criminal culpability were matters of uncharacteristic popular concern. This public declaration of a need for reform of the law, especially the operation of defences to murder in domestic homicides and a need to eliminate the mandatory life sentence for murder, may have been initiated by a Left/libertarian/feminist critique of the criminal justice system. However the campaign for the Roberts' release had been so successful in highlighting the disjuncture between the operation of the law, and its effects on the battered woman who it alleged to serve, that reforms to her legal and public situation were soon powerfully taken up by the state.

### The Domestic Violence Task Force

The response of Premier Neville Wran to the Roberts' case was to instigate two bureaucratic processes of review.[81] The first was an extension of the research and analysis of the law of homicide that had begun in the Attorney-General's Department during the Government's consideration of the Roberts' release on license.[82] Undertaken by the Criminal Law Review Division of that Department, which was directed by Greg Woods, a member of the Australian Legal Workers

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81 For identification of how this process was connected to and caused by the Roberts case see:; G. D. Woods and J. S. Andrews (1981), *Homicide Law Reform in New South Wales: Working Paper*, Criminal Law Review Division, New South Wales Department of the Attorney-General and of Justice (NSW Attorney-General's Department, Criminal Law Review Division: Archive), p. 1; Robyn Lansdowne and Wendy Bacon (the Women in Homicide Project) (1981a), *Comment on a proposal to reform the law of homicide*, (submission to the Criminal Law Review Division of the Department of the Attorney-General and of Justice ), (RL/WB), p. 1; New South Wales Domestic Violence Task Force (DVTF) (1981), *Report of New South Wales Task Force on Domestic Violence*, NSW Women's Co-ordination Unit, Sydney, p. 2. (herein the DVTF Report); Jane Deamer (1981), 'Domestic Violence: The NSW & SA reports', *Legal Service Bulletin*, vol. 6, no. 6, December, pp. 284- 287, p. 284.

82 Women Behind Bars (1980a), p. 241; *Sydney Morning Herald*, 15 October 1980, p. 3.

Group,[83] the process of review was in two stages. The first stage was designed to examine the need to reform the mandatory life sentence for murder codified by section 19 of the *Crimes Act* 1900 (NSW), and to recommend a provisional legislative response to that issue.[84] The second stage was to consist of a review of the entire codified law of homicide. As such, 'any change to the penalty or conviction for murder would be merely the first step in this ongoing and more long-term review.'[85]

The other response to the Roberts' case by the Government in New South Wales was the establishment in March 1981 of a Task Force on Domestic Violence, designed to assess and improve services for women like Violet Roberts.[86] Although the Women's Liberation Movement had been successful in securing state funding for refuges at the federal level since 1975, and as such forcing a recognition of domestic violence by the public sphere, the New South Wales Task Force was the first of its kind in Australia committed to developing a holistic reform package.[87] It was intended to cover a wide range of policy areas which affected survivors of domestic violence, such as law, health, welfare, housing, crisis services, and refuges. It aimed to develop a program of community awareness, and pledged to give special consideration to the particular problems faced by Aboriginal and migrant

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83 Lansdowne Interview, 1995; Interview with Helen L'Orange, 25 July 1995, Sydney. Note also that a version of Woods and Andrews (1981) appeared in the collected papers from the Australian Legal Workers Group's conference on the criminal justice system: John Basten, Mark Richardson, Chris Ronalds, George Zdenkowski (eds.) (1982), *The Criminal Injustice System*, Australian Legal Workers Group (NSW) and Legal Service Bulletin, with the Law Foundation of New South Wales, Sydney.

84 Woods and Andrews (1981), p. 1.

85 Bacon and Lansdowne (198a), pp. 1, 3.

86 Deamer (1981), p. 284 notes that the DVTF was a 'clear response' to the Violet Roberts case.

87 It must be noted that in South Australia a similar report was commissioned by the South Australian State Government. The report –*Report and Recommendations on Law Reform*- was released in November 1981. The SA report examined some of the same issues as the NSW Report, however, as Deamer (1981) has noted, this report was 'of a narrower ambit as it is only concerned with some aspects of the law and does not attempt to provide an overview', p. 286. For a discussion of the public sphere's response to domestic violence see generally Chapter Four. See also Heather McGregor and Andrew Hopkins (1991), *Working For Change: The Movement Against Domestic Violence*, Allen and Unwin, Sydney, pp. 40-43 for a discussion of the particular role played by the femocracy in this process.

women.[88] The Domestic Violence Task Force (the DVTF) was directly responsible to the Premier, Neville Wran, as the Women's Co-ordination Unit (itself a result of the rise of the femocracy, and a recognition of feminism's engagement with the state) which directed the Task Force was located within the Premier's Department.[89]

Wran, who had led a State Labor Government to victory in 1976, was, however, a cautious reformer. His attitude to the role of a non-conservative government was that 'whereas some Labor Governments in the past rushed in and tried to do everything at once, we tried to keep pace with community opinion.'[90] As Mike Steketee and Milton Cockburn have argued, this position was 'a long way removed from the Whitlam vision of leading the people to the promised land, flowing with

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88 The central recommendation of the DVTF Report (1981) was the need to establish specific legislation designed to deal with the domestic violence survivor's treatment by police and by the law. The recommendations in this area were presented to Parliament in the *Crimes (Domestic Violence) Amendment Bill* (1982). The Bill recommended: the enactment of a Domestic Violence Act under which women in de facto relationships would be provided with the same access as married women to injunctive relief; a clarification of police powers of entry; an attachment of an automatic power of arrest to injunctions granted under s 114 of the *Family Law Act* 1975 (Cth.); amendment of the *Bail Act* 1978 (NSW) to provide that any man arrested for 'domestic violence' be refused bail for twelve hours; a requirement that police attend all domestic violence calls; amendment of s 407 of the *Crimes Act* 1900 (NSW) so that a spouse becomes a compellable witness against her husband charged with assault upon her. The DVTF, fulfilling its policy of providing a holistic policy response to domestic violence, also recommended legal and police education on the issue; the establishment of a community information program; a revision of health services for and response to domestic violence survivors; attention to child care, housing, and social security issues to allow women better opportunities of leaving violent relationships; and a recommendation of increased funding for refuges. Significantly, it recommended the establishment of Aboriginal women's refuges in areas of need (noted in 'Appendix 2' of the Report) See generally the summary of recommendations in the DVTF Report (1981), pp. 3-25. Note also the recommendations to reform of the law as it related to battered women who kill, which will be discussed later in this chapter.

89 For a discussion of the role and development of the Women's Co-ordination Unit see NSW Women's Advisory Council to the Premier (1987), *A Decade of Change: Women in New South Wales 1976-86*, New South Wales Women's Advisory Council, Sydney, pp. 28-29. For an insight into the role and responsibility of women's advisory units during this period see: Hester Eisenstein (1996), *Inside Agitators: Australian Femocrats and The State*, Allen and Unwin, Sydney, pp. 34-35.

90 Mike Stekettee and Milton Cockburn (1986), *Wran: An Unauthorised Biography*, Allen and Unwin, Sydney, p. 334. The quote is taken from a speech given by Wran the day after his resignation as Premier of New South Wales.

equal opportunity and adequate government services.'[91] However it enabled Wran to maintain power in New South Wales until 1984.[92] In these terms, he was a reactive reformist leader, responding, for example, to feminists or the prison reform movement with vigour and attention, though only after the community had begun to fall into step with their radical, left agendas.[93]

This cautious approach to reform exposed the Premier to some criticism from the feminist community, especially feminist legal groups, when the DVTF was established. As Jane Deamer argued in the *Legal Service Bulletin* in 1981, without the campaign to free Violet and Bruce Roberts, which produced strong community support and sympathy for the circumstances of an abused woman or child, the DVTF may never have been established. By 1981, domestic violence was, after all, not a 'new found problem',[94] or a new found item on either feminist or federal Government agendas. Wran's pledging of a state review of services for domestic violence survivors, however welcome, was therefore viewed by some elements of the feminist community as merely reactive, and as an exercise of chivalrous liberalism.[95]

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91 ibid. For a brief review of the impact of the Whitlam Labor Government, especially its impact on feminist agendas for change, see generally Chapters Three and Four.

92 NB: Wran resigned from Government in 1984, but Labor remained in power in New South Wales until 1987. Comparing the Whitlam Federal Government (which gained power in 1972 and was dismissed in 1975) with the decade of Labor Government in New South Wales led by Wran, Steketee and Cockburn (1986) have noted: '...they were very different Labor leaders: Whitlam the visionary, leading the people to a better Australia by implementing The Program of reforms, anxious to clear away the cobwebs after 23 years of conservative rule; Wran much more interested in the exercise of political power...down-to-earth about the aspirations of average Australians and what reforms were achievable, placing absolute priority on getting into power and staying there', p. 106.

93 For example, Wran supported and initiated both the *Anti-Discrimination Act* 1977 (NSW) and the Royal Commission into New South Wales prisons (see: J. F. Nagle (commissioner) (1978), *Report of the Royal Commission into New South Wales Prisons, vols. I, II and III*, 4 April, Government Printer, New South Wales ) in response to the public attention galvanised by these groups. See Steketee and Cockburn (1986), pp. 121, 307.

94 Deamer (1981), p. 284.

95 See comments on the exercise of state support for issues like domestic violence as a manifestation of a chivalrous liberalism in Chapter Four. Helen L'Orange herself has noted that 'It was easier to get progress on areas where male politicians felt chivalrous. Domestic violence, child sexual assault, rape', quoted in Marian Sawer and Abigail Groves (1994), *Working From Inside: Twenty Years of the Office of the Status of*

Despite these criticisms of Wran's motives, the response of the femocrats who were working on the Task Force itself was positive. Helen L'Orange, who directed the DVTF from within the Women's Co-ordination Unit, has stressed adamantly that Wran's support of the domestic violence issue was not the result of an ad hoc, electorally opportunist platform. From her perspective, Wran's support for and investment in the domestic violence issue was genuine, reflected in his imprimatur to L'Orange herself.[96] She recalled that he had an 'open door policy' as far as the DVTF was concerned, providing direct and constant economic and political support for the Task Force's agenda.[97] As a femocrat, and duly inculcated within more mainstream processes of forcing state recognition of women's gendered harms and their gendered needs than a group like Women Behind Bars, L'Orange believed that the public recognition of domestic violence in New South Wales in 1981 was not a belated response.[98] From her perspective, the women actually involved in the emergent domestic violence movement in the early 1970s 'did not have time to theorise about those experiences in a general way...domestic violence was therefore not "discovered" as a focus by the [New South Wales] state in 1981, it was rather produced by a collision of material conditions that ensured a holistic state response finally emerged.'[99]

It was this commitment by L'Orange to a 'holistic' response to domestic violence, combined with the personal support of Wran himself, that enabled the DVTF to effect a rapid assessment of community concern, and a rapid identification of the areas in which services could be improved. L'Orange and the other members of

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*Women*, Australian Government Printing Service, Canberra, p. 12. L'Orange's comment, however, expresses the ambivalence of women working with the state, as opposed to the criticism articulated by Deamer (1981), or Wendy Bacon who called the process of the DVTF 'co-option', Bacon Interview, 1995.

96 L'Orange Interview, 1995.

97 L'Orange has commented that Wran's support could always be cemented by appealing to this 'chivalry'. When L'Orange reported to Barry Unsworth, Labor Premier of New South Wales after Wran's retirement, she 'had to market domestic violence issues from a "victim" perspective.' However, she did note that Unsworth was, like Wran, a supportive force behind domestic violence reform and education: L'Orange Interview, 1995.

98 Deamer (1981), p. 284.

99 L'Orange Interview, 1995.

the DVTF developed an analytical methodology that relied heavily on community consultation.[100] The DVTF initiated a public survey to examine the use and adequacy of available services to battered women, which was communicated to the general public by a questionnaire in the *Sunday Telegraph*.[101] In this way, the actual needs of the community could be expressed directly to those in the position of recommending change and policy direction.[102] L'Orange also advocated a consultative approach within the constitution of the DVTF itself, consciously eschewing an individual or committee perspective.[103] The DVTF canvassed the opinions of, and called for submissions from, those directly involved in the domestic violence arena: police, activists, refuge workers, clergy, social workers, and lawyers such as Robyn Lansdowne, who had a specific agenda to encourage the DVTF to recommend a review of the operation of defences for the battered woman who kills.[104] L'Orange has noted that 'a workable package of reforms was

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100 ibid. Other members of the DVTF included Greg Woods (Chairperson, and Director of the Criminal Law Review Division of the Attorney-General's Department); Barbara Wertheim (Convenor, from the Women's Co-Ordination Unit of the Premier's Department); Terri Bear (representative of the New South Wales Refuge Group); Jenny Morgan (Research officer for the Law Foundation of New South Wales); Clare Petre (Social worker and member of the Legal Services commission of New South Wales, and the Family Law Council); Sergeant Keith Mercer (New South Wales Department of Police); Eva Cox (New South Wales Women's Advisory Council). The other members of the DVTF were Francis Brennan, Anne Collier, Heather Saville, and Edith Warburton: The DVTF Report (1981).

101 This survey was carried put with assistance from the NSW Bureau of Crime Statistics and Research: The DVTF Report (1981), p. 2; Deamer (1981), p. 284

102 See The DVTF Report (1981), 'Appendix 1' for an analysis of the statistics derived from this survey.

103 L'Orange Interview, 1995.

104 See The DVTF Report (1981), 'Appendix 3',which lists the groups and individuals that the DVTF consulted. L'Orange remembers one discussion with several different groups regarding police matters, in which one policeman drew L'Orange to one side and asked her: 'It's OK to hit a woman, isn't it Helen?' L'Orange remarked that this incident 'demonstrated that working with a range of different groups showed that there was an educative function for some merely by being involved': L'Orange Interview, 1995. Wendy Bacon recalled a sense of frustration with the process of the DVTF itself, and displaying her anarchist disregard for forms of change inculcated in the state, called the DVTF that 'wretched committee': Bacon Interview, 1995. Robyn Lansdowne, on the other hand, 'felt flattered' by being invited to become involved in the first place: Lansdowne Interview, 1995. The reactions of Bacon and Lansdowne to the consultative methodology of the DVTF give some indication of the pluralist feminist response to the state, which managed, however, to work collectively in response to an issue like domestic violence.

developed by targeting interest groups whose first hand knowledge directed the recommendations... the aim was to develop a package which could be implemented as it was based on consensus.'[105]

The DVTF, however, had only been given nine months in which to complete their process of community consultation and recommendations for Government action.[106] It was the review by the Attorney-General's Department into the law of homicide, which had already commenced during the Violet and Bruce Roberts Campaign, that occupied public debate in the weeks and months directly following their release.

## Reforming Sentencing

The first stage of the review undertaken by the Criminal Law Review Division of the Attorney-General's Department was an analysis of section 19 of the *Crimes Act* 1900 (NSW), which codified mandatory life sentencing for subjects convicted of murder.[107] The preliminary review of this section during the campaign for the Roberts' release had been on the directive of Attorney-General Frank Walker in his attempts to discover whether there had been a miscarriage of justice in their case.[108] Walker's conclusion that Violet Roberts had been disadvantaged by the law in this respect (she had been sentenced under section 19), had formed the basis of his recommendation to Cabinet that the Roberts should be freed. Following their release, his opinion of section 19 was given powerful public support by responsive members of the New South Wales judiciary.

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105 L'Orange Interview, 1995.

106 Deamer (1981), p. 284.

107 Section 19 provided that 'Whosoever commits the crime of murder shall be liable to penal servitude for life.' The mandatory nature of the sentence was enforced by the second paragraph, which was not included in the *Crimes Act* as it applied in the Australian Capital Territory, and which provided that 'The provisions of s 442 shall not be in force with respect to the sentence to be passed under this section'. Section 442 provides that where an offender is made liable to a life sentence 'the judge may nevertheless pass a sentence of...less duration': see generally David Wesisbrot (1982), 'Homicide Law Reform in New South Wales', 6 *Criminal Law Journal* 248, p 249.

108 Women Behind Bars (1980a), p. 241; *Sydney Morning Herald*, 15 October 1980, p. 3.

Just three days after the Roberts were released from prison,[109] the press had given full coverage to another domestic homicide case, in which a man who shot his wife in a 'fit of jealousy'[110] was sentenced to six years imprisonment.[111] Following so soon after the dissemination of Violet Roberts' unjust life sentence, for a crime produced by her experience of domestic violence, the Sinclair case and the court's response to it were particularly cogent.[112] Justice Cantor of the New South Wales Supreme Court, who heard the case, publicly stated that murder trial judges should be able to impose lesser sentences 'where circumstances call for it.'[113] As a member of the judiciary, and a senior representative of the criminal justice system which had publicly failed Violet Roberts, Justice Cantor's comments were timely. The decision reflected the growing public opinion that a penalty less than a life sentence should be available to the sentencing judge in all cases of homicide. This included those cases provoked by the deceased but where the provocation did not reduce the homicide from murder to manslaughter.[114] Attorney-General Walker used Justice Cantor's comments to reiterate the developing position of the Government, and told the press that 'many criminal lawyers and criminologists supported...Justice Cantor's view that the life sentence for murder should not be mandatory.'[115]

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109 Violet and Bruce Roberts were recommended to be released on 15 October 1980, and gained their freedom on 17 October 1980: *Sydney Morning Herald*, 17 October 1980, p. 2.

110 *The Sun*, 20 October 1980, p. 3.

111 ibid. The case involved Bruce Donald Sinclair shooting his wife. He was charged with murder, but the Crown accepted a guilty plea of manslaughter on the ground of diminished responsibility. Justice Cantor, who heard the case in the Centreal Criminal Court, accepted that Sinclair had had become depressed, and 'abnormal' in his behaviour toward his wife in the 12 months before her death. He imposed a fixed non-parole period to expire on 1 December, 1982.

112 The correlative issue raised by the case was the disjuncture between the sentence for a man who killed his wife in a 'crime of passion', and Violet Roberts who had killed her husband in an act of self-preservation. See The FLAG Report (1982), pp. 173-179; 152-155.

113 Quoted in *The Sun* 21 October, 1980, p. 27.

114 *Sydney Morning Herald*, 22 October, 1980, p. 2.

115 ibid.

This position was given added weight by the Chief Justice of the Supreme Court of New South Wales, Sir Laurence Street, and by other prominent members of the judiciary including Justices Nagle, Hunt and Roden.[116] Focussing squarely on the technical issues involved,[117] Chief Justice Street identified however that reform to section 19 was a 'matter of policy'.[118] At a conference held in February 1981, Chief Justice Street stated:

> In many cases it is unnecessary and oppressively harsh to impose a life term. This is particularly so when the murder arises out of a domestic context and the circumstances leading up to the killing, although grave indeed, can be seen to have been strongly affected by emotional tensions which ultimately reached a point where the party concerned was no longer able to handle the situation. A determinate sentence, coupled with a non-parole period, could well be adequate for many of these cases, leaving the ultimately dreadful sanction of a life-sentence available for such crimes as require it.[119]

Although the response by the judiciary to the circumstances of domestic homicides reflected the fact that many of then felt hamstrung by the mandatory life-sentence for murder required by section 19,[120] the correlative issue of the inadequate operation of the defences to murder themselves were also placed on the agenda. As the Roberts' case had potently identified, many women who killed to free themselves from an abusive relationship were unable to meet the requirements of defences like self-defence or provocation.[121] Although these were acts of self-

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116 Wesibrot (1982), p. 250; The Nagle Report (1978), pp. 331-332; Street CJ quoted by Woods and Andrews (1981), pp. 2-3.

117 Woods and Andrews (1981), pp. 2-3. At pp. 3-4, Street CJ listed his criteria in support of discretionary sentencing. These were: that it would encourage more guilty pleas (and therefore save judicial, court and legal resources) particularly in those cases where the defence is striving largely to reduce murder to manslaughter; that it would lessen the degree of emphasis placed on the 'complex and legalistic' defences of provocation, diminished responsibility and self-defence which lengthen trial and appeals; and that it would allow for the release of the 'overwhelming majority' of convicted murderers considerably earlier than the present average of fourteen years served by the life sentence prisoner released on license, and as a result decrease 'the already overcrowded prison population'.

118 Woods and Andrews (1981), p. 3.

119 ibid.

120 Wesibrot (1982), p. 250; The Nagle Report (1978), pp. 331-332; Street CJ quoted by Woods and Andrews (1981), pp. 2-3.

121 See discussion of the Roberts' case in these terms, and the findings of the FLAG Report (1982) on this issue, in Chapter Five.

preservation in the context of the relationship, the fact that many women did not kill their spouse in 'the heat of passion', as required by section 23 (2) (c) of the *Crimes Act* (the codification of the provocation defence) meant that they were unable to meet the standard of immediacy and proportionality required by law for a successful application of the defence.[122] Violet Roberts and women like her were denied an opportunity to mitigate their charge of murder to manslaughter, and therefore fell under the provisions of section 19. Justice Nagle, in the Report on the Royal Commission into New South Wales Prisons in 1978, had already identified this problem of indeterminacy between crime and conviction:

> Whereas some offences are brutal, callous and sadistic and deserve the greatest public opprobrium, others are committed in extenuating circumstances which considerably reduce the moral blame attributed to the wrong-doer and the danger of a repeat of the offence.[123]

This issue, in the wake of the Roberts' release, was discussed both in the press and publicly by the judiciary in the context of an amalgamation of murder and manslaughter into a single offence of 'unlawful homicide'.[124] The argument behind the single category of homicide, attributable to Lord Kilbrandon in *Hyam v DPP*,[125] was that it provided a mechanism by which judges could exercise discretion, from life imprisonment downwards, when passing sentence in response to the subjective circumstances of the case. The interrelated problems of the operation of the defences and the sentencing issue could be alleviated. The Kilbrandon approach was duly considered in the Criminal Review Division assessment of homicide. Greg Woods, the Division's director, identified the two corollaries of a merger of murder and manslaughter into a single category. The first was that it would be

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122 The FLAG Report (1982), pp. 317-319; Wesibrot (1982), p. 252.

123 The Nagle Report (1978), pp. 331-332.

124 'Unlawful Killing' Editorial, *Sydney Morning Herald* 7 October 1980, p. 6; Woods and Andrews (1981), pp. 7-8; 'The Last Taboo', Editorial, *Sydney Morning Herald,* 25 July 1981, p. 12; 'Defining Murder', Editorial, *Sydney Morning Herald,* 23 October 1980, p. 6.

125 *Hyam v DPP* (1975) A. C. 55. Lord Kilbrandon noted at 98: 'There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment.' See also *Sydney Morning Herald,* 10 October 1980,

impossible to maintain a mandatory life sentence for 'unlawful homicide'. The second was that the defences reducing murder to manslaughter would disappear.[126]

Attorney-General Walker, however, did not lend his support to the proposal. He believed that a single category of 'unlawful killing' would:

> [R]emove from the statute books an ancient and powerful word, widely understood by the public, carrying the strongest possible overtones of moral condemnation. In our culture, to describe someone as a murderer is to employ the most bitterly and effectively stigmatising epithet available in our language. To remove that term from the law would be to risk possible public misapprehension and to invite criticism - rightly or wrongly - that the moral force of the law was being lessened.[127]

As a result of this vehement desire to maintain a community respect for the criminal law, and a belief that that the public would never support a law and order policy which figuratively 'abolished' murder,[128] the Criminal Law Review Division did not recommend that the Kilbrandon approach should be encoded in law.[129] The focus was therefore squarely placed back onto a reform of section 19 as the key to alleviating the questions about homicide which had been placed on a public agenda. In this way, the dual focus of the legal issues arising from the Roberts case were relegated to a single category of discussion: the question of sentencing. The Criminal Law Review Division, in the first stage of the reform process, advocated that 'upon conviction for murder, the judge should impose either (i) a sentence of

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p. 6. Attorney-General Walker was also quoted in the press as considering the US model of murder by *degree Sydney Morning Herald*, 10 October 1980, p. 2.

126 Woods and Andrews (1981), p. 8.

127 NSW Parliamentary Debates (Hansard) 11th March, 1982, p. 2483.

128 The *Sydney Morning Herald* Editorial, 7 October 1980, p. 6 noted: 'The concept of a new crime of 'unlawful killing' is superficially attractive. But the Government would be wise to consult public opinion before accepting the need for change. It will need to dispel any fear that the law on murder is being softened. The integrity of the system, as well as individual rights, has to be maintained.'

129 Woods and Andrews (1981), p. 8. They stated: 'it is considered that [the defence issue] remain matters to be determined by the jury...for this reason, but principally because of its probable public unacceptability, Lord Kilbrandon's proposal to merge the murder and manslaughter offences is not put forward here as a recommendation for reform of the New South Wales law.'

penal servitude for life, or (ii) a sentence of less than ten years, with or without conditions.'[130]

This emphasis by the state, through the first stage of the Criminal Law Review of homicide, on the sentencing issue did not allay the fears of feminists like Wendy Bacon and Robyn Lansdowne who had worked so hard for the Roberts' release.[131] The public sympathy for the battered woman who kills, combined with significant media attention and judicial recognition of the problem, had given hope that the winds of change would substantially improve the battered woman's specific treatment by the law when she killed a violent spouse. The problem was, however, that the concentration on the issue of sentencing, although motivated by the Roberts' case, was a more general, gender-neutral response to the broader agenda of prison reform. Justice Nagle's identification of the need for the judiciary to differentiate between killings when imposing sentencing was, after all, expressed in the context of a report into the treatment of all prisoners in New South Wales.[132] It was a recognition, therefore, of the broader agendas of groups like the PAG and the Australian Legal Workers Group to improve conditions for life sentence prisoners.[133]

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130 Woods and Andrews (1981), p. 1. In assessing these recommendations, the Criminal Law Review Division also took into account overseas proposals for change of the sentencing issue, specifically Home Office and Department of Health and Social Security (1975), *Report of the Butler Committee on Mentally Abnormal Offenders,* Rt. Hon. The Lord Butler of Saffron Walden, Chairman, London, H.M.S.O; Criminal Law Reform Committee (New Zealand) (1976), *Report on Culpable Homicide*, Wellington; , Report of the Advisory Council on the Penal Systems (1978), *Sentences of Imprisonment-A Review of Maximum Penalties,* London, H.M.S.O; Criminal Law Review Committee (1980), *Fourteenth Report: Offences Against The Person,* London, H.M.S.O.

131 See for example Bacon and Lansdowne (1981a), p. 3, where they responded to the Criminal Law Review Division recommendations on sentencing by arguing: 'Our own view is that it would be desirable for the defences or at least the defence of provocation to be reformed *at the same time* as any change to the mandatory life sentence....We believe that there would be significant public, judicial and academic support for changes to the law on provocation, without the need for an exhaustive inquiry.'

132 The Nagle Report (1978), pp. 331-332.

133 See also n. 116. Note also the political interconnections between the ALWG, the PAG and the processes of reform via individuals such as Greg Woods.

The political interests and informing perspectives of these groups did intersect with feminist organisation like Women Behind Bars, as the campaign to release the Roberts had indicated. However, the concentration on the sentencing issue as the key to change had the potential to subsume the issues identified in the FLAG report regarding the need to reform the law to allow a woman's experience of violence to constitute her defence. As Wendy Bacon and Robyn Lansdowne commented in 1981: 'Reform to sentencing is commendable and necessary, but the opportunity to create a humane and just law of provocation should not be lost.'[134]

## The Georgia Hill and 'Axe Murder' Cases

In 1981, however, two cases of domestic homicide in which a woman killed her spouse after years of systematic violence galvanised public attention. The cases of Georgia Hill in New South Wales, and the 'Axe Murder' case in South Australia, re-generated the momentum built by the Roberts case, and re-invigorated a feminist and community response to the deficiencies of defences for battered women who kill.

Georgia Hill shot her de facto husband Alan Day on 26 March 1981, and had argued self-defence at her trial on the basis that she had shot him during an attack in which she was in fear for her life. Day was a violent alcoholic, who would drag Georgia about by her hair, verbally abuse her, and had threatened to kill her on several occasions.[135] On the day of the shooting, Day had threatened Georgia, who picked up his loaded rifle to protect herself. Day challenged her to shoot. She fired three shots to frighten him, but the third bullet hit Day fatally in the temple. Refusing to plead guilty to manslaughter (via a defence of provocation or diminished responsibility), Georgia relied on self-defence to attempt to secure a

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134 Wendy Bacon and Robyn Lansdowne (1981b), 'Domestic Violence and reform to the law of homicide', *Challenge*, 28 August, pp. 6-7, p. 7.

135 Robyn Lansdowne (1982), 'Homicide Law Reform: New South Wales', *Legal Service Bulletin*, vol. 7, no. 2, pp. 80-81, p. 80. Note also that Day threatened constantly to kill Georgia Hill's animals, which was a factor in Hill's remaining in the relationship. As the Justice For Georgia Campaign noted: 'Georgia is a poet and an animal lover, it was because this man threatened to torture her animals if she left him that she stayed with him': Justice For Georgia Campaign (1981c), 'Savage life sentence for battered woman', *Sydney Women's Liberation newsletter*, May, p. 5.

complete acquittal, even though this meant that she faced a possible life sentence for murder.[136]

At first instance, the Crown argued that the killing had been premeditated, and exercised its right of challenging the composition of the jury, so that it carried eleven men and one woman. Despite the claim that Hill was not judged by a jury of her peers (the desperation of a battered woman arguably not being within the range of experience of most men),[137] the jury deliberated for six and a half hours, yet returned a verdict of guilty of murder.[138]

Following her trial, Georgia Hill was sentenced to life imprisonment under section 19 of the *Crimes Act*, as the recommendations of the Criminal Law Review Division had not yet been made law.[139] But even if they had, there was no guarantee that Hill's actions would have met the standard of reasonableness required for a successful use of self-defence.[140] The lack of significant attention by the Criminal Law Review Division to the operation of defences in domestic homicides meant that even with a reformed section 19, Georgia Hill could still have been found guilty of murder.

The 'Axe Murder' case, which went to trial in Adelaide in July 1981, arrested public and media attention on a national scale,[141] and drew even greater attention to the feminist-identified need to reform the defences to murder to allow for a recognition of women's experience of domestic violence. The case was somewhat of a *cause celebre*. The woman at the centre of the case, Mrs. R (all names had been suppressed),[142] had killed her husband with an axe after discovering that he had

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136 *R v Georgina Marie Hill*, [1980] 3 A Crim. R 397

137 Justice For Georgia Campaign (1981a), 'Domestic Homicide Revisited', *Legal Service Bulletin*, vol. 6, no. 3, pp. 149-150, p. 150.

138 ibid.

139 ibid., p. 149.

140 See Chapter One for a discussion of the operation of self-defence.

141 See generally: *Sydney Morning Herald*, 25 July, p. 12; *Advertiser*, 18 July 1981, p 1; *Sunday Mail*, 19 July 1981, p. 1; *News*, 20 July 1981, pp. 2, 6, 7; *Nationwide*, ABC Television, 20 and 21 July 1981.

142 The counsel in the case, Geoff Eames and Susan O'Connor, realised that the media focus would be intense, and therefore had no difficulty gaining a suppression order under s 69 *Evidence Act* 1929 (SA): Ann Genovese (1992), 'The Law, The State, and

systematically raped and sexually abused all five of their daughters. Mrs. R, who had also been the subject of prolonged and brutal treatment by her husband, had been told of the history of incest by one of her daughters several hours before the killing. As she said at trial, 'something finally snapped,'[143] and she killed her husband as he slept. Her defence counsel attempted to include the history of violence and incest as the basis for a defence of provocation. However, the time delay between the provocative words or conduct of the deceased (in this case, words articulated by her daughter, and not by her husband)[144] ensured that Mrs. R did not meet the requirement of immediacy necessary for a successful mitigation of murder to manslaughter via the provocation defence.[145] On this basis, the trial judge had refused even to leave the question of the defence of provocation to the jury.[146] As a result, Mrs. R was sentenced to life imprisonment, South Australia's law being on point with that of New South Wales as far as the sentencing issue was concerned.[147]

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Protection of the Person, Domestic Violence in South Australia 1981-1992, Thesis submitted in partial requirements for the Honours Degree of Bachelor of Arts at the University of Adelaide, p. 19.

143 *The Queen v* R (1981) 28 SASR 321, pp. 323-325.

144 The traditional common law reading of the elements of provocation held that 'mere words' may never amount to provocation: see for example *Holmes v DPP* [1946] A.C. 588 (even though Viscount Simon in dicta suggested otherwise: at 600.) It was also necessary that the provocative act or omission may not emanate from anyone other than the deceased: R *v Arden* [1975] V.R. 449. However, this view was mediated by Murphy J in *Moffa v The Queen* (1977) 138 CLR 601, and in the appeal to the *Queen v* R - R 4 A Crim. R 127 – by King CJ at 132-133, where it was finally stated that that words could have amounted to provocative conduct 'when viewed against this background of physical and sexual abuse.'

145 See elements of provocation discussed in Chapter One.

146 The trial judge, Justice Sangster of the South Australian Supreme Court noted: 'I am not sure why [the history of abuse] was emphasised by the defence, for the Crown case is that those years of harsh treatment by the deceased led to the decision by the accused to do what she did...if there was this long harsh cruel experience suffered by the family...that is not some kind of defence.': *The Queen v* R, Supreme Court of South Australia, 17-19 July (full transcript), p. 19.

147 ibid., p. 23. Note also the state response to codify discretionary sentencing in the aftermath of this case: Legal Services Commission of South Australia (1981), *Law of Provocation and Associated Changes: Submission to the Attorney-General of South Australia,* Legal Services Commission, Adelaide (NSW Attorney-General's Department, Criminal Law Review Division: Archive).

The public reaction to the 'Axe Murder Case' (as it was dubbed by the press)[148] was one of sympathy and outrage. The extreme circumstances of this case were given momentum by the Violet Roberts case in New South Wales, and a feminist-generated campaign to secure justice for Mrs. R was assisted by WBB, national feminist networks, and lawyers like Robyn Lansdowne.[149] As a result, after her second trial there was hardly a member of the South Australian public available to sit on the jury who was not aware of the case.[150] The South Australian Court of Criminal Appeal ruled that the defence could be left to the jury, and Mrs. R was acquitted entirely. There was no basis in law for this result, as provocation technically only leaves open the avenue for murder to be mitigated to manslaughter. However, the reaction to the circumstances of the battered woman who kills was so intense that the jury in the case 'realised that in this situation the law is an ass.'[151]

A campaign similar to that organised to free Violet and Bruce Roberts, and to bring justice for Mrs. R, was also launched by the 'Justice For Georgia' group to secure freedom for Georgia Hill. Unlike the involvement of WBB in the Roberts campaign, the 'Justice for Georgia' group was not directly connected to the broader movement to challenge the criminal justice system. It was community based, consisting of friends and neighbours of Hill from the Wollongong area, south of Sydney, where she lived.[152] It indicated that although the state may have temporarily forgotten the inadequacies of defences to murder for battered women who kill, the wider public, and especially the feminist community, had not. The 'Justice For Georgia' group publicised the case widely in feminist newsletters and journals, like *Girls' Own* and the *Sydney Women's Liberation Newsletter,* exhorting women to write to Attorney-General Frank Walker to protest Hill's imprisonment,

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148 See n. 142. See also Bebe Loff (1982), 'Provocation and Domestic Murder: The Axe Murder Case', *Legal Service Bulletin,* vol. 7, no. 2, April, pp. 52-55.

149 See generally: Loff (1982); Genovese (1992), pp. 31-34; Anonymous (1981a), 'Vile Bondage', *Sydney Women's Liberation Newsletter,* August, p. 6; Resolutions of Public Meeting on Provocation in Murder Cases, held 22 July 1981, YWCA, Pennington Terrace North Adelaide (herein SA Resolutions (1981)), (RL/WB).

150 See Genovese (1992), pp. 39-40.

151 Lansdowne (1982), p. 80. See also Loff (1982), p. 54.

and the reasons why that imprisonment had been deemed necessary by the law.[153] With assistance from Robyn Lansdowne and Wendy Bacon (now identifying themselves as the 'Women and Homicide Project'[154]) and from WBB, the 'Justice For Georgia' campaign articulated clearly the areas of reform needed to serve justice to women like Hill, and like Violet Roberts and Mrs. R. Their primary demand was that the subjective factors of the case be taken into account, so that the circumstances of the particular woman who had lived with violence were judged contextually, as opposed to being measured against 'what is reasonable for the ordinary man.'[155] However, the feminist demands for law reform articulated through the Hill case also included 'that the defences of provocation and self-defence relate not only to the time of the offence but can include the background of domestic violence; and that juries be questioned on their attitudes, not merely excluded on the basis of sex, so that a fair hearing can be guaranteed.'[156]

Georgia Hill's case came up for appeal in June 1981 and was heard by Chief Justice Street, Justice Lee and Justice Nagle in the New South Wales Court of Criminal Appeal.[157] Chief Justice Street, in the leading judgement, reassessed the proportionality between Hill's fatal response and the deceased's violent treatment of her in the past. He argued that her power of self-control on the instant occasion she shot and killed her spouse had been 'rendered more fragile by his past assault

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152 Lansdowne Interview, 1995; Justice For Georgia Campaign (1981a), p. 149.

153 Anonymous (1981b), 'Gentle Georgia Wins Her Appeal Against Life Sentence', *Sydney Women's Liberation Newsletter*, July, p. 1; Colleen Jones (1981), 'Still No Justice', *Girls' Own*, May-June, p. 21.

154 Lansdowne Interview, 1995.

155 Justice For Georgia Campaign (1981b), 'More About Georgia Hill' *Sydney Women's Liberation Newsletter*, June, p. 9. The reform agenda proposed by a conglomeration of these groups, and transmitted throughout a wider feminist community, were: that the law acknowledge that the battered woman should be judged subjectively, and not against 'what is reasonable for the ordinary man'; that the defences of provocation and self-defence relate not to the time of the offence but can include a background of domestic violence; that juries be questioned on their attitudes, not merely be excluded on the basis of sex, so that a fair hearing can be guaranteed. See also SA Resolutions (1981).

156 Anonymous (1981b), p. 1.

157 *R v Hill* [1980] 3 A Crim. R (NSW) 397.

on her.'[158] Unlike the acquittal in *The Queen v R*[159] which produced a legal anomaly and no sustainable precedent, *R v Hill*[160] provided a significant case from which to re-invigorate the reform of the defences to murder. The importance of the decision was that the court placed far greater emphasis on the entire history of violence suffered by the accused, and a correspondingly slighter emphasis on the assault or threat immediately preceding the killing.[161] As a result of Chief Justice Street's decision, Georgia Hill's sentence was reduced to a minimum of twelve months non-parole, and Robyn Lansdowne was prompted to comment that 'the stage [is] set for the legislature to incorporate this reform into the statute definition of the defence [of provocation].'[162]

## The Women and Homicide Project: Reforming Provocation

The public discussion around the need to recognise the experience of battered women when judged by the law therefore began to regain momentum. By the time Georgia Hill had been released, the second stage of the Criminal Law Review Division assessment of the law of homicide had begun in earnest, and was rapidly reaching a point where a reform Bill could be drafted.[163] Concurrently, the review of domestic violence policy undertaken by the DVTF was drawing to a close. Both of these bodies had called for submissions on how to approach the question of liberalising defences like provocation and self-defence in order to make them more accessible for battered women who kill.

Wendy Bacon and Robyn Lansdowne, who had analysed these defences in the context of domestic violence precipitated homicides in the FLAG research in 1979, and who had organised the Roberts campaign around their findings in 1980, were invited to give submissions on the issue to both bodies.[164] In their submission to

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158 ibid., at 400 per Street CJ.

159 (1981) 4 A Crim. R (S.A.) 127.

160 [1980] 3 A Crim R (NSW) 397.

161 Bacon and Lansdowne (1981a), p. 11.

162 Lansdowne (1982), p. 80.

163 The Bill was presented to Parliament on 11 March 1982: Lansdowne (1982), p. 80.

164 Lansdowne Interview, 1995; Bacon and Lansdowne (1981a).

the Criminal Law Review Division of the Attorney-General's Department, they highlighted Chief Justice Street's decision in *R v Hill*, and contended that: 'it is not enough to rely on this and further change by case law for without legislative reform changes introduced by case law are always subject to overturn by the High Court on appeal. Further...we are concerned that if discretionary sentencing is introduced without legislative change to the defences, the case law will stagnate.'[165]

The ways in which Bacon and Lansdowne suggested that the defence issue be approached reflected the philosophy behind the FLAG project, which was a desire to ensure the law could 'reflect the human reality of the situations of battered women and children who kill a violent husband or father.'[166]

Responding to their own findings in the FLAG research that provocation was the most commonly used defence in situations of battered women who kill (a factor born out in both *The Queen v R* and *Hill*),[167] their recommendations directly addressed a need to reform the operation of that defence. Encoded by section 23 (3) of the *Crimes Act* 1900 (NSW), conduct said to constitute provocation was viewed as that which occurred immediately before the killing. The defence also required that the lethal response to the provocative act follow 'suddenly, in the heat of passion.'[168] Finally, the defence required that an accused's actions be judged objectively against those of an 'ordinary person', which meant that an 'ordinary' person in the same circumstances as the accused would have been similarly provoked.[169]

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165 Bacon and Lansdowne (1981a), p. 11.

166 Wendy Bacon and Robyn Lansdowne (1981b), 'Domestic Violence and reform to the law of homicide', *Challenge*, 28 August, pp. 6-7, p. 6.

167 This decision can be seen as a policy directive of 'The Women and Homicide Project', for the FLAG Report (1982) had indicated that in fact diminished responsibility was the preferred defence option for battered women who kill, yet an option which Bacon and Lansdowne felt perpetuated the idea that a woman acting in response to domestic violence must be inherently unstable: The FLAG Report (1982), p. 312.

168 See general discussion of the provocation defence in Chapter One.

169 ibid. The Ordinary Person Test was encoded by s 23 (2) (b) *Crimes Act* 1900 (NSW).

Bacon and Lansdowne, under the moniker of 'The Women and Homicide Project',[170] challenged each of these substantive requirements. To begin with they argued that the defence be amended to incorporate the possibility of a build up of provocation over time, as suggested by Chief Justice Street's judgement in *Hill*.[171] They contended in their submission to the Criminal Law Review Division: 'In domestic situations the last incident [before the killing] may be relatively minor to an outsider, but the straw that broke the camel's back to the person who has been a subject of violence and abuse over a long period of time.'[172]

Bacon and Lansdowne also argued that the defence be amended to allow for the situation of a battered woman or child who 'is too cowed by years of submission and too terrified of the assailant's greater strength to fight back in the midst of an attack.'[173] They acknowledged that people have different ways of reacting, that many women 'socialised into passivity and...far less experienced in physical violence [than men]'[174] only lost their self-control after hours or days of accumulated tension, and recommended that 'the requirement that the fatal response follow immediately on the provocation or final provocative incident is artificial and unjust and should be abolished.'[175]

The also directly and explicitly condemned the 'ordinary person' test. To begin with, Bacon and Laansdowne acknowledged that such a test, with its concentration on an 'objective' assessment of the actions of any legal subject, was out of step with the diverse constitution of the community, and of its lived experience. They argued: 'In a society such as ours...composed of people from many different racial,

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170 This title was used by Bacon and Lansdowne, for example, in their correspondence with ALP branches in attempts to lobby support for their proposed recommendations to s 23: Robyn Lansdowne to ALP Branch Secretaries, 13 August 1981 (RL/WB).

