

RESTRICTED VISION—WOMEN, WITCHES AND WICKEDNESS IN THE COURTROOM

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The great Pakistani poet and philosopher Dr Allam Iqbal says,

Tyranny cannot endure forever. But ... democracy alone is not enough [to end it].

Freedom of choice alone does not guarantee justice.

Equal rights are not denied only by political values.

Social justice is a triad of freedom, an equation of liberty:

Justice is political liberty.

Justice is economic independence.

Justice is social equality.

Benazir Bhutto

Is tyranny too strong a word for the way in which the British justice system, and now the Australian justice system, has treated women? What word properly applies to a system wherein women:

- were deprived, by Law Societies and Bar Associations, from going into the practice of law, despite their qualifications¹ matching those of men,²

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¹ Other than their being women, and the men being men.

² See for example: *Re Haynes* (1904) 6 WALR 209; *Re Bradwell*, 83 US 130, 16 Wall 130 (1873); 55 Ill Sup Ct Rep 535 (1970); *Bebb v Law Society* [1914] 1 Ch 286. See generally: Jocelynn A Scutt, *Women and the Law* (1990) Chapter 1.

- were refused, by judges, the right to practise law, by a sleight of hand which labelled women ‘not persons’ for the purpose of *Legal Practice Acts* enabling persons with relevant qualifications³ to practise law;⁴
- once qualified⁵ to practise law, were required year after year to lobby governments and Attorneys-General to pass *Women’s Legal Practice Acts* (or *Women’s Legal Status Acts*) so that women might enter legal practice;⁶
- once having had *Women’s Legal Practice Acts* passed, done their articles, and gained admission to practice, were told by judges that these Acts served to confirm the ‘rightness’ of earlier determinations that women were not ‘persons’ (otherwise, why any need for *Women’s Legal Practice Acts*?), so that a qualified woman lawyer was not entitled to be a notary public, for the *Public Notaries Act* referred to ‘any person’, not ‘women’.⁷

What word properly describes a system where:

- laws built up over centuries have been created by courts peopled by men alone, without any input from women, with at least the vast majority of those sitting on the benches and formulating the laws having no inkling at all that the laws might therefore be biased in accordance with their own perceptions of ‘justice’, ‘fairness’ and ‘neutrality’;⁸
- or, worse, at least some of those sitting on the benches and formulating the

³ Apart from, as it turned out (according to the judges) the requirement that all ‘persons’ be male, and that no ‘person’ be female as the criterion upon which acceptance as coming within the term ‘person’ in the legislation was premised.

⁴ See n 3.

⁵ Apart from sex/gender — that is, being female rather than male.

⁶ For example, Ada E. Evans, graduating from the University of Sydney in 1902 as Bachelor of Laws, lobbied the Attorney-General every year following her graduation until in 1918 the *Women’s Legal Status Act* was passed by the New South Wales Parliament. Only then was Ada E. Evans entitled to register as student-at-law, completing her two years so entitling her to be admitted to practice as a barrister of the Supreme Court of New South Wales. See: Bek McPaul, ‘A Woman Pioneer’ (1948) 22 *ALJ* 1; Gail Griffith, ‘The Feminist Club of New South Wales, 1914-1970: A History of Feminist Politics in Decline’ (1988) 14 (No. 1) *Hecate* 56; Jocelyne A Scutt, *Women and the Law*, above n 2.

⁷ In South Australia, Mary Cecil Kitson was admitted as a practitioner of the Supreme Court under the *Female Law Practitioners Act 1911*, having been lobbied for by women denied the right to practise by judicial determinations that ‘person’ in the *Law Practitioners Act* did not mean ‘women’. She then sought to be appointed a public notary but was denied, on the basis that s 3 of the *Public Notaries Act* stated: ‘Every person who shall be desirous of obtaining an appointment to act as a Public Notary in the said Province [South Australia] shall apply by petition to the Supreme Court ... for that purpose setting forth such facts therein as he [sic] may deem expedient for the purpose of satisfying the said court as to his fitness and qualifications to discharge the duties and exercise the functions of Public Notary.’ A male Mary Cecil Kitson would have been appointed: *Re Kitson* [1920] SASR 230.