171 Bacon and Lansdowne (1981a), p. 11. Reference was also made to the shifts on the immediacy requirement indicated by a focus on intent in *Johnson v R* (1976) 11 ALR 23; *Parker v R* (1963) 111 CLR 610.

172 ibid., p 2

173 Women and Homicide Project (1981) *Reform of the Law of Homicide*, Press Release, 5 August, (RL/WB), p. 1.

174 ibid.

175 ibid.

cultural and religious backgrounds, it is no longer possible to say, if it ever was, that there is such a being as the "ordinary person."'[176]

Furthermore, Bacon and Lansdowne contended that in evaluating what an 'ordinary person' would have done, the jury had the opportunity to rely on community misconceptions about domestic violence, such as that women invite violence, that a woman who remains in a violent relationships is masochistic, and that domestic violence is a problem confined to the working-class.[177] The 'ordinary person' test therefore ensured that a battered woman was to be judged objectively against a (male) standard which did not reflect her own experience. As such, Bacon and Lansdowne argued that in the situation of assessing the *mens rea* of an accused in a domestic homicide, the 'objective test is dangerous and should be abolished.'[178]

Finally, Bacon and Lansdowne argued that the onus of proof in provocation be shifted from the defence to the prosecution. At common law, the person on trial was required to prove that she or he was provoked, but it remained for the prosecution to prove beyond reasonable doubt that he or she was not.[179] The codification of the onus of proof in New South Wales prevented this burden being

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176 Bacon and Lansdowne (1981b), p. 7.

177 ibid.

178 Women and Homicide Project (1981), p. 2; Bacon and Lansdowne (1981a), p. 13. See Chapter One for an explanation of the mens rea. In discussing the shift in common law from an ordinary person test which relied solely on an objective assessment of the accused's behaviour and intent, to a more subjective understanding that the accused must be judged against a benchmark subject who *in fact* would have behaved as they did in the circumstances, Bacon and Lansdowne relied on the dissenting judgement of Murphy J in *Moffa v* R (1977) 138 CLR 601. In arguing that the objective ordinary person had been significantly eroded at common law they also referred to: *DPP v Camplin* (1978) A.C 705 (House of Lords) in their overturn of *Bedder v DPP* [1954] 2 All ER 801; and the Australian adoption of the *Camplin* position in R *v Dutton* (1979) 21 SASR 356, and *R v Croft* (1981) 3 A. Crim. R (NSW) 307. They also referred to Law Reform Commissioner, Victoria (1979), *Working Paper No. 6: Provocation As A Defence to Murder,* Law Reform Commission, Victoria, pp. 9-11, which argued for an abolition of the ordinary person test. For a summary of the law on this point see Weisbrot (1982), pp. 256-262. For further discussion of the ordinary person test and its relevance to the defence of the battered woman who kills, see Chapter Ten.

179 Bacon and Lansdowne (1981a), pp. 12-13, relying on *Woolmington v DPP* [1935] A.C. 462 (House of Lords). See discussion of the development of the law in this area in Weisbrot (1982), pp. 264-265.

placed on the Crown.[180] Bacon and Lansdowne recommended that 'change to this position in New South Wales would make the law on provocation consistent with the central and time-honoured tenet of the criminal law - that is for the prosecution to prove guilt, and not for the defence to prove innocence.'[181]

In many respects, these recommendations of 'The Women and Homicide Project' mirrored public opinion about the ways in which the provocation defence should be reformed. In New South Wales, they had support from the left legal community (The Australian Legal Worker's Group), and many of their arguments were sustained by judicial comment, and recent precedent.[182] Research into the operation of provocation in Victoria and South Australia also recommended a similar agenda of reform.[183] However, it was the recognition by the Women and Homicide Project of the need to view the battered woman completely in terms of her own subjective characteristics that was the radical step in addressing the legal identity of the battered woman. Bacon and Lansdowne's recommendations, developed in the context of a broader program of Women's Liberation to force community understanding and elimination of domestic violence, understood that for a battered woman to be treated as equal to a man charged with a similar offence, her difference to him (and the 'ordinary person' whom he represented) needed to be acknowledged.

## The Domestic Violence Task Force and the Battered Woman Syndrome

In terms of a liberal feminist interpretation of women's legal identity, however, this position did not have unequivocal support. Bacon and Lansdowne had been

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180 There was no separate subsection of s 23 that referred to the onus of proof in this way. The issue was, as Weisbrot (1982) notes 'whether the provisos of...s 23 amounted to a statutory exception to the general common law rule expressed in *Woolmington.*', p. 264.

181 Women and Homicide Project (1981), p. 2.

182 Australian Legal Workers Group (1981), *Reform of the Law of Provocation*, Press Release, 6 August (RL/WB).

183 Victorian Law Reform Commission (1979); Legal Services Commission of South Australia (1981).

invited to collaborate with the DVTF on the homicide issue.[184] In general, the DVTF advanced the grass roots feminist agenda on domestic violence, and publicly described its recommendations as working towards a reduction of domestic violence, and its 'eventual...elimination.'[185] It was committed to generating policy about domestic violence that reflected the need to motivate community understanding of its incidence, and to improve services for domestic violence survivors that would assist in demythologising common misconceptions about them.[186]

Bacon and Lansdowne presented to the DVTF the same agenda for change that they had presented to the Criminal Law Review Division of the Attorney-General's Department. However, Helen L'Orange, having undertaken research into the situation of the battered woman who kills, also discussed with them research emerging from the United States on a new evidentiary tool called 'the battered woman syndrome' (BWS).[187] The BWS was derived from psychologist Dr. Lenore Walker's text *The Battered Woman*,[188] and was not a defence in itself, but was used to support existing defences like provocation and self-defence.[189] The 'syndrome' (introduced into legal narrative through the expert testimony of a psychiatrist or psychologist) suggested that domestic violence is of a cyclical and escalating nature. The cumulative effect of surviving such violence for the woman concerned, according to Walker, caused a particular state of mind characterised by 'learned helplessness' and chronic fear'.[190] These attributes meant that a woman was psychologically unable to escape a violent relationship, or particular incidents of violence, even when the opportunity was ostensibly available for her to do so.

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184 Bacon Interview, 1995; Lansdowne Interview, 1995; The DVTF Report (1981), 'Appendix 3'.

185 The DVTF Report (1981), p. 2.

186 For a discussion of the continuation of the DVTF's policy in terms of state political agendas after 1981-2, see: NSW Women's Advisory Council to the Premier (1987), especially pp. 219-222; and for a discussion of the operation of the legislative reforms see Robyn Lansdowne (1985),'Domestic Violence Legislation in New South Wales', 8 *University of New South Wales Law Journal* 80.

187 L'Orange Interview, 1995.

188 Lenore Walker (1979), *The Battered Woman*, Harper and Rowe, New York.

189 For a full discussion of BWS see Chapters Nine and Ten.

Bacon and Lansdowne had already discussed and discredited the BWS during the FLAG research. They had argued that it perpetuated the worst aspects of domestic violence, and had forcefully contended in the FLAG Report that 'recent US research':

> [I]gnored the broader social consequences of the use of such of a defence in perpetuating insulting and oppressive views about women and in keeping domestic violence obscured from the public gaze by the emphasis on the woman as sick rather than the man as violent.[191]

Helen L'Orange agreed. Despite the *prima facie* benefits in recommending the BWS to the Government as the basis for reform in this area (it did focus directly on the battered woman herself, and removed the problems of her being judged against a male standard), L'Orange has said that the BWS 'went against the whole ethic of the 1981 domestic violence package: that is to focus on domestic violence as a crime, and to attempt its elimination.'[192]

The femocrats included in the DVTF, and Bacon and Lansdowne, therefore shared an understanding of the importance of ensuring that the battered woman's own experience was directly represented in the recommendations for homicide law reform. However, the divergent political perspectives of women like Helen L'Orange and Wendy Bacon meant that the more radical suggestion of the 'Women and Homicide Project' was removed from the DVTF agenda. As a libertarian committed to permanently protesting the exercise of authority of the state, Wendy Bacon was aware of the complexity of her involvement in the processes of liberal law reform. She was especially aware of the difficulties of critiquing the operation of the criminal justice system, and then working with a group like the DVTF which was implicated in it. However, her informing political perspective caused her to be scathing of the DVTF's decision not to support the elimination of the 'ordinary person' test.[193] Bacon has recalled the process of negotiation with the DVTF as one of 'disempowerment', in which the radical

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190 Walker (1979).

191 The FLAG Report (1982), p. 319.

192 L'Orange Interview, 1995.

193 Bacon Interview, 1995.

agendas of WBB and the campaign to free Violet Roberts were 'co-opted' by bureaucratised feminism.[194]

In this way, Bacon was not surprised when the DVTF, despite their support for most of the Women and Homicide Project agenda, and despite their strategic agreement to refuse the endorsement of the BWS, mirrored the Criminal Law Review Division's complete reform package, which liberalised provocation, but which refused to abolish the 'ordinary person' test.[195]

### The Crimes (Homicide) Amendment Bill

This package, which was subsequently presented before Parliament as the *Crimes (Homicide) Amendment Bill* on March 11 1982, consciously reflected the situation of women like Violet Roberts, Georgia Hill and Mrs. R, and the public sympathy generated by these cases, despite Bacon's reservations as to the nature of some of the recommendations themselves.[196] The Bill proposed a revised section 23 of the *Crimes Act* 1900 (NSW) in which the requirement of 'suddenness' was removed; the requirement that retaliation to the provocative act be proportionate to that act (not withstanding the fact that the accused must have lost their power of self-control) was removed; and the onus of proof was shifted from the defence to the prosecution in cases of provocation.[197] The Bill also recommended that section 19

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194 ibid.

195 The DVTF Report (1981) noted: 'The definitions of unlawful homicide and the defences thereto should be amended so as to give proper recognition to the situation of a battered wife who, after years of domestic torment, kills her tormentor. Precisely how this can be effected should be spelt out by the Criminal Law Review Division', p. 69. The Recommendations that The DVTF did make (R. 24 –27) were that: the defences be amended pursuant to the Criminal Law Review Divisions program of homicide law reform more generally; that the mandatory life sentence for murder be abolished; that all reforms be gender-neutral; that the Criminal Law Review division be 'requested to expedite its work on proposing the detail of these reforms', p. 6.

196 See for example: Woods and Andrews (1981), p. 1; Weisbrot (1982), p. 266; and the reading speeches around the passage of the Act: NSW Parliamentary Debates (Hansard) 11th March 1982, pp. 2482-2486; and 1st April 1982, pp. 3202-3207.

197 Weisbrot (1982), p. 268; Trevor Nyman (1982), 'Two Aspects of new homicide law', *Law Society Journal*, July, pp. 400-402.

be amended to allow for discretionary sentencing in cases which normally attracted life-term imprisonment.[198]

The removal of the objective 'ordinary person' test as an element of the defence was, as already noted, not recommended by either the DVTF or the Criminal Law Review Division of the Attorney-General's Department. Both of these bodies preferred to give support to an ameliorated section 23 (2) (b) which stated that 'the conduct of the deceased was such as could have induced an ordinary person *in the position of the accused...*'[199] to act as they did. In some respects, this amended section provided a tentative means by which the battered woman's experience of violence could be entered into the dominant legal narrative.[200] However, Robyn Lansdowne described the decision to amend section 23 in this way, as opposed to eliminating the objective ordinary person test, as a 'trade off' for the wide range of other reforms.[201] The rationale expressed by Attorney-General Walker as to why the test had not been abolished was that it provided a guarantee that 'the new law of provocation will not allow accused persons to name nebulous possibilities as a shield against punishment'.[202] The opportunity to genuinely codify in law a notion of a differentiated subjectivity for battered women based on their experience was thus consumed by a policy decision to remove the opportunity for allegedly

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198 ibid. Note that in 1989, s 19 was amended again to reintroduce mandatory life-sentencing for murder: s 19A *Crimes Act* 1900 (NSW). This was part of a package of sentencing reforms which commenced with the introduction of the *Sentencing Act* 1989 (NSW). For an analysis of the effects of this legislation see: Donna Spears and Ian MacKinnell (1994), 'Sentencing Homicide: The effect of legislative changes on the penalty for murder', *Sentencing Trends: An analysis of New South Wales Sentencing Statistics: Number 7*, June, Judicial Commission of New South Wales, Sydney.

199 Section 23 (2) (b) *Crimes Act* 1900 (NSW).

200 Weisbrot (1982) argues that s 23 (2) (b) in this form 'is somewhat of an improvement over the old section's bare "ordinary person" test, but following the decision in *Camplin*, is still unnecessarily vague. For example, it is unclear whether "in the position of" refers to the physical circumstances of the situation or to the peculiar characteristics of the accused which bear on the gravity of the provocation...a more specific provision would have been welcome to avoid any doubt.', p. 259.

201 Lansdowne (1982), p. 81.

202 ibid.

spurious pleas, lending credence, perhaps, to the anti-authoritarian suspicion that 'too many law reformers believe the liberal myths and legal maxims.'[203]

## Equality, Difference, and The Battered Woman Who Kills

The reform of section 23 therefore demonstrated that legislative attention had been directed toward the legal status of the battered woman who kills by feminist efforts to ensure that she was not judged equally against other legal subjects. Yet the reforms still indicated a desire by the state to preserve the rule of law. Thus despite the challenges to the criminal justice system from radical prison reform and feminist agendas, liberal notions of the law and of women as legal subjects still dominated the theoretical and political landscape. For example, the recommendations of the DVTF on the reform of homicide, although part of a collective feminist agenda to draw attention to the reality of domestic violence, reflected an equivocal relationship with a chivalrous liberal state.[204] In the end, the DVTF chose to adhere to the agenda for reform delineated by the Attorney-General's Department, despite negotiating with women like Robyn Lansdowne and Wendy Bacon who were so involved within the feminist campaign to improve the law in case of domestic homicide, and who had so strenuously argued for an abolition of the ordinary person test. [205] The approach of the DVTF can therefore be read as expressing the views within feminist legal thinking about the law that had pre-existed the FLAG study. It rested on a belief that reform should be enacted in order to identify publicly women as equal to men, that the state should and could 'legislate for the right to be equal.'[206]

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203 Peter Duncan (1982), 'Achieving Law Reform', in Basten et al (1981), pp. 288-299, p. 298.

204 See n. 95.

205 The DVTF Report (1981), recommendations 24-27, p. 6. The presence of Greg Woods as Chairman of the DVTF and Director of the Criminal Law Review Division would also suggest that influence on the package of reforms in this area did not come strictly from a primarily feminist agenda.

206 Jocelynne Scutt (1988), 'Legislating For The Right To Be Equal: women, the law and social policy', in Cora Baldock and Bettina Cass (eds.), *Women, Social Welfare and the State in Australia*, Allen and Unwin, Sydney, pp. 227-248. See discussion of the nature of feminist thinking about the law in the 1970s in Chapter Five. Note also

For women like Wendy Bacon, who approached the question of an engagement with the law from a more critical (and in Bacon's case, libertarian) perspective, the faith placed by the DVTF in the process of liberal law reform was perceived quite differently. Bacon's involvement in the campaign to reform the law of homicide demonstrated how complex the alliances between feminists of diverse political backgrounds really were when committed to working collectively towards the politicisation of women's experiences. However, this did not prevent Bacon in 1985 from commenting:

> As feminists, while fighting male violence in the form of rape or domestic violence, there is a danger that we could become allied with law and order forces...let us not play that historical role. We can demonstrate the practicality of other solutions.[207]

The dynamic and critical agenda of the FLAG Report, which had identified the need for the law to assess the battered woman completely in terms of her subjective characteristics,[208] was subsumed by the dominant commitment to liberal equality by the state, and more ambivalently, by the feminists working for that state. The recommendations of the FLAG Report, and echoed by the 'Women and Homicide Project' and the feminist groups who campaigned for justice for Violet Roberts, Georgia Hill and Mrs. R, endorsed wholeheartedly the elimination of the 'ordinary person' test.[209] Justice for the battered woman who kills would, they argued, be best served through an approach which attempted to secure her equal treatment by identifying and naming her difference. From this perspective, the battered woman who killed was neither to be judged as completely different from male offenders, as a subject constructed as psychologically aberrant because of her history of violence through the defence of diminished responsibility or the Battered Woman Syndrome, nor as the same, as subject in existing defences like provocation or self-defence to an objective test of her behaviour which was based on male experience.

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recommendation 26 of the DVTF Report (1981) which stated 'That these reforms be gender neutral i.e. should apply equally to both men and women', p. 6.

207 Wendy Bacon (1985), 'Women in Prisons', *Refractory Girl*, May, pp. 2-10, p. 10.

208 See discussion of The FLAG Report (1982) in Chapter Two

209 See n. 155.

The *Crimes (Homicide) Amendment Act* 1982 (NSW), which was passed with bi-partisan support in April 1982[210] was undoubtedly a major achievement of a pluralist feminist engagement with the criminal justice system. Just as the pluralist feminist agendas of the 1970s and early 1980s challenged the constitution and operation of a liberal state as a result of their own diversity, the feminist experience with liberal law began to evidence, through cases like that of Violet Roberts, a need to theoretically extend its particular operation and constitution as well. The feminism of this period, which acknowledged that women with diverse political and personal experience could be united collectively, provided the theoretical insight that the battered woman who kills could be treated as a differentiated, and sexed, subject. The identification of feminist legal thought about women's position before the law had therefore shifted from a primarily Marxist or liberal reformist position.[211] However, the feminist concentration on difference could not, as the reforms to section 23 and section 19 evidenced, yet subvert the traditional reading of women as legal subjects and citizens. The idea that women could be viewed as both equal to and different from men, and from each other, had not yet found a discursive or narrative means by which to be heard by doctrines of law, entrenched as they were in simple binary notions of what women's experiences meant, and who women were.

The notion of the battered woman who kills as a diversely constituted subject is therefore embedded historically in the campaign for Violet Roberts' release. This historical recognition of a pluralist feminist response to the identity of the female legal subject provides a key to analysing the emergence of the BWS in 1992 as the preferred defence option for battered women who kill.[212] The remainder of this thesis is devoted to investigating and assessing a methodology by which the feminist struggles of the 1970s and early 1980s for a differentiated subjectivity for

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210 Introduced 11 March 1982, passed all stages 1 April 1982, proclaimed 5 May 1982 (NSW *Government Gazette* No. 61, 7th May, 1982, p 1987); and n. 196.

211 See discussion in Chapter Five.

212 BWS was introduced into Australian law in the case of R *v Kontinnen* (unreported) Supreme Court of South Australia, 30 March 1992. For a discussion of the operation of the BWS in common law since 1992 see discussion in Chapter Nine. For an

the battered woman who kills can be reinterpreted, and applied to the questions raised by the BWS in a contemporary context. The next section of this thesis investigates the theoretical problems that emerge when history (specifically genealogical, feminist history committed to identifying subjectivity) attempts to challenge the law. More importantly, it examines how this challenge effects an understanding of women as subjects deserving of equal treatment before the law, who also demand understanding of their diversely constituted experiences.

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analysis of how the feminist campaign to reform the law of homicide in 1980-82 in New South Wales contributes to the feminist criticism of the BWS see Chapter Ten.

*Section Three*

# THEORY

*Chapter Seven*

# NARRATIVE AND TRUTH.

> The truly subversive power of legal narrative does more than undermine a supposedly widespread belief that lawyers tell the objective truth. It has more to do with taking a society's narratives so seriously as to carry their immanent possibilities of meaning beyond the limits that lawmakers who use narratives impose.[1]

When I first began thinking about this dissertation, the questions I wished to ask looked very different. My initial plan was to examine the notion of truth within contemporary legal discourse, and to unravel why that discourse, as a product of liberalism, was unable to accommodate a differentiated subjectivity for women. I intended to show why questions about law's truth (especially as they emanate from traditional jurisprudence) could have a potential practical reading or effect, by examining a particular scenario effected by both legal and external feminist interpretations: the situation of the battered woman who kills.

In jurisprudential terms, therefore, my plan was to initiate a challenge to formalism, and to take the ideas of the Critical Legal Studies School (with their express challenge to the nature of an objective law) further, towards a postmodern jurisprudential position.

I soon found problems with this project. The notion of a challenge to truth (a challenge to objectivity) was initiated by the CLS.[2] The task of the postmodern

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1 Robert Weisberg (1996), 'Proclaiming Trials as Narrative', in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in The Law*, Yale University Press, New York and London, pp. 61-83, p. 66.

2 CLS will be discussed critically later in this chapter. However, see generally: Peter Gabel and Duncan Kennedy (1984), 'Roll over Beethoven', 36 *Stanford Law Review* 1; Mark Tushnet (1991), 'Critical Legal Studies: A Political History', 100 *Yale Law Journal* 1515; Roberto Mangabeira Unger (1986), *The Critical Legal Studies Movement*, Harvard

legal scholar goes much further. It is not merely to overturn that objectivity (although that may become part of the project) for to do so would be to replace one constant with another: a system of law and sovereignty based on truth, to one where there is no truth. Truth itself, as a term, is slippery. It implies an opposite, a falsity. That is, law is true, because if it were not true, it must be false, and a system of coercive and legal sovereignty[3] based on falsity would simply not work.

In terms of a philosophy of liberalism, law is a form of sovereignty, and maintains coercive power over the subjects that it governs. Such sovereignty itself must be seen by those it governs to be *true* in order to be powerful, otherwise it would have no meaning, it could not control, and could not be obeyed. This is a tautological argument in philosophical terms, and one posited from John Austin downwards, which has been criticised for its reliance on an objective conceit.[4] The point of a postmodern approach, therefore, is not to ask what the truth is and why there is a truth. The point is to understand, as Michel Foucault has made explicit in his work[5], that such truth carries a social currency in terms of belief (through the inextricable connections between power, truth and knowledge) and as far as law is concerned, an institutional authority[6].

Carol Smart, in reflecting on law's truth in these terms, highlights the contingent problem of translating other ideas of everyday truth, such as experience, into legal discourse. She argues that:

> If we accept that law, like science, makes a claim to truth and that this is indivisible from the exercise of power, we can see that law exercises power not simply in its material effects (judgements) but also in its ability to disqualify other knowledges and experiences ...

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University Press, Cambridge, Massachusetts; David Kairys (ed.) (1990), *The Politics of Law: A Progressive Critique*, Pantheon Book, New York.

3 WJ Rees (1950), 'The Theory of Sovereignty Restated', 59 *MIND* 495.

4 Phillip Soper (1988), 'Making Sense of Modern Jurisprudence', 62 *University of Colorado Law Review* 67.

5 Michel Foucault (1980), *Power/Knowledge: Selected Interviews and Other Writings*, Pantheon Books, New York, pp. 137-138; Lawrence Kritzman (ed.) (1988), 'On Power', *Michel Foucault: Interviews and Other Writings* ,Routledge, London, pp. 96- 109.

6 See generally Jerry Leonard (1995), 'Foucault and (the Ideology of) Genealogical Legal Theory', in Jerry D. Leonard (ed.) *Legal Studies as Cultural Studies: a reader in (post) modern critical theory*, State University of New York Press, New York, pp. 133-151.

> these experiences must be translated into another form in order to become 'legal' issues and before they can be processed through the legal system.[7]

It is not enough, therefore, that the post modern scholar challenges law's 'truth', the legacy of formal legal 'science'. Instead, the questions must be re-directed towards how such truth is itself constructed.

This 'how' question (as opposed to merely why or where)[8] led me to step away from an investigation of truth *per se*. I began to ask a series of different questions: How can the subjectivity of a particular female experience enter a dominant, overwhelmingly male, legal canon that is perceived to be true? Can the law accommodate experience or personal histories as evidence within a trial on their own merit - as part of their own narrative transaction - without being subsumed within the law's organising framework?

Framed in this fashion, the problem of how best to represent the interests and stories of the battered woman who kills initiated an investigation of a range of truth-telling narratives. The criminal law presents one story, and one way of deciding what evidence is admissible at such a woman's trial. Historical theory and methodology, especially in terms of the work of Hayden White (which will be discussed later in this chapter), offers another way of viewing notions of past events and their reconstruction as historical evidence. Feminist theory, again, through the work of writers like Carol Smart and Joan Scott, argues for ways of viewing female experience and giving it a subjective political voice, an evidentiary trace.[9]

This thesis investigates all of these perspectives. But its central contention is that history - especially genealogical history which asks *how* women's subjectivity and

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7 Carol Smart (1989), *Feminism and the Power of Law*, Routledge, London, p. 11.

8 Joan W. Scott (1988). 'Deconstructing equality – versus - difference: Or, the uses of poststructuralist theory for feminism', in Steven Seidman, (ed.), *The Postmodern Turn, New Perspectives on Social Theory*, Cambridge University Press, New York, pp. 282-298, p. 284.

9 Feminist debates and challenges to the construction and reading of women's experience will be discussed in Chapter Eight.

experience is constructed[10] – is an important contribution to feminist legal debates about liberal law's truth, insistence on objectivity, and correlatively, its treatment of women as legal subjects. This chapter argues that narrative, conceived of as a form of discourse, and not just a way of telling stories, is an important means by which such a history can be of benefit to legal theory. This argument entails an investigation of how narrative had been used and defined in law and history. The complicating factor of feminism will be discussed in Chapter Eight.

On the surface, both law and history have traditionally used the language of 'narrative' and 'evidence', both disciplines having emerged, albeit in complex ways, from a tradition of defining themselves as 'science'. However, these similar positivist roots belie the fact that law and history construct their interpretations of truth in seemingly incommensurable ways. This incommensurability between law and history, which will be investigated in this chapter, presents a serious problem if narrative is argued to be a means by which women's (and particularly battered women's) experience can be heard by the law.

Although narrative has been discussed in this way by scholars of jurisprudence (most notably those of the law and literature school)[11], they do not consider how 'narrative' is itself constituted. Geoffrey Bennington, discussing Jean-Francois Lyotard's theory of narrative, has argued:

> If [narrative] theorists agree on anything it is this: that the theory of narrative requires a distinction between what I shall call 'story' – a sequence of actions or events ... and what I shall call 'discourse' – the discursive presentation or narration of events.[12]

It will be argued that it is this second, discursive function of narrative, used by postmodern scholars of historical theory, and left unconsidered by legal theory – that presents a real challenge to the construction of female subjectivity, and experience, by the law. As such, this chapter contends that if the postmodern

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10 See explanation and discussion of genealogy, especially in reference to the work of Foucault, later in this Chapter and in the Introduction.

11 See discussion of the law and literature movement presented later in this chapter.

12 Geoffrey Bennington (1988), *Lyotard: Writing The Event*, Columbia University Press, New York, p. 108. See Introduction of this thesis for a definition of how 'discourse' is understood and discussed.

theoretical development around narrative undertaken in historical theory is similarly approached within legal theory, a more fluid understanding of what narrative is, and to whom it belongs, can be developed. From this perspective the potential for diverse challenges to existing legal truths can be demonstrated, and a genealogical approach to the law's treatment of the battered woman who kills can be theoretically grounded.

## Narrative in Legal Doctrine

This discussion must begin, however, with an identification of the ways in which liberal legal doctrine, as opposed to critical legal theory, conceptualises narrative. This identification, based primarily on law's commitment to coherence and rationality, provides reasons for the distinctions between the understanding and use of narrative in legal and historical theory.

At first glance, legal and historical narrative have much in common. An examination of the hearsay rule provides a useful example. The hearsay rule relies explicitly on legal determinations of what constitutes a narrative, or what constitutes the *res gestae* (that is, matters surrounding and comprising events or transactions in issue.)[13] The traditional reading of this rule holds that only statements which are in a particular narrative form - statements reporting past observations or events - can generally be effectively reproduced in court so that their accuracy as material facts to prove the charge at hand can be determined.[14] In other words, the hearsay rule is designed to prohibit from evidence the tender of out-of-court assertive narratives. To be included as part of the *res gestae*, a statement must be shown to have been made during an event or transaction, 'so as not to constitute a narration of a past event or transaction.' Non-narrative statements and

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13 Andrew Ligertwood (1993), *Australian Evidence* (second edition), Sydney: Butterworths, p. 447.Paul Gewirtz also notes 'The entire law of evidence regulates whether and how stories may be told at trial, and can be seen as a law of narrative.': Paul Gewirtz, (1996), 'Narrative and Rhetoric in the Law', in Peter Brooks and Paul Gewirtz (eds.), *Law's Stories: Narrative and Rhetoric in The Law*, Yale University Press, New Haven, pp. 2-13, p. 9.

14 Ligertwood (1993), p. 448.

narrative representations of the event are therefore admissible;[15] statements and stories or representations told *about that* event, no matter how immediately afterward, are rendered inadmissible.

The hearsay rule and the notion of meaning of the narrative in these strictly legalistic terms rely on interpretation of what constitutes the narrative transaction. The main residual question, therefore, is: how does the law determine the *telos* of a particular story, and who is entitled to recount narrative?

The High Court case of *Brown v* R.[16] offers a dramatic example of the narrowness in which the legal narrative transaction, the boundaries of the story able to be told in court, is defined. In this 1911 case, the deceased, having been fatally shot, walked out of a house to a gate, a distance of some 25 yards, and there commented to a witness upon the shooting that had occurred. These comments, albeit from the victim, were excluded as inadmissible under the hearsay rule. Although part of the general representation of past events, the court held the victim's statement to be outside of the narrative transaction of the killing itself. As the court explained:

> [I]t would in our opinion be going beyond the limit of authority to admit evidence which is in substance and reality a mere narration respecting a concluded event, a narration not naturally or spontaneously emanating from or growing out of the main transaction, but arising as an additional transaction.[17]

Although a relatively isolated example of how the law interprets and determines narrative, the example of the hearsay rule indicates that to remain admissible as evidence, and to be counted within the *res gestae*, there is a presumption that there can be only one interpretation, or one voice, telling the story of the event. If, for example, the victim in *Brown* wrote down her statement, or if her killer confessed, or if the witness was present at the crime and *then* heard the victim's accusation, the material would be able to be included within the narrative. It would then be part of the material facts which could be determined by the players as they stood at the scene of the crime. It does not matter that the witness in *Brown* may have heard raised voices, arguing, inside Brown's home. These events would be part of the

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15 *Adelaide Chemical and Fertilizer Co. Ltd. v Carlyle* (1940) 64 CLR 514

16 (1913) 17 CLR 570. This case upheld R *v Bedingfield* (1879) 14 Cox CC 341.

'additional' transaction, the additional story, that not withstanding the reliability of the witnesses themselves, remain as peripheral, and therefore hidden from the formal legal language and institutionalised narrative of the event that is eventually permitted in court. Such stories remain, therefore, an interpretation to be challenged.

The narrow definition of narrative transaction in the hearsay rule gives an example of how legal doctrine demands a strictness of vision and of voice. It acts as an illustration of the general principal that evidence not traditionally accepted as being within the immediate parameters of the narrative transaction, or its supporting rules, is excluded from the formal account of a crime or a defence. This is most notable in the marital homicide cases this thesis investigates. In these cases, especially before domestic violence emerged on the public agenda in the 1970s, any history of violence between the accused and her spouse could not be taken into account in determining the applicability of available defences, unless the violent spouse threatened the accused immediately before the unlawful killing. Long term threats, abuse, fear for safety of self and children have often remained outside the narrative transaction as 'additional' or peripheral narratives, as commentary by the accused and her counsel on the material facts and, as such, inadmissible, or deemed as an irrelevant basis on which to argue a defence like provocation.[18] The concept of narrative in legal doctrine, and defined in the law of evidence, therefore prevents accounts of experience which do not fit within the boundaries of liberal legalism and its construction of events and subjects.

History, on the other hand, while initially explicitly construing the narrative function as the truth of the 'real' events alone, has blurred its own definitional boundaries. While law has, to greater and lesser degrees, maintained its institutional authority through a reliance on the foundations of both jurisprudential objectivity and coercive and legal sovereignty, history, never possessing that institutional authority, has constantly challenged itself through exploration into other fields and theories. Historians, while still *prima facie* telling 'what happened', have generally

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17 *Brown v* R, per Isaac and Powers JJ at 598.

18 See for example: *The Queen v* R (1981) 28 SASR 321

begun to acknowledge voices and stories beyond those of the public record. History has (through contact and conversation with feminist theory, anthropology and literary theory)[19] begun to acknowledge that the 'additional narrative' is often as much part of the 'real' story of what happened as the public, government or observable 'eyewitness' record.[20] History has therefore begun to challenge its own truth as a scientific discourse, a point to which I will return. However, while the hearsay rule provides an example of law's continuing procedural strictness to maintain standards of truth in the courtroom, legal theory has begun to challenge the epistemological boundaries of its own truth in various ways.

## Legal Theory Challenges The Truth: Critiquing Objectivity

Although imbued with its own authority, which makes external practices and historical formulation of social activity unable to be easily translated into legal doctrine or scholarship, there have been movements *within* the law toward an understanding of the law's inter-action with society. Although these movements did not set out to disrupt the sovereignty of law, or institutionalized legal history, they did move jurisprudence towards a more passive, or interactive position from where other, later, scholarly critiques of legal discourse itself could be mounted.[21]

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19 See for example: Joan Scott (1988), *Gender and The Politics of History,* Columbia University Press; New York; Clifford Geertz (1973), *The Interpretation of Cultures: selected essays,* Basic Books, New York; Roland Barthes (1977), 'Introduction to the Structural Analysis of Narratives', *Image, Music, Text.*,(ed. and trans. S. Heath), Hill and Wang, New York.

20 It must be stated that this process is neither necessary nor straightforward. It would be a gross generalization to suggest that all historians take kindly to thinking beyond traditional ways that history is approached, or that critiques to positivist history are only a recent development. The incursion of theory into history, although more visibly championed by historians than legal scholars, is nevertheless an often difficult process for some. As Greg Dening notes: 'Many historians...would rather write history than know how to define it, and they have a suspicion that too much thinking leads to sinking...'. Greg Dening (1988), *History's Anthropology: The Death of William Gooch,* University Press of America, Lanham US, p. 98.

21 These 'other, later' legal critiques of the law include postmodern interpretations of the law question, feminist jurisprudence, and legal narrative scholarship. The latter movement will be discussed in this section. Postmodern and feminist jurisprudence will be discussed in the next chapter.

The jurisprudential framework offered by J L Austin divides law and society into separate categories or spheres.[22] Society, or 'real life'[23] is the primary realm of social experience, and what is 'immediate and truly important to people, like desire and its fulfillment and frustration, goes on there.'[24] Law, on the other hand, is seen as the specialized realm of state and professional activity that is created by the social world in order to serve that same world's needs. Although this functionalist understanding of law and society separates them into two distinct realms, they are logically (by definition of law's function) related.[25] Therefore the problematic question within the law, theoretically and politically, has always been the nature of that relationship.[26] In general, legal scholarship, including legal history, has played a role in the discussion of the law question in that it grounds competing ideological claims to law's authority within the liberal state, and over citizens' lives.

Both Formalism and Realism, as two schools of modern jurisprudence, have been influential in developing visions, albeit contrasting visions, of what social development consists of, and how law adapts to or influences that development. Put simply, Formalists argue that the legal system is the domain of legal specialists,

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22 See John Austin (1954), *The Province of Jurisprudence Determined and the Uses of the study of Jurisprudence*, Weidenfeld and Nicholson, London.

23 Robert Gordon (1984), 'Critical Legal Histories', 36 *Stanford Law Review* 57, p. 60.

24 ibid.

25 Robert Gordon defines functionalist method as constructing a 'typology of stages of social development, and then to show how legal forms and institutions have satisfied, or failed to satisfy, the functional requirements of each stage.': Gordon (1984), p 64. See also JM Kelly (1994), *A Short History of Western Legal Theory*, Oxford University Press, Oxford, pp. 442-443.

26 'The Law Question'- or 'What is Law?' has proved as difficult to answer as 'The History Question', and quite impossible to answer in any depth in this context. Paul Hirst has pointed out that there is considerable dispute over what law is: Paul Hirst (1986),'Law and Sexual Difference', 8 *Oxford Literary Review* 193. Or as Carol Smart notes: 'law constitutes a plurality of principles, knowledges and events, yet it claims a unity through the common usage of the term "law"': Carol Smart (1989), *Feminism and The Power of Law*, Routledge, London. For an intelligent and coherent overview see generally Margaret Davies (1994), *Asking The Law Question*, Law Book Company and Sweet and Maxwell, Sydney. Robert Gordon poses some of the sustaining questions as being: "'Is law a dependent or independent variable?' 'Is everything about law- norms, rules, processes, and institutions- determined by society, or does law have autonomous internal structures or logic?' 'If it has internal structures, do they enable it to have and independent causal effect- to act as a positive feedback loop- on social life?'", Gordon (1984), p. 60.

and that it is both usual and necessary for legal decisions to follow the internalized logic of the common law.[27] The rationale behind this approach is that legal decisions will best serve the society they reflect if legal decision-makers do *not* think about society at all, because, as legal historian Robert Gordon comments, there is a 'logic of liberty or efficiency...inherent in the practice of [their] craft.'[28] Realists, on the other hand, have a broader notion of legal autonomy: law is 'what officials do about disputes'[29], and as such, takes into account the work of anyone, including legal decision-makers, whose task is the administration of public policy. Law therefore is inherently connected to society. However, the Realists suggest that policy makers should be insulated from short-term political interests in order to concentrate on macro social needs.

The Formalist and Realist understandings of the law/society relationship have particular consequences for the nature of legal history. Gordon puts their formulations like this:

> Formalist legal history considers phenomena outside the legal craft as distorting judicial decision making or as simply irrelevant to the important story to be told...Realist history, on the other hand, takes as its main subject the relations of function or dysfunction between the law and major trends of social development.[30]

Both schools see Law, and legal history, as central. Their refusal to *acknowledge* the connections between law and society in any form, ensures that they place law and jurisprudence as active and dominant upon the society they reflect.

One of the most controversial developments in legal theory over the past twenty years has been the development of Critical Legal Studies (CLS) as a reaction to the inadequacies of preceding schools like Formalism and Realism to effectively critique law's objective face. CLS is not a theory per se, but a 'political location.'[31]

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27 For a classic exposition of this position see Hans Kelsen (1967), *Pure Theory of Law*, University of California Press, Berkeley.

28 Gordon (1984), p. 66.

29 This famous phrase is attributed to Karl Llewellyn. For a statement on the Realist position see: Karl N. Llewellyn (1931), 'The Call For A Realist Jurisprudence', 44 *Harvard Law Review* 697

30 Gordon (1984), p. 67.

31 Tushnet (1991), p. 1515.

The movement originated in the United States' 'ivy league' Law schools in the late 1970s as a response to a perceived increasing political and legal conservatism,[32] and as such, developed within a close knit group of young, Left, male legal academics predominantly at Harvard and Yale. The closeness of the core CLS 'group' combined with its loosely defined commitment to revisionist scholarship and Left politics has caused Alan Hunt to describe the CLS Movement as exhibiting 'both homogeneity and diversity.'[33] The CLS Movement has been committed to historical investigation of legal development and identifying legal doctrine as contingent, situated in historical (and ideological) contexts. As Allan Hutchinson and Patrick Monahan articulate the CLS position:

> Law is simply politics dressed up in different garb; it neither operates in a historical vacuum not does it exist independently of ideological struggles in society.[34]

This approach could be pinpointed as being directed primarily at law's foundation in liberal political theory - its blind insistence that people are free and equal, that the law is impartial in its objectivity, and presents a true 'vision' of a just civil society.

The CLS Movement's commitment to showing the contradictions, indeterminacy and incoherence of legal doctrine and legal analysis,[35] has in return been accused of being 'nihilist'.[36] Despite its claims to historical investigation of the ways in which

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32 Davies (1994), p. 145. Those in this 'close knit' community included Mark Tushnet, Peter Gable, Duncan Kennedy and David Trubeck.

33 Alan Hunt (1986), 'The Theory of Critical Legal Studies', 6 *Oxford Journal of Legal Studies* 1, p. 12.

34 Allan Hutchinson and Patrick Monahan (1984), 'Law, Politics and The Critical Legal Scholars: The Unfolding Drama of American Legal Thought', 36 *Stanford Law Review* 199, p. 206.

35 Margaret Davies describes CLS indeterminancy theory like this: 'legal doctrines do not and in fact cannot be determinate: they cannot, in other words, determine absolutely the outcome of a case. The manipulability of legal doctrines means that any number of outcomes could be justified in any particular case. Not all of the "crits" (as they call themselves) support this "indeterminancy thesis" in such a strong form.': Davies (1994), p. 147. See also Hutchinson and Monahan (1984).

36 See for example Ed Sparer (1984), 'Fundamental Human Rights, Legal Entitlements, and The Social Struggle: A Friendly Critique of the Critical Legal Studies Movement' 36 *Stanford Law Review* 509; Owen Fiss (1982), 'Objectivity and Interpretation', 34 *Stanford Law Review* 739.

liberal law discounts the experience of subjects who do not fit universalised, objective standards, the CLS approach is ultimately ahistorical. As such it is unable to recognise fully the claims of marginalised groups for justice. American legal academic Ed Sparer regards the CLS 'trashing' of liberalism as dangerous, in that by depicting the entire tenets of liberalism as contradictory and contingent, important concepts like human freedom and welfare are erroneously disposed of and damaged.[37] As he argues, 'this [CLS] attack is both ahistorical (despite the Critical legal insistence on historically conditioned analysis) and reactionary. It is sometimes blind to the significance of legal protections for certain fundamental human rights.'[38]

For critical race theorists and feminist theorists working in jurisprudence, who have used rights theory as a fundamental point of argument to make gains for equal representation and recognition by *using the law,* the result is a pyrrhic victory. Mari Matsuda, a critical race theorist, has argued on this point that there are times to stand outside the courtroom and protest [against] the system as a whole, and times to stand inside to defend one's rights.[39]

The problem is that although the CLS scholars support a critique of liberal ideology and objective legal truth, they assume that a time will come when that liberal mythology will disintegrate, and a clear vision of 'what to do next' will disclose itself. As Margaret Davies notes:

> Surely it is better, rather than wait for the impossible, to begin to push for a better legal system, better political understanding *now* ...This does not mean that we need a grand plan for the revolution. But it does mean working in a positive, reflective and interactive way with whatever we can.[40]

The CLS Movement argues, in the Marxist tradition, that a critique of liberalism inherently infers upon law or society a better and alternative ideology. Despite its critiques of legal objectivity, CLS still seeks an absolute truth. This is reflected in

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37 Sparer (1984) positions this critique of CLS in terms of labour law, and the rights of the working class.

38 Sparer (1984), p. 512.

39 Mari Matsuda (1988), 'When the First Quail Calls: Multiple Consciousness as Jurisprudential Method',11 *Women's Rights Law Reporter* 7, p. 8.

the CLS assumptions about history. Rather than use history as a critical tool to uncover, in the genealogical sense, *how* legal liberalism has operated in disseminating truth about subjects, and subjectivities, CLS history relies predominantly upon formal legal sources. Its critique of legal doctrine is therefore largely constructed on top of formalist legal exegesis. As Robert Gordon poses to the CLS scholars:

> What I can't understand is why you choose to write about...case law and treatise literature produced by the high mandarins of the legal system in the first place. After all, isn't part of your theory that everyone in society- not just lawyers and certainly not just jurists and appellate judges- produces, applies and interprets 'law'? And isn't it therefore perverse of you to stick with the mandarin materials beloved of the most reactionary of formalists?[41]

This focus on the canon removes the potential for other narratives which exist *outside of* it to call for a theoretical rethinking of law's truth. [42] Consequently, CLS - despite its important position in contemporary jurisprudence in driving the critical push against law's objective truth - does not give full attention to *how* narrative operates in claims for transformative political spaces within law's dominance. More importantly, it does not address how marginalised groups which have always existed outside of the 'treatise...of the high mandarins of the legal system' can influence those claims.

## Legal Theory and Narrative.

In terms of the claims of marginalized groups for justice, American legal scholar Robert Cover argues that understanding how narrative operates within the law is the key to addressing legal change and reform. In terms of the wider issues canvassed in this thesis, Cover's approach is crucial in order to rethink methods for

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40 Davies (1994), p. 157.

41 Gordon (1984), p. 120.

42 As Margaret Davies notes '...for political reasons, most feminists prefer to identity with other feminist scholars rather than with the CLS'. Davies (1994), p. 144. For a sustained analysis of the inadequacies of CLS positions for critical race theorists *and* feminists see: Patricia Williams (1987), 'Alchemical Notes: Reconstructing Ideals from deconstructed Rights', 22 *Harvard Civil Rights-Civil Liberties Law Review* 401

incorporating the personal histories of battered women who kill into existing criminal law narratives.

Referring to work by Hayden White and Clifford Geertz on narrative, as key to the production of meaning within history and anthropology respectively[43], Cover interprets the law and narrative as 'inseparably related.'[44] He states:

> No set of legal institutions or prescriptions [that is, norms] exists apart from the narratives that locate it and give it meaning...Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.[45]

As such, Cover views every prescription or existing social norm as 'insistent' in its demand to be 'supplied with history and destiny, beginning and end, explanation and purpose.'[46] A result of this insistence, according to Cover, is narrative's enclosure in Geertz's 'thick contextuality'[47]: a need for stories and explanations to be understood in terms of their normative universe, their origin and experience, and ultimately their morality. As Cover sees it, narratives, be they legal, historical or anthropological, are all 'trajectories plotted upon material reality by our imaginations.'[48]

For Cover, therefore, narratives are the realised places through which meaning, and interpretation of meaning, of the normative worlds in which we live are expressed. In legal terms, he sees the Nomos as constructed by not only rules or doctrines to be understood, but also worlds to be inhabited. Concurrently, he acknowledges that legal 'interpretation', or production of meaning, is not confined to the particular hermeneutic examples that are the daily fare of legal practitioners, that is, legal interpretation is not confined to questions of statutory interpretation,

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43 Geertz (1973); Hayden White (1992), 'The Question of Narrative in Contemporary Historical Theory', in *The Content of the Form: Narrative Discourse and Historical Representation*, John Hopkins University Press, Baltimore, pp. 26-57. (Note that this essay first appeared in (1984) *History and Theory* vol. 23, no. 1.)

44 Robert Cover (1983), 'The Supreme Court 1982 Term Foreword: Nomos and Narrative', 97 *Harvard Law Review* 4, p. 5.

45 ibid.

46 ibid.

47 Geertz (1973).

48 Cover (1983), p. 5.

classification and definition. As he views the world we live in as being constructed and understood in terms of a 'normative universe', Cover acknowledges that this world, and especially the legal world, is held together by the force of 'interpretative commitments.'[49] These may include the commitments of legal practitioners and bureaucrats to determine what an existing piece of legislation 'means' in terms of official rules and policies. However, these commitments also extend to the understanding of the people whom the law governs and controls, and their precepts, their resentment or acceptance of such public or official interpretations. Even if the opinions and moral value ascribed to a strictly legal interpretation by a group (or groups) of people fails initially to represent itself within the court room or other legal arena, Cover contends that the normative world (in which the opinions of those groups and the strict legal interpretation both coexist) will itself be altered.

According to Cover, creation of legal meaning (jurisgenesis) is therefore a system of tension between a reality and an imagined alternative, both of which can be imbued with normative significance only through the devices of narrative.[50]

However, as a necessary precondition for this reflection of societal normative value into legal meaning, Cover identifies that the groups attempting a 'redemptive constitutionalism'[51] must themselves be tightly bound together by a historical set of values and principals, which endow them with a unity, and a normative 'boundary' against which existing legal (or other) interpretations can be measured. As Cover sees it, such groups must have this 'inner life' and 'social boundary', this cohesion, otherwise, he contends, it would make no sense to think of them as distinct entities.[52] Although he acknowledges that within such groups there may be distinct

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49 ibid., pp. 44-60.

50 ibid. Cover examines these issues through the example of religious groups, such as the Mennonites, whose collective interpretative commitment to conscription and the narrative which represented this commitment, both challenged and altered the boundaries of legal meaning and compliance within the US Supreme Court. Cover identifies this situation of 'rescuing' exiled narratives (and their divergent social bases) by incorporating them into the pre existing legal narratives as a strength of the American Constitutional order.

51 ibid., p. 34.

52 As Cover states: 'Creation of legal meaning entails, then, subjective commitment to an objectified understandin

visions of the social order requiring such a transformational politics, these distinctions are ultimately contained within the autonomous insularity of the association itself.[53]

It is this condition for containment within a single unifying narrative that raises questions about Cover's redemptive constitutionalism. Although using sources and theories from other disciplines (most notably history to determine a theory of narrativity) Cover only takes such theories to a certain point. He presents an opportunity to allow stories and values that stand outside of a strict legal interpretation to be included and taken account of through narrative interpretation. However he retains a commitment to reading those stories objectively, reinforcing the liberal legal construction of subjects and experience that he seeks to critique.

In Cover's analysis, therefore, if legal meaning is to be created, subjective positions - even existing within an 'umbrella' group contesting an existing legal interpretation - must be subsumed within an organising narrative which is coherent, and objective, in order to give effect to the interpretative challenge. Even though this may be an accurate observation as far as some religious groups are concerned (these groups being the primary study of Cover's discussion, and within themselves bound by particular organised and express doctrines) the argument becomes less viable when applied to other groups who may fall within Cover's definition of redemptive constitutionalism. For the purposes of my general discussion, which itself centres around competing political subjectivities and theories of the subject as put forward by feminist theory, Cover's argument becomes problematic. As I will discuss in Chapter Eight, the multiple and diverse visions of feminism do not present an organised or objective nomos, and therefore do not present a cohesive narrative challenge to existing legal narratives. Cover identifies the American Women's Movement as a monolithic whole, and includes it as an example of a jurisgenerative group.[54] However, as Marie Ashe notes,

> The question arises at this point whether there exists any body of narrative - of the kind that Cover defines as essential - that could undo the contradictions of equality theory [within feminist

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53 ibid.

54 ibid., pp. 33-35.

> theorising] by embodiment of a coherent feminist vision of gender justice.[55]

This thesis accepts the basic premise of Cover's argument: that challenges to the production of legal meaning are able to be mounted through narrative. However, this acceptance requires an additional theoretical investigation which explores ways of thinking about narrative as discourse that allow notions of diversity and subjectivity to be read in legal frameworks.

## Legal Storytelling

It has been the recognition of the interdisciplinary relationship between law and literary theory via narrative that has offered, as a counter to the CLS tendency to subjective closure, an opportunity for legal feminist and critical race theorists to contest the law's objective, liberal dominance. The Law and Literature movement has developed conspicuously both in Australia and the United States over the past eight years.[56] Although I am explicitly discussing the interactions of law and history in this thesis, it must be acknowledged that the exchange between law and literary theory has been the focus of more constructive and considered interdisciplinary analysis. Peter Brooks and Paul Gewirtz (in an edited collection which developed from a conference on Narrative and Rhetoric in the Law held at Yale Law School in February 1995)[57] develop the shared influences and taxonomical distinctions between law and literature, and refer obliquely to both law *in* literature and law *as* literature.[58] The commonality between the two categories, albeit recognising that

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55 Marie Ashe (1995), 'Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence', in Jerry Leonard (ed.) *Legal Studies As Cultural Studies: A Reader in (Post)Modern Critical Theory*, State University of New York Press, New York, pp. 85-132, p. 99.

56 See generally Symposium (1989), 'Legal Storytelling', 87 *Michigan law Review* 2073; Brooks and Gewirtz (1996); Lisa Sarmas (1994), 'Storytelling and the Law: A Case Study of *Louth v Diprose*', 19 *Melbourne University Law Review* 701; Regina Graycar (1996), 'Telling Tales: Legal Stories about Violence Against Women', 7 *Australian Feminist Law Journal* 79; Kim Lane Scheppele (1992), 'Just the Facts Ma'am: Sexual Violence, Evidentiary Habits, and the Revision of Truth', 37 *New York Law School Law Review* 123.

57 Brooks and Gewirtz (1996).

58 Gewirtz (1996), p. 3 discusses the different taxonomical permutations of the 'law and literature' movement.

law unlike literature is capable of coercive power, is that both 'attempt to shape reality through language, use distinctive methods and forms to do so, and require interpretation.'[59] It is this awakening of legal scholars to law as a *form* of story, that opens the door to literary techniques of interpretation of narrative form and content being acknowledged as useful in traditional legal analysis.

The ideas of Brooks and Gewirtz and others, I want to argue, can be equally extended to historical narrative, which bears a different social and political responsibility than literature per se, although literary theory and history genuinely share some theoretical boundaries themselves.[60]

This said, identifying law as literary narrative offers in itself a multiplicity of interpretative opportunities: examining the relationship between stories and legal argument and theories; analysing the ways in which legal stories are constructed and used; evaluating why certain stories are problematic at trial. Although this thesis attempts to draw attention to all of these interpretative functions, it is the explicit use of experiential narrative as a redemptive tool by feminist legal scholars that must be concentrated upon in this context.[61]

Kathryn Abrams has argued that narrative, explicitly experiential narrative, is *crucial* to feminist theory in and about the law, as it brings to light voices that usually remain hidden from the official record. As she comments: 'Feminist narratives present experience as a way of knowing that which should occupy a respected, or in some cases a privileged position, in analysis or argumentation.'[62]

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59 ibid.

60 The connections between literary theory and historical narrative will be explored in the final section of this Chapter, with particular reference to the work of Roland Barthes.

61 Note that Kathryn Abrams dates the feminist legal narrative 'school' to Susan Estrich's article *Rape* in which she weaves together stories about her own experience as a rape survivor with other stories about substantive legal procedure and reform told in her capacity as a legal academic: see Estrich (1986), 'Rape' 95 *Yale Law Journal* 1087. Abrams comments about Estrich's approach: 'Estrich's primary goal is doctrinal reform, not methodological or epistemological innovation.', Abrams (1991), 'Hearing The Call of Stories', 79 *California Law Review* 971, p. 986.

62 Abrams (1991), p. 974.

In other words, by reformulating an idea of law as narrative, the possibility exists for 'outsider voices'[63] to disrupt the dominance of 'stock stories'[64] (those familiar to traditional legal decision-making) in legal scholarship. The development of experiential narrative scholarship as a way of unsettling the foundations of law's truth - its assumptions of the liberal subject as a universalised entity - can not be underestimated. Stories, especially those about the reality of women's lives, bear the power to broaden the range of understandings and knowledges among listeners: particularly judges and other decision-makers who have an 'insider' formalist perspective. Rae Kaspiew has noted: 'If law is viewed as 'language expressive of subjective life', official stories...reflect acceptance of the masculinist perspective as neutral, natural and legally appropriate.'[65] They also provide a way in which feminist (and critical race theorists) can demonstrate 'that there is nothing essential, objective or neutral about [the] current legal order.'[66]

However, by and large these developments have existed in the forums of academic journals and debates, leaving open the question of their potential to influence substantive legal decision-makers. One of the main barriers, on a conceptual level, to admitting the subjective voices of women to be heard in the courtroom is the problem incurred when the law is identified as a culture of argument. As Paul Gewirtz notes: 'The goal of storytelling in law is to persuade an official decision-maker that one's story is true, to win the case, and thus to invoke the coercive force of the state on one's behalf.'[67]

Experiential narratives do not necessarily lead to particular outcomes; they have no innate power to be accepted by the intricate and often archaic rules of evidence and

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63 Mari Matsuda (1990), 'Pragmatism Modified and the False Consciousness Problem', 63 *Southern California Law Review* 1763; Matsuda (1989).

64 Richard Delgado (1989), 'Storytelling for Oppositionists and Others: A Plea For Narrative', 87 *Michigan Law Review* 2411.

65 Rae Kaspiew (1995), 'Rape Lore: Legal Narrative and Sexual Violence', 20 *Melbourne University Law* Review 350, p. 364.

66 Sarmas (1994), p. 728.

67 Gewirtz (1996), p. 5.

procedure by which stories compete against one another within a court room.[68] From this perspective, Regina Graycar argues:

> There seems to be an assumption that new stories themselves will make a difference; that they will be heard not withstanding the structures within which they must be told...not only must we challenge law's stories, and in particular the stock stories told about women, but we need also to dismantle and rearrange the framework within which those stories are told.[69]

Graycar's identification of the need to 'rearrange the framework' has broader implications. [70] Feminist scholars using experiential narrative need to recognise the cultural power that those stories infer.[71] Just as feminist history challenged itself by rethinking redemptive categories of empirical inquiry as critical genealogies of the historical construction of gender,[72] feminist narrative in legal scholarship similarly needs to challenge the presumptions behind *its* redemptive, experiential story-telling.[73]

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68 Feminist experiential narratives are also often dismissed by other legal scholars: or critiqued as 'emotive' or 'unrepresentative': Abrams (1991).

69 Graycar (1996), p. 80.

70 This is in itself a crucial problem, and one which will be addressed in Chapter Ten in terms of the Battered Woman Syndrome, which in some readings operates as a incursion of experiential narrative into the criminal law. For a preliminary discussion of how BWS, or how women's experience of violence which leads to murder, can be readdressed in terms of other legal categories see: Therese McCarthy (1995), "Battered Woman's Syndrome': Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on R v Raby', 4 *Australian Feminist Law Journal* 147.

71 It must be made clear that I am not attempting to dismiss these forms of scholarship: I believe they are important and timely contributions to the jurisprudential debates about women, and necessary tools for the translation of other forms of narrative expression to enter legal discourse. Furthermore, it would be incorrect to suggest that feminist narrative scholars writing in the law are not aware of the complexities of critical gender theory, and the philosophical problems connected to the determination of corporeality and 'woman'. For example, Marie Ashe has made clear the complications of gender theory in her study of reproduction and the law: Marie Ashe (1989), 'Zig-Zag Stitching and the Seamless Web: Thoughts on 'Reproduction and the Law', 13 *Nova Law Review* 355. However, I would argue that these complications are not connected to historical circumstances which illuminate the issues dealt with contextually.

72 Scott (1988).

73 I refer here to the discussion of the developments in feminist history as discussed in the introduction to this thesis

It is not enough, therefore, for law to be equated with literature. Its historical function, and the operation of historical narratives which exist outside of, but influence, substantive legal challenges and effects, must also be recognised. Robert Weisberg, in discussing the 'Law and Literature' theory of narrative incursion into the law, believes that 'law-as-narrative scholarship would do well to recognise that the relations among legal authority, narrative form and cultural identity are far more complicated.'[74] It is insufficient to assert the *existence* of 'outsider voices' and expect the stock stories of the law to sit up and take notice. Those voices - both individual and collective - form complicated and nuanced identities which have localized historical foundations. It is essential to review 'narrative' as 'historical narrative'. Although narrative-in-history has been influenced over the past thirty years by interdiscursive conversation with literary theory in similar ways to narrative-in- law,[75] it offers a different matrix of potentiality. It suggests an analysis of change and resistance that can also encompass a re-thinking of legal identities for subjects 'othered' by liberalism and its objective conception of truth and identity. Narrative in history, as epitomized by the work of Hayden White, is identified as a *discourse* which has a function in constructing and critiquing experience, not simply acting as a means of telling stories about experiences. This discursive identification of narrative has, as Robert Weisberg notes, 'found energy in the combination of exacerbated self-consciousness about narrative method in the social sciences and the utility of narrative in promoting symbolic national or group identity over abstract ideology or government structure.'[76]

However, to make a claim that recent developments in historical thinking about narrative can assist in disrupting and reconstituting legal narratives, it is important first to examine the ways in which the relationship between law and history has traditionally been viewed.

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74 Weisberg (1996), p. 76.

75 These influences will be discussed later in this chapter in relation to the work of Roland Barthes.

76 Weisberg (1996), p. 77.

## Law and History

Law and history, as disciplines, have long shared an intimate sibling-like relationship. In their positivist manifestations, both are constructed as intellectually inquiring disciplines, concerned to seek the truth, to 'find out what really happened'. Both are also, in varying degrees of intensity, committed to focussing their inquiries on the past: be this an immediate past, a shared collective past, or more often than not, a micro analytical past which grounds itself within a self-enclosed prism of inward gazing authority.[77] On a superficial level, law and history have also, shared joint methodological concerns, or techniques. They both position their inquiries in the collection of empirical evidence, the interrogation of that evidence and the testimony of witnesses, and the evaluation of competing claims to the truth. Most importantly, law and history both present their accounts as narrative transactions, as forms of stories which impose upon their inquiries a unifying conceit that initiates a progressive journey through the tested evidence and claims for truth that serve an audience with an ultimate conclusion.

However, to assume that law and history are able to be transposed from one to the other because of their shared technical and conceptual boundaries is to neglect an important, and crucial distinction between the two. Law, unlike history, is ordered by its own constructed meta-narrative of authority. As discussed in Chapter One (in relation to the development of criminal law) modern legal doctrine is underscored by notions of rationality and coherence. As such, law, unlike history, is

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77 It must be noted that I am referring to the writing and recording of history and historiography in terms of its Western discourse. This anglo-centric bias is regrettable. Despite my awareness of the problems inherent in accepting this bias, I feel constrained by the Western body of law with which I am attempting to engage. For insightful and politically astute analyses of the problems of adhering Western discourses to the historicizing of other races please see generally: Heather Goodall (1992) '"The Whole Truth and Nothing But...": Some Intersections of Western Law, Aboriginal History and Community Memory', in Bain Attwood and John Arnold (eds.) *Power, Knowledge and Aborigines*, A Special Journal of Australian Studies, La Trobe University Press with the National Centre for Australian Studies, Monash University, Victoria, pp. Pp. 105-109; Robert Young (1995), *White Mythologies: Writing History and The West*, Routledge, London.. Also note that the metaphor of 'prism' is used in terms of trial representations and the law explicitly: that is, micro-narratives encased by precedent. For an analysis of the intersections of literary theory with legal narrative construction around criminal cases see: Robert A. Ferguson (1996), 'Untold Stories in the Law', in Brooks and Gewirtz (1996), pp. 84-98.

constantly entangled in its own judgement, and its own preconceived rules of how history (its own history, its own particular system of rules of admissibility and precedent) can be told. History as a discipline, although embroiled in a long struggle to produce its own 'scientific' theoretical justification, its own claim to disciplinary sovereignty, has always possessed a freedom that law can not allow itself. As such, history, unlike law, has been able to undertake the challenge of questioning its ultimate presumptions of objectivity, and truth-telling through narrative, in more theoretically, politically and socially responsive ways.

It is the relationship between history and law, as arbiters of truth inveigled in narrative pursuit, that form the central concern of this thesis. This 'feminist legal history' of the battered body is necessarily methodologically concerned with unravelling the ways in which history and law, as bodies of inquisition and exposition, engage with each other. We can not assume that apparent shared pre-histories and shared pre-occupations with truth and truth-telling allow interdiscursive conversation between law and history. A postmodern feminist history concerned with identity politics, and questioning the subjectivity of women categorised by both law and domestic violence discourses is of use to legal theory in the situation of the battered woman who kills, but only if there is a thorough investigation of how conversational bridges can be built between the two.

Law and history have been conceptually and categorically linked together in different ways. Historiographically, the two share a common past through narrative. Hegel, in *The Philosophy of History*,[78] directly links historical narrative with law. For Hegel, there is no possibility of an objective form of history without law, because there is, as Robert Weisberg has commented, 'no impulse to record for posterity outside a law-bound society, for only in law-bound societies do definable and hence recordable social transactions take place.'[79] In this sense, it can be argued that the subject of all history is 'the legal nation itself and the endless conflict between law (or authority) and desire.'[80] For Hegel what history tells its audience is

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78 GWF Hegel (1899), *Lectures on the Philosophy of History*, (trans. J. Sibree), The Colonial Press, New York.

79 Weisberg (1996), p. 77.

80 ibid.

not the real story of what happened (always and inevitably a subjective experience) but the relation a juridical state has constructed between a public present and a past made identifiable by statehood. In Hegel's view history is a mode of political inquiry of human community, which required forms of narrative for its public articulation and representation of identities.

Although Hegel's formulation of the law/history relationship is a celebration of objectivist narratives and nation state politics which ignores the subtleties of marginalised groups and communities who had no 'purchase' in the creation of statehood (expressly, this view of history and law is white, Western and male-centric)[81], the formulation is nevertheless relevant in this context. Hegel's epistemological linking of law and history through narrative form, and the conscious articulation of their relationship as inherently political and politically reflective of cultural communities, becomes useful when refiguring both law and history's traditional reliance on objective truth and ways of truth-telling. It signposts a methodological and epistemological relationship between law and history, which although not explicitly *necessary* goes beyond the perspectives traditionally accepted as the scholarly face of their relationship.

Put simply, traditional conceptions of the relation between law and history fall taxonomically into several explicit categories. The first is 'legal history'- the enclosed enterprise of case law as expressed within legal discourse, and also the narratives and analysis of these developments in traditional legal scholarship.[82]

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81 See n. 77.

82 This type of legal history is exemplified in such works as Alex Castles (1971), *An Introduction To Australian Legal History*, The Law Book Company Ltd., Sydney. In the editor's preface to the inaugural edition of the *Australian Journal of Legal History*, Suzanne Corcoran dedicates the issue to Professor Castles, noting: 'He was one of the founders of the discipline of Australian legal history.' Castle's contribution to Australian legal history as a discipline which extended historical analysis of the law beyond English legal history and common law should not be underestimated. However, I would contend that Castle's work does not engage with historical events or theoretical analyses existing outside of the parameters of the law itself. Furthermore, the *Australian Journal of Legal History*, although a welcome contribution to the field, and despite its commitment to interdisciplinary study, perceives itself as 'particularly concerned with comparative legal history, and the legal history of the 'new world' and its relationship with the 'old' (Suzanne Corcoran (1995), 'A New Journal in An Old Discipline', 1 *Australian Journal of Legal History* 1.) As such, the

'Legal history' also designates the work of historians writing expressly about legal developments, albeit with a cultural and social historical perspective.[83] The problem with this type of legal history is that the relationship between the two, which is at best theoretically murky, is glossed. That is, most historians writing legal history continue to use depositions and judgements as merely another historical text. This approach is often valid and necessary. However, it does not identify a need to read legal texts in such a way as to broaden the investigative processes of the historian, to ensure they acknowledge the culturally specific positions and perspectives of other disciplines and other discourses.[84] 'Law and history' as another permutation of the relationship is a method by which historians attack legal arenas and legal procedures, acknowledging the interchange between social and ideological forces and the autonomy of legal authority.[85] However, the 'law and history' school does not recognise the epistemological barriers between the two, cast in terms of different acceptance and construction of narrative form, which would allow substantive change to the law by way of historical analysis. Both approaches are still enclosed within their own discrete disciplinary areas. Because of a reluctance to tackle head on the problem of interdisciplinary and interdiscursive conversation,

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boundaries of legal history as encompassing other methodologies of historical inquiry and empirical subject outside the law seem to be limited.

83 See for example: Judith Allen (1990), *Sex and Secrets: Crimes Involving Australian Women Since 1880*, Oxford University Press, Melbourne. Allen's text, which weaves feminist critiques of historiography with empirical analysis, and cultural critique, is a useful and necessary contribution to the crime history field, and one which I have relied on myself in this thesis in order to establish an historical context. However, I contend that Allen's analysis glosses the substantive and epistemological function of the law itself: her critique of source documents does not extend to the premises on which the depositions and trial transcripts which she uses to ground her study are based. See also Jill Bavin-Mizzi (1995), *Ravished: Sexual Violence in Victorian Australia*, UNSW Press, Kensington NSW for a similar 'legal history' perspective.

84 For a more extended discussion of this point see: Ann Genovese (1996), 'Book Review: Ravished: Sexual Violence in Victorian Australia', *Australian Historical Studies*, vol. 27, no. 106, pp. 181-182. See Michel Foucault (1975), *I, Pierre Riviere, Having Slaughtered My Mother, My Sister and My Brother: A Case of Parricide in the 19th Century*, Pantheon, New York, for an example of legal genealogy/crime history which seeks to broaden the theoretical presumptions and technical methods of evidentiary inquiry in the law/history field.

85 For example, EP Thompson (1975), *Whigs and Hunters: The Origin of the Black Act*, Allen and Lane, London. Thompson's influential history is an analysis of the 'Black

'legal history' as written by lawyers continues to be predominantly concerned with teleological programs of development and progress, in which the law is always placed centrally.[86] Similarly, 'legal history' as written by historians tends to be about unravelling the *effects* the law has on a specific matrix of circumstances in the past, without looking at the substantive operation of the law itself.

In order to write a legal history which attempts both to examine the development of substantive law, and to determine its cultural effects and influences it is necessary to examine the connections and barriers between law and history *as discourses.*

From this perspective, history is a discursive tool for interpreting the present. Catherine Hall has noted that history 'is always premised on a relation between past and present, is always about investigating the past through the concerns of the present, and always to do with interpretation.'[87] History, then, offers to any investigation of social and political issues situated in the here-and-now, a matrix of conditions which can help explain and unravel contemporary debates, or in a Foucauldian sense, contemporary understandings of the operation of truths.[88] Traditional legal history understands this only partially. As Alan Norrie notes:

> To the extent that lawyers think historically about the law, they tend to think in terms of the slow evolution of legal forms from the crude to the sophisticated, and not in terms of the particular connections between different legal forms and different kinds of societies. When lawyers look back, they tend to discover no more

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Act' of 1723, and uses microhistorical techniques to describe the conflict between farmers and forest officials.

86 This point will be discussed in more detail later in this chapter in relation to the CLS assumptions about historical 'unmasking' of legal doctrine. For further analysis see Sparer (1984).

87 Catherine Hall (1992), *White Male and Middle-Class: Explorations in Feminism and History,* Routledge, New York, p. 1. Also note Raymond Aron's formulation of the history/politics dialectic in Raymond Aron (1984), *Politics and History,* (Miriam Blenheim, trans.), Transaction Books, New Brunswick.

88 Please refer to the Introduction in this thesis where Foucault's concept of genealogy and truth is explained: truth which is itself neither static nor inviolable. See generally Charles Taylor (1986), 'Foucault on Freedom and Truth', in David Couzens Hoy (ed.), *Foucault: A Critical Reader,* Basil Blackwell Ltd., Oxford, pp. 69-102.

> than the present writ small in the past. They propagate a closed version of legal history that can be described as 'mythical.'[89]

In short, legal understandings of history, in a traditional legal-positivist sense, entail an explanation of the present, but only of the contained immediacy of *the case at hand.* If law, based on rationality and legality, and committed to determining universal, rationalising principles, accepts the full potential that history existing outside of law (specifically historical discourse) offers, its legal analytic exercise of reconciling contradictions in legal doctrine is endangered. As Morton Horwitz notes:

> It is history that comes to challenge this approach by showing that the rationalising principles of the mainstream scholars are historically contingent. Consequently, [legal] analytic scholarship is anti-historical: it regards history as subversive because it exposes the rationalizing enterprise.[90]

In a broad sense what History *existing outside of law* offers law is a critique of the premises of its construction. Such an overwhelming critique, however, is resisted by the law, creating a conversational impasse, a barrier of incommensurability between the two.

## Interdiscursivity and *Le Differend*

Kathryn Abrams, in an essay on what literary theory (and theories of experiential narratives) can offer to legal understandings of women, argues that narrative legal scholarship can disrupt methodological boundaries that traditionally exist between law and literature. She harbours no fear of conversational difficulty between law and any other discipline, be it literary theory, or more obliquely, History. She asserts:

> Fears about the 'incommensurability' of meaning created within disciplinary or sub-disciplinary communities...are to my mind overstated. While it may not be possible to make the methodological conventions of one group acceptable to another, I believe that it is possible to make them clear enough that members

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89 Alan Norrie (1993), *Crime, Reason and History: A Critical Introduction to Criminal Law,* Weidenfeld and Nicolson, London, p. 9. The term 'mythical' is attributed to P Fitzpatrick (1992), *The Mythology of Modern Law,* London, Routledge.

90 Morton Horwitz (1981), 'The Historical Contingency of the Role of History', 90 *Yale Law Journal* 1057.

> of one group can understand what is being said and done and see how it differs from the conventions operative within their own group.[91]

In this assertion Abrams makes a significant assumption in likening a *clarity* of methodological interchange between disciplines to a *transposition* between discourses. It is true that narrative, as a form of story-telling, is a convention shared between law, literature, history and a number of other disciplines which seek to relay content via a specialised structure. However, to assume that narratives *of* History, and *of* Law can be equated, denies the specificity of the scope and form of legal narratives which, as observed earlier, are constructed within the boundaries of procedural and substantive legal convention. Hayden White, in his investigation of the role of narrative discourse, has argued:

> Since no given set or sequence of events is intrinsically tragic, comic, farcical...but can be constructed as such only by the imposition of the structure of a given story type on the events, it is the choice of the story type and its imposition upon the events, that endow them with meaning.[92]

By this, White means that constructing a narrative involves the projection onto the events of the plot structure of one or another of the genres of literary figuration. This notion of narrative construction advocated by White- impositionalism- is an inevitable outcome in the context of multi-disciplinary projects, or projects which attempt to allow theoretical conversation between discourses. For example, if I place White's analysis back into the context of this project, it is evident that the different discourses with which I am attempting to engage are already-inscribed spaces, which generate their own literary figurations and consequently their own meanings, that are appropriate for their own select audiences. In other words, legal discourse generates legal narrative structure, which could be read by many, but read critically only by those positioned within that system's framework.

If White is correct, and imposition of form onto content generates specific meanings in certain contexts, the question becomes: why does law so vehemently resist the transcription of other forms of telling stories?

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91 Abrams (1991), p. 1019.

92 White (1992), p. 44.

White's work consistently argues for, and demonstrates, a commitment to broadening the parameters of the ways in which historical evidence is read, and provides history with the capability of removing itself from the Rankian positivism which marked the start of the era of professional historiography. The legacy of White's approach is a form of historical narrative which purports to acknowledge not only the subjectivity of the historian, but the multiple viewpoints and subjectivities of the people and events of which he or she writes.

Legal narrative, on the other hand, allows no movement of story telling device or subjective position other than that which stands inside its own well defined parameters. On a *prima facie* level, it seems that methods used in historical narrative cannot be understood by the law and vice versa, with the result being that the terms and ideas common to both (the definitional and representative boundaries) become impenetrable.

In other words, the configurations of meaning generated by each will be subsumed by the other, in a way that does not allow their differences (and their similarities) to speak.

Lyotard names this situation 'le differend.'[93] He argues that many disputes or conversations take place according to a single and determinant rule of judgement, or find ways in which their differences they can be mediated by a common set of interpretative techniques. Lyotard calls this mode of presentation 'litigation'. However, he acknowledges that there are other conversations, between radically incommensurable language games, where no one rule can be invoked in terms of which to pass judgement, since that rule necessarily belongs to one language only.[94] In other words, 'in a litigation, the accuser and the accused speak the same language as it were recognise the same law. In a *differend* they speak two radically different idiolects.'[95]

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93 Jean-Francois Lyotard (1983), *The Differend: Phrases in Dispute*, (trans. G. Van den Abbeele), University of Minnesota Press, Minneapolis.

94 Bill Readings (1991), *Introducing Lyotard: Art and Politics* , London, Routledge, p. 117.

95 ibid.

Lyotard uses terms like 'litigation' and 'accused' as metaphors. However, it is suggested here that the law in the ordinary literal sense is itself acting in a *differend* with personal histories which stand outside its own genealogy. History and law are not, in contemporary terms, in litigation, but are speaking different languages in different 'courts' of discourse.

Although useful in signifying the incommensurability of shared notions (like narrative and evidence) *le differend* does not prima facie provide any avenue for thinking about how such 'imporosity' or incommensurability can be challenged or subverted. Of course, such a challenge is only necessary if law and history are seen to be of use to one another, in terms of both their theoretical development and production of meaning. I believe that they are, and agree with Robert Cover's analysis of historical narrative as defining and giving meaning to the claims of groups which are constructed outside of the dominant paradigms of liberal law. Yet to understand how history bears the potential to disrupt the objective, monovalent narrative used by the law, it is necessary to examine the developments within history and historiography themselves. History, like law, once claimed a scientific knowledge base.[96] However, the ideas and work of Hayden White, Michel Foucault and others have substantially reconceptualised the homogeneity of historical narrative. It is these ideas that provide the foundations for an expansion of the identification of narrative, by Robert Cover and the 'Law and Literature' movement, as a method for making claims for justice for those that stand outside of the stock stories of the law. As such, it is important to place the challenge to

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96 This 'scientific' base, as advocated in the nineteenth century by historians like Ranke, was premised on claims for a 'natural science' view of history and historical method. This model was however, challenged by contemporaries of Ranke, who argued that historical method and theory should be based on a human, or social science model, which emphasised interpretation and understanding. In this way, historians like Thomas Buckle argued in the nineteenth century for a conception of history that was capable of understanding the past, rather than just causally explaining it: a hermeneutic (following Thomas Dilthey's philosophy of the human sciences) as opposed to positivist history. For a discussion of the 1868 debate between Buckle and Johann Droysen (a positivist) conducted over this issue, see Helen Irving (1992), 'History and the "Insider"', in Susan Magarey, Caroline Guerin and Paula Hamilton (eds.), *Writing Lives Feminist: Biography and Autobiography,* Australian Feminist Studies, Adelaide, pp. 105-114, p. 112.

history's own truth within the context of historiographical debates around the meaning and use of the narrative form.

## History Challenges The Truth: Claiming Subjectivity

> Those historians who draw a firm line between history and philosophy of history fail to recognise that every historical discourse contains within it a full-blown, if only implicit, philosophy of history...The principal difference between history and philosophy of history is that the latter brings the conceptual apparatus by which the facts are ordered in the discourse to the surface of the text, while history proper (as it is called) buries it in the interior of the narrative, where it serves as a hidden or implicit shaping device.[97]

History, in arguably its most accepted meaning, is an account of *what happened.* However, the disjuncture between an understanding of past events, be they individual or retold to a collective consciousness, and how that understanding is written about or explained is at the heart of what historian E H Carr has referred to as 'The History Question.'[98] The status of a historical fact, event or narrative turns on the question of subjective interpretation, and 'interpretation enters into every fact of history.'[99]

The relationship between History (accounts of the past) and historiography (writing and studying those accounts) has a history itself: a narrative of its own development that is ambivalent, circuitous, and often contradictory. To undertake a project that seeks to apply a particular reading of history and historiography to other disciplines that use historical method in accepted ways, it is essential to 'unpack' the history question; to place under the microscope history's relationship with itself in order to demonstrate more clearly the value of both privileging

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97 Hayden White (1978), *Tropics of Discourse*, John Hopkins University Press, Baltimore, pp.126-127.

98 The 'History Question' that I refer to is a paraphrasing of Carr's quintessentially titled book. See EH Carr (1962), *What is History?*, Macmillan and Co. Ltd., London. This concept however is not limited to Carr's work; the History Question itself has a long and respected tradition in scholarship. See for example Geoffrey Elton (1969), *The Practice of History*, Collins, London; Keith Jenkins (1991), *Re-Thinking History*, Routledge, London; and the work of Hayden White, specifically *The Content of The Form* (1992) and *Tropics of Discourse* (1978).

99 Carr (1962), p. 7.

historical practice, and endowing it with a methodological meaning that is capable of not only investigating what happened and why, but how it happened and what that signifies for contemporary problem solving (contained within history itself, but more often than not, existing outside of its own discursive parameters.)

Narrative (and the narrative form) are the accepted means by which human experience is shaped into a culturally acceptable form, a form that has a thematic structure, a beginning, and end, and a sustainable claim to truth through an omnipresent narrator. As Roland Barthes describes it, narrative is 'simply there like life itself...international, transhistorical, transcultural.'[100] The implication is that, embedded within the arguments and scholarship of a history is an investigation of human temporality, of history itself, that transgresses cultural and discursive boundaries, and draws the reader to both desire an investigation of the past in the present and to try to make sense of time itself. However, story telling has never been the only way of writing history, or writing about history. Despite the classic early works of historians being constructed as narratives, other forms of expression and interpretation existed, as did criticism for the imposition of the narrative structure (arguably too closely related to fiction to bear any claim to accuracy.)[101]

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100 Barthes (1977), p. 79.

101 What constitutes a 'classic' historical work is of course itself open to interpretation. However, I would suggest texts like Herodotus' *Histories,* Augustine's *City of God* and Carlyle's *The French Revolution* act as excellent examples of historical works that are able to be read as much for their literary form as for their historical accuracy. (Indeed, chronology, for example, has been proved to be inaccurate in parts of *Histories.*) Hayden White makes the point that despite narrative being the dominant form of expression of the past, annals and chronicle forms of historical representation existed both prior to and concurrently with more traditional story telling functions. (see Hayden White (1992) 'The Value of Narrativity in the Representation of Reality', in White (1992), pp. 1-25. The essay first appeared in (1980) *Critical Inquiry* 7, no. 1) White does not relegate these forms as ahistorical, or as mere supporting evidence for the meta-historical narrative: he reconceives them as 'particular products of possible conceptions of historical reality that are alternatives to, rather than failed anticipations of, the fully realised historical discourse that the modern history form is supposed to embody.' (pp. 5-6) In his analysis, White is making reference to ,amongst other things, lists of dates and events that pre date Christ.(pp. 6-7.) However, the non narrative form has also been conceived as antinarrative by modern historians such as Tocqueville and Burckhardt.(p. 2) By using devices such as the meditation, an assumption is made that past events, within themselves, do not necessarily have an innate ordering quality that forms a story. This is not to say that Tocqueville and Burckhardt do not describe, or narrate what they see in the past. The distinction

The decision about how to write history, how to view history's relationship to historiography within the written form itself gives some indication as to the paradoxes inherent in The History Question. Is there an identifiable past through documentary sources, or does no necessary account exist? Does telling stories about the past link history writing too closely to forms of fiction, or is it, by default of subjective interpretation of source, partially fictitious? Is there a truth to be revealed about the past through history, or does history itself help constitute truths?

Traditional history writing and research developed primarily in Germany in the mid- nineteenth century.[102]. As a newly designated profession under Leopold von Ranke, history set out to place on the record the facts of particular, political, events. As such, and imbued with the spirit of positivism which permitted discourses like history and law to determine facts of events in a 'scientific', and therefore verifiable, way, history writing had two main tasks. The first was to tell the 'true' story of what happened, mainly by using the public archives and documents of the government whom they sought to represent. From this perspective, the narrative account was, and sometimes still is, the 'necessary result of a proper application of historical method...the simulacrum of the structure and processes of real events.'[103]

After historians had discovered the public face of 'what happened', they could stand back from the truth of their narrative account to comment on those events from their own opinion: to make observations about agents, processes, culture, law or economics of the period, using a different, 'dissertative' mode of address. This commentary was therefore to be assessed on different grounds to the accurate historical representation set forth in the narrative. White comments, '[t]he

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therefore becomes one between a decision to narrate, and one to narrativise: to endow a form of representation upon events, or to adopt a manner of speaking about them.

102 White (1992), p. 27.

103 ibid.

historian's dissertation was an interpretation of what he took to be the true story, while his narration was a representation of what he took to be the real story.'[104]

It is this dissertative mode of address - the subjective voice of the historian, albeit often expressed in the third person - that shows where law and history begin to depart from one another, where they present an opportunity to be viewed as Lyotard's *le differend.* Although both telling stories of real events for different ends (law to determine a truth by certain developed societal rules, history to explain certain societal rules by examining a truth) it is their means - the narrative transaction and its production of meaning - that allow law and history to share discursive boundaries. It is also the interpretation of these means that have caused the 'imporosity' of understanding and theoretical development between the two.

Perhaps most significantly, history has identified its own premises, its own claims to objectivity based on Hegel's phenomenology, as complex and open to question in ways that law has had more difficulty in pursuing. History has always been a problematical concept. As Robert Young notes:

> Any examination of the history of 'history' will demonstrate that it has never had the immediate certainty that is implied in the all too frequent invocation of 'concrete history'. Far from being the concrete, it has always rather been the theoretical problem. To acknowledge that amounts to something very different from simply exercising history as such.[105]

It is the challenge to History's certainty: the public, objective face of its dissertative function and its exposition of Truth (a monovalent perspective of a hidden author) that has been challenged by many historians, from Thucidydes and Vico to Droysen, Carr and Collingwood.[106] However, it is probably Karl Marx's critique of the liberal assumption of History as a narrative of capitalist progress that has proved most disruptive to History's claim to disciplinary sovereignty, a critique that

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104 ibid., p. 28.

105 Young (1995), p. 23.

106 See for discussion of this point: Judith Allen (1986), 'Evidence and Silence: Feminism and The Limits of History', in Carole Pateman and Elizabeth Grosz (eds.), *Feminist Challenges: Social and Political Theory*, Allen and Unwin, Sydney, pp. 173-215;Irving (1992); White (1992).

has led to other perspectives beyond those of Marx allowing other voices and subjectivities to bear witness on the historical record.[107]

From Lukacs' insistence on history as opposed to economics as the primary element in Marx's methodology,[108] Marxist theory has provided the influential jumping-off point to a reformulation of history as complicated by notions of temporality and more explicitly, subjectivity.[109]

Although Marxist theory is important because it disrupted the 'stranglehold' of the objective face of capitalist, liberal progress reflected in history, it did not necessarily or automatically translate into history which had freed itself from the constraints of scientificity. For all of its reworking of the forces of history, purist Marxist history still had difficulty in appreciating forms of knowledge, discourses and identities that existed outside of a totalising system. Put crudely, Marx replaced one organising framework with another, and despite the crucial recognition of class in the organisation of human activity, replicated the binary framework of the liberalism that he was setting out to critique. The question of what happened to division and cultural expression *within* class, the differences of race or gender, were left no theoretical space for exploration. [110]

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107 See generally G McLennan (1981), *Marxism and The Methodologies of History*, Verso and New Left Books, London.

108 Georg Lukacs (1971), *History and Class Consciousness: Studies in Marxist Dialectics*, (trans. Rodney Livingstone), Merlin Press, London.

109 Young (1995), p. 61 notes the contribution of Louis Althusser to the temporality issue: 'If the Althusserian mode of production is made up of differential times and histories, a 'complex intersection of the different times, rhythms, turnovers etc.', then each element cannot express the whole because the whole is only accessible as a concept, which is precisely not expressed at all.' Young (1995), p. 7 also pays tribute to the work of the Frankfurt school, notably Adorno and Horkheimer, in their revision of traditional materialism in order to take account of the subject.