⁸ A view strongly held amongst conventional judges is that the only ‘neutral’ judge can be ‘one of them’ — white, male, middle-aged or older, middle-class or better, of Anglo-Australian or possibly Anglo-Irish origin. This is exemplified in the remark, reportedly made by one such judge at a seminar on bias in the judicial system, that the real problem with appointing Maltese-origin (sic) men to the bench would be that they would never be able to sit on workers’ compensation cases. (The racist implication being that they would be biased in favour of their own countrypeople.)

laws *do* know that the laws operate in their interests and against the interests of women and, believing this ‘right’ — or *their* right, see them as ‘fair’ and ‘just’, for ‘justice’, ‘fairness’ and ‘neutrality’ properly apply to men only;⁹

- laws are assumed to be ‘neutral’ because they are not, on their face, labelled ‘for men only’ or ‘applicable to women alone’;¹⁰
- courts and judges never ever consider the certainty — or even the probability — that they might be biased, lacking in neutrality and imbued with injustice, because for centuries women were disenfranchised from sitting on the bench;¹¹
- courts and judges never ever consider the certainty — or even the probability — that they might be biased, lacking in neutrality and imbued with injustice, because the courts remain almost wholly dominated by white, middle-class Anglo-Australian or Anglo-Irish men of a certain age;¹²
- the rules of natural justice are assumed to apply in accordance with a neutrality that does not admit of male–female power imbalances, racial preju-

⁹ Some judges are asserted to continue to think — and operate — in these terms. This is, effectively, the proposition put by an organisation established to represent the interests of ex-wives of members of the legal profession, including judges. They say that their ex-husbands have the ‘inside running’ in divorce proceedings, in that (for example) they have ‘free’ legal advice and representation, as a ‘favour’ to them by their colleagues; because of their own legal expertise and that of their representatives they manage to ensure that proceedings are adjourned so as to favour their interests; they are positioned through their representation, etc. to effect property settlements in their interests, to the detriment of their ex-wives; they are better able to conceal assets etc. This view is not supported by the mainstream legal profession or, it is fair to say, by the courts.

¹⁰ See for example: Victorian Law Reform Commission, *Homicide*, Discussion Paper No 13 (1988). See further: Tess Rodd, ‘Marital Murder’ in Jocelynn A Scutt (ed), *Violence in the Family* (1980), Jocelynn A Scutt, *Even in the Best of Homes — Violence in the Family* (2nd ed, 1990) Chapter 8; Jocelynn A Scutt, ‘Sexism in Law’ in S K Mukherjee and Jocelynn A Scutt (eds), *Women and Crime* (1980).

¹¹ Rather, the notion is that it is women’s ‘fault’ that there were no, and are now few, female judges: they are insufficiently meritorious, didn’t study law in ‘sufficient’ numbers in the past, began to ‘choose’ law in equal numbers only from the mid-1980s on, don’t go to the Bar in sufficient numbers, don’t stay at the Bar long enough, don’t practise in the ‘right’ areas, don’t have the ‘right’ experience, having ‘family responsibilities’ choose not to ‘dedicate’ themselves to law in the way necessary to be considered ‘judicial material’ (that is, in the way men who have family responsibilities but do not recognise them, or fail to see that they are or ought to be equally their responsibilities as those of their wives, dedicate themselves to the law so rendering themselves ‘judicial material’).