110 Note that I am referring to 'purist' Marxist history and theory in this context, and that work of historians like EP Thompson, especially in *The Making of the English Working Class* (1963) Vintage, New York, was committed to marrying Marxist historicism with analyses of this kind. As Thompson states: '..the way in which these experiences [of productive relations] are handled in cultural terms: embodied in traditions, value-systems, ideas and institutional forms.'(p 10) Lynn Hunt has interpreted the influence of sociology and anthropology as critical disciplines interacting with history as a theoretical catalyst for this type of history writing, a form which saw the rise of social history as a sub-discipline in the 1960s: Lynn Hunt (1990), 'History Beyond Social

Robert Young has, in a more sophisticated fashion, argued that Marxism's inability to deal with the political interventions of other oppositional groups, like women and non-western especially black races, means that its history can no longer lay claim to subsume all processes of change.[111] This critique of Marxism, historicism and objective truth within history has been maintained from a variety of fronts, most significantly post-colonial and feminist histories.[112] It would therefore be misleading to suggest that any focus on the relation of liberalism, its grand projects or truth claims, critical or otherwise, to the politics of marginalised and resistant groups emanates solely from the work of post modern theorists like Michel Foucault. However, it is Foucault's unravelling of the truth/knowledge/power relationship, especially in connection to a discursive understanding of history, that serves a useful purpose in that it articulates common, albeit differently conceived, concerns of these resisting groups in their theoretical manifestations.

## Genealogy

Foucault's work, although disparate and non-unified in itself, comprises a critique of historicism, including that of Marx, and its relations to the operation of knowledge and power. It is from this perspective that it becomes possible to understand the basis of Foucault's distrust of totalising systems of knowledge which rely on concepts of universality, as opposed to singularity.[113] What Foucault does is articulate through historical perspectives the problems encountered by those preceeding him who grappled with the History Question, and attempts to present a new *method* of historical inquiry that is both coherent and politically effective with respect to the particular problems under the 'microscope' of social examination.[114] For Foucault, the knowledge/power/truth relationship is not about

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Theory', in David Carroll (ed.), *The states of 'theory': history, art and critical discourse,* Columbia University Press, New York, pp. 93-111.

111 Young (1995), p. 5.

112 See generally: Scott (1988); Allen (1986); Hall (1992); Young (1995).

113 Lyotard (1983), p. 19; Young (1995), p. 178.

114 For examples of Foucault's genealogical approach, which demonstrate an exposition of a theoretical method as opposed to a theory per se, see: Michel Foucault (1991), *Discipline and Punish: The Birth of the Prison* (first published 1977), Penguin, Harmondsworth, UK; Michel Foucault (1978), *The History of Sexuality volume 1: An*

'trashing' particular meta-narratives of truths, replacing one system of knowledge with another. It is about understanding *how* those truths operate in specific and localised examples. In a general sense, what Foucault gives to history as methodology and as historiography is an investigation of the conditions of the emergence of the subject as a *basis* of knowledge. As Robert Young notes:

> Just as History involved the legitimation as knowledge of certain forms of political power, so the production of the subject by the human sciences as an object of knowledge also enabled a new form of political control.[115]

Or as Foucault articulates it in *Power/Knowledge*: 'The individual is not a pre-given entity which is seized on by the exercise of power. The individual, with [his] identity and character, is the product of a relation of power exercised over bodies.'[116]

What Foucault's formulation suggests is a reworking of traditional topic-based history which attempts to base itself on grand explanations of social and political change, to more localised micro-historical contexts, as well as the historiographical understanding of the actors; the subjects which constitute those histories.[117] Foucault's central concern is to examine the systems of thought that produce what we accept as knowledge, and therefore as truth. Foucault's ideas and formulations of knowledge owe a debt to Friedrich Nietzsche and his criticism of the blind acceptance of scientific fact as truth in traditional, positivist history writing. For Nietzsche, and for Foucault, knowledge itself can be interpreted differently and subjectively. There lies behind it no single truth or reality. Knowledge, therefore,

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*Introduction* (first published 1976), Random House, New York; Michel Foucault (1973), *The Birth of the Clinic: An Archaeology of Medical Perception* (first published 1963), Tavistock, London.

115 Young (1995), p. 79.

116 Michel Foucault (1980), *Power/Knowledge: Selected Interviews and Other Writings, 1972-1977*, (ed. Colin Gordon, trans. Colin Gordon et al), Pantheon Books, New York, pp. 73-74.

117 See for example: Carlo Ginzburg (1980), *The Cheese and The Worms: The Cosmos of a Sixteenth Century Miller*,(trans. John and Anne Tedeschi), Routledge and Kegan Paul, London; Natalie Zemon Davis (1983), *The Return of Martin Guerre*, Harvard University Press, Cambridge (Mass.).

can have countless meanings, a concept Foucault calls 'perspectvisim.'[118] This idea seems to prescribe a proliferation of topic based histories in previously subjugated areas. However, it also suggests a methodology; a way in which other theories have been used in the past to interact with history writing. If knowledge itself is constructed through a series of historical accidents, history which relies on facts to explain why, what and where is insufficient. By using the idea of 'perspectvism' - of *genealogy* - each fact, each source, must itself be 'unpacked' to determine where it fits historically, and how it was used in its own time to categorise a particular event or subject.

As mentioned previously, it would be wrong to suggest that Foucault alone stands as the instigator of the disruption of objective truth, and truth-telling, in order to allow hidden, subjective and local historical voices a transformative space. Feminist history, a scholarship devoted to documenting both the untold stories of women in the past and the unravelling of historical forces in the construction of gender which situates women politically and culturally, can be argued to alternatively ground or reflect a Foucaldian approach.[119] Why Foucault is concentrated on in this context is that his genealogical perspective is representative of the general movement away from the 'dissertative' function of both traditional positivist and Marxist historical practice, and it is similarly representative of the shifts that have occurred in feminist history itself.[120] It is Foucault's postmodern approach to history, and the function of historical narrative as a discourse which constructs and situates subjects, that provides a jumping off point for theorists like Hayden White, and a foundation for an expanded use of narrative in the law as put forward by Robert Cover.

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118 Michel Foucault (1984), 'Nietzsche, Genealogy, History', in Paul Rabinow (ed.), *The Foucault reader*, Pantheon Books, New York, pp. 76-100, p .90.

119 For a useful discussion of this general unease see Jill Julius Matthews (1996), 'Doing Theory or Using Theory: Australian Feminist/Women's History in the 1990s', *Australian Historical Studies*, vol. 27, Number 106, pp. 49-58. See also Lois McNay (1992), *Foucault and Feminism*, Polity Press, Cambridge (UK), for a protracted analysis of the tensions and usefulness of Foucault's ideas to feminist theory more generally. For insights into the grounding of feminist theory- especially around issues of resistant politics and reverse discourse see Jana Sawicki (1991), 'Foucault and Feminism: Toward a Politics of Difference', in Mary Lyndon Shanley and Carole Pateman (eds.), *Feminist Interpretations and Political Theory*, Polity Press, Oxford, pp. 217-239.

## Legal Theory, Historical Theory and the Discourse of Narrative

The incommensurability between law and history posits a serious problem if narrative is taken as the jurisgenerative (creation of legal meaning)[121] of particular and competing normative arenas. As Robert Cover argues, to reform the law (often the action of particular groups with an agenda emergent from their shared normative values) it is essential that such groups develop a sustaining narrative that defines the vision of the group and permits the objectification of its values.[122]

However, Cover's conception of narrative is very narrow. He perceives narrative as a useful legal methodological tool which is capable of altering existing legal truths, but only if based on a unifying and homogeneous conception of groups and subjects. By examining postmodern theories of narrative as discursively developed within history, it is possible to expose Cover's reliance on objectivity within legal narrative which cuts off any significant discussion of subjectivity or difference within seemingly unified groups.

Following Cover's own starting point - an investigation into the work of theorists like Hayden White - it is possible to identify how historical theory has challenged the epistemological prop of objectivity, and developed a conception of narrative that is fluid enough to bear the potential of inclusion of subjective stories and representations of past events. In other words, it is possible to see within Cover's argument a working example of *le differend*. He acknowledges and incorporates strands of historical theorising and thinking, but subsumes such ideas back into a notion of objective legal truth - a formalist position which belies his critical vision. In this way, Cover argues that historiographical ideas about narrative are of use to jurisprudence, but fails to identify these ideas as functioning discursively, a form and approach which questions the construction of subjects and subjectivities.

In 'The Question of Narrative in Contemporary Historical Theory', White maps the tensions within historical theory and the notion of narrative *per se*. White's central argument (as already discussed) is that historical narrative is inextricably

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120 Please refer to the discussion of feminist history in the Introduction.

121 Cover (1983), p. 4.

122 ibid., p. 45.

linked to literary figuration, in that the imposition of form - be it comedy, epic, farce - transforms an otherwise chronological set of events into a 'story'. It is this argument which Cover in fact uses in his exposition of the production of meaning in legal narrative. Following White, he too argues that narrative does not therefore possess an inherent ability to tell 'true' stories and dispel 'false' ones. What it does, in White's terms, is: 'test the capacity of a culture's fictions to endow real events with the kinds of meaning that literature displays to consciousness through its fashioning of patterns of 'imaginary' events.' [123]

Where the ideas about narrative as presented by Cover and White diverge, however, is centered around the notion of containment, and notions of multiplicity. As Cover argues for a cohesive organising narrative representation (based on narrative as a form of telling stories about hidden experiences and submerged truths), White follows philosopher Louis Mink, who has argued: 'Narratives...contain indefinitely many ordering relations, and indefinitely many ways of combining these relations.' [124]

In other words, within the meaning produced through 'emplotment' on the narrative form, there is an implicit understanding that this form could be ordered in more than one way, and could itself represent one of many plot figurations, or stories.

The multiplicity inherent in Mink's position is a threat to the positivist type of narrative story-telling that was once typical in history, and in some ways continues to be in law. However, White also refers to the work of literary theorist Roland Barthes, most importantly the essay 'Historical Discourse', to illustrate how developments in poststructuralist linguistic theory have influenced the ways in which we can understand the production of meaning in history.

Barthes in 'Historical Discourse' argues that there is little distinction between history and fiction. He challenges the perception of historical narration of past

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123 White (1992), p. 45.

124 Louis O Mink (1978), 'Narrative Form as a Cognitive Instrument', in RH Canary and H Kozicki, (eds.), *The Writing of History: Literary Form and Historical Understanding* ,University of Wisconsin Press, Madison, pp. 143-144.

events as a 'science', a representational truth, by asking if, and how, it really differs from other modes of representation or story telling such as the epic or the novel.[125] In other words, by drawing connections between the development of realism in fiction and objectivity in historiography, Barthes is attempting to demonstrate that both relied on a narrative form which was (in linguistic terms) a way to 'substitute surreptitiously a conceptual content (a signified) for a referent that it pretended merely to describe.'[126]

Barthes critiques the notion of a 'real' or truthful account of events and accompanying production of meaning. An objective historical narrative (as developed in the nineteenth century) is therefore the method, in Foucault's terms, by which society shapes an individual subjectivity into a position capable of bearing the responsibility of an objective law or organising nomos. Historical narrative in this form bears an imaginary side: the illusion of a centred consciousness capable of looking out on the world and shaping it with meaning. If history is seen as a form of discourse related to literature, as Barthes suggests, there is no longer any 'real' or singular story to be told which can contain the individual subjective writing position or material. If traditional historical narrative is itself in possession of an 'imaginary', other forms and imagined organising visions and structures become possible.

Using these ideas from White, Mink, and Barthes, it is possible to contest the objective, singular vision of the narrative form as originally developed in history writing, and which is still used in legal narrative formation. What these ideas give us is a way to challenge the relegation of the 'signified' within narrative as an unformulated subject, or group, hiding behind an 'all powerful referent.'[127] By viewing narrative as a form of discourse, as historical theorists suggest, it is possible to allow a more diverse way of telling stories about past events, and concurrently allow a more diverse range of meanings produced through this process to be

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125 Roland Barthes (1967), 'Historical Discourse'(trans. Stephen Bann), in ES Schaffer (ed.)(1981) *Comparative Criticism: A Year Book*, Cambridge University Press, Cambridge, p. 7.

126 White (1992), p. 37.

127 Barthes (1967), p. 17.

introduced back into a cultural or societal understanding of the event or person(s) of whom the original story was told.

Returning to Cover's argument that a cohesive narrative around the subjectivities of a particular group need to be objectified to allow entry into the law, the question still remains: why does the law still view itself as the 'all powerful referent'? To allow divergent ideas, stories and politics which are incapable of forming such an objectified narrative to be heard, it seems that some of the ideas developed in recent historical theory around what narrative can be are useful for the legal theory.

However, before the means by which such translation could occur is examined in Section Four in relation to the experience of the battered woman who kills, the existing conversational impasse between law and history can not be ignored. To demonstrate more clearly how this actually operates - especially when compounded with the problem of untangling different feminist voices - I will investigate, in the next chapter, the competing methods of producing meaning as evidenced in the US case of *EEOC V Sears*.[128] This case, in which feminist historians were used as expert witnesses, provides an excellent example of how the law judges historical narrative, and how it discounts the narrative visions offered by feminist theory that attempt to complicate the idea that feminisms are part of a monolithic whole. By revealing the operation of *le differend* through the Sears case, it is possible to also examine the ideas offered by feminist legal theory which are committed to disrupting the binary positioning of women by the law and by liberal theory more generally. Through an examination of the confluence of the relationship of legal theory with history and feminism, an opportunity exists for the articulation of a feminist legal history, which allows a heterogeneous and genealogical reading of women's experience with and by the law.

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128 Civil Action No. 79-C-4373, US District Court for the Northern District of Illinois, Eastern Division.

*Chapter Eight*

# EQUALITY AND DIFFERENCE

> [E]ven where feminist discourses lack the social power to realize their versions of knowledge in institutional practices, they can offer discursive space from which the individual can resist dominant subject positions. [1]

## Law, History, Feminism

In some respects, the separation of 'evidence' from 'truth' and 'narrative' seems artificial, both in terms of the law, and of history. Conceptions and interpretations privileged as truth are dictated by rules surrounding the inclusion of evidence in a narrative form. However, the separation, albeit artificial, illuminates the way that debates around these elements within law and history as distinct disciplines and practices, have produced different kinds of narratives, with different political and public potential.

It is the aim of this chapter to identify and illustrate the operation of the *differend* through the US decision of *EEOC v Sears*[2], in which gendered understandings of identity and equality were under negotiation. The history/law conversation in the Sears case is a working example of how these two disciplines can become incommensurable, as a result of their different understandings of what constitutes a narrative. The analysis of the Sears case offered in this chapter contends that although 'either/or' choices regarding acceptance of equal or different positions within feminist theory is in itself a problem, these positions indicate feminist theory itself has no organising or coherent 'normative vision', in the terms discussed in Chapter Seven. This presents a problem to be addressed if the argument of legal

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1 Chris Weedon (1987) *Feminist Practice and Post-Structuralist Theory*, Blackwell, Oxford, pp. 110-111.

theorist Robert Cover as discussed in that chapter is accepted. Cover contends that a unifying and value-objective narrative is needed by marginalised groups seeking to challenge the law and legal thinking. As such, there needs to be a different way of representing the multiple strands of feminist politics within the courtroom, in order to give effect to a notion of subjective politics, as opposed to normalising one feminist position within the dominant nomos of the law, and relegating any other (or others) to a position of inadmissible and contradictory evidence.

By examining the Sears case, somewhat of a *cause celebre* amongst feminist historians, this chapter demonstrates how *le differend* operates between law and history when complicated by competing feminist interpretations of what gendered difference means, and how the 'difference dilemma' operates.[3] It then examines the work undertaken by feminist legal scholars who advocate a postmodern approach, which emphasises readings of women's subjective experience as a method for avoiding the stasis produced by adhering to the either/or choices invoked by much feminist theory as a result of its equivocal relationship with liberalism. This chapter, together with the discussion of narrative in Chapter Seven, provides the conceptual basis for 'marrying' a postmodern legal feminism with genealogical readings of history and historical discourse. It is this collusion of discourses, as argued in the final section of this thesis, that provides a methodology by which experience and a differentiated subjectivity for women can be incorporated into feminist legal readings of the battered woman who kills, without being subsumed within the paradox that liberal law presents.

## *EEOC v Sears*: Investigating *Le Differend*

In 1973, the United States' Equal Employment Opportunity Commission (EEOC) filed a charge against Sears, the worlds largest retailer and America's largest private

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2 Civil Action No. 79-C-4373, US District Court for the Northern District of Illinois, Eastern Division.

3 This term is attributed to Martha Minnow (1984), 'Learning to Live with the Dilemma of Difference: Bilingual and Special Education', 48 *Law and Contemporary Problems* 157.

sector employer of women,[4] alleging discrimination by race, sex and national origin, in violation of Title VII of the *Civil Rights Act* 1964 (US). In the years that followed, the EEOC sought to reach an agreement with Sears whereby the necessary changes to work practices could be effected, and the charges dissolved. No such agreement was reached and, by 1979, the EEOC notified Sears of its failure to conciliate. Sears filed a preemptive suit against the EEOC and nine other government agencies, contending that 'the myriad Federal anti-statutes and regulations' were impossible to comply with and that the government policies themselves had created 'an unbalanced workforce dominated by white males.'[5] Sears' case was dismissed, and five months later, in October 1979, the EEOC filed five suits against Sears. These were a nationwide suit alleging sex discrimination and four separate suits alleging race discrimination in hiring against Afro-Americans and Hispanics in particular Sears stores.[6] A settlement was eventually reached in the localised race suits, while the sex discrimination case continued to be pursued by EEOC until it went to trial in 1984.

The case at trial involved three basic charges. Sears was accused of: failing to use the same hiring criteria for men and women in commission sales positions; failing to promote female non-commission sales persons on the same basis as their male equivalents and paying women in specific management positions less than men at the same level.[7]

The bulk of evidence presented in the case at trial involved the EEOC attempting to determine whether 'differences between male and female applicants in characteristics that might be associated with success'[8] could explain the discrepancies between the number of women applying for commission sales positions and the number of women hired.

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4 Ruth Milkman (1986) 'Women's History and the Sears Case, *Feminist Studies* vol. 12 no. 2, pp. 375-400, p 376.

5 ibid., p. 378.

6 ibid., p. 379.

7 Mary Joe Frug (1992), 'Feminist Doctrine', in *Postmodern Legal Feminism,* Routledge, New York, pp. 12-29, p. 13.

8 Milkman (1986), p. 380.

In describing the hiring process for commission sales positions used by Sears during this period, the EEOC contended that anyone who applied was granted an application form and interview. If that interview was passed (a subjective decision by the specific store manager) a second interview was granted. The only document to give direction regarding Sears overall hiring policy at this stage was a manual called the 'Retail Testing Manual', originally published in 1953. This directive profiled Sears' ideal 'Big Ticket Salesman'- a description couched in overwhelmingly masculine terms. Although the form was re-written to be gender neutral in 1966, the characteristics described remained unchanged. The 'Big Ticket Salesman'- alleged to possess 'considerable physical vigour' and 'a liking for tools'- was assessed via a test adopted by Sears called the 'Active and Vigour Scores', which measured seven dimensions of temperament. Six of the seven dimensions demonstrated no intrinsic differences between male and female respondents.

However, the seventh (the 'Vigour' scale) produced remarkable disparities in male and female applicability for sales commission positions. The overt reason for this was evident from the questions comprising the Vigour Scale, such as 'Do you have a low pitched voice?', and 'Have you played on a football team?' According to the manual, as Ruth Milkman points out in her analysis of the case, a score of 14 for a man on this test would be considered a 'best' score, while a women scoring nine would be considered a poor risk, even though Sears believed their behaviour would be the same.[9]

The 'Vigour Test' was used to bolster the EEOC's case. However, the bulk of their argument relied on the establishment of statistical disparities between the female proportion of those hired and promoted and the female proportion of the relevant pools of available workers.

In their defence, Sears did not contest the description of the hiring process itself, although they did assert that the 'Vigour Test' was but a minor consideration in their overall hiring and promotion policy.[10] Instead, they attempted to rebut the statistical basis of the EEOC's case, arguing that the EEOC needed to show that

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9 ibid., p. 382.

10 ibid.

an intention on their behalf to discriminate lay behind the statistical discrepancies. Sears argued that their affirmative action policies rebutted such an imputed intention.[11] Furthermore, they argued that the EEOC had assumed that male and female applicants were equally qualified and equally interested in applying for commission sales positions. Sears contested this assumption of equality by arguing that there were fundamental differences between women's and men's qualifications and preferences, as well as inherent differences in their applicability for the positions. In other words, Sears contended that the EEOC had 'grossly overestimated female availability for sales commission jobs.'[12] Under-representation of women in these positions was therefore not discriminatory, but merely a reflection of the differences between male and female employment preferences.

To contextualize this central question, Sears' counsel introduced historical evidence- through historian Rosalind Rosenberg as an expert witness - to indicate that most women are not interested in sales commission jobs *per se.* After introducing history as evidence, EEOC counter-acted Sears by introducing another historian, Alice Kessler-Harris, to contest Rosenberg's claims, and to offer a different reading of the historical record, which would ultimately go to support the EEOC's case.

It is this use of historical evidence as the basis for expert testimony that provides the relevance of *EEOC v Sears* to this general discussion. There are two main reasons for this. The first is the problem evidenced in the Sears case around the competing notions in history and law as to what constitutes evidence, and what constitutes a narrative explanation: a working example of what I have identified, borrowing from Lyotard, as *le differend.*[13] The second reason is the fact that in the Sears case the historians used as expert witnesses were in fact feminist historians. Within the context of the trial they were therefore taking up positions in a

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11 ibid., p. 383.

12 ibid., p. 384.

13 See discussion of *le differend* in Chapter Seven.

dichotomous and adversarial argument, around the political stakes of equality and difference as dominant positions for feminist theory and practice.

In the context of *EEOC v Sears*, the evidence that Rosalind Rosenberg presented on behalf of Sears furthered the argument that EEOC had made an incorrect presumption about the identical interests and aspirations of men and women regarding work. Using existing accounts of the history of women's work in the United States (including the work of Kessler-Harris herself) Rosenberg outlined a narrative interpretation which alleged that in the history of the division of labour, weight needed to be given to the fact that women had values and interests that were distinct from those of men. Using examples such as the hostility to employing married women during the Depression and the reluctance of the US government to provide child care during the mass employment of women in World War Two, Rosenberg contended that not only is there a historical consensus that women's work outside the home is subordinate to that within the home, but that many women in fact choose jobs that complement their family responsibilities (despite the loss of earning potential).[14] Pitting her version of the historical record against statistical evidence adduced on behalf of the EEOC, Rosenberg claimed that it was incorrect to assume that given equal opportunity, women would make the same employment choices as men. As she explained in her offer of proof, women and men are different, and 'difference doesn't always mean discrimination.'[15]

Alice Kessler-Harris, testifying for the EEOC, offered a different reading of the historical record. As she stated:

> History does not sustain the notion that women have, in the past, chosen not to take traditional jobs... the argument that women are only interested in certain kinds of work reflects women's perceptions of opportunities available to them which are themselves products of employers' assumptions and prejudices about women.[16]

Although Sears had attributed to the EEOC an assumption that men and women had identical interests, Kessler-Harris attempted to show that this was not the case.

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14 Milkman (1986), p. 385.

15 ibid.

16 ibid., p. 387.

She did not argue that men and women were the same. Instead, her rebuttal consisted of three main points. First, that the historical record demonstrated that women had been engaged in a greater range of occupations than Rosenberg assumed; secondly, that economic conditions offset the effects of socialisation in women's attitudes towards employment, and; thirdly, that historically, job segregation was the result of employer preferences rather than employee choices. [17]

Kessler-Harris acknowledged that there was room in the debate for disagreement as to the factors shaping the occupational choices and employment options of both men and women. But she objected to Rosenberg's testimony on the grounds that it misquoted her own work, and that it was 'onesided, overgeneralized from limited information, and ignored the role of employers in shaping women's employment patterns.'[18]

Given an opportunity to respond to Kessler-Harris' testimony, Rosenberg sought to discredit Kessler-Harris herself, and did this by challenging Kessler-Harris' role and function as a historian, and as an expert witness. She claimed that Kessler-Harris' statements at trial were contradictory to the greater body of her written work concerning the labour history of women in America during and since the Second World War. Rosenberg tendered as an appendix to her rebuttal a twelve-page document, in which she compared Kessler-Harris' 'Statements in this Case' to Kessler Harris' 'Contradictory Statements in her Writing'. In addition, she read out sections from Kessler-Harris' book *Out to Work*, which seemingly supported Rosenberg's own argument that in America's recent past more women than men chose career over family, notwithstanding any ingrained employer prejudice against the employment of women.[19]

Karen Baker, a lawyer for EEOC, countered by reading into the court record the material from *Out to Work* that appeared in Rosenberg's ellipses, and which referred

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17 Frug (1992), p. 14.

18 Milkman (1986), p 387

19 Joan W. Scott (1994), 'Deconstructing equality-versus- difference: Or, the uses of poststructuralist theory for feminism', in Steven Seidman (ed.), *The Postmodern turn. New perspectives on social theory*, Cambridge University Press, Cambridge,, pp. 282-298, pp. 290-1.

to the cultural constraints imposed and used by employers in their hiring and promoting procedures.[20] Yet this did not affect the final reading of the historical evidence or of the feminist historians who presented it.

In January 1986, seven months after the trial came to an end, the District Court of Chicago handed down its decision in favour of Sears. Judge John Nordberg, in Milkman's account, gave the historical testimony 'considerable weight' in justifying his acceptance of Sear's argument that women were uninterested in commission sales jobs and in rejecting the EEOC's statistical evidence of discrimination.[21] He perceived Rosenberg to be a 'highly credible witness' who offered 'reasonable, well-supported positions.' Kessler-Harris, on the other hand, was characterised as giving a non-generalised, unfounded testimony, which 'fatally undermine[d]' the EEOC's statistical data.[22] Comparing the two historians and their narrative accounts, Justice Nordberg found Rosenberg's evidence more 'credible' and her testimony 'more convincing'.[23]

Many commentators have argued that Nordberg, an appointee of President Reagan and known as a political conservative, found in Rosenberg's testimony a perception of gender difference, and a narrative account of the sexual division of labour in America's history, that coincided with the prevailing normative view of the administration that appointed him.[24] Whether or not this is an accurate assessment of the judgement, Judge Nordberg's decision can also be viewed in terms of narrative construction. As Cover, and others such as Jennifer Wicke have suggested,[25] without a coherent, objective narrative representation, views which contest the law in localized contexts will remain outside of the law's normative boundaries.

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20 Milkman (1986), p 389

21 ibid., p. 390.

22 ibid.

23 ibid.

24 See Frug (1992), Scott (1994), Milkman (1986).

25 Jennifer Wicke (1991), 'Postmodern Identity and the Legal Subject', 62 *University of Colorado Law Review* 455.

The Sears case thus demonstrates an incommensurability between narrative as understood by law, and stories or narrative representations that stand outside its organised parameters.

To begin with, Rosenberg and Kessler-Harris, as feminist historians, placed a interpretative value on their evidence that was *prima facie* different from more objective, positivist historical or legal analyses. Joan Scott notes in her analysis of the case that Rosenberg and Kessler-Harris were: '....forced...to swear to the truth or falsehood of interpretative generalisations developed for purposes other than legal contestation, and they were forced to treat their interpretative premises as matters of fact'.[26]

In this situation, Rosenberg unified her historical perspective in a way that Kessler-Harris did not. In terms of the need to represent a particular political perspective within a courtroom via a unified, objective narrative, it was Rosenberg, and not Kessler-Harris, who was successful. Her narrative representation of women's employment history coincided with the nomos of the dominant political and juridical administration of the day. Instead of following a historical reading of the evidence in which there was more than one interpretation, she implicitly eschewed the potentialities for multiple readings offered by Kessler-Harris. In an arguably strategic fashion, she saw her historical text as a reality, devoid of imagined potential, and as such it was her rendition of the historical record which presented itself as 'more' objective and unified than Kessler-Harris, and more likely to be both accepted and able to read by the law as the 'powerful referent.'[27]

Alternatively, Kessler-Harris, attempting to offer a nuanced explanation of women's work history was, as Joan Scott again notes, 'forced into a reductive assertion by the Sears lawyers' insistence that she answer questions by saying yes or no.'[28] In seeking to offer a range of voices and narrative positions within her testimony, Kessler-Harris was placed outside the notion of objectified and single-

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26 Scott (1994), p. 291.

27 Roland Barthes (1967), Historical Discourse', (trans. Stephen Bann), in E S Schaffer (ed.), (1981), *Comparative Criticism 3: A Year Book*, Cambridge University Press, Cambridge, pp. 3-20.

28 ibid.

voiced evidentiary truth traditionally favoured by the law. While the different positions she offered in her testimony were an entirely legitimate attempt to offer different emphases for different contexts, in the court room they were dismissed as incredulous

The Sears case is further problematized by the issue of competing feminst narratives. Feminist legal theorist Mary Joe Frug, in her analysis of the Sears case, saw the fundamental issue in the case as being Kessler-Harris' and Rosenberg's tendency to polarise their representations of the gendered labour market into two opposing feminist stereotypes. For Frug, this adversarial feminist theoretical positioning interrupted any ability of the law to allow for legitimate alternative interpretations of the evidence.[29]

I would suggest that Frug's position serves to reiterate the view that via the imposition of form onto content in legal narrative, a unitary objective organising nomos is required before a competing interpretation can be read by the legal discourse. In this sense, the testimony of the historians in the Sears' case failed to present a singular feminist position. As a result, in Cover's terms, the potential of any 'feminist' challenge (as a form of redemptive constitutionalism) was greatly undermined.

## 'The Difference Dilemma'

From the broader debates within feminist theory itself, contest and conversation between the positions of 'equal' and 'different' have a long and complicated history. As Jane Flax has argued: 'A central tenet of all feminist theory is that gender has been and remains a historically variable and internally differentiated relation of domination.'[30] This history has its preconditions in Enlightenment theories of emancipation and transcendence. Pauline Johnson has pointed out how current trends towards the unmasking of Enlightenment metanarratives stand in stark contrast to the understanding of feminism as humanism expressed by Simone

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29 Frug (1992), p. 13.

30 Jane Flax (1992), 'Beyond Equality: gender, justice and difference', in Gisela Bock and Susan James (eds.), *Beyond Equality and Difference: Citizenship. Feminist politics and female subjectivity*, Routledge, New York and London, pp. 193- 210, p. 193.

de Beauvoir, and other early philosophers of feminism's second wave. Johnson argues:

> According to the standpoint of *The Second Sex* the oppression of women appears as a denial, in a specifically discriminatory sense, of their right and task as human beings to freely choose their own identity and destiny. For de Beauvoir, feminism meant the demand that women should cease to be stultified by their culturally imposed femininity and should, along with men, enjoy the human task and responsibility of making *themselves.*[31]

However, as Genevieve Lloyd has pointed put, analyses of de Beauvoir's humanist feminism indicate that its premises are based on male epistemological standards, notably those of Jean-Paul Sartre. In Lloyd's account, Sartre's ideal of transcendence is formulated as an 'exhortation to the masculine self to transcend or overcome the threat of a supposed feminine state in which the mere facticity or 'given' character of the body engulfs the self.'[32]

The general re-thinking of the premises of a feminist reliance on male philosophical foundations is exemplified by Genevieve Lloyd's work, but is not by any means limited to it, or to her critique of de Beauvoir's humanist feminism. The critical re-thinking of the epistemological boundaries which surround strategic choices for feminisms have been significantly extended to the pre-history of gender relations more generally. As Jane Flax argues, in the modern West, gender has been constituted through a 'vicious, circular' logic:

> A range of 'differences' (e.g. mind/body, reason/emotion, public/private) is identified *as* difference, and as salient to and constituent of gender. These differences are also conceived as oppositional, asymmetric dualisms on a hierarchical, binary and absolute scale rather than as pluralisms in an indefinite and open ended universe.[33]

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31 Pauline Johnson (1993), 'Feminism and the Enlightenment', *Radical Philosophy* 63, Spring, pp. 3- 12, p. 3. As Simone de Beauvoir expressed: '...what particularly signalizes the situation of woman is that she- a free and autonomous being like all creatures- nevertheless finds herself in a world where men compel her to assume the status of the Other.', *The Second Sex* (1972), Penguin Books, Harmondsworth, p. 29.

32 Quote per Johnson (1993), p. 3; but see generally Genevieve Lloyd (1984), *The Man of Reason: 'Male' and 'Female' in Western Philosophy*, Methuen, London, p. 101.

33 ibid.

The problem has been, for both feminisms and other critical political theories, a genuine and ethical dilemma over which strands, and which tenets, of liberalism and its claims to rationality and equality should be preserved to enable women as political subjects, and which elements should be discarded altogether as preventing any real account of women on their own terms. Modern feminism, Pauline Johnson notes, is both a critique and an interpretation of the Enlightenment. In her analysis, feminisms can be viewed as preserving the Enlightenment emancipatory vision in which humans are affirmed as the determinators of their own social world. Yet at the same time, feminisms have always attempted to repudiate Enlightenment formulations which turn on and appeal to 'an impartial reason and ...an eternal and normatively conceived human nature.'[34]

The result has been a continuing debate on whether and how to claim a distinct 'female' identity in the processes bequeathed by liberalism, whilst also acknowledging that women *despite* the differences imposed by their corporeality are entitled to claim equal rational status with men

In terms of these debates, as located in the realm of feminist thinking about the law and women's access to it, those who argue that sexual difference ought to be an irrelevant consideration in schools, employment, the courts or legislation are put into the 'equal' category. Those who argue that challenges to the *status quo* should be made in terms of the needs, interests and characteristics common to women as a group are placed in the 'different' category.[35]

The equal/different dichotomy, which has polarised feminists (and others) since the publication of Mary Wollstonecraft's *Vindication of the Rights of Women*[36] has left

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34 Johnson (1993), p. 11.

35 Scott (1994), p. 287. For a representative overview of how these positions have impacted on Australian feminist thinking about and incursions into legal theory and reform see Jenny Morgan (1993) 'Women and The Law', in *Refracting Voices: Feminist Perspectives From Refractory Girl,* Southwood Press, Sydney, pp. 116-128. See also Chapter Five.

36 Mary Wollstonecraft (1982), *Vindication of the Rights of Women,* (first published 1792) Penguin Books, Harmondsworth. Pauline Johnson comments on the character of Wollstonecraft's feminist project: 'Despite its own overt radicalism, Wollstonecraft's feminism is haunted by an historically understandable, naturalistic construction of the gendered character of social tasks and duties. In this capacity her feminism does

its trace on a multiplicity of discourses and activisims, with the result that there is no singular way in which the projection of this debate within feminist theory can be adequately discussed.[37] In terms of the wider questions this thesis is asking, it is important that the 'difference dilemma'[38] is examined through the competing interpretations of what constitutes contemporary feminist jurisprudence, a feminist theoretical project which is inextricably embedded within, and committed to, articulating strategic choices for women in terms of their legal, ethical and political outcomes. However, a connecting epistemological strand through *all* configurations of the equal/different dichotomy in feminist theory and practice (and indeed in the general organising principles of contemporary society) is the predominance of the binary opposition as a philosophical and social construct. The organisation of knowledge around the premises of reason dictate that there is an opposite, an other, that is by nature 'un'reasonable. Thus, the construct of truth suggests that what remains outside its shared cultural meaning is untrue; that 'male' and 'female' themselves are polarised as cultural genders (not biologies) and that equality insists upon an opposite representation: an inequality, an assessment made on the grounds of difference (be it race, sex, religion, class or culture.)[39]

In the broader spectrum of feminist theorising, no matter that there may be a common goal for women to advance their status in reaction to an Enlightenment

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nothing to challenge the priorities and the practical arrangement of her society. It merely calls for the recognition of the vital importance of 'womanly' duties in the realisation of an harmonious, balanced social life.': Johnson (1993), p. 9.

37 Ursula Vogel (1986), 'Rationalism and romanticism: two strategies for women's liberation', in Judith Evans et al (eds.), *Feminism and Political Theory*, Sage Publications, London and Beverley Hills, pp. 17- 45. As an example of the diversity of perspectives and strategies surrounding the 'difference dilemma'. Moira Gatens has pointed to Rosi Braidotti's claim that, in the interpretative mode, 'a feminist woman theoretician who is interested in thinking about sexual difference and feminism today cannot afford not to be essentialist.': Rosi Braidotti (1989), 'The Politics of Ontological Difference', in T. Brennan (ed.), *Between Feminism and Psychoanalysis*, Routledge, London, p 93. However, Gatens goes on to argue that this strand of Enlightenment conceptualization of gender relations, which may be the crucial conceptual tool in psychoanalytic thought, is of little use to theorists pursuing the economic, legal, political and ethical implications of such strategy: Moira Gatens (1996), 'Contracting sex: Essence, genealogy, desire', in *Imaginary Bodies: Ethics, Power and Corporeality*, Routledge, London and New York, pp. 76-91, p. 77.

38 Minnow (1984), p. 160.

39 See generally Lloyd (1984).

projection onto women as 'other' to the juridico-social male subject, there has been dichotomised thinking about how such reaction should be organised. The result has been what Martha Minnow calls 'the difference dilemma', in which women, by both focusing on and ignoring difference in their attempts to shift an idea of female as 'other' run the constant risk of recreating it.[40] As Jane Flax puts it:

> Domination arises out of an inability to recognize, appreciate and nurture differences, not out of a failure to see everyone as the same. Indeed, the need to see everyone the same in order to accord them dignity and respect is an expression of the problem, not a cure for it.[41]

In other words, feminist polarising around the ideas of equal to and different from men (and often from each other) [42]simply recreates the binary oppostional categories that most women are reacting to in the first place. [43]

In her analysis of the Sears case, historian Joan Scott reflects on the criticism offered by Mary Joe Frug of that same case, but takes the questions Frug asks a step further. Scott rejects the idea that equal/different constitutes an opposition in itself, and suggests that, 'Instead of framing analyses and strategies as if such binary pairs were timeless and true, we need to ask *how* the dichotomous pairing of equal and different itself works.'[44]

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40 Minnow (1984), p. 160.

41 Flax (1992), p. 193.

42 Regarding this point of difference *between* women see Luce Irigaray (1985), *This Sex Which Is Not One*, (trans. Catherine Porter with Carolyn Burke), Cornell University Press, Ithaca New York. Irigaray argues that the concern with sex 'difference' leads to an unconcern about the specificity of differences. Women are treated like men, or as different to them, but not specifically as women. She argues that it makes no sense to ask 'what is woman'. Rather, that 'feminism finds itself defined as lack, deficiency or as imitation, negative image of the subject.' (p. 78.) As Zillah Eisenstein has commented, 'Men are privileged by presenting themselves as non-different. Women are generalized in terms of their difference and lose their individual specificity...Women are abnormal as in menopause or menstruation. Men are normal- as defined by the male body.': Zillah R. Eisenstein (1988), *The Female Body and The Law*, University of California Press, Berkeley, Los Angeles and London, pp. 32-33.

43 See also Martha Minnow (1988) 'Feminist Reason : Getting It and Losing It', 38 *Journal of Legal Education* 47.

44 Scott (1994), p. 289 (emphasis added.)

Scott's analysis is crucial in this project for two interconnected reasons. The first is that her approach to the 'difference dilemma' is genealogical. It is not concerned with the chronological process of what happened in time, but is concerned with 'the way people record, narrate, and explain their own past and with evaluating the effects of various types of historical narration upon life.'[45] From this perspective, the feminist challenge to the 'difference dilemma', a result of feminism's 'insurmountable paradoxical condition', (its existence within and simultaneous critique of liberalism), involves 'analysing not only the conditions of [social] existence that produce inequalities of power but also the discursive conditions that produce feminism.'[46]

It is Scott's commitment to unravelling 'how' questions: be they, in this context, related to the derivation and operation of gender categories or more broadly, how these categories themselves influence the subjectivity of women in other discourses like domestic violence or law, that allows for a more nuanced reading of history's relationship to and reading of women in the present.

The second, interrelated reason is that Scott's understanding of history as genealogy[47] and also as political strategy allows for a postmodernist reading of the 'difference dilemma' that enables an escape from its stasis, and as such opens up avenues of investigation across disciplines, and *inter alia* discourses, about women's bodies and their subjectivity.

Scott contends that the terms 'equal' and 'different' are in themselves interconnected, and not opposed, yet when paired dichotomously they offer an impossible choice for women attempting to challenge the *status quo*. She argues that equality often means ignoring differences between individuals for a particular

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45 Michael Mahon (1992), *Foucault's Nietzschean Genealogy: Truth, Power and The Subject*, SUNY Press, Albany, p. 95.

46 Joan W. Scott (1997), 'Comment on Hawkesworth's "Comfounding Gender"', in *Signs*, vol. 22, no. 3, pp. 697-702, p. 701. See also Joan W. Scott (1996), *Only Paradoxes to Offer: French Feminists and the Rights of Man*, Harvard University Press, Cambridge (Mass.).

47 Gatens (1996), p. 76 notes the power of genealogical history as a different strategy, both for historians, and more generally across disciplines. See discussion of genealogy on Chapter Seven.

purpose or in a particular context.[48] As Michael Walzer argues, '[t]he root meaning of equality is negative; egalitarianism in its origins is an abolitionist politics. It aims at eliminating not all differences, but a particular set of differences, and a different set in different times and places.'[49]

Therefore, embedded within an idea of equality is a social agreement to consider obviously different people as equivalent (not identical) for a stated purpose. In Judith Butler's terms this means that '[i]f the regulatory fictions of sex and gender are themselves multiple contested sites of meaning, then the very multiplicity of their construction holds out the possibility of a disruption of their univocal posturing.'[50]

From this perspective, the use of history in *EEOC v Sears* by Kessler-Harris and Rosenberg to explain processes of socialisation, where the choice and perception of women's employment opportunities were concerned, became subsumed by an assertion by Rosenberg that men and women were biologically (and culturally) distinct. Kessler-Harris' attempts, on the other hand, to produce a more nuanced argument in the terms Scott is suggesting and to present historical evidence in the form of historical *discourse* about subjects, were (as I have indicated above) unable to be translated into legal conceptions of narrative, and as such were rendered inadmissible.

The overall problems, as illustrated through the Sears case, are complex. If Scott is correct in assuming that equal/different, or any other form of binary thinking, inherently hinders a strategic challenge by feminist thinkers to a particular *status quo* (legal or otherwise) a third way of approaching problems - of refusing such 'either/or' choices - needs to be advocated. However, in the courtroom, when Kessler-Harris attempted such an approach by acknowledging difference, yet advocating equality, in her reading of the historical evidence, Judge Nordberg dismissed her account as incoherent and non-credible. This tends to indicate that

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48 Scott (1994), p. 294.

49 Michael Walzer (1983), *Spheres of Justice: A Defense of Pluralism and Equality*, New York: Basic Books, p. xxi.

50 Judith Butler (1990), *Gender Trouble: Feminism and the subversion of identity*, Routledge, New York and London, p. 149.

writers like Robert Cover and Jennifer Wicke are correct in asserting that the law can be altered, yet only when the marginalised group challenging a particular law is able to exhibit a 'coherent subjectivity.'[51] This leaves the following questions: how can women hoping to challenge a male centered law to advantage other women, and let hidden stories and experiences be told, achieve this by relinquishing the either/or choices on which their arguments have been traditionally structured? And, how can they then enter such stories and experiences into an arena which allows only narrative expressions of a coherent, unified normative view? If the either/or challenge leaves women contesting each other, and if the law enforces feminism to stand behind one or the other, but never a combination of both, how can any useful redemptive challenge ever be mounted or contained by feminist politics both within and outside the courtroom?

In Chapter Seven, I discussed the potential for reading and producing meaning through narrative as discourse, as conceived by the intersections of literary and historical theory. I will now argue that by challenging the understanding of narrative within legal theory - by using the idea of historical discourse strategically - there can be a response to *le differend* in specific, localised contexts. Through such a technique, the postmodern feminist challenges to women's subjectivity and correlatively to 'the difference dilemma', present a way of being read by legal narratives, and by the legal doctrine that defines them.

However, before this melding of narrative theory with post modern feminist theory can be illustrated, it is important to contextualize how the 'difference dilemma' is interpreted within the theoretical and linguistic confluence of feminist and jurisprudential theory.

**Framing feminist jurisprudence.**

It is important first to indicate why a school of feminist jurisprudence exists, and why (in any of its diverse forms) it would contend that Western jurisprudence and law are, and have been, generally masculinist.

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51 Wicke (1991), p. 19. See discussion of Cover (1983) on this point in Chapter Seven.

To begin with, it is an empirically supportable claim that law and legal theory have been, and continue to be, the province of men.[52] It is men who have written the law, and also written theories of the law. While under the guise of the misconception that there is a genderless and faceless social subject,[53] which may not have been intentional, its practical effect has been to produce a body of formal and social knowledge that has excluded the diversity of female experience or thinking. Law is reflective of both the language and ideology of liberalism. Liberalism maintains a theoretical commitment to gender objectivity, but as discussed in Chapter One regarding criminal law doctrine, reflects a dualistic understanding of men and women through the hierarchy of mind/body.[54] As Zillah Eisenstein argues:

> The discourse regarding law - its objectivity, its neutrality, its fairness - is constructed through political discourses concerning sex and gender premised on the duality of man/woman. Therefore the sexual politics of liberal law(s) is presented as though it were neutral, and thinking about the law as though it were objective and fair allows this presentation.[55]

Or, as Margaret Davies notes: 'Austin's 'province of jurisprudence' is a terrain dominated by men. (Not all men, of course, but educated white men). Men have made the legal world.'[56]

Second, and contingent upon the creation of law and jurisprudence by men, is the fact that law reflects male values. The image of knowledge reflected through the law is male, and as a form dominated by a positivist ethic and a self truth, the meanings law produces therefore neglect male's opposite, its created 'other':

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52 See for example Australian Law Reform Commission (1993) *Equality Before the Law* , Discussion Paper 54, ALRC, Sydney. Also note that the framework for the analysis on pp. 305-306 can be attributed to Margaret Davies (1994), *Asking the Law Question*, Law Book Company and Sweet and Maxwell, Sydney, pp. 167-168.

53 That is, the unified social citizen behind Rawl's 'veil of ignorance'. For further discussion see Phillip Soper (1988), 'Making Sense of Modern Jurisprudence: The Paradox of Positivism and the Challenge for Natural Law', 22 *Creighton Law* Review 67, p. 19; and John Rawls (1971), *A Theory of Justice.* Harvard University Press, Cambridge (Mass.)

54 See Chapter One discussion of the Reasonable Man as a standard against which the subjective intentions, or mens rea, of female offenders are judged.

55 Eisenstein (1988), p. 20.

56 Davies(1994), p. 168.

namely, women. As a result, as Jenny Morgan and Regina Graycar note, the law becomes 'malestream'; its substantive categories overlook or reduce the concerns of women.[57]

Finally, traditional jurisprudence can be categorised as masculinist because it presents a view of the law to support its general, established characteristics. In other words, because law has traditionally been developed by men, legal theory reflects male values and sees itself as true; theorising about that law will therefore also be inherently gender inbalanced.[58] Law, in its claim to coercive sovereignty depends on rationality, and assumes its superiority and its scientific method of truth-telling as natural and definitive. Consequently, as Ann Scales has noted, it does so while establishing a system of classification characterised by the 'ideas' of similarity and difference within oppositions.[59] Furthermore, despite variation in jurisprudential schools in their quest to unravel law's meaning and its impact, these schools themselves do not exist outside of the dominant discourse.[60]

It is for these reasons that a 'feminist jurisprudence' has developed. Feminist activism of the second wave directed political energies to a transformation of the cultural, social and legal status of women, in similar (although localised) ways throughout Western Europe, the United States and Australia.[61] This meant, in practical terms, that feminism could be construed as a project directed toward particular 'women's issues' (such as child care, discrimination, abortion, rape,

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57 Regina Graycar and Jenny Morgan (1990), *The Hidden Gender of Law*, Federation Press, Sydney, pp. 2-14. Zillah Eisenstein complicates this point by arguing that law occupies an 'in-between' space: 'It constructs and mirrors patriarchal social relations through its phallocratic interpretations of truth, but there is no one interpretation through the law. The Law names reality at the same time that it mystifies reality; males and females are not biologically the same, yet they are not as different as the law assumes. Men and women are not the same, given nature and culture, yet they are not as different as the law makes them seem. Sex and gender are not as similar as the law assumes, yet they are connected.': Eisenstein (1988), p. 22.

58 Davies (1994), p. 168.

59 Ann Scales (1986), 'The emergence of Feminist Jurisprudence: An Essay', 95 *Yale Law Journal* 1386.

60 Eisenstein (1988), p. 45. These various jurisprudential schools include formalism, realism, positivism and critical legal studies. See generally Chapter Seven.

61 Ann Curthoys (1993), 'Citizenship and National Identity', *Feminist Review* no.44 Summer, pp. 19-38. See generally Chapters Three, Four, Five and Six.

domestic violence and pornography.) The result, as discussed in Chapter Five, was a tendency to concentrate on revising black letter law for women's purposes: to focus on the law as a redemptive strategy that enabled women to move from the private to public spheres, and to secure for them certain protections in areas that specifically impacted upon women's lives. This focus overwhelmingly enforced the tenets of the difference dilemma even as it made important, and crucial gains for women as legal subjects.[62] The aim of feminism (especially since the 1970s) has been the transformation of existing social organisation and categories to advance the status of women and, as such, was (and still is) as much about practice as about theory.

In these terms, a feminist interpretation of the law entailed a challenge to transform and contest the ordering concepts of law which gave it its meaning.[63] In theoretical terms, then, feminist jurisprudence came to be about asking questions like: Who is the 'reasonable man'?, Why do we have a liberal ideology of law and whom does it serve? How are women silenced or discriminated against by binary concepts like the public/private divide? [64]In other words, it became important to 'recognise the

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62 See generally Morgan (1993). Also note the effect of the different emphasis on women's relationship to the law by early second wave campaigns articulated by Carol Smart in the following terms. Smart is discussing the intersections of the regulation of prostitution with law and feminist politics, but the premises of her argument can be extrapolated more widely: '[we need to] shift concentration away from elements of self-evident discrimination in legislation towards the less self-evident question of ideologies of female sexuality which inform the enforcement and the development of law.': Smart (1985), 'Legal Subjects and Sexual Objects: ideologies, law and female sexuality', in Julia Brophy and Carol Smart (eds.) *Women-In –Law: Explorations in law, family and sexuality*, Routledge and Kegan Paul, London, Boston, Melbourne and Henley, pp. 50-70, p. 51. See also Chapter Five.

63 As Carol Smart notes: 'We are now familiar with other forms of feminist criticism- for example the criticism of law for excluding women...or the criticism of the content of legislation..., or the criticism of the specific practice of law. It is a fairly recent innovation for feminists to start to criticize the very tools of legal method which have been presumed to be neutral.': Smart (1989), p. 21.

64 See for example Tove Stang Dahl (1987), *Women's Law: An Introduction to Feminist Jurisprudence*, Oxford University Press, Oxford; Margaret Thornton (ed.) (1995), *Public and Private: Feminist Legal Debates, Oxford University Press, Melbourne;* Drucilla Cornell (1991), *Beyond Accommodation: Ethical Feminism, Deconstruction and the Law*, Routledge, New York; Davies (1994); Frug (1992); Marie Ashe (1995), 'Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence', in Jerry Leonard (ed.) *Legal Studies as Cultural Studies: a reader in (post) modern critical theory*, SUNY Press, Albany, pp. 85-132, p. 92.

way that the ideal of "objectivity" helps to stabilise and justify established anti-female perceptions and interpretations as it has been to question those interpretations themselves.'[65]

A recurring problem for feminist jurisprudence, as for feminist theorising across disciplines has been the operation of Martha Minnow's 'difference dilemma'. Although feminist legal scholars are increasingly posing critical questions towards law's biased epistemological foundation, feminist legal thinking, just as much as feminist thinking in any other area, has been influenced by the contradictory philosophies that liberalism (and therefore liberal law) has to offer. Thus, although writers like Carol Smart identify the central dilemma facing feminist legal thinking to be the difference dilemma, other influential writers and thinkers in the field have arrived at essentialist versus equality (or equal/different) positions.[66] That is to say, feminist thinking about the conditions of the law and its production of meaning (as well as its operation) can be divided superficially into two camps: those who believe a female subject within the law should be advanced to an equal standing with men, and those who believe the inherent differences between women and men should be acknowledged by defining distinct female and male legal subjects.

The way in which these ideas have been articulated has been described by Ngaire Naffine as an evolutionary process divisible into three stages. Naffine contends that this 'evolutionary' or taxonomical distinction is neither a teleology, nor designed to suggest that strands of feminist thinking about the law are necessarily mutually exclusive.[67] Naffine's contention is important for the argument in this thesis. However, it is useful to examine these stages of development in order to signify how post-modern legal writing, with its characteristic embrace of theoretical

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65 Davies (1994), p 172. See also Chapter Five and Six regarding the material conditions around which feminist thinking in the 1970s and 1980s in Sydney about women as legal subjects shifted away from an 'either/or' approach.

66 Carol Smart notes: 'The concept of phallogocentrism allows us to go beyond superficial notions of femininity and masculinity, and the values attributed to these constructs are part of our world view and identity.': Carol Smart ( 1990), 'Law's Truth/women's experience', in Regina Graycar (ed.), *Dissenting Opinions: Feminist Explorations in Law and Society*, Allen and Unwin, Sydney, pp. 1- 20, p. 10.

67 Ngaire Naffine (1990), *Law and The Sexes: Explorations in Feminist Legal Jurisprudence*, Allen and Unwin, Sydney.

and strategic diversity, emerged, and how it stands in relation to other feminist investigations of the law.

The first 'phase' of feminist jurisprudence, like the first phase of feminist history writing,[68] was concerned with identifying the causes of women's oppression, and making claims for women's visibility, and their equal status with men, within Western law's liberal foundations. The focus emerged from liberal feminism and was, as Naffine notes, concentrated on 'the pursuit of formal equality for women: from the acquisition of citizenship to the introduction of anti-discrimination legislation. In short, it identifie[d] and challenge[d] a male monopoly in the public sphere which a male-controlled legal profession has supported systematically.'[69]

This first 'phase' overwhelmingly accepted law's own account of itself when not dealing with women: that is, it accepted the rationality, and claims to transcendence and emancipation offered by Enlightenment thinking as objectively neutral. In a jurisprudential sense, scholars who argue from this liberal perspective can be classified as 'assimilationists'.[70] The work of American scholar Wendy Williams can be cited as representative of this general approach. Her work (which has centered mainly around sex discrimination legislation and litigation, and a wariness of 'protective legislation'[71]) expounds the belief that harm done by continuing and contributing to stereotypes that define women as more vulnerable and weak than men (as essentially different) will always outweigh any possible immediate benefits to particular women.[72]

Critiques of the liberal feminist position typically argue that, although it has been successful in gaining recognition for women and women's achievements (most

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68 See Introduction.

69 Ngaire Naffine (1993), 'Assimilating Feminist Jurisprudence', 11 *Law in Context* 78, p. 84. This position is exemplified by A Sachs and J.H. Wilson (1978), *Sexism and the Law: A study of Male Beliefs and Judicial Bias*, Martin Robinson, Oxford; S. Atkins and B. Hoggett (1984), *Women and the Law*, Blackwell, Oxford; Z. Adler (1987), *Rape on Trial*, Routledge and Kegan Paul, London.

70 Ashe (1995), p. 92.

71 Wendy Williams (1982), 'The Equality Crisis: Some Reflections on Culture, Courts and Feminism', 7 *Women's Rights Law Report* 175.

72 Ashe (1993), p. 93.

notably in terms of law reform), liberal feminism does not confront the liberal world view itself: the dichotomous pairing of male against female, or equality against difference. Thus it leaves the private work and achievements of women unarticulated and hidden.[73]

Another important criticism of the liberal feminist position is that it does not address differences between women themselves. To argue for a recognition of a female subject, as a unitary concept, ignores the fact that the needs and social requirements of women themselves oscillate and compete due to race, sexuality or class factors. Too often, the liberal achievements of second wave feminism have been achievements for, and from, the agenda of, white educated middle-class women.[74] As Ngaire Naffine notes, '[f]or law to be fair and ethical to all, it must recognise multiplicity, not singularity. It must admit that the impression of singularity is only achieved by the repressing and squeezing out all those who do not accord with a certain view of humankind.'[75]

The second 'phase', while similarly fixed on the same presumption, and the assertion of the right of women to attain equal status with men, extended the critique to acknowledge that male-bias in the law goes beyond the make-up of the bar and bench. This second phase initiated the critique on law's truth (a critique extended by postmodern feminism), and began to view the law as embodying male culture and values. This second phase, however, also embodied the practice of the 'difference dilemma' within feminist jurisprudence, as feminist writers and thinkers relied upon an essentialised female subject to act as a strategy to overcome male-centric bias in the law, both theoretically and substantively.[76] In a broader feminist

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73 Naffine (1990).

74 See for example: Larissa Behrendt (1993), 'Black Women and the Feminist Movement: Implications for Aboriginal Women in Rights Discourse', 1 *Australian Feminist Law Journal* 27; Mari Matsuda. and Roseanne Kennedy (1989), 'Racial Critiques of Legal Academia', 102*Harvard Law Review* 1745; Ruthann Robson (1990), 'Lesbian Jurisprudence?', 8 *Law and Inequality* 443.

75 Naffine (1993), p. 92.

76 Moira Gatens has commented on the quest for a female essence: 'Much contemporary feminist theory is concerned with this question of essentialism, which is typically run together in a confused fashion with biologism and a host of other '-isms'. Some argue that the risk of essentialism must be taken; others that it be adopted strategically.': Gatens (1996), p. 77.

context, this 'phase' of feminist jurisprudence connects with and mirrors to a certain extent the philosophical basis of radical feminisms.[77] Margaret Davies describes radical feminism in these terms:

> Radical feminism is feminism which sees oppression on the basis of sex as the fundamental or original oppression. Rather than assuming that existing social structures and values simply need to be reformed to cater for women, it has located the basis of subordination within those structures, and aimed at a much more fundamental transformation of power.[78]

Probably the most famous exponent of this position within feminist legal theory is Catherine MacKinnon. MacKinnon has argued that radical feminism is 'feminism unmodified' because it is not a male-authored perspective simply applied to women. In other words, she contends that the function of a radical feminist perspective is to champion an essential female experience, to reject assimilation with male experience or the adoption of male epistemological continuums.[79]

Mackinnon's method is to champion one of the strategies of early 1970s feminism, consciousness-raising. Smart argues:

> Dispensing with the idea of psychoanalysis, [MacKinnon] tend[s] to argue that it is possible to reach an essential or pre-patriarchal woman through the process of collectivising women's experience. It is argued that a different reality, or a different definition of reality, is reached when women come together to express their experiences.[80]

However, although MacKinnon acknowledges that consciousness-raising is a means to an alternative 'truth' which seeks to champion and celebrate women *as*

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77 For a discussion of the contest between radical and other forms of feminist theory and practice in Sydney during Mary Daly's visit in the 1980s see Ann Genovese (1996), 'Unravelling Identities: Performance and Criticism in Australian Feminism', *Feminist Review*, no. 52, Spring, pp. 135-153.

78 Davies (1994), p. 193.

79 Catharine MacKinnon (1987), *Feminism Unmodified*, Harvard University Press, Cambridge, (Mass.)

80 Smart (1990), p. 11.

*women,*[81] her argument tends to invoke a 'collectivised Woman as an epistemological device in order to make transcendent knowledge claims.'[82]

This notion of a collective, unified woman is also evident in the work of other scholars of feminist theory, such as Carol Gilligan. Gilligan proposes that the objective, masculine 'moral judgement' evident in both our culture and in our legal reasoning, has caused the 'voice' of the 'feminine mode' to be silenced. She argues that to redress this imbalance, the public ethic has to take on board and value 'essentially feminine' perspectives of care and responsibility.[83] She clearly defines certain attributes, methods for decision-making, and modes of thought as 'female' compared to 'male', and suggests it is these themes (as opposed to an ideology of assimilation) that need to be furthered investigated and championed by women working within the law.[84]

Within work like Gilligan's is an assumption that, as women and men are biologically different, their experiences and values are distinctly separate as well. A problem with this perspective is that if women and men are so essentially different, any activity to place women's legal or social status on an equivalent plane to that of men can be argued to work against a 'pure' female ethic. In other words, women are different, but should be treated in ways that celebrate this difference rather than silence it.

Another problem within radical feminist theory, as evidenced by MacKinnon's privileging of consciousness-raising as political method, is the insistence on 'the

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81 See generally Chapter Four. I argue that although collectivity, and consciousness-raising, were and are important tools for feminist activism, the rhetoric of collectivity is always undermined by diversity.

82 Smart (1990), ibid., p. 12.

83 Carol Gilligan (1982), *In a Different Voice: Psychological Theory and Women's Development*, Harvard University Press, Cambridge, (Mass.)

84 Zillah Eisenstein develops this theme around the understanding of women's bodies. She recognizes the role that culture plays in equating the female body with the mothers body. Woman is seen as more nurturing than man because of this mix of influences: 'A recognition of gender difference need not deny women their individuality and be used to oppose their claims for equality, as it is in antifeminist rhetoric. The problem, however, is that it can be, has been, and is being used this way. Whether this is done in the name of biology or culture- or feminism or antifeminism-matters little in the end.', Eisenstein (1988), p. 109.

female experience'. Just as liberal feminism (or feminist jurisprudence of the first phase) fails to take into account female difference epistemologically, radical feminism fails to address adequately the differences *between* women. For example, MacKinnon's insistence on giving a specific content to women's experience assumes that the causes of oppression will be the same for all women. As Moira Gatens notes:

> [T]he promotion of an essentialized view of women and men has had equally undesirable effects. Both Catharine MacKinnon and Andrea Dworkin propose essentialized conceptions of female and male sexualities that, if encoded in the law, will entrench conservative and destructive active/passive notions of male and female embodiment.[85]

The result is that both ways of viewing feminist theory – 'classical' liberal and radical approaches - perpetuate a dichotomous notion of the production of meaning. Depsite MacKinnon's claim for a 'feminism unmodified', essentialising female experience taps into a polarised, 'male stream' view of the world as much as any claim for assimilation.

The mapping of feminist jurisprudence in these terms therefore reflects the equal/different debate evidenced in the *EEOC v Sears*. The problem, as Joan Scott indicated in her analysis of that case, is that of how to frame choices for feminist theory and practice that do not tap into 'either/or' positions, that can accommodate both perspectives. The law, however, recognizes duality rather than diversity.[86] As a result, the 'difference dilemma" is discussed in relation to feminist jurisprudence (or legal theory) by Carol Smart in these terms:

> At present it seems as if feminist legal theory is immobilized...[It has] become trapped into debates about the....relative merits of 'equality' versus 'difference' strategies, or the extent to which law reflects the interest of patriarchy, or simply men. These are necessary debates but they have the overwhelming disadvantage of ceding to law the very power that law may then deploy against women's claims. It is a dilemma that all radical political movements face, namely the problem of challenging a form of power without

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85 Gatens (1996), p. 78.

86 As Zillah Eisenstein notes: 'Instead of being able to recognize complexity within the relationships between true and fasle, right and wrong, law constructs dichotomous opposites that deny the complexity.': Eisenstein (1988), p. 48.

> accepting its own terms of reference and hence losing the battle before it has begun.[87]

Smart's analysis is perceptive, and valid if we remember the way in which legal narrative in the Sears case refused to accept the non-unified narrative represented by Kessler-Harris in her evidence. It does not, however, acknowledge the shifts within the existing 'sides' of the feminist legal theory debate, and the ways in which the definitional margins between 'radical' and 'liberal' feminism have become increasingly blurred. In other words, liberal feminism has begun to break outside of its organising framework (liberalism), and to rethink the way the social structures that could give equal status to women are themselves developmentally contingent on women's subordination. Similarly, radical feminism has increasingly come to terms with the existence of divisions between women themselves.

Given this emphasis on the ways in which different oppressive systems intersect, and a recognition of the crucial variations caused by cultural and political contexts, the theoretical map of feminist legal theory (or jurisprudence) is beginning to change.[88] This change, or coming to terms with the implications of 'the difference dilemma' before the law, can be described as feminist jurisprudence's 'third phase', and is exemplified in the work of Drucilla Cornell. Cornell argues that there is no prototypical woman, 'there are only women, of many different cultures, nationalities, races and sexual identity.'[89] Nonetheless, she accepts the usefulness of adopting a mythic feminine as a strategy to create alliances amongst women for explicitly ethical or political purposes - to 'erect a critical standpoint to judge "their" world [that is, that of men, and of the law] as false precisely because it pretends to be whole.'[90] Cornell's work is not devoid of political perspective. She is crucially aware that our views of the world are already inscribed by our language, culture, race, sex, and age. Her 'ethical feminism', rather, identifies identitites as being fixed by difference. In this way, Cornell, in seeking to build upon the work of first and second wave jurisprudence simultaneously critiques it.

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87 Carol Smart (1989), *Feminism and the Power of Law*, Routledge, London and New York, p. 5.

88 Davies (1994), p. 175.

89 Cornell (1991), p. 13.

**Postmodernism and Subjectivity**

In many senses, this shift in feminist jurisprudence reflects what Lyotard calls 'the post modern condition': a movement away from large theoretical explanations to more localised discourse.[91] Lyotard, like Michel Foucault, argues that knowledge and power are not separate, and he distinguishes two forms or models of knowledge. One is scientific: an evaluation of evidence inculcated into discourse which 'is authorised to prescribe the stated conditions (in general, conditions of internal consistency and experimental verification) determining whether a statement is to be included in that discourse...'[92] The other mode of knowledge is narrative in which 'the trier of fact, after listening to all the evidence presented attempts to formulate a sort of narrative which best fits the evidence.'[93] The usefulness of narrative as discourse, and as a distinct form of knowledge which bears the potential for a pluralist view of women's experience before the law, is a central contention of this thesis, and one that will be demonstrated in Section Four. However, it is important to note here the significance of the (scientific) knowledge/power relationship to the critique of dominant liberal forms of legitimation.

If law, as discussed in Chapter One, is a discipline that relies upon its own construction of rationality, it necessitates a development of 'scientific' and verifiable procedures and strategies to legitimate its coercive and authoritative function. These procedures and structures form universal standards for evaluating forms of knowledge which stand *outside* of law's own. This recourse to a higher 'scientific' standard is what Lyotard calls a 'metanarrative': a higher set of principles which are not themselves scientific. As Margaret Davies notes:

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90 ibid., p. 3.

91 Jean-Francois Lyotard (1984), *The Postmodern Condition*, (trans. Bennington and Massumi), University of Minnesota Press, Minneapolis. See also the definition of postmodern feminism as experience, and relationships constituted by discourse in Frug (1992), p. xix. My contention is that this idnetification of 'discourse' is not genealogically approached.

92 Lyotard (1984), p. 8.

93 Davies (1994), p. 224.

> Such a metanarrative is a necessary support for the desire for internal consistency and completeness. According to Lyotard, it is consensus among the community of scientists, not any absolute scientific principle, that forms the basis of scientific legitimacy.[94]

In terms of Western law, viewed as a modernist discourse, this means that law's truth is based on an internal and circular logic of self-sustaining claims to power, as opposed to any essential 'objective' or 'right' way of viewing the world and its subjects. Lyotard argues that there has been an increasing loss of faith in the credibility of metanarratives - including the law - and as such, an increased recognition of a heterogeneity of discourses, which opens the possibility for a 'postmodern' re-evaluation of a range of different knowledges, perspectives and voices to be seen as valid, and authentic. [95]

Feminist theories, in every context, have always been 'postmodern' in this sense, in that they identified male dominance (or patriarchy) as a meta-narrative - a grand, idealist discourse which referred to its own truth, and perpetuated its own authority. What is beginning to change, however, is the focus by diverse feminist theories on the means by which the epistemological foundation through which knowledge is produced and contested is constituted as 'male.' In these terms, there is a shift from challenging a world view to challenging the means by which the view has retained its legitimacy, and a correlative refusal to replicate the tools of that legitimation wherever they reduce female voices.

The focus on the breakdown of law as a meta-narrative - as a 'symptom' of the postmodern condition - has not been the exclusive project of feminist thinkers and writers. Indeed, the Critical Legal Studies (CLS) scholars perceived their project as exposing the premises of law's objectivity, in its liberal foundations. However, as discussed in Chapter Seven, the CLS movement failed to take into account *how* those same premises constructed the positioning of subjects before the law,

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94 ibid., p. 220.

95 See generally Antony Carty (1990), 'Introduction: Postmodern Law', in Carty (ed.), *Postmodern Law: Enlightenment, Revolution and the Death of Man*, Edinburgh University press, Edinburgh, pp. 1- 39.

especially subjects which did not easily fit the template of rational, universal man.[96] What postmodernism does in terms of legal thinking, and what the CLS movement did not attempt, is to introduce ontology into law. This is not, as Antony Carty suggests, to offer a solution to law's foundation, but to assert that law has no essential foundation, no *a priori* static process of scientific determination of the inherent value of subjects and their experience.[97]

Although the feminist and the postmodern legal project may intersect, they are not inherently equivalent. Despite shared values and techniques regarding the disruption of discursive closure by consensus of a scientific community, postmodernism and feminism entail a plethora of approaches, and a 'sibling rivalry' regarding the examination of difference.[98] As Linda Singer argues: 'feminist and postmodernist discourses disrupt the project of closure of consensus, by insisting on exposing how differences inscribe themselves, even when they are explicitly refused or denied.'[99] However, these discourses 'cannot be expected to develop in some sort of lock-up symmetry with one another, since each emerges from ... origins and historical positions that [are] specific and non-transferable.'[100] Nevertheless, the broader postmodern legal project, with its emphasis on exposing the construction of subjectivities, can further assist feminist (legal) thinking about women's experience.

As a proponent of a postmodern school of jurisprudence, James Boyle maps out the theoretical parameters thus:

> [P]ostmodernism suggests that there is no 'beyond'. There is no place outside of the forms...that could break free from the restraints in which it is ...embedded. Instead, postmodernism

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96 Pierre Schlag identifies part of this problem as being based on the inability of CLS scholars to acknowledge their own subjective speaking and viewing positions of the law, even during the process of their critique of its liberal foundations: Pierre Schlag (1991), 'Symposium Foreword: Postmodernism and Law', 62 *University of Colorado Law Review* 439, pp. 445-446.

97 Carty (1990), p. 6.

98 See generally on this point Linda Singer (1992), 'Feminism and Postmodernism', in Judith Butler and Joan Scott (eds.), *Feminists theorize the Political,* Routledge, New York and London, pp. 464-475.

99 Singer (1992), p. 470.

100 ibid., p. 471.

> suggests that the best one could hope for is ironic juxtaposition...One of [its] defining features is the juxtaposition of styles which, although individually they might have coherence, seem collectively to put each other into question.[101]

What Boyle (and others like Mary Joe Frug, Jerry Leonard and Marie Ashe)[102] identify as the central concern for a post modern jurisprudence, therefore, is the need for subjectivity to be challenged as a concept of law in the same ways that CLS challenged objectivity.

Boyle categorises the archive of thought on the concept of law into the positions of 'structuralism' and 'subjectivity' as opposed to the usual jurisprudential definers of positivism and naturalism. He describes those theories that have traditionally been seen as 'positivist'[103] in the following way:

> The structuralist theories...have left us with a number of conceptual tools...Their characteristic imprimatur is to claim that there is some deep...logic to the activities going on around us...They pull apart the rules and arguments with...analytic power, but at the same time they cut through to an underlying political vision, a set of deep metaphors that are woven into law and social life. In fact, they seem to offer the totalizing method of formalism...without its disciplinary compartmentalization.[104]

Boyle goes on to explain what he means by this through his analysis of legal subjectivity. By subjectivity, he does not refer to the concept as pure personal opinion, untethered in a vacuum. Rather, Boyle is interested in what subjectivity means within the structured theories of the existing concepts of law and within wider theory, within the context.

Boyle suggests that the structuralist concept of the subject is as a 'presuppositionless, ageless, classless, raceless, sexless knower.'[105] This, therefore,

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101 James Boyle (1991), 'Is Subjectivity Possible? The Postmodern Subject in Legal Theory', *University of Colorado Law Review*, vol. 62, pp. 489-524, p. 503

102 Frug (1992); Leonard (1995); Ashe (1995).

103 See generally Soper (1988).

104 Boyle (1991), p. 493.

105 ibid., p 496. For a critique of Boyle's understanding of Rawls see Dale Jamieson (1991) 'The Poverty of Postmodern Theory', 62 *University of Colorado Law Review*, pp. 577-595. Jamieson argues: 'Rawls tries to show that there are deep connections that run from our conceptions of fairness and impartiality, through various mediating terms, to substantive principles of justice. What ultimately justifies these principles is

is relied upon in much the same way as objective truth was relied upon: as part of 'the deep set of metaphors' around which theories, like those of John Rawls,[106] are constructed. This leaves the legal, positivist and classical notion of the subject as itself a construction, in the manner described by Merleau-Ponty: 'Subjectivity was not waiting for philosophers...They constructed it, and in more than one way. And what they have done must perhaps be undone.'[107]

Boyle then proceeds to show how this may be achieved. He takes as his starting point Foucault's observation that the interweaving of discourses in this century (be they psychoanalytic, linguistic or any other form) has managed to extricate the idea of the subject from the systems of rules (Boyle's 'deep sets of metaphors') that have existed for centuries. For Foucault, law is part of a sovereign regime of power, yet is also simultaneously challenged and undermined by the incursion of other discourses (medicine, psychology, social sciences.) It is these discourses that inscribe new meanings, linguistic and cultural, on the tenets of law's own scientific method. For example, in *Discipline and Punish* Foucault examines the shift in the regulation of lawbreakers from 'criminals' under a Benthamite regime to 'offenders' who need to be either treated or rehabilitated.[108] In this way, embodied subjects before the law begin to be both regulated and legitimated in a new matrix of control: the mechanism of discipline. Foucault still maintains that 'truth' comes with a social power via its dissemination of knowledge. However, he rejects the tendency to treat power as repressive and juridical, preferring to identify mechanisms of discipline as creating resistances and struggles which constantly reinterpret knowledge and resistance.[109] Charles Taylor points out that:

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our history, traditions, and self-understanding', p. 589. I would still ask, in reponse to Jamieson's inquiry, 'whose history?'

106 See n. 53.

107 Merleau-Ponty (1963), 'Everywhere and Nowhere', 153 *Signs* , quoted by Boyle (1991), p. 497.

108 Michel Foucault (1991), *Discipline and Punish: The Birth of the Prison*, (trans. Alan Sheridan) (first published 1977) Penguin Books, Harmondsworth. See discussion of this text, and Bentham's theory of punishment, in Chapter One.

109 See generally Alan Hunt and Gary Wickham (1994), *Foucault and Law: Towards a Sociology of Governance*, Pluto Press, London.

> Foucault's thesis is that, while we have not ceased talking and thinking in terms of this model (that is, power as a system of commands and obedience), we actually live in relations of power which are quite different, and which cannot be properly described in its terms. What is wielded through the modern technology of control is something quite different, in that it is not concerned with law but with normalization.[110]

If the premises of Foucault's articulation of the location of the subject within the power/knowledge/truth relationship are accepted (as from the passive jurisprudential viewpoint it should be), it follows that, as Boyle contends, structures of thought in all disciplines (including concepts of law) come to be seen as more than 'coding and decoding mechanisms' through which a subject views or represents an object.[111] From this premise (that knowledge is socially conceivable) the subject located within the discourse must be thought of as an actual person who is 'part of a speech-community, a particular society, an historical period, a professional discourse [etc]'[112] Concurrently, by acknowledging the existence of structural thought as dominant within the jurisprudential field, it stands that an object (i.e.: like 'law') can never be located anywhere except within the pre-existing interpretative construct that gives it its purpose.

This paradox, in Boyle's terms, produces an unsatisfactory result. Since the structuralist approach acknowledges subjects and objects in these terms in only a tacit sense (as metaphors), they disappear into the structure itself, and it becomes just as hard to show that it is as impossible for law to be 'subjective' as it is to show that it is *not* objective.[113] Therefore, in structuralist terms, this collapse of object and subject into each other means that the essentialised subject somehow disintegrates.

Boyle does not suggest that there is a 'right' way to solve the dilemma. All he does suggest is a restatement of the postmodern approach already discussed. That is, we can stop viewing jurisprudence (and correlatively, law) as just dealing with the

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110 Charles Taylor (1986), 'Foucault on Freedom and Truth', in David Couzens Hoy (ed.), *Foucault: A Critical Reader*, Blackwell, Oxford, pp. 69-102, p. 75.

111 Boyle (1994), p. 496.

112 ibid.

113 ibid., p. 497.

undeclared notions of subject and object upon which it relies. Once this has been achieved, Boyle suggests, we can choose a different metaphorical representation.[114]

It is these ideas (as illustrated through James Boyle's work) that have intersected with the divergent concepts of feminist jurisprudence. For feminisms (radical or liberal), to view the legal subject on which previous discourse and legitimation have been based as a collapsable concept is a very useful idea. If the post modern legal approach is used by feminists, political and theoretical[115] potential emerges from the dead-end of masculinist legal theory and the deadlock between feminist positions themselves. Marie Ashe, as a proponent of the co-mingling of these two perspectives, views the potential they offer to each other in these terms:

> An intermingling ...would pre suppose feminism's surrender of any claim to 'totality' of vision or of the narrative...it would deliver feminist jurisprudence from its present confinement in the structures of liberal ideology, in the structures of 'sameness' and 'otherness' defined other than by women-selves as speaking subjects.[116]

In terms of practical operation, the postmodern/feminist alliance offers a potential for the definitional boundaries of who, or what, constitutes the female subject to be shifted. If this is possible (as Boyle suggests) and a representative fixed legal subject can be challenged, it is also possible to challenge an 'either/or' notion of a normative female, and feminist position.

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114 It is necessary to acknowledge that there is resistance and critique of such an approach within the jurisprudential community as lacking normative implications, as appropriation, as lacking 'solutions'. As Dale Jamieson notes: 'In the end, the problem with postmodernism is that it reflects and expresses some of the most profound issues of our time without providing the resources for approaching them in a coherent way. As a heterogeneous collection of bumper stickers, postmodernism is not bad, though hardly original. As a way of reading texts, it can be liberating. As a philosophy, forget it.': Jamieson (1991), pp. 594-595. I would respond that it is precisely the critique of structured norms and scientific expectation of 'a' solution that is part of postmodernism's philosophy. As such, a postmodern legal perspective reminds legal science that there is a multivalency to their practice, which in Foucault's terms, offers potential for resistance for groups who do not fit the ascribed norm. See also: Wicke (1991); Mary Joe Frug (1991) 'Law and Postmodernism: The Politics of a Marriage, A Symposium Response to Professor Jennifer Wicke', 62 *University of Colorado Law Review* 483.

115 Cornell (1991), through the concept of a 'mythic feminine' achieves this end in terms of an ethical-legal project.

116 Ashe (1995), p. 117.

## Jurisprudence, Genealogy, Experience

In terms of the broader questions this thesis is attempting to address, the postmodern/ feminist approach indicates that the objective, coherent narrative (based on an objective, coherent understanding of subjects and their experience) that Robert Cover insists is necessary for groups (like women) to challenge the law is, in fact, itself subverted. Within feminist theory, it has been argued that the 'difference dilemma' can be resolved neither from rejecting nor embracing difference as it is normatively constituted.[117] Postmodernism allows a notion of the subject to emerge which is freed from these (and other) binary meta-narratives. It also recognises subjects as diverse beings, imprinted by their experience of the mechanisms of discipline in heterogeneous ways. In this way, it is theoretically possible to assert that the rejection in the Sears case of Kessler-Harris' concept of women's differentiated subjectivity, developed through narrative as historical discourse, need not have been the 'inevitable' outcome.

For many feminist theorists, part of the project of countering the entrenched value-laden identity of women before the law entails accepting the *residue*, but not the foundations, of the liberal-legal meta-narrative that confronts us. Echoing Foucault's ideas about truth/knowledge/power, Carol Smart explains that '[p]art of the power that law can exercise resides in the authority we accord to it. By stressing how powerless feminism is in the face of law and legal method, we simply add to its power.'[118]

In many senses, this perspective, combined with a commitment to unravelling the impossibility of either/or choices offered by challenges to women's subjectivity, has involved an emphasis on the inclusion of women's experience into substantive legal practice. Tove Stang Dahl argues that 'Women's Law' can challenge the direction of law by encouraging the 'use of legal sources from "below".'[119] Carol Smart has explained Stang Dahl's perspective as meaning 'that greater reliance

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117 Scott (1994), p. 297.

118 Smart (1989), p. 25.

119 ibid. Stang Dahl's use of the term 'Women's Law' refers to the disciplinary focus she pioneered as a legal academic in the Law School of the University of Oslo. See Stang Dahl, (1987).

should be placed on custom and public opinion of what law ought to be. This...allows empirical evidence about women's lives greater influence on the law. So law would become more responsive to the 'real' rather than its own internal imperatives.'[120] Part of Stang Dahl's approach entails a greater confluence between law and the social sciences (an echo of Foucault's disciplinary mechanisms extended to feminist legal discursive challenges), and an envisaged greater role for the Women's Movement in influencing the law (this is again, an echo of Foucault's insistence on resistance through the marginalization of certain discourses.)

I would contend that the Women's Movement has *already* influenced the trajectory of the law as it relates to women, especially in the context of domestic violence legislation in general, and criminal reforms around battered women who kill in particular. As discussed in Chapters Five and Six, it was a diverse and heterogeneous Sydney Women's Movement which exercised considerable discursive and resistant social power around these issues as embodied by Violet Roberts in the 1980s. The campaign to release Violet Roberts, in a genealogical sense, identified that the *experience* of the battered woman who kills was an important basis on which to make claims for a gendered, differentiated legal subjectivity for women.[121] The problem is, however, that feminist legal theory, although committed to contesting the subjectivities bequeathed by liberalism, do not locate their own challenges within the material and discursive historical foundations of feminism itself.

Even those feminist legal writers committed to an engagement with postmodernism, and a commitment to claiming an authentic subjective voice for women within and before the law, retain a reading of narrative which is circumscribed by legal techniques. Despite identifying the power that experience – constituted through narrative – has for challenging legal categorisations of women, those narratives themselves are not conceived of discursively. They remain forms of story-telling, as opposed to critical methodologies by which the categorisation of women as either equal to or different from the (male) liberal legal subject can be

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120 Smart (1989), p 24. See also Smart (1990).

121 See Chapters Five and Six.

exposed. They remain techniques of asking *why* liberal law views women in this way, as opposed to *how* the 'difference dilemma' is grounded, as well as how it has been contested by feminism in the past. Without genealogy, feminisms' own struggles which stand outside of the legal paradigm are rendered silent.

The recognition of women's experience before the law is therefore crucial. As discussed in Chapter Seven, this recognition, and challenge, has been pursued at length by feminist legal narrative scholars. In some senses, the narrative-in-law position involves the conflation of law with theories of narrative borrowed from literary criticism, and takes up the challenge of pursuing Lyotard's other, narrative mode of knowledge.[122] However, both the feminist jurisprudential perspective on experience, and the feminist legal narrative practice of storytelling do not allow for a theoretical space in which the influences of other discourses (like feminist history) and other broader understandings of women's experience as part of a diverse *movement* may be taken into account. They do not conceive of narrative as historical narrative.

Experience as subjectivity offers a way out of the difference dilemma. But the discursive construction of experience needs to be extended in the spirit of Boyle's 'ironic juxtaposition' of postmodernist influences and confluences. Teresa de Lauretis argues that:

> Experience...is the process by which, for all social beings, subjectivity is constructed. Through that process one places oneself or is placed in social reality and so perceives and comprehends as subjective (referring to, or originating in oneself) those relations - material, economic and interpersonal - which are in fact social, and, in a larger perspective, historical.[123]

The suggestion that women's experience could, or should, be extrapolated from the singular to the plural comes dangerously close to MacKinnon's method for defining women's legal subjectivity through the collective naming of injuries and consciousness-raising practices. However, I contend that MacKinnon's perspective

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122 Geoffrey Bennington (1988), *Lyotard: Writing The Event*, Columbia University Press, New York, p. 108.

123 Teresa de Lauretis (1984), *Alice Doesn't*, Indiana University Press, Bloomington, p. 159.

both signifies an essential 'woman' and refuses to take into account the history, the social modes of resistance, that women outside the law and the legal academy have pursued and experienced in order to challenge the law.

What history - a feminist history *and* a history of feminism - therefore adds to the postmodern legal perspective is the insight that the campaigns of women, although committed collectively to shifting public positioning and silencing of women in specific localized campaigns, have never held a unified perspective on how this should be achieved.

A postmodern legal feminism creates the epistemological base needed to confront the operation of the 'difference dilemma' within the law, and offers discursive spaces in which to challenge the entrenched masculinist perceptions of women's subjectivity. However, this needs to be added to a general understanding of the location of women's experience within these debates.

Through the examination of the Sears case early in this chapter, it is evident that Lyotard's *le differend* does exist: that law and other discourses or means of representation stand excluded from one another. By 'marrying' the perspectives offered by postmodern legal feminism to a feminist historical understanding of the experience of women before the law, a more nuanced narrative form - both legal and jurisprudential - begins to emerge which escapes the either/or choices of the difference dilemma, and the epistemological resistance of the law to accept 'outsider voices', be they feminist, or those of other challenging disciplines.