¹² Like the Australian judge who, when (during the time of the O.J. Simpson trial in the United States) asked whether he agreed with television cameras coming into the courtroom said that he would welcome it at least insofar as it would show the world that there was no ‘gender bias’ in ‘his’ court. This is a court where about five of the eighty or so judges are women and where (as in most other courts) the bar table is generally populated by men. Rarely would women counsel be opposed; even more rarely (if ever) would opposing female counsel be briefed by female instructing solicitors and likely never in this combination with female junior counsel. Only once in the entire history of the High Court of Australia has an ‘all woman’ team appeared: *Osland v The Queen* (2000) 173 ALJR 173. Rendering it even more rare, the team was all female at both the appeal and leave to appeal hearings. See further: Jocelynn A Scutt, ‘Sexual Politics in High Court Places — Judging Women, Judging the Judiciary’ (2001) *Women’s Law Journal*.

dice, disability discrimination and sex/gender differentials;¹³

- the rules governing bias are assumed to apply without regard to male–female power differentials, racism, sexism or discrimination based on disability;¹⁴
- the stark lack of representation of some groups within the legal profession, and the minority representation of others (women, Aboriginal women and men, for example), are never truly accepted by those in positions of power, and most particularly those who dominate it, as illustrative of a prejudice, bias and inequality within the confines of the law.¹⁵

¹³ With increasing numbers of women, persons of minority ethnic background, and Aboriginal Australians moving into the legal profession and thence to private practice at the Bar, rules of bias are susceptible to a paradigm shift, at least in the long term. That is, ‘bias’ has been interpreted to date by people (mainly men) adhering to conservative, establishment views of what is, what is not, ‘bias’. What happens in court is likely to be ‘seen’ differently, through these different perspectives. For example, in a Crimes Compensation Tribunal case the tribunal, taking an interventionist role, asked a social worker witness questions about the ‘paranoia’ of the grandmother whose grandchild had allegedly been sexual abused by a family member. There was no evidence of paranoia — no clinical or psychiatric material, for example; the social worker was not competent to answer such a question; the question was asked without any foundation; it was not a question that should properly have been asked by the tribunal (or, in the lack of any foundation, by anyone in the tribunal). That this intervention (and others similar to it) brought the question of bias into focus was clear to the female solicitor and barrister. It was not clear to the tribunal (otherwise, the question would not have been asked). Would a male solicitor and barrister have seen ostensible bias in the tribunal’s approach? It is doubtful that a male barrister and solicitor would have taken it on review to the Supreme Court.

¹⁴ A fracas in the Supreme Court of Victoria in September 2000 revolved around allegations that the Practice Court Judge, Justice Beach, had signified bias against women and trade unionists, when he allegedly stated that affidavits sworn by them were ‘worthless’ or ‘not worth the paper they were written on’. The implication was, it was alleged, that the documents were ‘worthless’ because women had sworn them. The matter was referred by the union lawyers to the Attorney-General, the Hon. Rob Hulls, who in turn referred it to the Chief Justice, Justice John Phillips. He determined that no bias had been expressed by Justice Beach.

¹⁵ Justice Mary Gaudron of the High Court, Australia’s most senior female member of the judiciary and one of seven most senior Australian judges recognised this amongst her colleagues in a speech delivered in 2000. When at the invitation of *The Australian* I wrote an ‘Opinion’ piece confirming this truth, it obviously unsettled some evidently already unsettled male member/s of the legal profession: I received an ‘anonymous’ ‘cartoon’ of a scene any reasonable person would assess as a crude depiction of male domination, and being vilifying of women as well as threatening. The caption asserted I had judicial aspirations and it in combination with the sketch was a clear indication that as a woman I had ‘ideas above my station’, the place for me was in the subordinate position all women are expected to occupy — in ‘no agency’ sexual submission to the aggressively violent ‘penis as weapon’ culture the author/s apparently see/s as ‘right’ for the world. Despite his/their sense of threat, no woman with judicial aspirations would, of course, ever publish any criticism of the judiciary (unless ever-so-mildly) or point to the bias inherent in their judgments, at least not in the way I do. ‘Naming’ the problem as it is is not a way to endear one to those in power, or who exercise power in the ‘right’ places, to appoint or endorse appointment to the judiciary! See: Geesche Jacobsen, ‘Women still seen as inferior: judge’, *Sydney Morning Herald*, 15 July 2000, 3; Bernard Lane, ‘Judge charges the powerful — Men fear equality of sexes’, *Weekend Australian*, 15–16 July 2000, 1; Editorial, ‘Well said, Justice Gaudron — Australia’s most senior female judge expresses the frustration of many women’, *The Age*, 17 July 2000, 16; Editorial, ‘Gaudron enlivens equality debate’, *The Australian*, 17 July 2000, 14; Jocelyne A Scutt, ‘No merit to endemic sexism in legal system — Female appointments to the judiciary are lamentably few’, *The Australian*, 19 July 2000, 13. Women lawyers views on the ‘place’ of women in law, and the existence of anti-woman views in it, can change over time, as Justice Gaudron has acknowledge for herself: see Mary Gaudron, ‘Speech to Launch Australian Women Lawyers’ (1997) 72 ALJ 119–24.