This conflated narrative form, this postmodern feminist legal history, will be discussed in the following chapter in relation to the criminal law's response to the battered woman who kills. By rethinking what women's experience and subjectivity mean genealogically, a substantive legal response which offers the potential to escape from the confines of legal liberalism's dualistic classification becomes possible. We need to *expose* the matrix of circumstances which construct women's identity beyond the stasis of the law when dealing *with* the law. As Joan Scott argues:

> Making visible the experience of a different group exposes the existence of repressive mechanisms, but not their inner workings or logics; we know that difference exists, but we don't understand

it relationally. For that we need to attend to the historical processes that, through discourse, position subjects and produce their experiences. It is not individuals who have experience, but subjects who are constituted *through* experience.[124]

124 Joan W. Scott (1992), 'Experience', in Butler and Scott (eds.), pp. 22-40, p. 26.

*Section Four*

# A Feminist Legal History

*Chapter Nine*

# THE BATTERED WOMAN SYNDROME PARADOX

> The legal view of the 'battered woman' tells us which sex law has in mind when it has mind to its subject, and it is clearly not the female sex. Women behaving as women in significant numbers, but not as the law thinks fit, do not prompt a critical self-scrutiny of law, an amendment of law's view of its subject, to make way for a common female response to a common legal problem. They do not generate a crisis in the conventional view of law's central character. The traditional legal subject remains intact and unquestioned; the self-possessed legal subject retains his self-possession, his rationality.[1]

The Battered Woman Syndrome [BWS] is expressly constructed as an evidentiary tool which validates hidden stories, and personal experiences. When Erika Kontinnen was charged with the murder of her abusive de facto spouse, Edward Hill, in 1991, and faced trial in March 1992 in the Supreme Court of South Australia, a feminist generated discourse around domestic violence, and around the battered woman who kills, had been entrenched, to greater and lesser degrees, in the public consciousness and the public sphere for almost twenty years.[2] The general acceptance of domestic violence as a social problem and a social phenomenon, wrought through feminist challenges to the law and the state (as discussed in Section Two) combined with the extremity of the personal experience of Erika Kontinnen, enabled her defence counsel to adduce the BWS successfully for the first time in Australian common law to support a defence for murder. Erika Kontinnen, unlike Violet Roberts, was acquitted on the basis of a defence that

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1 Ngaire Naffine (1996), 'Sexing the Subject (of Law)', in Margaret Thornton (ed.), *Public and Private: Feminist Legal Debates,* Oxford University Press, Melbourne, pp. 18-39, p. 35.

2 See Chapters Four, Five and Six.

acknowledged the life she had lived with fear and violence. In this sense, then, the exercise of telling Erika's story at trial, in comparison to that of Violet Roberts, *revolved* around the preconditions of violence in the relationship between the accused and the deceased. *R v Kontinnen*, in many respects, allowed the same kind of narrative to be told in the courtroom that, in Violet and Bruce Roberts' cases, were only told outside the court.

What this story of Erika Kontinnen does *not* tell, despite the evidentiary value given to her history of violence at Edward Hill's hands, is how, and where, she could speak. The legal rules surrounding the use of BWS at trial do not give any indication of how Erika Kontinnen would have fared as a battered woman who kills if she did not fit the standard of a legally defined battered woman, if her experience of domestic violence was extreme enough to be entered into the narrative transaction of her trial via expert psychological evidence. Erika Kontinnen's story, therefore, although an important signpost of how the Australian common law has been challenged by a feminist-generated discourse on domestic violence, leaves unanswered the question of whether BWS is consistent with that same discourse, or how it is invested in the equivocal relationship between feminism and liberal legalism.

What this chapter attempts to do is examine the narrativisation of Erika Kontinnen's legal treatment as a battered woman through the BWS, by reference to the transcript of her trial It also examines the feminist legal criticisms of the BWS as a manifestation of 'the difference dilemma', as a device that perpetuates a categorisation of women as different to the universalised subject of the 'Reasonable Man' in order to make a claim for equal justice. The analysis of the literature on BWS, despite identifying the paradox presented by feminist claims for women's differentiated subjectivity, and despite these claims being based on a feminist understanding of the experience of domestic violence, do not historicise that experience as a category of investigation in itself. The following chapter, Chapter Ten, takes up the argument developed in Section Three of this thesis that a genealogical approach to the paradox presented when feminism attempts to secure a particular subjectivity for battered women who kills benefits and extends the existing theoretical terrain. That methodological approach, based on an

understanding of historical narrative as a discursive intervention into legal theory, also acknowledges the importance of narrative as a form of story-telling, a device to give voice to women's experiences not often heard by the law. It is from this perspective, by presenting the narrative of Erika Kontinnen's case informed by a discourse on domestic violence, that this chapter begins, and from where the current debate can be examined.

## The Story of Erika Kontinnen/*R v Kontinnen*

In 1988, Erika Kontinnen was befriended by Edward Hill. She had been dating his cousin Ronald for nine years, when he suddenly left her for another woman.[3] While Erika was devastated by the breakdown in her relationship with Ronald, Hill supported her. She began to look up to him and to trust him.

Erika knew, however, that Hill was a violent man. He had been living in a de facto relationship with Olga Runjanjic since 1981, and she had seen Olga being beaten, and knew how Hill treated women.[4] But as he gave her attention when she needed it most, she considered him a friend, and therefore considered herself to be safe from his erratic outbursts.

Edward and Olga owned a property in the country, and one weekend Hill invited Erika there to stay, without Olga. During the course of the weekend he approached her sexually, and when she refused his advances, he raped her. He told her that there was no point in screaming, because no one would hear her, and no point in struggling, because he could kill her.[5] Erika remembered how Olga was treated in public, and succumbed because she was scared.

In the months that followed the rape, Hill forcibly encouraged Erika to move in with Olga, himself, and their son Archie, so that her rent money could be used to pay off their mortgage. As soon as she moved into the house, he used her fear to make her sleep with him. Hill also demanded that Erika leave her job and begin working as a prostitute. Erika refused. When she went to work the day after this

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3 *R v Kontinnen*, unreported, Supreme Court of South Australia, 30 March 1992, p. 332.

4 ibid., p. 322.

5 ibid., p. 323.

'discussion', Hill beat Olga so badly that her arm was broken. Olga rang Erika at work, Erika came home immediately to take Olga to hospital, and never returned to work.[6] From this point in time, both Erika and Olga worked as prostitutes to meet the family's economic demands.[7]

When Erika moved in, Olga said nothing. She was well aware that any comment on her behalf would result in injury to herself. But the two women soon became good friends,[8] which helped them in their attempts to protect each other.[9]

The life that these two women shared with 'Hilly',[10] a man they both claimed to love,[11] was driven by fear and powerlessness. Both women were at Hill's sexual beckoning. They could not eat unless he ate, and could not sleep unless he slept.[12] He made them wear a pager at all times so that they were never out of his control.[13] They lost their financial independence.[14] They relied increasingly on each other for support and sanity.

When Hill was angry, he screamed himself into a frenzy. By January 1991 this happened more than once a day, and invariably led to some form of physical violence.[15] He beat them with his fists, and jumped on them with his steel capped boots. He kept two loaded shotguns and .22 rifle around the house, and often had them pointed at the women's heads.[16] He maintained an armory of weapons which he used to beat the women - axe handles, steel bars, water pipes, and baseball

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6 ibid., p. 72.
7 ibid., p. 36.
8 ibid., p. 117.
9 ibid.
10 ibid., p. 40.
11 ibid., pp. 40, 375.
12 ibid., p. 447.
13 ibid., p. 102.
14 ibid., p. 311.
15 ibid., p. 107.
16 ibid., p. 38.

bats.[17] He dunked his son Archie in the bath, threw him against walls, and marked his body with a screwdriver when he cried.[18]

Every demand made by Hill had to be met by Olga and Erika, or else there was trouble.[19] And more often than not, 'trouble' resulted in severe injuries to both women. Between January and October 1988, for example, Olga was admitted to hospital with a broken hand when Hill hit her with a broom.[20] In July, she was punched so severely that she required eye surgery. In October, her spleen was removed after Hill jumped on her stomach with his steel capped boots.[21] Erika was also admitted to hospital for similar injuries - the worst occurred when Hill belted into her with his boots and broke her jaw.[22]

Between 1988 and 1991, Hill's behaviour patterns intensified. The abuse and the violent frenzy was followed by periods of calm. When he was calm, Olga and Erika thought it couldn't happen again; and they hated him, especially when he lashed out without provocation. They were afraid of him.[23] They tried to get help, but were so broken and frightened that they gave up. They were often beaten in public, but no one told Hill to stop, or offered them support.[24] They often rang 000 during an attack and left the telephone off the hook, but the police never came. They could not go to the police, because Hill told them: 'Even if I end up in gaol, I would still get you somehow.'[25] Olga escaped to a womens' shelter once, and Erika went to Sydney. But he tracked them down and forced them to return.[26] Both knew the status quo and stayed to protect each other.

By March 1991 the beatings were daily and more savage. On Sunday March 27, Hill attacked Olga with a broom handle and told her to get out. In fear, Olga,

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17 ibid., p 100
18 ibid., p. 339.
19 ibid., p. 204.
20 ibid., p. 78.
21 ibid., p. 88.
22 ibid., p. 99.
23 ibid., p 328.
24 ibid., p. 210.
25 ibid., p. 342.
26 ibid., p. 119.

Erika, and Archie left the house on foot. They hid out in a nearby park most of the day. They could not leave, for they were too scared and had no money of their own, so in the late afternoon they returned home. Olga's face was bruised, she had a black eye, and was limping. But the visitors who were at their house made no comment, and offered no help.[27]

Later that night, Erika visited a client. When she returned, Olga and Hill were in the bedroom and Archie was asleep in his room next door.[28] Erika walked in and picked up a magazine. Hill ordered her to put it down, and as punishment forced her to stand in the corner with her back to the room. She listened as Olga and Hill had sex. When Archie started crying, Hill told Olga to 'shut your bastard of a kid up.'[29] She went to the child's room and fell asleep with him.

When Olga had gone, Hill grabbed Erika by the hair, threw her on the bed and beat her up. She managed to get up and stood in the bedroom doorway. Hill said to her calmly, 'I'm tired, I'm going to sleep and all yous three will be dead when I wake up.'[30]

His tone of voice made her believe him.[31]

Erika then acted in a near state of automatism. She could not remember getting a gun. She could not remember hearing a shot.[32] All she could remember was standing in the doorway with the shotgun in her hand, the smell of gunpowder surrounding her, and the sight of Hill lying on the bed with blood pouring out of the back of his head.[33] She accepted that she had shot Hill, and ran to find Olga. She told her to grab Archie and some clothes. They got into Erika's car. Erika told Olga she had shot Hill. She said, 'I don't know whether he's dead or alive.'[34] She started to cry.

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27 ibid., p. 129.
28 ibid., p. 5.
29 ibid., p. 360.
30 ibid.
31 ibid., p. 361.
32 ibid., p. 363.
33 ibid., p. 361.
34 ibid., p 138

They drove to a petrol station and rang a friend that they could trust. Erika told her, 'I shot Hilly. Because I had to, because he was getting so.'[35]

At their friend's behest, they drove to the police station. As the police tried to determine who was responsible for Hill's death, Erika said, 'You are speaking to the right person.'[36]

**Introducing The Battered Woman Syndrome**

Erika was arraigned on 22 July 1991; and her trial for the murder of Edward Jan Hill began on 18 March 1992. At the time her trial commenced, Erika and Olga were already involved in a separate legal dispute. Before Hill's death, he had been jointly charged with Erika and Olga on false imprisonment and assault charges. Erika's lawyers, Kevin Borick and Angus Redford, had successfully obtained a suppression order from the court[37] preventing any disclosure to the press of this distinct charge.[38] Borick and Redford faced a legal dilemma when structuring Erika's defence to the murder charge. On a prima facie reading of the evidence, neither Erika, Olga, nor Archie had been threatened verbally or physically immediately prior to the killing. Hill, like most victims of spousal homicide committed by battered women, was asleep when he was killed.[39] Realising the judicial reluctance to interpret the immediacy component of provocation liberally in the South Australian jurisdiction, Borick's preferred line of defence was self-defence.[40]

As discussed in Chapter One, a successful plea of self-defence represents legal acknowledgement that the accused acted in a manner that was justifiable, and

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35 ibid., p. 140.

36 ibid., p. 5.

37 Borick and Redford relied on s 69 *Evidence Act* 1929 (SA). At the time of Hill's death, Erika was on bail for the assault charge, and counsel felt that the s 69 order was necessary to prevent Erika being portrayed negatively by the media. This case is reported: *Runjanjic and Kontinnen* (1991) 53 A Crim. R. 362.

38 *R v Kontinnen*, p. 1.

39 This point is discussed in Chapters One, Five and Six, in relation to its ability for the law to cast the action s of battered women who kill as premeditated.

40 *R v Konntinen*, p. 546.

results in a complete acquittal.[41] Despite the anomalous verdict of not guilty in the *Queen v R*[42], and despite the liberalisation of provocation encoded in New South Wales in the aftermath of the Roberts' case, as discussed in Chapter Six, provocation had the potential only to reduce murder to manslaughter. Borick, considering the abuse Erika and Olga had endured at Hill's hands, believed that an acquittal was justified. As he said in his address to the jury: '[Hill] was a man immensely capable of killing and it was only a matter of time before he proved the point.'[43]

A strict reading of self-defence in Erika's case, however, posed significant problems. As discussed in Chapter One, the elements of self-defence are grounded in male experience, and presume a conflict between equals. The requirements of imminent attack and proportional response are particularly difficult for female defendants to meet. Being less accustomed to engaging in physical aggression, and usually less physically able to defend themselves, women who kill their abusive partners typically kill when their partner is asleep or otherwise incapacitated or distracted. These characteristics of homicide committed by women are readily explicable in terms of the unequal nature of physical aggression between most men and most women. Yet these same characteristics mean that a woman's actions are unlikely to be judged as self-defence and justifiable. It was therefore easy for the Crown to establish that, in a scenario like that presented by Erika's case, the

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41 Ian Leader-Elliot discusses at length the jurisprudential distinction between excusatory and justifying defences. He argues that North American legal theorists tend to characterise self-defence as a plea which justifies rather than excuses homicide, with particular reference to the work of George Fletcher in *Rethinking Criminal Law*. The American debate centres around issues of morality. Killing in self-defence is said to be *justified* if it was the lesser evil in the circumstances. Conduct which is merely *excused* is viewed as regrettable and the wrong thing to do in the circumstances. Leader-Elliot contends that the potential significance of the distinction is obliterated in Australian jurisdictions by reliance on standards of reasonable proportionality, reasonable necessity and the likely or possible reactions of the ordinary or reasonable person. As such, these 'flexible criteria' displace sharp distinctions between categories of justification or excuse. See Ian Leader-Elliot (1993), 'Battered But Not Beaten: Women Who Kill In Self-Defence', 15 *Sydney Law Review* 403 pp. 430-431.

42 *The Queen v R* (1981) 28 SASR 321. See discussion in Chapter Six.

43 *R v Kontinnen*, p. 546.

conduct of the accused (killing in self-defence) was not reasonably necessary.[44] Aware of this problem Borick knew it would be difficult to convince the judge to direct on the applicability of self-defence. He was basing his whole defence on the words Hill said to Erika before he went to sleep on the night he died: 'I am going to sleep now, and yous three will all be dead when I wake up.'[45] Borick construed this statement, and the soft tone Hill reserved only for the direst situations,[46] as the imminent threat that caused Erika to shoot him. He believed that once the extreme violence of this man had been presented in court through Olga and Erika's testimonies, the court would believe that his statement was not an idle comment. The problem remained, however, of demonstrating that Erika's actions were both necessary and reasonable. Borick knew that the Crown could use the history of abuse and degradation against Erika by arguing that Hill's threat was not unusual, and that Erika had every possible opportunity to remove herself from the situation rather than kill her partner. It was for this reason that Borick invoked the Battered Woman Syndrome (BWS).

The introduction of expert witnesses to testify to BWS had already been attempted as a basis for the defence in Erika's assault charge. The trial judge had ruled the evidence inadmissible. However, in June 1991, the South Australian Supreme Court of Criminal Appeal reversed that decision. Chief Justice King concluded that the BWS 'appear[ed] to be a recognised facet of clinical psychology in the US and Canada' and ordered a retrial.[47] Although this retrial was pending when Erika's murder trial began, Borick seized the opportunity created by Chief Justice King's comments. He decided to argue self-defence and to invoke BWS to help establish a new standard against which a female defendant's behaviour might be measured.[48]

BWS describes a cluster of symptoms, which constitute a psychological state engendered by the abuse a woman has suffered. Her behaviour is compared not

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44 ibid., per Legoe J in summing up, p. 118.

45 ibid., p. 360.

46 ibid., p. 361.

47 *R v Runjanjic v Kontinnen,* p. 366.

with the standard of male reasonableness, but rather with a different standard appropriate for battered women. The symptoms which she is alleged to suffer are given legitimacy by carrying the scientific label 'syndrome.' The court is spared the problem of relying upon the woman's own account of events by calling upon the testimony of experts, usually psychologists or psychiatrists.

BWS, as such, is not the defence. It acts as an adjunct to support established criminal law defences, such as self-defence, although it has ceased to be confined to this alone.[49] It is part of the history of what the defence put into the whole case, to show that the cumulated treatment of the battered woman by her abuser has resulted in a certain state of mind that would enable her to act in a certain way to perceived threats.[50]

BWS is closely associated with American psychologist Dr Lenore Walker's text, *The Battered Woman* (1979), which has been drawn on by the legal profession to help provide a definition and standard of battered women and their behaviour.[51] Walker defines a battered woman as:

> A woman who is repeatedly subjected to any forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights. Battered women include wives or women in any form of intimate relationships with men.[52]

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48 Julie Stubbs (1991), 'BWS: An Advance For Women or Further Evidence of the legal System's Inability to Compehend Women's Experience?', 3 *Current Issues in Criminal Justice*, 267, p. 269.

49 BWS has also been used in support of a defence of duress relating to false imprisonment (as in the previously mentioned *Runjanjic and Kontinnen*, (1991) 53 A. Crim. R. 362 (appeal)), social security fraud (*Winnett v Stephenson,* unreported, Magistrates Court of ACT, 19 May 1993); and breaking, entering and stealing (*R v Webb*, unreported, Court of Criminal Appeal of South Australia, 19 June 1992). See generally P Easteal, K Hughes and J Easter (1993), 'Battered Woman Syndrome and Duress', 18 *Alternative Law Journal* 139. Most significantly, BWS has been used recently as the evidentiary basis for a gay male who killed his violent partner (*The Queen v Robert Vaughn McEwan*, unreported, Supreme Court of Western Australia, April 1995.) The complications of the standard of the 'reasonable man' not to mention the reasonable battered woman, illuminated by this case will be discussed later in this chapter.

50 *R v Konttinen*, per Legoe J in summing up, p. 136.

51 Lenore E Walker (1979), *The Battered Woman*, Harper and Rowe, New York.

52 ibid., p. xv.

Furthermore, in order to be classified as a battered woman, the couple must go through the battering cycle at least twice. Any woman may find herself in a relationship with a man in which he is violent once. If it occurs a second time, and she remains in the situation, she is defined as a 'battered woman.'[53]

The battering cycle, as proposed by Walker, has three phases: a build up of tension, acute violence, and a 'honeymoon' period of contrite behaviour. This third stage helps explain why women involved in violent relationships remain with the perpetrator. After the first cycle has ended, the reasons why the woman is with her partner are reaffirmed. He tells her he loves her, and promises that it will not happen again. She believes she can appease him, and that things will improve. When tension builds, the cycle repeats itself.[54] As the cycle continues, the woman starts to suppress her own anger, and becomes withdrawn and apathetic. If she attempts to escape, the man often goes after her and tries to win her back by promising to change. If she goes back, the abuse often continues. If she does not return immediately, he will often pursue her, and may become dangerous, either threatening to kill her, or himself.[55]

Associated with BWS is the psychological state called 'learned helplessness.' The term is borrowed from the animal experimentation of psychologist Martin Seligman, in which dogs subjected to inescapable electric shocks become passive and helpless. Seligman's work has been used as a model for what may happen to people put into situations where they feel that there is no escape. The victim is in a constant state of confusion and liable to finally snap under the pressure, and act to protect themselves.[56] Walker appropriates this model, and surmises that after experiencing ongoing violence at the hands of her partner, a woman may begin to believe that he is omnipotent, and that she is powerless and without recourse.

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53 ibid.

54 *R v Kontinnen* (1992) p. 465.

55 ibid., p 463. NB: Walker asserts that 50% of women who stay longer than one week in a shelter return to the batterer: see, Lenore E Walker (1977-78), 'Battered Women and Learned Helplessness', *Victimology: An International Journal*, vol. 2, nos. 3-4, pp. 525-534.

56 Martin E Seligman (1975), *Helplessness: On Depression, Development and Death*, WH Freeman, San Francisco.

Walker therefore suggests that there is a 'typical' battered woman, and a normative set of characteristics through which she can be identified. The battered woman loses her motivation and becomes helpless and fatalistic. Her self-esteem wears down. She becomes socially isolated, and believes there is no one to help her. She fears that if she escapes, her abuser will kill her. She has no energy to remove herself from the situation.[57]

The legal success of Kevin Borick's defence of Erika Kontinnen ultimately depended on the directions of Justice Legoe to the jury. In his summing up on 30 March 1992, Justice Legoe warned that BWS was not an illness, merely a state of mind;[58] and not a defence per se. He warned the jury that they were not bound to accept the expert evidence on BWS. However, he weighted his opinion heavily in favour of its consideration, and told the jury 'not to disregard [BWS] capriciously.'[59] He described Erika's mental condition on the morning she shot Hill as 'a cumulated attitude of mind, which had been built up in the way in which she had been treated by Hill...'[60] Because of Justice Legoe's failure to enforce a strict interpretation of an immediate threat, and his admission of BWS to invoke a standard of reasonableness for a woman like Erika Konttinen, the verdict was almost inevitable. In his final remarks, Justice Legoe stated:

> [The question]...is whether the accused believed upon reasonable grounds that it was necessary...in self-defence to do what she did. If she had that belief and there were reasonable grounds for it, then the accused is entitled to an acquittal in this case.[61]

The jury retired and, having unanimously decided that Erika Konttinen was so entitled, declared her not guilty.

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57 *R v Konttinen*, from expert testimony of Dr Renata Maruszczyk, p. 465.

58 ibid., per Legoe J in summing up, p. 10.

59 ibid., p. 109.

60 ibid., p. 136.

61 ibid., p. 119.

## Battered Woman Syndrome: A Strategic Success?

BWS, although accepted in many US jurisdictions for almost twenty years at the time of Erika's trial,[62] was introduced into Australian courts as evidence of a battered woman's reasonable belief of an imminent threat (in relation to self-defence) via the Canadian case of *Lavallee v R.*[63] The facts of this case, briefly, involved the accused shooting her violent spouse in the back of the head when he was leaving the room after assaulting her, and after threatening to kill her later if she did not kill him first.[64] In the judgement, Justice Wilson of the Supreme Court of Canada held that imminent threat was not necessary for self defence to succeed. She said:

> The judicial interpretation of the imminent attack requirement had been based on a model, from the point of view of a one time, bar room encounter between strangers of relatively equal size and ability.[65]

Justice Wilson therefore recognised that the imminent threat requirement of self-defence did not account for 'gender based differences in the sexes' respective abilities and dispositions towards aggressive conduct.'[66] Thus, a reasonable battered woman's perceptions may differ from that of a reasonable man. As Justice Wilson expressed: 'the definition of what is reasonable must be adapted to circumstances

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62 For example: *State of Washington v Wanrow* 559 P 2d 548 (1977), *State of New Jersey v Kelly* 478 A 2d 364 (1984). For commentary on the use and critique of BWS in the US see generally: Phyllis L Crocker (1985), 'The Meaning of Equality for Battered Women Who Kill Men in Self-Defence', 8 *Harvard Women's Law Journal* 121; Elizabeth Schneider (1986), 'Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering', 9 *Women's Rights Law Reporter* 195

63 (1990) 55 CCC (3d) 97.

64 The Supreme Court of Canada restored her first instance acquittal on the basis that she had been correctly allowed to introduce evidence of the BWS in support of her self-defence plea. See Donna Martinson, Marilyn MacCrimmon, Isabel Grants and Christine Boyle (1991), 'A Forum on Lavallee v R: Women and Self-Defence', 25 *University of British Columbia Law Review* 23 for a discussion of the case. For the development of the law since *Lavallee v R*, see Sheila Noonan (1993), 'Strategies of Survival: Moving Beyond the Battered Woman Syndrome', in Ellen Adelberg and Claudia Currie (eds.), *In Conflict With The Law: Women and The Canadian Justice System*, Press Gang Publishers, Vancouver, pp. 247-270.

65 Martinson et al (1991), pp. 41-42.

66 ibid, p. 25.

which are, by and large, foreign to the world inhabited by the hypothetical "reasonable man."'[67]

As the 'hypothetical' reasonable man is not modeled on a survivor of cumulative violence in the home, Justice Wilson admitted expert testimony to challenge the legal standard. BWS, in these terms, acts as a solution to the problem of the battered woman who kills.

Furthermore, Justice Wilson in *Lavallee*, presented BWS by not only challenging the standard of the reasonable man as a way of accommodating the subjective and lived narratives of battered women's experience,[68] but also as a means of counteracting existing public mythologies about domestic violence per se.[69] BWS, in Justice Wilson's assessment, acts as necessary evidence in cases of battered women who kill, not because of the unusual circumstances of domestic violence which may need to be explained to the jury, but because of the entrenched position of domestic violence within the private sphere. Acknowledging the collective naming of domestic violence by feminists in the 1970s, at least obliquely, Justice Wilson expressly indicated that the use of BWS as evidence in criminal trials was not intended to provide battered women with a definitive legal profile: it was not intended to be definitive of all battered women's experiences.[70]

Katherine O'Donovan, in reflection on Justice Wilson's judgement, has identified the use of an 'expert' to explain the experience of battered women to judge and jury as a 'strategic move' by Canadian law.[71] The reasonable man, as discussed in Chapter One, is posited by legal doctrine to act as a construct of universal generalizations about ordinary human behaviour, based on common experience. It is against this standard that the jury is asked to assess an accused's actions. Despite the important assumption in English common law that 'jurors do not need psychologists to tell them how ordinary folk who are not suffering from any

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67 *Lavallee v R*, p 874 (per ref 1 SCR 852)

68 *Lavallee v R* (1990), p 114

69 ibid. p. 113.

70 ibid. p. 123.

71 Katherine O'Donovan (1993), Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome', 20 *Journal of Law and Society* 427, p. 429.

mental illness are likely to react to the strains and stresses of life',[72] advocates of BWS evidence cite studies that have shown the average juror as incapable of understanding the reasonableness of a battered woman's actions.[73] The common sense expected of jurors to adhere to the construction of behaviour as equivalent to that of a reasonable man becomes destabilized when the accused is a battered woman.[74] This destabilization is compounded by the myths and stereotypes of what a violent domestic relationship, and the perceptions of a battered woman, are like. In Justice Wilson's formulation, the introduction of the expert assessment exposes the jury to the particular experiences and psychological condition of the battered woman when she kills her violent spouse. In these terms, the BWS does not give rise to grounds on which the jury could 'pass judgement' on the fact that the accused battered woman stayed in the relationship, or to concede that she forfeited her right of self-defence by doing so.[75]

O'Donovan has described the introduction of the expert witness, as perceived by Justice Wilson in *Lavallee*, as overcoming the 'why didn't she leave?' question; a question which assumes masochism or lying.[76] As such, the BWS questions the notion of a common universal experience embedded in the standard of the reasonable man, and simultaneously decentres the technical legal requirements for self-defence of retreat, immediate response and reasonableness of action.[77]

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72 *R v Turner* [1975] QB 834

73 Patricia Weiser Easteal (1992), 'Battered Woman Syndrome: Misunderstood?', 3 *Current Issues in Criminal Justice* 1, p 3. Easteal cites Debra Kromsky and Brian Cutler (1989), 'The Battered Woman Syndrome: A Matter of Common Sense?', *Forensic Reports*, 2, no. 3, pp. 173-185; O'Donovan (1993) has also argued that 'there seems to be an intuitive public understanding that long experience of being a victim of violence may lead a woman to kill', p. 427.

74 See generally O'Donovan (1993); Elizabeth A Sheehy, Julie Stubbs and Julia Tolmie (1992), 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations', 16 *Criminal Law Journal* 369; Therese McCarthy (1995), '"Battered Woman Syndrome": Some Reflections on the Invisibility of The Battering Man in Legal Discourse, Drawing on *R v Raby*', 4 *The Australian Feminist Law Journal* 141.

75 *Lavallee v R*, p. 124.

76 O'Donovan (1993), p. 430; Leader-Elliot (1993), pp. 416-417; Sheehy et al (1992), p. 385.

77 As discussed in Chapter One, these issues have already undergone an arguably liberal reinterpretation in light of the High Court decision in *Zecevic v DPP* (1987) 71 ALR 641. In this case, the High Court reformulated the law to place focus on the question

The effects of the use of BWS also have a strategic impact beyond the quest for justice for individual women who kill. Elizabeth Sheehy has argued that judicial rulings like that in *Lavallee* have a broader, educative function. By allowing the experience of a battered woman to find a voice in the court room, the BWS 'challenges woman-blaming mythologies and paradigms created from exclusionary male experience.'[78] From this perspective, Justice Wilson's challenge to the standard of the reasonable man goes beyond a recognition of Lenore Walker's cycle of violence, providing a context for the actions of a battered woman who kills. Her assessment of, and insistence on, the realities of battered women's *experience* evinces a deeper understanding of the social (as opposed to merely psychological) reasons why a woman may not leave a violent spouse, and a life-threatening home situation. In this sense, Justice Wilson enters a counter argument into the dominant legal readings of battered woman who kill. She articulates the experiences of survivors in the discourse of feminist theory and practice around domestic violence, and notes that 'lack of job skills, the presence of children to care for, fear of retaliation by the man'[79] prevent women leaving as much as an engendered state of 'learned helplessness.'

Furthermore, in Justice Wilson's reading of the battered woman's experience, and her strategic evocation of the BWS to illuminate that experience, is an understanding that women in violent relationships are not necessarily passive, but may strike back or attempt to leave.[80] As Justice Wilson states:

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of whether or not defensive action was necessary in the circumstances. However, as Julie Stubbs and Julia Tolmie note: 'Nevertheless the concepts of imminence, proportionality, serious harm and the duty to retreat remain as informal considerations in deciding that question and, as such, continue to exert influence in the application of the law to the facts of any particular case:' Julie Stubbs and Julia Tolmie (1994), 'Battered Woman Syndrome in Australia: A challenge to gender bias in the law?', in *Women, Male Violence and The Law,* Julie Stubbs (ed.), The Institute of Criminology Monograph Series No. 6, University of Sydney, Sydney, pp. 192-225, p. 195.

78 Sheehy et al (1992), p. 390. Note that the authors of this article expressly indicate who wrote each section. The comments referred to above are attributable to Sheehy in the final section, 'Salvaging "Battered Woman Syndrome": Issues and Ideas'.

79 *Lavallee v* R, p. 123.

80 ibid., p. 125.

> The fact that she [the battered woman] may have exhibited aggressive behaviour on occasion or tried (unsuccessfully) to leave does not detract from a finding of systematic and relentless abuse.[81]

The consequences, and impact, of this 'educative' function of the BWS for the law, in Sheehy's terms, have great potential. She argues:

> Criminal responsibility imposed on mothers for failure to protect children against violent fathers, the narrow interpretations of defences such as duress, automatism, and necessity, and the excusatory approaches used by judges who try and sentence violent men, must all be challenged and reconstructed in light of women's experiences of violence and the response of the legal system.[82]

As a result of Justice Wilson's judgement in *Lavallee*, it would appear that the BWS is a marked success both for individual women, and for feminist legal thinkers committed to challenging the epistemological bias within criminal law doctrine which has prevented adequate and systematic recourse to justice for battered women. The precedent set in *Lavallee* therefore has much to commend it, not the least of which in the Australian context has been the pragmatic decision to adduce BWS evidence to attempt to gain acquittals or reduced sentences for battered women who kill.

## Using The BWS

Since the introduction of the BWS via expert testimony in *Kontinnen* and *Runjanjic and Kontinnen*, BWS evidence has been adduced with varying degrees of success in a number of domestic violence precipitated homicides.

For example, in *R v Hickey*[83] evidence regarding BWS was successful in supporting a plea of self-defence, and the accused was acquitted by the Supreme Court of New South Wales. In *R v Woolsey*,[84] the Crown accepted a guilty plea to manslaughter on

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81 ibid.,

82 Sheehy et al (1992), p. 391. Sheehy cites relatively the Canadian cases of *Brown v Urbanovitch* (1985) 66 CCC (3d), *Robbins* (1982) 66 CCC (2d) (Que. CA). See Stella Tarrant (1992), 'A New Defence in Spouse Murder?', 17 *Alternative Law Journal* 67, as support for these propositions. Sheehy also notes the effect BWS may have on the area of criminal injuries compensation in terms of reversing preexisting mythologies of the behaviour of battered women who kill.

83 Unreported, Supreme Court of New South Wales, 14 April 1992.

84 Unreported, Supreme Court of New South Wales, 19 August 1993.

the basis of provocation and did not proceed with a murder charge. BWS evidence was however successfully used to mitigate her sentence and the Supreme Court of New South Wales imposed a suspended sentence. A similar result was produced in *R v Spencer*[85] in which the Crown accepted a plea of guilty to manslaughter on the basis of provocation. Although BWS was not adduced per se, the Court did accept expert evidence from a psychologist and a psychiatrist which resulted in a sentence of three years periodic detention. In *R v Raby*[86] BWS was successfully used as an adjunct to provocation, and the accused was found guilty by the Supreme Court of Victoria of the lesser charge of manslaughter. In a recent case in the Northern territory, Sherrie Seakins (who killed her de facto with a tomahawk after he had threatened to use the weapon to cut off her baby's head) did not even proceed to trial. Seakins' lawyers indicated that she would not plead guilty to manslaughter, and that she intended to seek a complete acquittal on the basis of self-defence, supported by the BWS. The Northern Territory Director of Public Prosecutions in this case exercised prosecutorial discretion and did not proceed to trial.[87]

In other cases, the BWS has been used to support defences for battered women against charges other than those of murder or manslaughter. In *Runjanjic and Kontinnen*, the false imprisonment charges against Olga and Erika were defended on the basis of duress, supported by BWS evidence, and both received suspended sentences.[88] And in *R v Gunnarson Weiner*, in which the accused was charged with breaches of the Tasmanian Companies Code, the Supreme Court of Tasmania accepted evidence of BWS in mitigation of sentence, and imposed a suspended sentence[89]. In the case of *R v McEwan*[90] BWS was successfully adduced to reduce

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85 Unreported, Supreme Court of New South Wales, 18 December 1992.

86 Unreported, Supreme Court of Victoria, 22 November 1994. See McCarthy (1995) for an intelligently considered response to this case.

87 Stubbs and Tolmie (1994), pp. 202-203. See also, 'No trial after woman kills violent husband', *Sydney Morning Herald*, September 14 1993, p 1.

88 *Runjanjic and Kontinnen* (1991). See also see also Stubbs and Tolmie (1994), p. 200.

89 Unreported, Supreme Court of Tasmania, 13 August 1992. The accused and her husband had been declared bankrupt, which prevented them, under s 117 (1) *Companies Act* 1962 (Cth.) (and supported by s 227 (1) *Companies (Tasmania) Code)* from acting as company directors. They had, however, represented themselves as company directors to obtain loans from financial institutions, and had only nominally relinquished their position as directors in Companies formed after their initial

the charges of a gay man charged with the murder of his spouse. From these cases it appears that the function of BWS as an educative tool for the judiciary and jury, not to mention its role as a pragmatic defence strategy, have become entrenched within the Australian criminal law jurisdictions.

## Critiquing the Battered Woman Syndrome

However, the cases mentioned above as memoranda *do not* disclose the ways in which the BWS has been applied or interpreted contrary to the imperatives set forth in the authority of *Lavallee*. Unlike Justice Wilson, many defence lawyers and judges using evidence and arguing for BWS may be unaware of the difficulties, both epistemological and procedural, identified by feminist legal theorists and lawyers, and may in fact be hostile to feminism.[91] This conceptual gap between BWS as a strategy designed to challenge the law's closure to narratives of domestic violence, and feminist narratives more generally, and its role as a pragmatic defence strategy is problematic. If the dangers inherent within the BWS are ignored, or the use of BWS is subsumed within doctrinal and theoretical practices which silence the experience of battered women who kill, it has the potential to damage the challenge to gender bias in the law proposed by Justice Wilson's judgement.

This danger can be identified very early in the history of the use of BWS in the Australian courts. Chief Justice King in *Runjanjic and Kontinnen* although accepting BWS evidence, did so on the basis that domestic violence, at least when as extreme as that experienced by Erika and Olga, was 'so unusual' that it stood outside common or ordinary experience, as such, the jury would require the benefit of expert testimony on its incidence and effects. This expert evidence, in Chief Justice King's estimation, acted primarily to illustrate why a 'woman of reasonable

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bankruptcy. The accused relied upon the BWS as a mitigating factor in her sentencing, and to make the claim that she had acted, from fear, under her husband's instructions.

90 Unreported, Supreme Court of Western Australia, 18-25 April 1995 (trial), and 18 March 1996 (sentencing). See also, 'Gay killer jailed in 'battered wife' case', *The Advertiser*, March 19, 1996, p 3; 'Gays hail bashed spouse verdict', *Sydney Morning Herald*, 9 February 1996, p 2.

91 Sheehy et al (1992), p. 388.

King's estimation, acted primarily to illustrate why a 'woman of reasonable firmness' had not acted to remove herself from the potentially life threatening situation in which she found herself.[92]

The reading of BWS by Chief Justice King, and echoed in Justice Legoe's acceptance of BWS evidence in *Kontinnen,* reflects the adduction of BWS evidence more generally in subsequent Australian cases. The language of these judgements suggests that Chief Justice King and Justice Legoe were *prima facie* sympathetic to the circumstances of battered women who kill. Their acceptance of BWS evidence to assist the survivor of domestic violence when she appears before the court on murder or manslaughter charges reinforces the chivalrous liberalism displayed toward such survivors by the state, as discussed in Chapters Two and Four. Accepting BWS, in these terms, demonstrates a level of awareness of these women's plight, and a level of recognition that they deserve an element of protection in the assessment of their moral blameworthiness.

However, it also allows for a perpetuation of the 'comforting fictions'[93] which centre around the question of 'why didn't she leave?' As Dobash and Dobash argue:

> To accept the masochistic explanation of why a woman does not leave a violent relationship is very comforting. It removes the moral outrage over a wife's victimisation and it means [that] outsiders can quietly ignore the problem without feeling guilty.[94]

The emphasis by Justice Wilson on BWS as *reinforcing* rather than substituting the social and economic reasons why a woman does not leave a violent relationship have been lost in Australian assessments of how the BWS operates. The ways in which the rules of evidence have been interpreted severely limit the nature of the evidence that can be presented when defending the battered woman who kills. The narrative of a woman's experience of domestic violence is curtailed and shaped by her psychology, rather than by the broader social and historical narratives which construct the experience of domestic violence as a discourse more generally.

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92 *Runjanjic and Kontinnen,* p. 368.

93 Leader-Elliot (1993), p. 418.

Feminist criticism of BWS evidence is detailed and extensive. Many commentators identify its pragmatic value, in adducing evidence which potentially subverts the gender bias of the 'reasonable man' test. Yet they also have grave reservations about the broader, epistemological impact of a reliance on such evidence, as it allows the law to continue to underestimate the experience of battered women more contextually.[95]

To begin with, the assertion by Chief Justice King, which has been followed in other BWS cases, that the experience of domestic violence is beyond the understanding of the jury is paradoxical, considering the widespread incidence of domestic violence in the community.[96] Katherine O'Donovan has even suggested that there is 'an intuitive public understanding that long experience of being a victim of violence may lead a woman to kill.'[97] Thus it could be argued that the use of BWS to *assert* women's experience via their psychology reinforces the appearance of domestic violence as unusual. It contributes to the mythology of the domestic violence survivor as 'masochistic', as discussed in Chapter Two, and as developed by the regulation of such violence by psychological discourse in the 1940s, 50s and 60s. As Julie Stubbs has noted:

> The characterisation of ongoing violence within relationships as rare contributes to an individualized response to such violence, and serves to deny social, structural and political factors pertinent to an understanding of male violence.[98]

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94 R E Dobash and R P Dobash (1980), *Violence Against Wives: A Case Against Patriarchy*, p. 160, quoted by Leader-Elliot (1993), p. 418, n. 87.

95 This point could be well summarised by Stella Tarrant, who has argued 'to stretch and manipulate experience so as to fit a social or legal category is to presuppose the 'otherness' of those who have had that experience': Stella Tarrant (1990), 'Provocation and Self-Defence: A Feminist Perspective', 15:*Legal Service Bulletin* 147, p 147. See also O'Donovan (1993); Leader-Elliot (1993), McCarthy (1995); Sheehy et al (1992); Stubbs and Tolmie (1994); Stubbs (1991); Noonan (1993).

96 See for example William McLennan (1996), *Women's Safety in Australia*, Australian Bureau of Statistics, Canberra, especially Chapter Six 'Male Partner Violence', pp. 50-60. This statistical report contends that 23% of Australian women who have ever been married or in a de facto relationship experienced violence by a partner at some time during the relationship. Or as McCarthy (1995) notes: 'The fact that 'expert' testimony is required to understand the effects of a crime which is second only to traffic offences in terms of police workload is extraordinary', p. 145.

97 O'Donovan (1993), p. 427.

98 Sheehy et al (1992), p. 384.

The second major difficulty with BWS from a critical feminist perspective is that it acts evidentially to deny the battered woman agency within the narrative transaction of her trial. The reliance on the voice of an 'expert' psychologist or psychiatrist, in preference to the first hand experiential narrative of the accused herself, reinforces the perception of the battered woman as 'an incredible witness.'[99] This problem is exacerbated by the legal requirements necessary for the admission of expert evidence in the first place.[100] Chief Justice King in *Runjanjic and Kontinnen* delineated the prerequisite of accepting the BWS as evidence of 'a scientifically established facet of psychology.'[101] This necessitates the reconstruction of the battered woman's experience of violence in terms of medical or scientific discourse, rather than a *feminist* discourse of domestic violence that has intervened in public understanding of the issue since the 1970s. The 'syndromization' of a battered woman's experience in this way, as a state of 'learned helplessness' which prevents her from leaving a violent relationship as opposed to an understanding of the myriad of other practical reasons why she may not leave, has wide ramifications. It puts the central question of the battered woman's actions, in terms of their proportionality or reasonableness, on to the 'why didn't she leave' question as opposed to the violence which precipitated her actions. For example, the expert evidence tendered in *R v Hickey* suggested that battered women are a category of

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99 Jocelynne Scutt (1991), 'The Incredible Woman: A Recurring Character in Criminal Law', paper presented to the Australian Institute of Criminology Conference on Women and The Law, quoted by Sheehy et al (1992), p. 384.

100 It has also been argued that the use of expert testimony places expert testimony beyond the comprehension of lay jurors more generally. See Sheehy at al (1992); Stubbs (1991); K Budrikis (1993), 'A Note on Hickey: The Problems with a Psychological Approach to Domestic Violence', 15 *Sydney Law Review* 365.

101 *Runjanjic and Kontinnen,* p. 366. The legal rules surrounding the admissibility of expert testimony act as an exception to the general prohibition that opinion evidence be disallowed. However, based on the High Court decision of *Murphy v R* (1989) 167 CLR 94, the general rule is a functionalist one: that experts may assist in the drawing of inferences if they have an expert knowledge and experience which in the court's opinion will assist the trier of fact in reaching a correct finding on the particular issues of the case at hand. Andrew Ligertwood, however, identifies that the tree to two split in this case only emphasised the difficulty in determining whether expert testimony will sufficiently add to a jury's stock of knowledge and thereby enable it to reach a more accurate decision: Andrew Ligertwood (1993), *Australian Evidence* (second edition), Butterworths, Sydney, p. 371. The rules surrounding expert testimony as an

people with a particular sort of mental and emotional makeup, one that is not only 'inadequate', but that predates the violence itself, and may in fact be congenital and permanent.[102]

Correlatively, resort to scientific explanations of her act reinforces the perception of the criminal female subject as aberrant and as irrational. The crime of killing an abusive spouse becomes one of an unreasonable, potentially mentally unstable female subject, as opposed to a criminal subject preconditioned by a subjective background of fear and abuse which constructs her mens rea. To this end, BWS evidence sustains the imperatives behind the use of diminished responsibility as a defence to murder for battered women used predominantly in the 1970s,[103] and which was adduced (unsuccessfully) in Violet Roberts' case.[104]

BWS is also logically flawed as an evidentiary device. Reflecting on Lenore Walker's empirical basis for the BWS, Ian Leader-Elliot argues that her preoccupation with 'learned helplessness' as a theory obscures the reality of the battered woman's experience. He contends that Walker's research is flawed, that there is no 'syndrome', that the women in Walker's study were not suffering from a disorder; and that the dogs used in Martin Seligman's experiments are irrelevant, 'a grotesque metaphor'.[105] As he argues:

> The experiments showed that the dogs reduced to a state of learned helplessness made no attempt to escape from pain when escape was possible...There is no analogy, even on the level of suggestive metaphor, with the dilemmas faced by most women in abusive relationships.[106]

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exception to the opinion evidence rule are codified in New South Wales by the *Evidence Act 1995* (NSW), s 79.

102 Stubbs and Tolmie (1994), p. 205.

103 Wendy Bacon and Robyn Lansdowne (1982), 'Women who kill husbands: the battered wife on trial', in Carol O'Donnell and Jan Craney (eds.),*Family Violence in Australia*, Longman and Cheshire, Melbourne,, pp. 67-93, p. 89; Wendy Bacon and Robyn Lansdowne (1981) , *Feminist Legal Action Group Report: Women Homicide Offenders In new South Wales,* FLAG, Sydney, pp. 311-313.

104 See Chapter Five and the Prologue for a discussion of diminished responsibility, and its use in the Violet Roberts case.

105 Leader-Elliot (1993), p. 416.

106 ibid.

Although Leader-Elliot concedes that Walker is aware that many women do successfully escape from violent relationships,[107] he still asserts that 'learned helplessness' is an essentially dismissive basis on which to ground the experience of domestic violence. It is illogical to rely on learned helplessness as explaining a woman's resort to killing her violent spouse. The BWS therefore denigrates or subsumes the behaviour of many women in seeking to characterise them as helpless. As Sheehy at al argues, '[i]t is the agencies which fail to provide women with effective support and protection which should be characterised as helpless, not the women.'[108]

There is, therefore, no sustainable reason to assume, even in the rare cases when a woman kills her abusive spouse, that she was incapable of leaving due to psychological maladjustment, or that her choice to remain was irrational. As Leader-Elliot (himself the child of a domestic violence survivor) passionately intones:

> More credit and more humility is due to the courage in adversity, to the ingenuity and to the not infrequent humour which sustains these grossly imperfect though far from uncommon relationships. When domestic violence is in issue it is the spectators, rather than the victims, who are likely to engage in unreal speculations and flights from reality.[109]

This criticism is strongly supported by the evidentiary treatment of the narrative in Erika Kontinnen's case. Psychiatrist Dr Alan Fugelman gave evidence in that case that:

> Women in these situations have been everywhere. They've been, for example, to women's shelters, walked out of the door and found the batterer waiting for them outside. They have been to the police. They have difficulty in assisting in these matters. There was no other support. [Kontinnen] didn't have a good relationship with her parents and overriding it all is the absolute fear that if she

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107 Leader-Elliot refers explicitly to Lenore Walker (1984) *The Battered Woman Syndrome, Sringer Publishing Co., New York*, p. 114.

108 Sheehy et al (1992), p. 385.

109 Leader-Elliot (1993), p. 418. Leader-Elliot descibes, through the device of story-telling, his recollections of his mother's relationship with hisviolent step-father.

> leaves the person will find her and that the violence and the brutality will be worse than before she left.[110]

In light of this testimony, and in light of the fact that Erika attempted to leave Hill on several occasions, an emphasis by the Court on her state of 'learned helplessness' seems illogical. As Christine Littleton argues, BWS evidence delivered by experts labels women as 'unreasonable, incompetent, suffering from psychological impairment or just plain crazy,'[111] with the result that the focus is shifted from the actions of deceased perpetrators of domestic violence, and the intolerable conditions under which domestic violence survivors live.

It is the normalization of battered women's experience that is probably the target of the most vehement criticism from feminist commentators.[112] The BWS evidence, and its medicalization of the battered woman's experience, constructs for the court a standard of a 'reasonable battered woman' against which women's actions in marital homicides can be tested. In Chapter One, the standard of the reasonable man or ordinary person as a generalized, universal standard which reflected male experience, and notions of fallibility was discussed at length. In the discussion of BWS as put forward by Justice Wilson, it was argued that expert evidence in fact *challenged* the reasonable man by invoking the particularities of a class of women who did not fit this standard. From Justice Wilson's assessment, it is possible to contend that BWS evidence is, in fact, an important jurisprudential challenge to the universal subjectivity insisted upon by legal liberalism.[113] However, the political and social awareness displayed by Justice Wilson has not been adopted in Australian jurisdictions. The danger in constructing BWS as a means by which women's knowledge and experience may enter criminal law narratives is that the law universalizes women's experience. It constructs a standard of a 'reasonable battered woman' as opposed to a reasonable man, a standard which implies a

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110 *R v Kontinnen*, per Legoe J in summing up, pp. 52-53. Expert testimony was also given by a psychiatrist in this case, Dr Renata Maruszczyk.

111 Christine Littleton (1989), 'Women's Experience and the Problem of transition: Perspectives on Male Battering', 23 *University of Chicago Legal Forum* 38

112 See for example, O'Donovan (1993), p. 431; McCarthy (1995), p. 145; Sheehy et al (1992), pp. 369, 384.

113 See for example, Stubbs and Tolmie (1994), p. 198.

coherent subjectivity of these women as a class, and a medicalization of their experience which ignores the subtleties of difference between women themselves.

In *R v Buzzacott* for example, Justice Bollen of the South Australian Supreme Court did not accept that the accused manifested the BWS.[114] Despite the fact that the Court accepted that the accused had been beaten by the deceased on the night of the incident and for a period of months previously, Justice Bollen concluded: 'I do not think that any situation of battered woman arises in this case. There was not sufficient battering.'[115]

The BWS, in these terms, and in reflection of the extremity of violence evident in *Kontinnen* therefore leaves open the question of how battered woman who kill are to be treated equitably (albeit not equally) if they do not present the *same experience* and level of severity of domestic violence in their relationship. As such, if women are unable to convincingly construct a helpless and dependent personality profile in order to invoke the BWS, they will have to establish imminence and necessity, and meet credibility standards on male terms.[116]

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114 Unreported, Supreme Court of South Australia, 12 July 1993. See also 'Editorial: A Hard Case For Justice Bollen', *Sydney Morning herald*, 11 August 1993, p 12. In this case, the accused was found guilty of manslaughter and sentenced to four years, with a minimum non-parole period of two years. Stubbs and Tolmie (1994), p 213 argue that the accused's Aboriginality may have been a factor in the Court's inability to read the circumstances of battering widely, and may have reflected the Court's acceptance of the mythology that domestic violence in Aboriginal communities is a condoned practice. In terms of the complete acquittal granted in Erika Kontinnen's case, the accused in this case received a comparatively harsh sentence. However, it must be acknowledged that for a member of the judiciary such as Justice Bollen, this was probably a concessionary sentence. It is not the aim of this project to cast direct aspersions on the subjective political intentions of any individual member of the judiciary, but it must be noted that Justice Bollen was responsible for the directions to jury that a 'rougher-than usual-handling' during sex was acceptable in a rape in marriage case before the South Australian Supreme Court in 1993. These comments sparked a controversy over the need to educate the judiciary as to the realities of violence against women, and the need for judicial attitudes to keep in step with community (and feminist) expectations. See 'Full court overrules Bollen', *The Advertiser*, April 21 1993 for a summary of public reaction to Justice Bollen's judgement at first instance.

115 Unreported, Supreme Court of South Australia, 12 July 1993. Quoted in Editorial, *Sydney Morning Herald*, 11 August 1993, p. 12.

116 Stubbs and Tolmie (1994), p. 211; See also Stella Tarrant (1990), 'Provocation and Self-Defence: A Feminist Perspective', 15 *Legal Service Bulletin* 147.

Furthermore, if battered women on trial (and their counsel) refuse the label of BWS because they object to being represented as victims, and rely on traditional interpretations of self-defence or provocation, the cases to date suggest that they will not be treated as sympathetically as those women the court can treat paternalistically, as mentally incapacitated because they *do* fit the BWS profile. Stubbs and Tolmie contend that there remains a real reluctance by the courts to acquit in domestic violence related homicide cases, and also a reluctance by counsel to argue self-defence.[117] In *Muy Ky Chhay, Gilbert* and *Buzzacott,*[118] in which self-defence and provocation were raised, the courts found the defendants guilty of manslaughter. The results lead Stubbs and Tolmie to argue:

> While we applaud any improvement in results for these women, our concern is that the BWS does not appear to have presented many challenges to the pattern of gender bias informing the law and legal practice.[119]

In short, BWS evidence, although significant in Justice Wilson's critically aware judgement, has been subsumed into the dominant readings of both battered and criminal women by the law. It offers no real epistemological challenge to the standard of the reasonable man as it replaces it with a reasonable battered woman, which many women either can not or choose not to meet. It renders the battered woman's actions as scientifically stereotypical, and denies both the collective historical naming of domestic violence and the individual's subjective responses to battering.[120]

## BWS, Race and Sexuality

The problems inherent in the universalizing of battered women's experience through BWS evidence are brought into sharp relief when examined in the context of Aboriginal women defendants. Stubbs and Tolmie argue that Aboriginal and

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117 Stubbs and Tolmie (1994), p. 204.

118 *R v Muy Ky Chhay*, unreported, Supreme Court of New South Wales. 8 September 1992; *R v Gilbert*, unreported, Supreme Court of Western Australia, 4 November 1993; *R v Buzzacott* (1993).

119 Stubbs and Tolmie (1994), p. 211.

120 This 'collective, historical naming of battering' refers to the influence of 1970s feminism in creating a discourse around domestic violence. See Chapter Four.

Torres Strait Islander women who have been the target of male violence confront two sets of stereotypes: those of battered women and those of Aboriginal women.[121] Jocelynne Scutt has discussed the distortion of the role Aboriginal women play within their own communities. Rather than mirroring the dominant mythology of Aboriginal women as dependent and socially alienated, Aboriginal women play an important role in their communities.[122] As Jan Pettman notes, Aboriginal women are perceived by white Australians to be dependent on their men, when they are, rather, 'often heads of households, responsible for the financial as well as emotional survival of their families as primary kin-keepers.'[123] The problem for Aboriginal women who may be the victims of domestic violence within their communities is that they may challenge their situation in ways that remove them from the stereotype of learned helplessness profiled in the BWS.[124]

Stubbs and Tolmie note that in *Hickey* and *Gilbert* (two cases in which the accused were Aboriginal women) evidence was presented to the court that demonstrated that both had suffered extreme violence, had sought police assistance, and assistance from Aboriginal and non-Aboriginal agencies. However, the courts seemed unable to accommodate evidence which indicated that the accused were resourceful, and had sought external help. Instead, 'evidence of their agency and survival was accorded less weight than that which conformed with the dominant

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121 Stubbs and Tolmie (1994), p. 211; Julie Stubbs and Julia Tolmie (1995), 'Race, Gender, and the Battered Woman Syndrome: An Australian Case Study', *Canadian Journal of Women and Law*, vol. 8, p 142. Stubbs and Tolmie also make reference to the work of other feminist legal thinkers committed to the unravelling of the race/gender divide within the law, notably Larissa Beherendt (1993), 'Aboriginal Women and the White Lies of Feminism: Implications for Aboriginal Women in Rights Discourse', 1 *Australian Feminist Law Journal* 27.

122 Jocelynne Scutt (1990), 'Invisible Women? Projecting White Cultural Invisibility on Black Women', 46 *Aboriginal Law Bulletin* 4

123 Jan Pettman (1992), *Living In The Margins: Racism, Sexism and Feminism in Australia*, Allen and Unwin, Sydney, p. 65.

124 Another interrelated problem is the misconception of white feminists as to the specific identities and needs of Aboriginal women within the processes of domestic violence reform, or provision of services for domestic violence survivors. For an analysis of the colonizing tendencies of anglo-centric tendencies within a refuge see Tikka Jan Wilson (1996), 'Feminism and Institutionalized Racism: Inclusion and Exclusion at an Australian Feminist Refuge', *Feminist Review*, no. 52, Spring, pp. 1-26.

construction of both Aboriginal women and battered women as dependent, apathetic and helpless.'[125]

Indeed in *Hickey* the accused's strong connections with her Aboriginal community and affiliation with friends and family was read by the expert witness as evidence of dependence and personal inadequacy.[126] The context of her experience as a battered woman, *and* as an Aboriginal woman with particular subjective perceptions of community and of violence, was subsumed within the dominant myths created by white, western medical discourse.

The other problem with BWS and its tendency to normalize the experience of violent relationships is that of the constraints against survivors telling their stories in the first place. For many women who have experienced domestic violence, part of the tyranny of fear is keeping the violence secret to prevent reprisal within the privacy of the relationship.[127] This fear of telling is exacerbated in cases of women who kill if they are from non-western backgrounds, and have a non-western perception of and relationship to the law. For many white women who kill, their experience of domestic violence, when it comes to their trial for murder, is a significant part of their personal narrative. In this way, BWS can be read as a way of opening up avenues to insert narratives of domestic violence into the criminal trial, in ways that were not conceived of when Violet Roberts went to trial in 1976. However, for other women, especially Aboriginal women, their cultural context and the complex barriers of identity, politics and language, may prevent them from disclosing the information which may be used to adduce BWS evidence in the first place.[128]

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125 Stubbs and Tolmie (1994), p. 213.

126 *R v Hickey* (1992), p. 124.

127 See generally, Patricia Easteal (1996), 'Till Death Do Us Part', in *The Thing She Loves: Why Women Kill*, Kerry Greenwood (ed.), Allen and Unwin, Sydney, pp. 1- 18, p 6.

128 To complicate this point, it must be noted that in *R v Gilbert* (1993) evidence was called from an Aboriginal tribal elder in an attempt to insert a broader and more representative narrative of the accused's circumstances and experience: Stubbs and Tolmie (1994), p 207.

*R v Kina*[129] provides a telling example. In this 1988 case, Robyn Kina killed her abusive, white de facto after a prolonged and extreme history of violence, emotional degradation, rape and duress. Kina finally killed her spouse after he threatened to anally rape her fourteen year old niece. When first granted representation by Queensland Legal Aid, Kina, 'deeply depressed and humiliated by the shameful nature'[130] of her relationship with her spouse, was unable to respond to questioning, and her defence counsel felt that she should not give evidence on her own behalf at her trial. Evidence was also not called from David Berry, a social worker who had visited Kina in gaol, and to whom she had confided the details of her relationship.[131] Kina was convicted of murder at first instance and was sentenced to life imprisonment. Four and a half years later, Kina's petition for pardon was referred by the Queensland Attorney-General to the Supreme Court of Queensland for appeal. The court relied on Kina's Aboriginality, the BWS and the 'shameful' nature of the events which led up to the murder (especially the anal rape of Kina and threatened anal rape of her niece) to expose the difficulties of communication between Kina and her legal representation. The court found that there had been a miscarriage of justice due to inadequate legal representation, the DPP exercized prosecutorial discretion in not proceeding with a retrial, and Kina was freed.[132]

Although in *Kina* there was, ultimately, a satisfactory and just result that overcame the initial difficulties of cultural subjectivity and race, the case still provides an important example of the possible legal difficulties that arise when Aboriginal

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129 Unreported, Supreme Court of Queensland, 5 September 1988 (trial).

130 Frank Robson (1994), 'Finally Justice', *Good Weekend*, March 26, pp. 38-45, p 42.

131 ibid., *R v Kina*, unreported, Court of Criminal Appeal of Queensland, 23 November 1993 (appeal). Davies JA and MacPherson JA held that the reluctance of Kina's counsel to use Berry's evidence of the nature of Kina's relationship with Black was of high importance in finding a miscarriage of justice. Berry was the only person to whom Kina had confided her experience of domestic violence. Although her solicitor at the ALS, and the appointed barrister, Michael Shanahan, had received a report from Berry, they informed him that his evidence would not be necessary, and that they 'wished he would not interfere with proceedings.' The Court of Criminal Appeal therefore questioned the reasons why this information was not built into the case, and questioned the basis on which counsel formed the opinion that Kina should not give evidence (i.e.: her 'reluctance' to communicate with them).

132 ibid.

women are not able to tell their stories to the law. The different experience of violence, and the cultural significance given to the disclosure of those experiences, are highlighted. Furthermore, the inadequacy of the BWS in providing a universal standard and systematic evidentiary basis for justice for domestic violence survivors is thrown into sharp relief when women like Robyn Kina can not even express their experience to counsel in a way that allows them to use it as a defence. Not all women share the same access to or understanding of the legal system, and not all women share a normalized or coherent subject position as battered women. From this perspective, the BWS only exacerbates the misunderstanding of domestic violence as a discourse evident in Australian criminal cases, and highlights the fact that there is a continuing mythology surrounding domestic violence in the public (legal) sphere that needs closer attention.

The case of *R v McEwen*[133] provides another, albeit distinct, example of the inability of the BWS to dispel mythologies of domestic violence, and to accept the different subjectivity of those who kill to protect themselves in domestic situations. In this case, as previously mentioned, BWS was successfully adduced in defence of McEwen, a gay man who killed his violent spouse, and resulted in the reduction of his charge from murder to manslaughter, and a mitigated sentence.[134] The defence counsel argued that BWS evidence was not gender specific, and might be better labeled 'Battered Spouse Syndrome'. Yet the phenomenon of same sex battering could only be explained to the Supreme Court of Western Australia via reference to traditional heterosexual active/passive gender roles.[135] Although the decision was welcomed by some gay and lesbian groups as a legal recognition of homosexual relationships,[136] the narrative presented in court told a different story.

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133 *R v McEwen*, unreported, Supreme Court of Western Australia, 18-25 April 1995.

134 Catharine J Simone (1997), 'Comments and Notes: 'Killer man was battered wife': the application of Battered Woman Syndrome to Homosexual Defendants: *The Queen v McEwan*', 19 *Sydney Law Review* 230. Simone notes that the sentence effectively amounted to one year of imprisonment, allowing three years credit for the time McEwen had already spent in custody, and one year credit for the emotional stress that he suffered in gaol as a result of repeated sexual assaults by other inmates.

135 ibid., p. 231.

136 'Gays hail bashed spouse verdict', *Sydney Morning Herald*, 9 February 1996, p2, quotes Brian Grieg of the Australian Council For Lesbian and Gay Rights, as noting:

Catherine Simone has argued that throughout the trial, McEwen's sexuality was either ignored (depicted as irrelevant) or 'hetero-relationised'[137] (renamed 'battered spouse syndrome.') Furthermore, no social context was presented of the particular nature of same sex battering. A study by social workers at St Vincent's Hospital in Sydney, for example, has documented cases of abusive male behaviour upon discovery of a partner's HIV status including physical beatings, emotional abuse, withholding medication, and withholding or enforcing sex.[138] The result, for gays and lesbian survivors of domestic violence was therefore a pyrrhic victory. As Simone argues:

> The legal categorisation of Robert McEwen as a battered wife was effected via the collusion of medical and legal discourses. In their claim to establish the truth of McEwen's relationship...and the events leading up to its destruction, other realities such as McEwen's resistance, the particular dynamics of a gay male relationship, the unique difficulties facing a gay victim of domestic violence, were delegitimated.[139]

The implication that can be drawn from *McEwen* is that the BWS is incapable of adequately presenting in court the different experiences of domestic violence being tragically played out in the community. Like the Aboriginal women who have attempted to rely on BWS evidence, the experience of gay men, and lesbians (as yet an untested category),[140] do not fit the normalized, predominantly white stereotype of the battered woman implied by the BWS. Furthermore, the experiences of Robert McEwen and Robyn Kina indicate that the BWS, while attempting to articulate an epistemological challenge to the standard of the reasonable man, simply codifies *one* perception of domestic violence for the law. It devalues the historical, discursive and social context in which these crimes are executed. It also

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'[c]ourts are increasingly saying that homosexual relationships exist, they carry obligations and are affected by the same issues as heterosexual relationships...'

137 This term is per Ruthann Robson (1990), 'Lavender Bruises: Intra-Lesbian Violence, Law and Lesbian Legal Theory', 20 *Golden Gate University Law Review* 567.

138 Simone (1997) quotes Kimberley O'Sullivan (1995), 'The Violent Betrayal- Domestic Violence in Gay and Lesbian Relationships', 227 *Campaign Australia*, 34, pp. 38-39.

139 Simone (1997), p. 234.

140 'Untested' is used in this context as a reflection on the absence of cases of lesbian intrarelationship homicide precipitated by domestic violence. However, see Robson

renders any experience or narrative that does not fit the new standard of the reasonable battered woman (or more dangerously, the 'hetero-relationised' 'battered spouse') as different, and outside the sanctioned avenues for justice that the BWS prescribes.

As *Kina* and *McEwen* indicate, the attempt to explain battered women's experience through the BWS is inadequate. It expects, in Robert Cover's terms, a coherent subjectivity,[141] and a coherent narrative of experience to be presented. For women who do not fit the profile, the avenues to justice for battered women who kill, provided by the BWS, are closed.

BWS evidence therefore not only devalues women's experience by filtering their narratives through psychological explanations for their actions, but guarantees a collusion between traditional medical and legal discourses which silences other ways in which a battered woman's behaviour could be interpreted.[142] Justice Wilson's contention in *Lavallee* was that BWS evidence reinforces the myriad of reasons why a woman may not leave a violent spouse. However, in the Australian cases to date, it acts to perpetuate the myth that women do not leave because they are somehow irrational or psychologically aberrant, and are for this reason alone entitled to a mitigation of the charge against them, or a reduction of their sentence. The BWS in these terms entrenches the chivalrous liberalism of the public sphere. It demonstrates that the law, as part of a multifarious public, is prepared to help women, yet only when they are pathologised as a class, when they are reduced, when their actions of defence are rendered less dangerous.

As such, the BWS perpetuates the operation of the difference dilemma within criminal law narratives of battered women who kill. Although giving credence to feminist positions that argue from the difference perspective in an attempt to value and prioritise essentially female voices, the BWS, by constructing the accused's

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(1990) for an examination of the theoretical jurisprudential terrain around violence in lesbian relationships, and the attitudes of the law.

141 Robert Cover (1983), 'Nomos and Narrative: The Supreme Court 1982 Term Foreword', 97 *Harvard Law Review* 4. See discussion of Cover's argument in Chapter Seven.

142 See Chapter Two.

story through the conventions of psychological evidence, paradoxically denies her the chance to tell her own narrative. Though stories like those of Violet Roberts, as told in the Prologue, become incorporated into the dominant discourse of the law, they become subsumed into a new universal standard of a reasonable battered woman. In these terms, the BWS attempts to address the gender bias in the law by introducing evidence intended to put battered women who kill on an equal footing with men, yet which results in a situation in which they continue to be read as different.

*Chapter Ten*

# THE BATTERED BODY: A GENEALOGY

> If feminism is to maintain its critical force, if it is to challenge and disrupt the workings of powerful hierarchies designed to keep women 'in their place,' then it must be allowed to contemplate its paradoxes and the ambiguities of its existence. Such contemplation involves analyzing not only the conditions of existence (psychic as well as social) that produce inequalities of power but also the discursive conditions that produce feminism.[1]

As discussed in Chapter Nine, BWS, in Justice Wilson's assessment at least, provides an evidentiary avenue through which women's experience can be heard in the courtroom. Her perspective mirrors the arguments of the Law and Literature School discussed in Chapters Seven and Eight, especially proponents of feminist narrative scholarship, who contend that the 'stock' stories of the law do not allow 'outsider' voices to disrupt the procedural outcomes of the courtroom.[2] Indeed, the emphasis placed on narrative as a tool of redemptive critique in cases of battered women is a common feature of critical works dealing with BWS. Terry Threadgold, Martha Mahoney and Ian Leader-Elliot in particular use narrativised accounts of battered women's experience in their critiques of the defences available to battered women who kill.[3] The imperative behind these accounts seems to be a challenge to

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1 Joan W Scott (1997), 'Comment on Hawkesworth's "Confounding Gender"', *Signs*, vol. 22, no. 3, pp. 697-702 p. 701.

2 The term 'outsider' stories is attributable to Mari Matsuda (1990), 'Pragmatism Modified and the False Consciousness Problem', 63 *Southern California Law Review* 1763. The term 'stock stories' is attributable to Richard Delgado (1989), 'Storytelling for Oppositionists and Others: A Plea For Narrative', 87 *Michigan Law Review* 2411. For a general discussion on the law and literature movement see Chapter Seven.

3 Ian Leader-Elliot (1993), 'Battered But Not Beaten: Women Who Kill in Self-Defence', 15 *Sydney Law Review* 403; Terry Threadgold (1997), 'Narrative and Legal Texts: Telling Stories About Women Who Kill', *UTS Review*, vol. 3, no. 1, May, pp.

the relegation of domestic violence, by the law and state, to the private sphere, and therefore rendering particular women's experiences silent.

This thesis also presents Violet Roberts and Erika Konttinen's experiences as narrative in order to complicate the interplay between legal, political and social perceptions of domestic violence. It thus attempts to draw out implications of the historical context of feminist activisms over the past fifteen years by evidencing when, and how, challenges to the private narrative enter the public, controlled account.

However, what this thesis attempts to do which scholars writing from the Law and Literature perspective do not, is to examine how the public conception of the experience of domestic violence is constructed. As Regina Graycar argues, it is not sufficient for 'outsider' stories simply to be told, and for dominant readings of the law to be automatically revised as a result.[4] What is needed is a commitment to 'dismantle and rearrange the *framework* in which these stories are told.'[5] Graycar advocates an invigorated reassessment of legal categories and the ways in which they shape legal problems and the ability of the law to tell stories about women's experience. The focus in this chapter, however, is on the challenge to the discursive framework of legal thought, including feminist legal thought.

This chapter argues that narrative, and particularly historical narrative, has a power as discourse, as well as a form of story-telling, that allows hidden stories and experiences to be heard in legal frameworks. As such, it offers a genealogical reading of the BWS that historically situates feminist claims for a female legal subject who refuses to be categorised as either equal to or different from the standard (male) legal subject. By re-examining the material, historical conditions which ground this approach discussed in Section Two, through the methodology described in Section Three, this chapter argues for an interdisciplinary engagement

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56-73; Martha Mahoney (1991), 'Legal Images of Battered Women: Redefining The Issue of Separation' 90 *Michigan Law Review* 1.

4 Regina Graycar (1996), 'Telling Tales: Legal Stories About Violence Against Women', 7 *Australian Feminist Law Journal* 79 p. 80.

5 ibid.

between feminist legal and historical theory, which allows a fresh assessment of the BWS paradox.

## Complicating The Critique: Experience and Difference

Some proponents of BWS, like Patricia Easteal, wish to promote a differentiated female subject, yet they retain a commitment to the strategic benefits that the BWS promises. Easteal's argument is that few defences are without critical difficulties for battered women who kill, but maintains that 'justice is best served by permitting their presentation in open courts of law which can evaluate the merits of BWS'.[6]

The paradox is that while in practical legal terms, BWS as a defence tool is reasonably successful in both reducing murder to manslaughter and even allowing some women who kill to be acquitted,[7] it perpetuates, like Rosalind Rosenberg's testimony in the case of *EEOC v Sears*,[8] the view of women as Other traditionally favoured by a positivist, rational 'malestream' jurisprudence. The question therefore becomes a very difficult one: should a feminist jurisprudence accept the gains offered by the BWS, despite the fact that it reduces the battered subject to both an Other, and to a victim needing protection, or should feminist jurisprudence attempt to find another way to constitute a female subject as part of a broader narrative, a thicker contextuality[9] with potential to be seen as either equal, different or both?

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6 Patricia W Easteal (1992), 'Battered Woman Syndrome: Misunderstood?', 3 *Current Issues in Criminal Justice* 1, p. 4. See also Patricia W Easteal (1996), 'Till Death Us Do Part', in Kerry Greenwood (ed.), *The Thing She Loves: Why Women Kill*, Allen and Unwin, Sydney, pp. 1-18; Patricia W Easteal (1993), *Killing The Beloved: Homicide Between Adult Sexual Intimates*, Australian Institute of Criminology, Canberra.

7 For example, *R v Kontinnen* (unreported) Supreme Court of South Australia, 8 September 1992; and the anomaly of *The Queen v R* (1981) 28 SASR 321, as discussed in Chapter Two.

8 Civil Action No. 79-1-4373, US District Court for the Northern District of Illinois, Eastern Division. See discussion of this case in Chapter Eight.

9 This term is attributable to Clifford Geertz, and refers to a need for stories and explanations to be understood in terms of their normative universe, their origin and experience. See Clifford Geertz (1973), *The Interpretation of Cultures: selected essays*, Basic Books, New York.

Feminist scholars committed to challenging the questions raised by the BWS are aware of the complicating critiques, and offer diverse responses to how to address the BWS paradox. Katherine O'Donovan, for example, is aware of the epistemological stumbling block to gender equity presented by BWS, yet still believes it is of educative benefit to the law. As she argues:

> The requirement of the objectification of women's experiences by science is an indication of women's lack of legal subjectivity. However, if this is the only way that such experiences can gain legal recognition, then the strategy of objectification may be temporarily necessary. Battered women syndrome and its theory of 'learned helplessness' are metaphors for the suffering of abused women, and it as metaphors that we should accept these terms.[10]

Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, recognising the problems inherent in the ability of BWS to 'medicalize' women's experiences at the risk of ignoring broader understandings of domestic violence, have argued that the category of 'expert' witnesses be extended. They suggest allowing refuge workers, feminist counsellors and women who have lived in violent relationships to testify as to why women do not leave violent relationships. The result in these terms would be to remove the BWS from the control of psychiatrists and psychologists so that 'women's experience could shape legal concepts.'[11] Martha Mahoney has suggested that the BWS be made to accommodate women's agency by proffering a new area of legal expertise of 'separation assault' to describe men's efforts to control women who leave by escalating the violence.[12] Elizabeth Sheehy has proposed a new gender-neutral defence of 'self-preservation', where it would be necessary for courts to assess whether an accused had sought assistance in any form of protection from the state, or whether she feared retaliation if she left.[13] Therese

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10 Katherine O'Donovan (1993), 'Law's Knowledge: The Judge, The Expert, The Battered Woman and Her Syndrome', 20 *Journal of Law and Society* 427 p. 434.

11 Elizabeth A Sheehy, Julie Stubbs and Julia Tomlie (1992), 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations', 16 *Criminal Law Review* 369 p. 393.

12 Mahoney (1991), p. 993.

13 Elizabeth A Sheehy (1987), *Personal Autonomy and the Criminal Law: Emerging Issues For Women*, Canadian Advisory Council on the Status of Women, Ottawa, p 40, quoted by Sheila Noonan (1993), 'Strategies of Survival: Moving Beyond the Battered Woman Syndrome', in Ellen Adelberg and Claudia Currie (eds.), *In Conflict With The Law:*

McCarthy suggests codifying a description of men's violence to provide a context to assist in understanding both domestic violence and the women who use lethal force to save their own lives.[14] Many authors have also indicated that a broader feminist-generated response to disseminating the realities of domestic violence could shape the use of BWS evidence, bringing it more in line with Justice Wilson's original vision. Such a response, as it is suggested, would include preparation of material for use by defence lawyers, continuing education programs for lawyers and judges, and initiatives to enhance public awareness of the reality of domestic violence.[15]

Although these responses usefully problematize the BWS paradox, two objections must be raised. Firstly, the proposals to reform the BWS do not overcome the difference 'dilemma.' Reform strategies like those suggested by Sheehy, McCarthy and Mahoney still focus on establishing an objective criteria against which battered women should be judged. Despite requiring a subjective belief that the accused woman felt under threat of death or grievous bodily harm, a reconstituted BWS would continue to require an 'objective' assessment of this apprehension. In short, this would require courts to rely upon a standard (admittedly broader than present) of the reasonable battered woman. So long as the BWS places importance on an individual woman's psychology, the law will continue to impose its own vision of a coherent narrative that renders women as different from men according to a standard of behaviour that ignores many women's experience of domestic violence. Furthermore, these suggestions still place importance on providing an answer to the question of why the woman failed leave the violent relationship,[16] which denigrates the broader social, economic and cultural dimensions of domestic violence.

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*Women and the Canadian Criminal Justice System,* Press Gang Publishers, Vancouver, pp. 247-270.

14 Therese McCarthy (1995), "'Battered Woman's Syndrome": Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' 4 *Australian Feminist Law Journal* 147.

15 Sheehy et al (1992), p. 391.

16 Noonan (1993), p. 262.

Secondly, all of the suggested responses to reform of the BWS fail to complicate the category of experience. While such responses acknowledge that there is a collective, and discursive, understanding of domestic violence which forms the basis for their advocacy of law reform, questions concerning *how* it arose or *how* it has influenced, and continues to influence, responses to the BWS paradox are not examined.

Joan Scott, in reflecting on experience as a category, has argued that it is often proffered by some historians as evidence to correct oversights resulting from inaccurate or incomplete visions.[17] This is particularly applicable to the theoretical 'recovery' phase of feminist history writing of the early 1970s, in which historians attempted to write women into the 'gaps' and omissions presented in traditional normative history.[18] This reading of experience as unproblematised evidence is also present in the notion of the BWS as a *legal* evidentiary device committed to entering 'other' narratives into the trial process. Scott argues however that such an understanding of experience as evidence of marginalised visions is taken as self-evident, with the result that 'the identities of those whose experience is being documented...thus naturalizes their difference.'[19] As Teresa de Lauretis argues, the point is that experience is the process by which subjectivity is constructed, and that process is, in a broad perspective, historical.[20]

In both the BWS and feminist legal critiques of it, questions of the constructed nature of experience (and correlatively subjectivity) are left unasked and unanswered. Feminist scholars critical of BWS need to ask how subjects are constituted as different in the first place. Without doing so, questions about how experience, language and history are constructed are ignored. To acknowledge that there is a broader historical narrative informing the feminist understanding of domestic violence without identifying BWS as ahistorical exacerbates the problems

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17 Joan W Scott (1992), 'Experience', in *Feminists Theorize The Political,* Judith Butler and Joan W Scott (eds.), Routledge, London and New York, pp. 22-40, p 24.

18 See discussion of feminist historiography and history, especially how it relates to genealogy, in the Introduction.

19 Scott (1992), p. 25.

20 Teresa de Lauretis (1984), *Alice Doesn't,* Indiana University Press, Bloomington, p. 159

BWS evidence causes in the first place. The result is, in Scott's terms, that '[t]he evidence of experience then becomes evidence for the fact of difference, rather than a way of explaining how difference is established, how it constitutes subjects who see and act in the world.'[21]

From this perspective, it is necessary to approach the battered woman who kills as a subject genealogically informed by a collusion of discourses. Feminist legal commentary on BWS, although addressing the legal and jurisprudential difficulties that such evidence infers, has not yet read those difficulties historically, continuing to perceive the historical background to the cases within the confines of the law only. The fact that battered women's experience is therefore constructed and informed by other discourses - like the feminist-generated discourse of domestic violence discussed in Chapter Four, or the discourse produced by the politicization of Violet Roberts as a battered body who kills as discussed in Chapter Five and Six - is identified but not engaged with theoretically. This results in feminist analyses of BWS which, while grappling with the epistemological difficulties it inscribes on gender equality for the law, do not move beyond the confines of the difference dilemma.[22] That is, they can not move theoretically beyond the argument that the BWS, however flawed, may continue to be a useful and educative 'metaphor', merely in need of revision or review. Stubbs, Tolmie, Mahoney et al are trapped within the confines of *le differend*,[23] unable to see the necessity of history for their legal argument.

Feminist analyses of the situation of battered women who kill require an historical reading of experience that exists outside of the restraint of the law, in order to assist legal responses. BWS therefore needs to be read genealogically. It needs to be exposed, in its current procedural and critical manifestation, as ahistorical. It needs

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21 ibid.

22 The term is borrowed from Martha Minnow (1984), 'Learning To Live With The Dilemma of Difference: Bilingual and Special Education', 48 *Law and Contemporary Problems* 2, pp. 157-211. A discussion of the 'difference dilemma' as a problem for feminist legal thinkers is discussed in Chapter Eight.

23 Jean-Francois Lyotard (1983), *The Differend: Phrases in Dispute*, (trans. G. Van Den Abbeele) University of Minnesota Press, Minneapolis. See Chapter Seven for a

to be viewed through the collective feminist experiences of reform to domestic violence and to criminal law relating to battered women who kill which predate it and inform it. It requires history, not just precedent, to investigate methods and approaches which bear the potential to move beyond the universalized account of experience that it currently presents. It needs genealogical history to facilitate a postmodern feminist perspective on how to view women who kill as subjects both equal to and different from the standardized subject of law based on male experience.

## Feminist Legal History: A Genealogy of BWS

The methodological approach offered here, an approach best described as a postmodern narrative of feminist legal history, is not intended to be legally transformative. The theoretical concerns outlined in Section Three are intended to point to a jurisprudential approach which focuses on claiming women's subjectivity within the existing confines of legal doctrine identified by both CLS and postmodern scholars as objective, and objectifying. I therefore do not critique the Australian scholars of BWS on a substantive level; much of their analysis I agree with, and I share their feminist concerns about the construction of battered women's experience and subjectivity. Rather, I am interested in reviewing the jurisprudential project within which their analysis is embedded, and directing some questions towards the historical preconditions of the debate itself. The critique offered by scholars such as Stubbs, Tolmie, Sheehy et al does represent, to a certain extent, a feminist legal history. It acknowledges obliquely that the Erika Kontinnen case presents the incursion of a feminist narrative about domestic violence into the law. It further acknowledges this narrative by indicating that the focus on women's psychology by the BWS detracts attention away from the myriad of other socially constituted reasons which construct the battered woman's experience and prevent her from leaving her relationship. It does not explain however how the BWS was assessed in the context of a history which identified the experience of domestic violence as a political struggle in the first place. The dominant feminist critique of

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discussion of *le differend* as a theoretical referent for the identified difficulties of interdiscursive conversation between law and history.

BWS is similar to a critical legal studies perspective on history. It questions through *legal* texts and *legal* narrative the objectivity of the law's treatment of battered women who kill, suggesting that these women are ill served by the falsified face of liberal legalism's notion of equality. It does not, however, go behind and beyond the trajectory of case law. It does not expose the jurisprudential subtext of what is accepted, in terms of a feminist analysis, as self-evident.

The feminist legal history offered here attempts to understand *how* the current criticisms were reached. It attempts to render a more sophisticated approach to the critical history already offered; to identify history itself as an epistemology, and by doing so, to indicate that the epistemological basis of the law on which the battered woman's subjectivity turns can be disrupted by the perspectivism offered by genealogical history.

Some feminist critics of BWS do *prima facie* acknowledge the struggle to identify the Battered Body through the Violet Roberts case that occurred in the 1980s. As Julie Stubbs, for example, notes:

> The experience of women who kill their partners following prolonged periods of abuse do not neatly coincide with the prescribed standards for the use of legal defences such as self-defence and provocation. It is true that in New South Wales it was just these sort of considerations which drove the law reforms regarding homicide in the early 1980s. The public campaigns around the cases of Violet and Bruce Roberts and Georgia Hill were significant in demonstrating the inadequacies of the then existing legislation.[24]

Stubbs goes on to acknowledge that these public campaigns resulted in reform to the existing codification of provocation in section 23(3), which ensured a more liberal interpretation of the requirement of sudden and temporary loss of self-control, and a recognition that cumulative provocation in some cases allowed a

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24 Julie Stubbs (1991), 'Battered Woman Syndrome in Australia: An advance for women or further evidence of the legal system's inability to comprehend women's experience?', 3 *Current Issues in Criminal* Justice 267, p. 268. See also O'Donovan (1993), p 430. For a discussion of the cases and campaigns to release Bruce and Violet Roberts and Georgia Hill see Chapter Six.

time interval between the final provoking incident and the killing.[25] Yet her indication of a context for legal reform does not identify the operation of feminist struggles to expose the experience of domestic violence. Since the reforms, in short, did not occur within a theoretical and historical vacuum, attention therefore needs to be refocused on the fact that in the early 1980s a shift occurred in how the battered woman was to be interpreted as a subject by the criminal law.

It is worth noting that the paradox which the BWS encapsulates - the adoption of a device which removes women from the problems of the gender biased reasonable man, yet which prima facie reads their behaviour as sick, as outside the normative range of morality and voluntarism demanded by legal liberalism - has historical echoes in the politicization of Violet Roberts as the Battered Body. As discussed in Chapters Five and Six, the FLAG, in their report on female homicide offenders in NSW published in 1981, noted with suspicion the 'recent US research' which formed the basis of Lenore Walker's work.[26] FLAG, as a body informed and produced by the collision of feminist activist and legal campaigning against the inadequate treatment of battered women who kill, were indisputably aware of the diverse experiences of domestic violence in the community.[27] Their criticisms of diminished responsibility as the favoured defence option for women like Violet Roberts, a defence which depicted their behavior as psychologically aberrant and the offender as potentially sick, were echoed in the syndromization of battered women's behaviour through the BWS. As such, they consciously expressed a political and jurisprudential desire to explore other means of delivering women like Violet Roberts individual justice, of finding other ways of incorporating the narrative of the experience of domestic violence into the canon of law without

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25 Stubbs (1991), p 268. See also Stanley Yeo (1991) 'Sudden Provocation Downunder', 141 *New Law Journal* 1200.

26 Wendy Bacon and Robyn Lansdowne (1981), *Feminist Legal Action Group Report: Women Homicide Offenders in NSW*, FLAG, Sydney [herein The FLAG Report], pp. 313-314.