In 1986, the *Report of the New York Task Force on Women in the Courts* said:

... gender bias against women ... is a pervasive problem with grave consequences ... Cultural stereotypes of women's role in marriage and in society daily distort courts' application of substantive law. Women uniquely, disproportionately and with unacceptable frequency must endure a climate of condescension, indifference and hostility ...¹⁶

Yet is democracy (at least as now expressed) — or a few faltering steps resulting in representation of women and racial or ethnic minorities on the bench and in the courtroom — sufficient to end it? The notion that centuries of judicial myopia and a century of bullying from the bench and bar table will be overcome by random or even semi-planned appointments of women, one slowly after the other, to positions of ostensible authority within the legal system is misguided. For a system that has not seen women as credible, the immensity of the change required is beyond calculation. For a system that aligned the condemnation of women as witches to the highest principles of jurisprudence, the immensity of the task is beyond human measurement. Accepting women's personhood as equal to, and equally valuable as, that of men is a task beyond measure for male jurisprudence.

I WITCHES IN COURT

In England in the sixteenth and seventeenth centuries, more than 1,000 women were put to death as witches. In Scotland, too, witch-hunting and witch-burning had the imprimatur of the legislature and the courts. In 1643, in one Scots county alone — Fife — 30 witches were burned.¹⁷ Cromwell sought to eliminate the crime of witchcraft and the burning of witches from the statute books, but gained a short moratorium only. The crime remained on the statute books until early last century. Today, some calculations of the number of all women burnt as witches measure into millions.¹⁸

Judges were more persistent in their view that witchcraft was a crime deserving of court time and jurors' deliberations. After sitting on his last trial of witches, in 1662 Matthew Hale, Chief Justice of England, concluded, when the verdict of 'guilty' was recorded, that the decision was sound because:

- the crime of witchcraft was one to be properly condemned;
- the women who stood condemned were proof of the crime of witchcraft;
- the women and the verdict were evidence of the wisdom of both the law and the jury system.¹⁹

¹⁶ Reprinted in (1986-1987) 15 *Fordham Urban Law Journal* 11, 17-18.

¹⁷ John McLeod, *Dynasty — The Stuarts 1560-1807* (1999), 167, 202.

¹⁸ See for example Justice Murphy's judgment in *Chamberlain v The Queen* (No. 2) (1982) 153 CLR 521.

¹⁹ See Jocelynn A Scutt, 'Schemers, Dragons and Witches: Criminal Justice and the Fair Sex' in Suzanne Dixon and Barbara Garlick (eds), *Reconstructing Women in Political History* (1991).

In his charge to the jury, Hale told them he would 'not repeat the evidence unto them, least by so doing he should wrong the evidence on one side or on the other'. This was very different from his usual approach, which was to trawl through the

evidence, repeating it item by item, and reciting to the jury his opinion of all the facts as presented to the court. Here, the evidence for the prosecution constituted that of the girls and boy claimed to have been infected by the witchcraft, which was contradictory and consisted of assertions that were 'magical' and thus unable to be tested or admitting of no exceptions, so that they could not be challenged, or subsisted in the women's physical appearance redolent of old age.²⁰ The defence relied upon an experiment, presided over by Lord Cornwallis, Sir Edmund Bacon and Mr Serjeant Kelyng, which was designed to test the girls' evidence, as demonstrated by them in court, that the 'least touch' by the accused caused them to spring open their clenched fists and shriek out with a sudden, high pitch. When they saw that rather than confirming the prosecution case, the experiment denied it, Cornwallis, Bacon and Kelyng made an open protest, but to no avail.