27 The FLAG Report (1981), p. 11. The methodological perspective taken by the researchers in the FLAG Report specifically attempted to address the individual complexities of the sample study's experience of domestic violence and the criminal justice system: see especially Chapter Two of the FLAG Report, 'Characteristics of our cases', pp. 44-91.See also Chapter Five of this thesis for a discussion of FLAG's approach.

resort to strategies which detract away from the horror that induced her to kill.[28] The campaign which FLAG set in train to address the complexity of justice and individualism, guilt and morality, reasonableness and self-defence, which the law attached to the battered woman on trial, demanded a legal reckoning of the feminist naming of and campaigning against domestic violence. It was this project, committed to securing justice for individuals and negotiating an understanding of the discourse of domestic violence by the law, that was furthered in the reformist program initiated after Violet's release.

As discussed in Chapter Six, Premier Neville Wran commissioned a task force in New South Wales to formulate policy on domestic violence. Part of this program was to recommend means by which the application of defences for battered women who kill could be reformed to allow a more equal and equitable consideration of their circumstances. As part of the consultation and research process behind the recommendations of the DVTF (which were endorsed by groups as disparate as Civil Libertarians to the Prisoners' Action Group)[29] Helen L'Orange (Head of the Women's Coordination Unit which produced the *Report*) has indicated that Lenore Walker's *The Battered Woman*[30] was discussed as a possible basis for reform.[31]

In an interview, L'Orange argues that the Walker thesis, and BWS itself, went against the whole ethic of the domestic violence reform package of 1981: that is, to focus on domestic violence as a crime, and to attempt its elimination.[32] In these terms, although BWS offered women a chance to be heard within the court room (and indeed, for domestic violence itself to show that it had been translated into a legal discourse) it could be argued that as a supporting arm for any defence, BWS did not allow women like Violet Roberts to speak directly. In using the BWS,

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28 The FLAG Report (1981), p. 314.

29 Interview with Helen L'Orange, 25 July 1995; Interview with Robyn Lansdowne, 23 August 1995. See generally Chapter Six.

30 Lenore E Walker (1979), *The Battered Woman*, Harper and Rowe, New York.

31 Interview with Helen L'Orange.

32 Interview with Helen L'Orange; Domestic Violence Task Force Committee [herein DVTF] (1981), *Report of The New South Wales Task Force On Domestic Violence*, NSW Women's Coordination Unit, Sydney, p. 2.

personal stories, or narratives, are voiced though expert witnesses and in terms of an abnormality of mind, rather than as a reasonable response to another person's criminal act. In the language of a liberal feminist commitment to equality, the BWS denied women agency.

The reforms to the *Crimes Act* in New South Wales in 1981, therefore, did not codify the BWS. The reform package also, significantly, did not support the abolition of the 'Ordinary Person' test (another element of the provocation defence) as recommended by feminist groups who had been involved in the campaign for Violet Roberts' release. This was arguably a reflection of the dominance of an equivocal, liberal understanding of the female subject before the law.[33] The section 23 reforms did, however, ensure that the actions of a subject invoking the provocation defence need not be an immediate response to a provocative act.[34] This was, as the Reading Speeches around these reforms noted, a direct reflection of cases like that of Violet Roberts, and an attempt to redress the gender inbalance inherent in the criminal law.[35]

It was also a reflection of the theoretical impetus behind such a challenge to the gender bias of law. The rejection of BWS indicated that a feminist discourse on domestic violence refused any reform which rendered the battered woman, and female legal subjects more generally, as essentially *different.* It also recognized that the existing defences as they stood denied women equal treatment. In this sense, the feminist activists, lawyers and femocrats who took part in the reform process recognised obliquely that part of the project of countering the value laden identity of women by the law entailed accepting the residue, but not the foundations of the liberal-legal metanarrative. They concluded that reform should be couched in terms of working within existing legal parameters to shift the recognition and

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33 See discussion of the recommendation to abolish the Ordinary Person Test in Chapter Six.

34 *Crimes Act* 1900 (NSW) s23; New South Wales Law Reform Commission (1993), *Provocation, Diminished Responsibility and Infanticide: Discussion paper No. 31*, New South Wales Law Reform Commission, Sydney, p. 32. See generally Chapter Six.

35 NSW Parliamentary. Debates (Hansard), 11 March, 1982, pp. 2482-2486, and 1 April, 1982, pp. 3202-3207. See Chapters One, Five and Six for discussion of the immediacy element, and how it operates to disadvantage battered women who kill.

interpretation of women's subjectivity. They recognised what Carol Smart has more recently explained in these terms:

> Part of the power that law can exercise resides in the authority we accord to it. By stressing how powerless feminism is in the face of law and legal method, we simply add to its power.[36]

In other words, attempting to subvert the interpretation of the battered woman as a legal subject from within the confines of the law itself, instead of supporting an evidentiary device like the BWS, which couched women as Other to traditional legal subjects, inferred a commitment to refusing to accede further power to law's own sense of authority.[37]

From the investigation into the Violet Roberts episode (and surrounding contextual terrain) it seemed likely that the reforms to provocation in section 23 of the *Crimes Act*, as discussed in Chapter Six, would become the primary legal basis for defending the battered woman who kills. However, since the early 1990s, BWS has gained ascendancy. The reasons for this are not expressly clear. However, one analysis of the adoption of BWS can be adduced through reference to the analysis of *EEOC v Sears* as discussed in Chapter Eight. In these terms, the section 23 reforms - attempting to equalise a traditional defence by shifting the narrative boundaries to encompass the different female reaction and retaliation time - could be problematised in the same way as was Alice Kessler-Harris' testimony. Kessler-

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36 Carol Smart (1989), *Feminism and The Power of Law*, Routledge, London and New York, p. 25.

37 It is important to note here the reading of existing defences as viable options to battered women who kill offered by Ian Leader-Elliot. Leader-Elliot (1993) argues that unlike the US and Canadian jurisdictions in which the BWS was initially devised, the Australian criminal law system was already capable of disseminating compassionate justice to battered women who kill. However, Leader-Elliott relies on a humanist faith in law's essential liberalism- its protection of the person. He complicates the construction of the reasonable man and ordinary person standards, and identifies that their traditional operation excludes much female experience. He also identifies that the increasingly liberal interpretation of these tests in cases like *Stingel v The Queen* (1990) 171 CLR 312 and *Zecevic v DPP* (1987) 71 ALR 641 provides avenues for entering experience of domestic violence into the law without resort to the BWS. However, he does not acknowledge the ways that prima facie humanist faith in the law and its developments is itself ordered through significant social change external to it, and despite his feminist sensibilities, he does not read cases like *Stingel* in terms of their jurisprudential potential in broadening conceptions of female subjectivity by the law more generally.

Harris attempted to offer a nuanced reading of the female subject: equal, yet acknowledging difference. It was this reading of the historical record that was deemed incoherent by Judge Nordberg, resulting (partially) in his decision to favour the testimony of Rosalind Rosenberg.[38] The irony is, however, that the 1981 reform package rejected the more radical recommendation of abolishing the objective element of the 'Ordinary Person' test, on the very ground that it did not allow for a coherent subjectivity which would be accepted by liberal law.[39]

On a more substantive level, Julie Stubbs has suggested that it was the concentration on provocation itself that caused the reforms to have less impact than their authors intended. She has rightly pointed out that one of the legal failures of the 1981 reform package was the 'inability to grasp the harder issue of self-defence.'[40] Self-defence, unlike provocation, accords with a complete defence to murder. Furthermore, a focus on provocation, according to Stubbs, Tolmie and Sheehy, is inappropriate, as it is 'designed to deal with an unreasonable, but understandable, over-reaction to an emotionally stressful incident. Provocation labels the offender's perceptions of and responses to their circumstances as "unreasonable and extraordinary."'[41] From this perspective, provocation fails to distinguish between cases in which an accused kills to protect herself and her children,[42] from cases in which an accused kills because he is incapable of dealing with a partner's infidelity or desire to leave him.[43] Provocation also, on this reading, suggests that when women perceive themselves as being in danger in their homes and unable to access protection from law or the state, their perceptions are deemed

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38 See discussion of *EEOC v Sears*, Civil Action No. 79-C-4373, US District Court for the Northern District of Illinois, Eastern Division (1984-1986), in Chapter Seven.

39 See discussion of the demands for a coherent subjectivity inherent in legal narrative in Chapter Seven.

40 Stubbs (1991), p. 268.

41 Sheehy et al (1992), p 174, *Stingel v The Queen* at 378.

42 for example *The Queen v* R (1981) 28 SASR 321.

43 for example *Moffa v* R (1977) 138 CLR 601; *Parker v* R (1963) 111 CLR 610.

irrational.[44] The danger identified is that 'on an individual and broader societal level, provocation may contradict the reality that such women experience.'[45]

Conversely, it is significant that the defence of provocation developed in the seventeenth century as a recognition of a *man's* fallibility in the face of an unassailable sense of anger.[46] Perhaps by focusing on those elements of the defence which denied battered women from relying upon the defence (the immediacy standard), the attention on provocation by feminist reformists in the 1980s attempted to reinforce the sense of public and private wrong committed against battered women who kill. From this perspective, attempts to extend the defence of provocation can be read as a strategy to position women as survivors, rather than as victims, of domestic violence. Furthermore, despite the inherent flaws of the provocation defence,[47] it continues to support the BWS in offering an alternative means of mitigating the culpability of battered women who kill, as the case of *R v Gilbert* demonstrates.[48] For these reasons, and until such time as the defences to murder are reformed or streamlined,[49] provocation continues to provide an (albeit

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44 Sheehy et al (1992), p. 378.

45 ibid., p. 379.

46 see Janey Greene (1989), 'A Provocation Defence For Battered Women Who Kill?', 12 *Adelaide Law Review* 145 for a history of origins of the defence in duelling.

47 For an analysis of the reform attempts to recognise the gender-bias inherent in the defence of provocation, see generally Adrian Howe (1994), 'Provoking Comment: The Question of Gender Bias in the Provocation Defence- A Victorian Case Study', in *Australian Women: Contemporary Feminist Thought,* Norma Grieve and Ailsa Burns (eds.), Oxford University Press, Melbourne, pp. 225-235.

48 *R v Gilbert* (1993), unreported, Supreme Court of Western Australia, 4 November 1993. The accused in this case stabbed her violent de facto during an argument. BWS was adduced in support of both self-defence and provocation. The jury acquitted the accused of murder, but convicted on manslaughter based on provocation. The sentence was commuted to 150 hours of community service.

49 For discussion of attempts to reform the defence of provocation, including its elimination in favour of graduated degrees of unlawful homicide see generally: M R Goode (1991) *Discussion Paper: The Law of Homicide,* South Australian Review of Criminal Law, Attorney-General's Department, Adelaide; Victorian Law Reform Commission (1991), *Homicide,* Report No. 40, Melbourne; New South Wales Law Reform Commission (1993); The Victorian Law Reform Commission's Report recommended retaining provocation as a partial defence to murder. However, the reasons offered in dissent revolved around the inherent identified gender bias. As Howe notes, they identified that provocation usually operated 'in favour of male defendants and against female victims: Adrian Howe (1994), 'Provoking Comment: The Question of Gender Bias in the Provocation Defence- A Victorian Case Study',

flawed) option for women whose criminal narrative may not fit the requirements of self-defence.

As the debate around both the existing defences and the BWS demonstrates, there was never going to be a simple or obviously satisfying resolution of the legal options available to battered women who kill. Indeed, the fact that BWS presented itself as the most efficacious defence in Erika Kontinnen's case underlines the limitations of modifying existing defences to such circumstances. However, what became important in the early 1980s, and what is evident in all contemporary commentary on cases of battered women who kill, is feminism's identified need for battered women's experience to be broadly recognised by legal discourse, and for women's subjectivity to be continuously negotiated within the parameters of that discourse. The reforms of the 1980s provide a genealogical link to the current situation.

From this perspective, the rethinking of subjectivity by postmodern scholars of jurisprudence can be analysed through recent Australian cases in which the objective/subjective distinction of the ordinary person test is challenged. I do not mean to suggest that these developments provide a satisfactory legal answer. Yet they do indicate how the theoretical perspectives offered by this thesis can be approached; that is, how a narrative offered by feminist legal history *can* converse with narratives offered by substantive legal doctrine. This is an essential step in promoting the methodology offered in this project, for as Elizabeth Grosz notes, 'Critiques always imply the establishment of a (provisional) position. Critique is not clearly distinct from construction.'[50]

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in Norma Grieves and Allsa Burns (eds.), *Australian Women: Contemporary Feminist Thought,* Oxford University Press, Melbourne, pp. 225-235, p. 227. See also Chapter Six for a discussion of the single category of 'unlawful killing' as mooted for the homicide law reform process initiated after Violet Roberts' release.

50 Elizabeth Grosz (1988), 'The In(ter)vention of feminist knowledges', in *Crossing Boundaries: Feminisms and the Critique of Knowledges,* Barbara Caines, E.A. Grosz and Marie de Lepervanche (eds.), Allen and Unwin, Sydney, pp. 92-104, p. 93.

## Challenging Subjectivity: A Provisional Perspective

The provisional perspective on the legal reading of the battered woman who kills offered in this section focuses on developments to the ordinary person test through recent provocation cases.[51] This is not intended to promote provocation as the viable option for battered women who kill. Rather, it is to indicate that provocation provides an historical connection to previous feminist challenges to the law's construction of women's subjectivity. It is intended as an *illustration* of a jurisprudential position, as opposed to a substantive solution.

As indicated in Chapters Three, Four and Five, feminist activism, and specifically that of the Women's Liberation Movement during the 1970s, influenced the emergence of a discourse on domestic violence. Until this time, domestic violence was to a certain extent a 'problem with no name', constructed and controlled by the interconnections of legal, psychological and public policy discourses.[52] Feminist activity which pre-existed that of the 1970s, especially that of the 1890s, was aware of the treacheries of abuse dominating many women in their homes, and used 'the good graces of a masculinist public'[53] to argue for state support for and recognition of the experience of wife-beating. However, the concentration on women's public identity by post-suffrage feminisms ironically drew attention away from the specific harms suffered by women in the private sphere.[54] The 1970s period of feminist activism brought an invigorated critique of the state's treatment of women in the

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51 Several commentators have argued that recent formulations of self-defence in Australia, as in *Zecevic v DPP*, and especially in relation to the relaxation of the objective test as offered by Deane J in minority, have rendered the defence flexible enough to incorporate the subjective experience of battered women who kill: see for example, Leader-Elliot (1993), p. 406; Julia Tolmie (1991), 'Add women and stir: An Australian perspective on defence to murder for battered women who kill', paper presented at Law and Society Conference, Amsterdam, June, quoted in Julie Stubbs (1991), p. 269. However, in this context, provocation, despite its flaws, provides an illustrative historical link to the issues of subjectivity raised in the early 1980s, and is therefore useful as a means of raising a series of jurisprudential as opposed to substantive legal questions.

52 See Chapter Two.

53 Margaret Thornton (1995), 'The cartography of public and private', in Thornton (ed.), *Public and Private: Feminist Legal Debates,* Oxford University Press, Melbourne, pp. 2-16, p. 7.

54 See Chapter Two for discussion of postsuffrage feminism.

public *and* private spheres. It also heralded an invigorated sense of identity as *women*, with shared interests and shared naming of collective harms that transcended the diverse political make up of the Women's Liberation Movement. This Movement, although constituted by libertarian, socialist and liberal feminist ideas and approaches, revolved around a rhetoric of collectivity. This rhetoric suggested a sense of solidarity against an identified masculinist public sphere and the amorphous dangers of patriarchy. In this sense, the Women's Liberation Movement was always aware of the interplay of equality and difference that constituted women as a social group, and as a social class. Throughout the 1970s and 1980s, sexuality, race, class and ethnicity continued to disrupt the idealism of women as a unified group. However, an understanding of women's subjectivity as diverse coexisted throughout this period with a public unification around particular issues that affected large numbers of women, albeit in unique ways.[55]

Domestic violence was one of these issues. In some respects a feminist generated discourse on and against domestic violence emerged from a collective naming process. However the experiences and knowledges drawn from the multifarious political arms of the Women's Movement in campaigning for resources for domestic violence survivors ensured that like the Women's Liberation Movement itself, the emergent domestic violence discourse was devoid of a monovalent perspective.

Through the grass roots of the refuge movement, Women's Liberation activists met and were educated by contact and connections with domestic violence survivors, amply demonstrating that for each, their experience of survival was unique, individual, subjectivised. However, the same experience of interconnection between women drawn from the refuges also enabled a public narrative to gain ascendancy. The commonality of these women's experience, their subjection at the hands of their partners, the police, the Department of Social Security and the law, was glaringly similar. The commonality of the Battered Body was identified as holding a distinct power. The potential for a counter narrative against the

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[55] See Chapters Three and Five.

mythologies of domestic violence[56] was named and applied through political struggle in the public sphere to achieve gains for the individual survivors of domestic violence.[57]

It was this diversely constituted but collectively named discourse that was used to challenge the law's treatment of battered women who kill in the Violet Roberts case. The campaign for Bruce and Violet's release, as discussed in Chapter Six, identified the operation of existing defences in domestic violence precipitated homicides as inadequate. It exposed the liberal ideology of law, which asserted the need to provide equal protection of the person before the law through objective standards like the reasonable man or ordinary person, as discriminatory. Through the diverse elements of libertarian activism and feminist liberal reformism, came an engagement with the state and law that demanded a reckoning. Violet Robert's experience as a battered woman was made public, her individual circumstances, her history of abuse, were articulated through the campaign for her release in ways that had been denied at trial.[58]

The public and state support for Violet Roberts as an individual was inscribed upon a broader, collective narrative of a need for the law to recognize the collective experience of violence in the home: violence so extreme that that it reduced women to kill their partners to free themselves. Through the libertarian/left legal initiated campaign for her release, Violet Roberts became not just a woman seeking justice against malecentric criminal law defences and a life sentence, but a politicized battered body demanding a recognition by the law of her discursively constituted experience.[59]

One of the reforms to the New South Wales *Crimes Act* proposed during the 1981 package, as previously mentioned, was abolition of the objective element of the

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[56] See Chapter Two.

[57] See Chapters Three and Four.

[58] See Prologue and Chapter Five.

[59] See Chapter Five for discussion of the interconnections between these political perspectives and feminism, and how those interconnections shifted the conceptualsiation of women's tretament by the criminal justice system, including the law.

'ordinary person' test, which is central to the operation of the defence of provocation.[60] Despite feminist groups involved in the campaign for Violet Roberts release lobbying for the test's abolition,[61] it was retained. This has been described as a 'trade off' for the other reforms - a guarantee that the liberalisation of the provocation defence in other respects (largely a response by the state to accommodate a discourse on domestic violence) would not open the gates to 'spurious pleas.'[62]

The Ordinary Person test requires that the provocation in issue must actually have deprived the defendant of his or her power of self control and that it also must have been sufficient to have deprived an ordinary person of this power, such that the ordinary person would be moved to kill.[63] There has been significant academic and judicial comment on the nature of the test as 'objective,' in particular the extent to which it can be 'subjectivised' by incorporating characteristics of the particular defendant. The nature and scope of this test, in terms of its subjective/objective elements of law, have been discussed at length in Chapters One and Six. However, it is important to note that this test, as complicated by Justice Murphy in *Moffa*, continues to be accepted as judicial authority on more recent cases.

The two-pronged objective/subjective test has been upheld recently, for example, by the High Court in *Stingel v The Queen.*[64] In that case it was held that the function of the Ordinary Person test was to 'provide an objective and uniform standard of the minimum powers of self- control which must be observed.'[65] In other words, as the New South Wales Law Reform Commission has noted:

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60 See generally Chapter Six; Robyn Lansdowne and Wendy Bacon (The Women and Homicide Project) (1981), *Comment on a proposal to reform the law of homicide*, (submission to the Criminal Law Review Division of the Department of Attorney-General and of Justice). (RL/WB).

61 Interview with Robyn Lansdowne. See discussion in Chapter Six.

62 ibid.; David Weisbrot (1982), 'Homicide Law Reform in New South Wales', 6 *Criminal Law Journal* 248, p. 263.

63 L Waller and C Williams. (1989), *Criminal Law: Text and Cases* , Butterworths, Sydney, pp. 205-251.

64 (1990) 171 CLR 312.

65 ibid., p. 327.

> The governing principles of equality and individual responsibilty require that all people are held to the same standard. The Court [in *Stingel*] considered it necessary for the trial judge to instruct the jury on the relevance of characteristics when applying the test.[66]

Viewed in these terms, where does this leave the battered woman who kills, whose subjective circumstances of violence and abuse act as significant characteristics leading toward provocation for, or self-defence of, the crime?

Several analytic strands must be unravelled with regard to this issue. To begin with, it is important to note that the reforms proposed to the Ordinary Person test in the 1981 package centered around a removal of the objective element of the test. As the New South Wales Law Reform Commission has noted, the gravity/self-control distinction is flawed, and because it is central to maintaining the objective test, it has been argued that this is a good reason to abandon the objective test altogether.[67] The refusal to adopt this reform reflects, in a jurisprudential sense, a reluctance to open up the narrative through which the meaning of the legal subject is produced. A judicial and legislative reliance on the objective element of the Ordinary Person test reflects Robert Cover's argument, discussed in Chapter Seven, that to mount a redemptive constitutional challenge, the subjective voices of the group (or groups) arguing for reform must themselves present an objectified normative view of the world. In other words, the law maintains its dominant position within *le differend* by relying on a test that renders the subjective impotent, and that subsumes the marginalised subject within a mainstream narrative representation.

In *Moffa*, Justice Murphy strongly criticised the leading authority of *Bedder v DPP*,[68]and the operation of the objective aspect of the Ordinary Person test in these terms:

> Once the full circumstances are taken into account, the objective test disappears because it adds nothing to the subjective test. For this reason, those who adhere to the objective test have rigidly excluded peculiarities of the accused. Behaviour is influenced by age, sex, ethnic origin...and above all individual differences. It is

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66 New South Wales Law Reform Commission (1993), p 41.

67 ibid., p. 43.

68 [1954] 2 All ER 801.

> impossible to construct a model of a reasonable...or ordinary Australian...[69]

Subsequent cases, such as *R v Webb*[70], acknowledged Justice Murphy's criticisms. However, the legal adherence to both the objective standard and to the reasonable man of traditional liberal philosophy that it represented was difficult to relinquish. As Chief Justice Bray commented:

> [A]s a matter of abstract jurisprudence I acknowledge with respect the remarks of Murphy J...[however] the proper distinction is that the individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not.[71]

The result has been that although the 'ordinary person' has begun to look more and more like the actual person on trial,[72] these characteristics are, for the most part, only relevant to the extent that they explain how the alleged provocative conduct would have effected someone like the accused. In other words, the subjective characteristics of the accused are not relevant to the degree of self-control which the person on trial could be expected to be held: they are not relevant to the 'standard.'[73]

From a feminist jurisprudential perspective, an 'ordinary person,' in a strict legal positivist sense, is male, and thus the Ordinary Person test as it stands in *Stingel v the Queen* continues to represent a standard that ignores the experiences of women.

As James Boyle notes, postmodern jurisprudence challenges traditional ways of thinking about the law, especially in terms of the collapse of the objective subject.[74] In these terms, and through an understanding of the transgression of procedural narrative boundaries as developed through historiography, it is possible to

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69 *Moffa v R*, at 625-626.

70 [1977] 16 SASR 309.

71 ibid., at 313.

72 Stanley Yeo (1992), 'Power of self-control in provocation and automatism', 14 *Sydney Law Review* 3.

73 David Weisbrot (1982), 'Homicide Law Reform in New South Wales', 6 *Criminal Law Journal* 248, pp. 256-259.

reconceive the site of the Ordinary Person test as a place through which a different meaning of the battered woman who kills can be produced.

If the objective standard is removed from the Ordinary Person test (as suggested by Justice Murphy in *Moffa*, and recently advocated by the New South Wales Law Reform Commission) the boundary around the narrative transaction of a crime and its defence are altered. If there is no objective legal (male) subject against which the individual characteristics and foibles of an accused are to be tested, those same characteristics and foibles - the personal history of the accused - become a credible and admissible part of the narrative transaction. In terms of narrative theory, this means that a localised removal of a positivist legal prop broadens the temporal and procedural boundaries of the stories able to be heard in the courtroom. It means that a story like that of Violet Roberts gains a narrative credibility, and a standard that can be subjectively determined within the parameters of each case.

In terms of feminist theory, this postmodern blurring of narrative boundaries though the collapse of the object/subject distinction would enable a new way of thinking around and about the 'difference dilemma' in order to infiltrate mainstream jurisprudence.

A removal of the objective arm of the Ordinary Person test was rejected when mooted in the reform package that followed the Violet Roberts case 1981. As mentioned, the struggle within the DVTF itself dissipated the potential for greater argument about the Ordinary Person test. There were, of course, other players, and other interests involved in its refusal.[75] However, the fact remains that feminist choices and opinions regarding reform of the *Crimes Act* were formed around the broadening of the immediacy element, a bid for the recognition of women within a male defined and operated defence; a refusal to be subsumed into a position of being viewed as either equal or different to the masculine subject of liberal legalism.

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74 James Boyle (1991), 'Is Subjectivity Possible? The Postmodern Subject in Legal Theory', 62 *University of Colorado Law Review*, pp. 489-524. See Chapter Eight for a discussion of Boyle, and a postmodern approach to jurisprudence.

75 See Chapter Five for discussion of the interactions between prison reform groups (Women Behind Bars, Prisoners Action Group), the refuge movement, left lawyers, and femocrats around the issue of the reform of homicide in the early 1980s.

As we have noted with respect to the Sears case, 'either/or' options do not present realistic choices for women, replicating the process of 'othering' instigated by liberal theory and related male-centered productions of knowledge. Framing choices for feminist theory and practice between 'either/or' also exacerbates the central problem within feminist theory itself: the lack of an objectified normative vision and accompanying narrative which becomes readable to legal discourse operating as Lyotard's *le differend.*[76]

In these terms, a rejection of the objective element of the Ordinary Person test in favour of a purely subjective test would allow a more fluid meaning of both the battered woman who kills, and of the feminisms that have supported an emergent discourse around domestic violence. If BWS is advocated, women are denied legal agency, and rendered voiceless and 'different.' BWS also bears the potential problem of excluding women whose personal histories of abuse do not 'match' the objective characteristics which psychology imposes. Advocating a broadening of the parameters of immediacy within the existing defences, although useful theoretically, has been ignored in preference for BWS. The subjective Ordinary Person test, a test of the individual legal subject, would overcome these problems. This is not to deny the need for a continuing feminist program of public and judicial education around the experience of domestic violence. However, such a program, combined with a reformed notion of the objective/subjective distinction, would represent a localised, case-specific response to the individual accused, be they a battered woman, or any other subject or group marginalised by traditional legal thinking (that is, subjects of different race, sexuality or ethnicity). The removal of the need for an objective standard would ensure that the evidentiary narrative transaction would be capable of being broadened to accept as admissible evidence of the personal history or characteristics of the accused, through their own terms, and not through the medicalisation of their situation into a mental problem, or abnormality of mind.

Furthermore, the gender neutrality inherent in a subjective test for provocation could ensure that the most damaging aspects of the 'difference dilemma' could be

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76 See Chapters Seven and Eight.

circumvented. That is, female characteristics and differences (such as physical inferiority) could be taken into account within the broader parameters of a test that is not specifically designed for women (as is BWS), but is rather open to interpretation for an individual legal subject, either male or female.

There is no obvious answer, in a substantive legal sense, of how to secure just legal recourse for all battered women who kill. The law is unlikely to provide within itself an instant solution to accepting battered women's experience, while still maintaining its own historically derived standards of morality, legality, rationality, and coherence. Yet the jurisprudential challenge to these standards must incorporate and develop attempts to eliminate domestic violence and to secure a legal identity for battered women who kill, which were initiated in a feminist past. It is important to remember that history, and histories existing external to the machinations of precedent, offer a way of 'rendering the present strange'.[77] A feminist legal history of the battered body, an investigation of its genealogy, is therefore an important step towards unravelling the theoretical paradox that the BWS currently presents. As Anna Davin notes:

> Historical understanding is essential to our struggle; we must find the roots of our oppression to destroy it; we must know where we came from to understand where we are going, and we must examine the struggle of earlier generations of women to help us win our own.[78]

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77 Alan Hunt and Gary Wickham (1994), *Foucault and Law: Towards a Sociology of Governance*, Pluto Press, London, p. 88.

78 Anna Davin (1972), 'Women in History', in Micheline Wandor (ed.), *The Body Politic: Women's Liberation in Britain 1969-1972*, Stage 1, London, pp. 215-224, p 224.

*Conclusion*

# BATTERED BODIES

> The body is the inscribed surface of events (traced by language and dissolved by ideas), the locus of a dissociated self (adopting the illusion of a substantial unity), and a volume in perpetual disintegration. Genealogy, as an analysis of descent, is thus situated within the articulation of the body and history. Its task is to expose a body totally imprinted by history and the processes of history's destruction of the body.[1]

The key theoretical concern of this thesis has been to investigate a methodology by which women's subjectivity can be asserted before the law. Its empirical case study - the changing identification of battered women who kill - provided a vehicle by which this broader question could be addressed. At the heart of the empirical investigation is the argument that the law, as a result of its own epistemological preconditions, has been incapable of recognising the diverse subjectivities that constitute women as legal subjects. This argument is grounded in an analysis of the philosophy of liberalism, which has powerfully constructed the realm of universal truths, including that of law, and which monitor the ways in which society's subjects are given identity and voice.

From this perspective, this thesis has been invested in a critique of the contradictions of liberalism. Liberalism appears to celebrate and champion individual difference, but in the practical interpretation of its tenets, has universalised human experience in the quest to realise full access to equal rights for citizens governed under the social contract. In Chapter One, law was identified as a liberal discourse. Part of the operation of modern criminal law doctrine, as

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1 Michel Foucault (1984), 'Nietzsche, Genealogy, History' (first published 1977), in Paul Rabinow (ed.) *The Foucault Reader*, Pantheon Books, New York, pp. 76-100, p. 83.

discussed in that chapter, was the securing of concessions to subjects who broke social conventions. These concessions were based on a philosophical recognition that legal subjects are fallible, and their fallibility is embedded in their differences from the standard of reasonable human behaviour. Despite the assertion by criminal law of the variable subjectivity of legal subjects through the operation of defences to murder (such as provocation and self-defence), this subjectivity is judged against a standard of universalism. Thus within the operation of law as a meta-narrative run contradictory strands of liberal philosophy: a recognition that subjects are not the same, and are motivated to act for a diverse range of reasons, but the retention of a single benchmark of civil behaviour against which they are judged which expresses commitment to a notion that all subjects are fundamentally destined to be treated as equal.

The criticisms which have been leveled against the 'ordinary person' or 'reasonable man', the signification of legal liberalism's commitment to securing a monovalent identity for its subjects, are varied. For critical race theorists, or scholars of queer theory, those criticisms are directed to the constructed nature of this metaphoric, ideal citizen as white and heterosexual. In terms of the perspectives offered by this thesis - the perspectives of critical feminisms - the reasonable man is identified as male. Taking these perspectives together, the liberalism which seeks to treat all citizens as equal is exposed as being capable of recognising the perpetuation of this philosophical right only when the subject is cast in the mould of its makers: male, white, propertied, heterosexual.

The question arising from critical feminist perspectives is: how does the law then treat female subjects it acknowledges as different to the standard of the reasonable man, yet at the same time attempts to accommodate as equal?

The critical feminist perspective advocated by this thesis does not attempt simply to criticise liberalism through its contradictions. It is impossible to run a sustained and wholehearted critical feminist argument against liberalism, because feminisms themselves are implicated in its philosophical project. Feminism can never be outside liberalism. The relationship between the two, as organising philosophical and political perspectives, is uneasy, especially in terms of a story about the law. In the quest to recognise the differences between men and women, and the

differences between women themselves, feminisms can ill afford to destroy or disregard the protections that legal liberalism does acknowledge in its project to secure equality for all subjects. Feminisms can not set themselves in complete opposition to liberalism, either philosophically or in an activist sense, because of their own inherent ambiguity in relation to equality and difference.

Tackling a critique of liberalism's contradictions from a position which is itself implicated in those contradictions, is difficult. Additional theoretical tools and perspectives are needed to unravel the subjectivity of women before the law. Opportunities for such perspectives are offered by a multitude of disciplines; including linguistics, anthropology, philosophy, political theory, and sociology. The focus of this thesis has been history.

History is useful for unpicking the feminism/liberalism problem, because it provides techniques for both locating information and contextualizing it. Even in its most empiricist or positivist manifestations, history, by its disciplinary nature, has always refused universalisms. It is a theory and a practice invested in particularizing the moment. It is a discipline committed to undermining and challenging inappropriate or false generalizations about human behaviour and subjects' identities. History has the potential to provide a continually critical perspective.

However, history itself is not uninvolved or unimplicated in the processes of critique it carries out. There is no position from which history can stand removed from the subjects it investigates, be it the development of legal doctrine, second wave feminisms or liberalism itself. It is impossible to extricate a singular historical perspective or account: history is necessarily subjective. History, like liberalism itself, is contradictory. Able to critique the premises of a philosophy like liberalism by exposing its foundational premises, it can itself act as a meta-narrative, a grand theory of temporality, a supra narrative of the movement of Time itself.

It is underscored, despite its inherently subjective identity, by the unifying practices of narrative. Despite investigations into other ways of recounting the past, history inevitably involves a story-telling function. As Roland Barthes describes it, narrative

is 'simply there like life itself...international, transhistorical, transcultural.'[2] Hayden White argues that history's having to be presented through narrative always imposes particular restraints, always presents a broader ideological, cultural or philosophical position. Historical narrative inevitably expresses the culture of the historian as well as the culture of the period of which he or she writes. Despite its inherent ability to contextualize, history's critical perspective is constrained by its *own* historical construction.

The theory of history offered by White is important to this thesis because it allows a self-critical position from which historians can acknowledge not only their own subjectivity, but also their shifting relationships with the subjects of the past *as* subjects, and not just as objects of a universal or empirical inquiry. White's position, in other words, exposes the underlying contradictions and possibilities of history, instead of the more common practice of acknowledging and then taking refuge behind them. From this perspective, history must be read as theory, and not just as practice. Of course other theorists have been invested in this quest: the historical theories of Karl Marx, E H Carr and E P Thompson are important in developing a theoretical terrain around historical practice. This thesis relies principally upon the theories offered by White and Michel Foucault specifiedly because of their investment in historicising subjectivity.

Yet this has not been a classic Foucaldian project. Rather, it is a project interested in borrowing particular historical techniques from theorists like White and Foucault for the specific project of unravelling the problems faced by feminism when it engages with the law.

The problem when dealing with law and history, however, is that legal writers take an unproblematised view of history (just as most historians do with the law). History is used in both legal writing/theory and in substantive law itself as a procedural tool to expand the purview of the law. In this way, history is inscribed upon legal doctrine as a means of explaining teleologically the objective criteria by which the law operates. Critical problems faced by subjects excluded by the law

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2 Roland Barthes (1977), 'Introduction to the Structural Analysis of Narratives', *Image, Music, Text*, (ed. and Trans. S. Heath), Hill and Wang, New York, pp. 79-124, p 79

(those which do not fit the universalised standard) are therefore constantly hidden. This thesis contends that the law needs the techniques offered by historical theorists committed to questioning the apparently self-evident nature of subjectivity.

If the difficulties within historical theory itself are acknowledged, however, and if Western law is read as a discourse whose authority is derived from liberal notions of sovereignty, it is evident that a translation of recent historical theory about subjects into the law is neither automatic nor straightforward. However much law and history share similar techniques (around notions of evidence and narrative) there remains a radical disjuncture between their projects. Whereas history is free to be self-challenging and self-reflective, law relies upon its own constructions of power over subjects to enable it to possess the authority needed to govern them in the first place. Jean-Francois Lyotard identifies such disjunctures as constituting *le differend.* He argues that some interdiscursive conversations, or exchanges, are impossible, because no one rule can be invoked in which to pass judgement, since that rule necessarily belongs to one discourse, or language, only.[3]

From such a point of disjuncture, this thesis has been committed to investigating theoretical places from which to overcome the law/history *differend.* Critical historical theory, particularly that which assists in deconstructing essentialised notions of the subject, can play a role in the broader project of challenging the philosophical basis of the law, and in this way challenging its self-enclosed notion of objective authority. History is one means by which post structuralist critiques of the contradictions of liberalism can be made transparent within legal doctrine. This thesis has been committed to re-evaluating the law/history relationship in order to suggest a methodology for law to open itself up to acknowledging subjects and subjectivities that do not fit the universalised standards, as embodied in the 'ordinary person' or 'reasonable man'.

The question of subjectivity could be explored from a multitude of perspectives. This thesis has chosen to investigate domestic violence, or more precisely how

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3 Jean-Francois Lyotard (1983) *The Differend: Phrases in Dispute* (trans. G. Van den Abbeele), University of Minnesota Press, Minneapolis

feminisms have conceptualized it, and the difficulties the law has in reading those concepts and in reading the subjectivity of battered women.

There have been several attempts within legal theory itself to deal with the questions raised by feminism. Both feminist jurisprudence and the Critical Legal Studies school have explored critically the objective, liberal foundations of modern legal doctrine. However, unlike Critical Legal Studies, feminist jurisprudence has acknowledged the value that equality bequeathed by liberalism has for women seeking full legal citizenship. Feminist jurisprudence, like feminisms more generally, is constantly implicated in liberalism while it attempts to challenge it.

In recent times, these challenges have involved theoretical investigations on how to deal more comprehensively with the intersections between sexuality, gender and race. Underscoring such investigations is a continuing commitment to questioning the male/female dichotomy. The reliance by discourses like the law on this dichotomy has produced a flawed ability both to recognise female subjectivity and a failure to recognise male-female difference. This reading of gender has been increasingly undermined by feminist scholars of all disciplinary persuasions. 'Classical' radical/liberal feminist positions, which rest also on a male/female dichotomy, are being weakened. The influence of postmodern perspectives on the unravelling of the male/female dichotomy, and the critique of liberalism as a meta-narrative, therefore have a particular resonance for feminist theory. Feminist theory has always been 'post modern' in the sense that it is committed to critiquing 'modern' male dominated practices and disciplines. The ideas of Lyotard and Foucault, however, are of particular relevance when applied to legal thinking, and these enable a critique of law's objectivity to be taken further.

It is not enough, especially for groups (like women) marginalised by traditional legal categories to trust that the challenge to legal liberalism will result in a protection and promotion of their subjective needs. Some challenges might discard the opportunities of liberalism along with its constraints. Postmodernism, which critiques liberal notions of objectivity but does not seek to displace them, becomes useful. A postmodern jurisprudential approach does not assert that there is no truth, but is involved instead in finding ways that truth operates. It necessarily becomes involved in unravelling the ways in which subjectivity is constructed.

The commitment in this thesis to exposing the construction of subjectivity within the law thus mirrors the project undertaken by historical theorists of constructing histories about divergent subjectivities. This project - most easily recognizable in Foucault's articulation and development of the notion of genealogy - is about asking 'how' questions as opposed to 'why'. This perspective enables, rather than closes off, challenges for groups traditionally hidden from public recordings of past events, and on a more general level, adds to history's inherent power of critical voice.

Therefore a valuable means by which feminism, and a feminist jurisprudence, can extend its project of creating a public space for women as citizens of diverse subjectivities is to embrace the project of genealogy. The shared commitment by scholars of post modern jurisprudence and by contemporary historical theorists to highlighting the question of subjectivity provides a means of overcoming the discriminatory excesses of liberalism, whilst maintaining its prima facie commitment to equality. It also provides a method for overcoming the problem of *le differend.*

Legal scholars, to some extent, have identified a self-consciousness about legal narrative as the key to overcoming the exclusion of minority perspectives from legal discourse. Scholars of the law and literature movement identify transformative potential for feminists and critical race and queer theorists, in challenging the law through narrative. However, they maintain that challenges to the law via narrative are only capable of occurring when a marginalised group seeking to challenge their legal identity presents a coherent subjectivity. Thus they cede to law the very foundations of objectivity by objectifying the identities implicated in the building of those narratives.

The methodology offered in this thesis attempts to avoid this problem by borrowing from contemporary historical theory more fluid conceptions of narrative than are used in legal theory, and acknowledging the subjectivities by which such narratives are constructed. In this way, 'marrying' genealogy with postmodern jurisprudence allows a methodology by which both feminism and the law can be challenged.

This thesis has explored the conjunction of different strands of Australian feminism with related political movements such as libertarianism, socialism, and liberal reformism, at both a given moment of time (the 1970s and 1980s) and over time. While these different, informing perspectives lead to the difficulty of feminisms' lack of a coherent subjectivity, they also give to feminism an internal dynamism that allows it, as both theory and practice, to transform its critical stance on dominant ideologies, like liberalism.

The convergence of feminist perspectives in the 1970s was accompanied by a rhetoric of collectivity, which became a foundational tool for building a discourse on domestic violence. The emergence of this discourse allowed the experiences of horror and bravery of individual survivors of domestic violence to be politically identified, a process which involved a transition of women's experience as a discursive category from the private to the public sphere. Although not all women involved in the campaigns around domestic violence in the 1970s and 1980s perceived their political position as implicated in the liberal project, their collective power - articulated through a discourse of the battered body - resulted in an engagement with and recognition by a uniquely Australian liberal/welfare state. The extension of this project, to force an identification of the subjectivity of the battered woman by the law, changed the nature of Australian, and specifically Sydney, feminisms even further. The politicisation of Violet Roberts as the battered woman who kills was the product of a collusion of informing perspectives which publicly challenged the universal standards of liberal law (of the reasonable man) and simultaneously declared a multivalent feminist commitment to the project of women's (especially battered women's) unique subjectivities.

Throughout this thesis, the task of developing a feminist jurisprudential approach to battered women who kill has been made more complex by the internal ambiguity of feminism. Yet this ambiguity has also served as a means of acknowledging difference, and furthering the quest to articulate and identify women's subjectivity by the law. By taking a genealogical approach to the paradox of the law's treatment of battered women who kill, the preconditions of feminisms' struggles to challenge its own contradictions, not to mention the contradictions of liberalism, are exposed. History, therefore, discloses the practices of the present. It

provides the location and contextualisation of the struggle of the battered body to free itself, metaphorically and in terms of its corporeality, from the insidious violence of the denial of subjectivity and freedom enacted in both a multi-perspectived public, and private, sphere.

The Battered Body, then, comes to signify more than the politicisation of Violet Roberts as an embodiment of the historical nature of feminism's challenges to liberal law. It also suggests the possibility of challenging the boundaries of disciplines and discourses themselves. Bodies of knowledge, and discourses, which do not investigate their own processes of construction and operation, deny the opportunity for groups who are excluded from the universal, and 'malestream', standards of experience to challenge the identities which are inscribed upon them. In approaching the question of claiming women's subjectivity before and within the law, the interdisciplinary incursions offered by genealogical history become invaluable.

The ambiguities of theory, in a time of political commitment to the celebration of difference and differences, must continue to be made transparent. Methodologies which investigate the location and context of struggles to find voice and identity must be championed and extended, in order to give value both to the diversity of interdisciplinary practices, and the diversity of the subjects and subjectivities which constitute those practices. This thesis has attempted to contribute to the evolution of such methodologies.

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