Cornwallis, Bacon and Kelyng's test was to place an apron up before the eyes of one of the girls, so that she could not identify who was to touch her. They then had a person other than the accused touch the girl's hand. This touch produced an effect identical to the touch of the women standing accused as witches: the girl reacted by springing open her clenched fists and letting forth a sudden, high pitched shriek. Immediately, the three independent observers returned to court, telling Hale that they believed 'the whole transaction of this business was a mere imposture'.²¹

Hale's charge to the jury did not canvass this and the other evidence. His summing up was short. He told the jury that they had 'two things to enquire after' only:

First, whether or no these children were bewitched? Secondly, whether the prisoners at the bar were guilty of it?

That there were such creatures as witches he made no doubt at all; for first, the Scriptures had affirmed so much. Secondly, the wisdom of all nations had provided laws against such persons, which is an argument of their confidence of such a crime. And such hath been the judgment of this kingdom, as appears by that Act of Parliament which hath provided punishments proportionate to the quality of the offence. And desired them strictly to observe their evidence; and desired the great God of heaven to direct their hearts in this weightily thing they had in hand: for to condemn the innocent and to let the guilty go free, were both an abomination to the Lord.²²

Hale did not congratulate himself to the jury on his own handling of the case. He had no need of open self-congratulation, for he was and remains revered amongst

²⁰ In *Select Cases of Conscience Touching Witches and Witchcraft* (published in 1646), John Gaule observed: 'Every old woman with a wrinkled face, a furrowed brow, a hairy lip, a gobber tooth, a squint eye, a squeaking voice, or scolding tongue, having a ragged coat on her back, a skullcap on her head, a spindle in her hand, and a dog or cat by her side, is not only suspected but pronounced for a witch.'

²¹ *A Tryal of Witches at the Assizes Held at Bury St Edmunds ... before Sir Matthew Hale, 1682*, London, UK.

²² David Lanham, 'Hale — Misogyny and Rape' (1983) 7 *Criminal Law Journal* 153.

blackletter lawyers for his judicial 'wisdom' and his exemplary contribution to jurisprudence, particularly blackletter law. Against substantial evidence (of which justifying as sound law the putting of witches to death must surely be accepted, in all reasonableness, as part), Hale has even been lauded as 'far from being a misogynist ... both personally and professionally treat[ing] and regard[ing] women at least as well as men ...'²³

Amy Duny and her colleague Rose Cullender were accused of swallowing large nails whole, then regurgitating them without damage to their gullets and causing cramps in their victims, who walked lame first on one leg, then on the other, apparently uncertain of which leg it was that they had asserted initially as being affected by witchcraft. They were old women, and poor, and living without the protective cover of a husband, and so were likely to be more vulnerable to charges of witchcraft. Those who lived under coverture were controlled by their marital status.²⁴ Those who did not had to be controlled judicially, through the words of wisdom spoken by judges holding the highest positions on the bench.

For the crime of witchcraft had a differential impact on women as accused, and was used to control 'loose' women: those women who were single or widowed, and without male protection — or male/marital control.²⁵ Women were most often accused of witchcraft; women were most often charged and tried; and women were most often found guilty. Citing the figure of 92 per cent of those accused as witches in Essex, England, Geis notes that the 'most marked social correlation is that between witchcraft and women'.²⁶

'Differential impact discrimination' principles illustrate the lack of neutrality in the notion that because 'witches' or 'witchcraft' definitionally included both women and men, women and men were equally affected by the law condemning witches as guilty of witchcraft.²⁷

²³ Ibid 148. For a rebuttal, see: Gilbert Geis, 'Revising Lord Hale, Misogyny, Witchcraft and Rape' (1986) 10 *Criminal Law Journal* 319. Lanham asserts that because the legal definition of possible witches included both women and men, 'Hale's willingness to preside over witchcraft trials can hardly be regarded as evidence of misogyny.' But as critical analysts of any law and legal system well know, what the law says and how it operates, or how it operates within a particular courtroom, under the hand of a particular judge, are what can illustrate judicial misogyny, xenophobia, homophobia or racism.

²⁴ And at times by marital rape, which Hale denied the existence of, by asserting that by her consent to marriage a woman had given her consent to sexual intercourse, so that a husband could never (in law) rape his wife. See: Jocelyne A Scutt, 'Consent in Rape: The Problem of the Marriage Contract' (1977) *Monash University Law Review* 255.

²⁵ In her book *A Passion for Friendship*, Janice Raymond traces the origin of 'loose woman' from its original meaning of 'free' woman in the sense not of being 'free' for sexual favours or open to ravishment, a slut or a slattern, but being 'free' as in independent. This meant independent of male control in marriage, and independent of male control through fear of predatory or violent sexual behaviour, or through his being a purchaser of sexual 'favours' in the need for a woman to sell her body to survive.

²⁶ Geis, above n 23, 321. See also Anderson and Gordon, 'Witchcraft and the Status of Women — The Case of England' (1978) 29 *British Journal of Sociology* 171. Geis points out that Amy 'Duny' is properly named as Amy 'Denny', the name appearing in the presentment. Over the years, 'Duny' has been used consistently by historians, lawyers and critics.

²⁷ In Australia, differential impact discrimination is generally labelled 'indirect discrimination', a confusing term that does not illuminate: people (both in the general and the legal community) express explicitly or by implication their struggle with the meaning and concept of this form of discrimination in

Differential impact discrimination takes place where a rule (or law) is in its words sex/gender neutral, but in its interpretation or application impacts negatively upon one sex/gender more than the other *because* of their sex or because characteristics are attributed to that sex/gender. Women, sharing or being believed to share characteristics that are 'witch-like' more than such characteristics are shared by men, will be disadvantaged by the 'neutral' rule (or law) that women and men *can* be condemned as witches. Women are more at risk by a practice of pursuing 'people' as witches, or labelling 'people' as witches, prosecuting them as witches and finding them guilty as witches. That is, the 'people' pursued, labelled, prosecuted and found guilty will more often be women.

The problem is exacerbated when women accused of witchcraft are obliged to protest their innocence in courts run by judges operating in accordance with a misogynist belief system. This is starkly evident in the trial of witches in the court of the Chief Justice of England. For even were the argument that Hale was simply operating within the spirit and letter of the law of his time legitimate to discount his misogyny today, and to render equally 'innocent' that of his fellows who lauded him as the jurisprudential ideal,²⁸ ample evidence is available to show that by the time Hale was pronouncing on the wisdom of condemning women as witches, 'scepticism in regard to the belief in witches was widespread both on the continent and in England'.²⁹ Some 50 years before the Duny–Cullender trial, early in the seventeenth century, in his play *The Devil is An Ass*, Ben Johnson ridiculed witchcraft. This was not an isolated event, and community condemnation of the laws of witchcraft built up through the century.³⁰ Eventually, a struggle ensued within the legal system itself as to the 'wisdom' of condemning women as witches and of maintaining a law under which they might be tried and found guilty.

That Hale's successor some decades later, Chief Justice Holt (a man), convicted no woman of the crime of witchcraft, and sentenced to the pillory an accuser of one witch after having found him to have faked the spitting out of pins, does not deny the danger confronting women accused of witchcraft in courts peopled by male judges, male prosecutors, male defence counsel and all-male juries. Holt had the man searched *after* he had found the woman 'not guilty', so that she relied for her acquittal not on external, objective evidence, but on the disposition against witchcraft of the Chief Justice.³¹ If all 'witches' were to be safe from conviction, the system as a whole had to recognise the lack of substance of the charge, rather than accusing and prosecuting them, leaving them to hope for a 'sensitive' judge.

It is no argument that women came into court accused of witchcraft by members of

the way it is described in equal opportunity or anti-discrimination legislation. See for example: *Equal Opportunity Act 1995* (Vic) ss 8 and 9 ('direct' and 'indirect' discrimination) and *Anti-Discrimination Act 1998* (Tas), ss 14 and 15 ('direct' and 'indirect' discrimination).

²⁸ And this is a poor justification and miserable argument.

²⁹ Geis, above n 23, 321.

³⁰ Just as, the following century, community revulsion at capital punishments being meted out on 'small' crimes — thefts of low amounts or small items, and the like. The community voice was heard through juries' refusing to find accused persons guilty of these crimes, long before the judiciary and, eventually, the legislature, moved to restrict capital punishment to 'higher' crimes.

³¹ Geis cites both examples in above n 23, 322.

the community, and that women (and girls) might accuse other women.³² No law of witchcraft would ever have existed, and no one would ever have been found guilty of witchcraft, had all-male legislatures and all-male courts not determined it to be so. Women had nothing to do with the making of the law, nothing to do with its interpretation, and nothing to do with its execution.

Nor is it an argument that judges of Hale's ilk acted only to serve the law, having no choice but to apply the law as it was written. No law can be applied without being interpreted, and judges notoriously disagree with one another about the meaning and application of all manner of laws. It was no different in the seventeenth and eighteenth centuries.

Judicial hagiography writ large featured in the preface to *Hale's Pleas of the Crown* in its 1778 edition, reprinted from the 1736 volume:

The following treatise being the genuine offspring of that truly learned and worthy judge Sir *Matthew Hale* ..., stands in need of no other recommendation, than what that great and good name will always carry along with it.

Whoever is in the least acquainted with the extensive learning, the solid judgment, the indefatigable labours, and above all the unshaken integrity of the author, cannot but highly esteem whatever comes from so valuable a hand.

Being brought up to the profession of the law, he soon grew eminent in it, discharging his duty therein with great courage and faithfulness; and tho he lived in critical times, when disputes ran so high between king and parliaments, as at last broke out into a civil war, yet he engaged in no party, but carried himself with such moderation and evenness of temper, as made him loved and courted by all ...³³

If, as Emlyn asserts, Hale was a 'great lawyer [who] would never suffer the strictness of law to prevail against conscience', why did his conscience desert him in the face of accusations of witchcraft made against women? Why, when Hale is said to approach his role as judge by summing up evidence to the jury always in a painstaking manner, did he not do this in the trial of the 'witches' Amy Duny and Rose Cullender?³⁴

Neither is it an answer to say that all-male courts eventually brought the law's operation to an end, by summing-up for acquittals or refusing to entertain the charges, and that all-male legislatures eventually repealed 'witch laws'. The courts

³² In above n 23, 148, Lanham seems to rely upon the fact that (passing over the boy) girls were the witnesses against Amy Duny and Rose Cullender, and that Hale ignored the 'test' that showed up the faked evidence somehow 'proves' he was not misogynist. Added to this is, for Lanham, the fact that those who applied the test were men. Hence, apparently, Hale was even-handed: he favoured the girls' evidence over the men's 'test'. That this led to the death of women as witches doesn't seem to count in the equation. Or is Lanham suggesting that because girls (not 'women' as he says, in setting out the equation) accused women as witches, and women died as witches accused by girls, Hale — the one, after all, making the rules (or at least applying them according to his wont) — had nothing to do with it?

³³ S Emlyn, *Hale's History of the Pleas of the Crown* (1778) vol 1, i.

³⁴ This description of Hale's approach to the law and in his role as Chief Justice appears at ix-x of the Preface.

and the legislature were not in the vanguard. For years before they took steps to abandon and abolish witchcraft, the community had long moved on. The courts and the law were in disrepute. Even at the time Hale dealt with the Bury St Edmund 'witches', he was not revered amongst the populace, if he ever had been:

Hale's refusal to sum up the evidence and his statements about witchcraft were considered extraordinary at the time ... It seems fair to conclude that Hale's zeal against atheism overcame his commitment to the new methodology, with his refusal to sum up indicating his awareness of the cognitive dissonance which he had created for himself.³⁵

Ultimately, it is unsurprising that the courts lagged behind. The doctrine of precedent makes this inevitable, for judges and lawyers are forever looking back, to the past, for guidance as to what is or ought to be.

True it is that judges and lawyers are not the only ones who look to the past. Other disciplines and the community may, of course, look to or 'live in the past', or be imbued with past ideology, interfering with their capacity or ability to move forward, and to change. Yet no discipline other than the law *requires* through its *formal processes*, direct reference to the past (in the law, past cases), with 'penalties' for failing to centre present decisions in case law decided by (mostly) dead judges, who themselves founded their judgments in those of the dead judges who preceded them.³⁶

Today, with the abandonment of witchcraft as a crime to be dealt with under the law, and changes — however slight, over all, in the composition of courtroom personnel — is differential impact discrimination in law a thing of the past? Or is the foundation upon which Hale built his reputation, and the way in which he is revered, still relevant in today's courtrooms, for women and men? Does the movement of women into the courtroom as counsel, instructing solicitors, expert witnesses, magistrates or judges make a difference?

II BULLYING, BASTARDRY AND BAD BAD GIRLS

Oscar Wilde once said:

Questions are never indiscreet. Answers sometimes are.

(from *The Ideal Husband*)

Women who come to the bar learn that somewhere there is a secret book of questions, the questions that are designed to elicit the indiscreet answers. These are the questions that are never to be asked, the ones that those in the category of 'black-letter lawyers' would never ask, for they are the questions that challenge the status quo, that deny that the law must never be challenged, that defy the authoritarian

³⁵ B. Shapiro, *Probability and Certainty in Seventeenth-Century England* (1983) 191.

³⁶ On this problem in the context of the law on child sexual abuse and exploitation, see: Jocelyne A Scutt, 'Confronting Precedent and Prejudice: Child Sexual Abuse in the Courts' in Kim Oates (ed), *Understanding and Managing Child Sexual Abuse* (1990). 'Penalties' include being overturned on appeal.

right of the law to impose itself without regard to the culture of racism and prejudice against women that infuses the legal system.

Those who adhere to a belief that the law is there to be used not to provide more power to the powerful and to deny the rights of the powerless, are never provided with the book of secret questions.³⁷ Ultimately, of course, the book is not needed. For as soon as that question is asked and it is always asked by one who does not believe in the law as a mechanism for keeping power with the powerful, and away from the powerless every lawyer knows it. The frisson in the courtroom is palpable. The agitation on the bench, the uproar at the other end of the bar table and the oh, so evident desire for the question not to be answered. This is the question that will, if allowed by the court to be answered, elicit the 'indiscreet answer', the one that those in power do not want to hear. Most particularly, they do not want to hear one of their own give voice to it.

For 15 years at the end of the last century, women equalled men in number in most Australian law schools. Women now figure as approximately 12% of barristers around Australia. These figures are touted as if they evidence a great advance when challenges are made to the overwhelming male bias of the legal system. Privately, amongst those who prefer their fellow judges to be 'brothers', their barrister colleagues to be male, 12% is evidence of too great an abundance of women.³⁸

Sometimes, the private thoughts (spoken man to man) are uttered in public. This is the advantage of the Australian justice system: most proceedings are held in public; most courts are open; judgments of the superior courts are published; generally, now, court proceedings are taped and transcripts may be obtained. Yet even before looking at words spoken in courts, and words written in judgments, the legal arena shows itself as significantly attuned to the wants, needs and realities of men, and impervious to, or unmindful of, even the most basic of wants, needs and realities of women.

The structure of the courtroom is male. This begins with the furniture.

In Victoria, barristers sit opposite instructing solicitors, facing the bench. The bar table is aligned between them. The bar table, and the chairs on which barristers and solicitors sit, are designed to accommodate particular physical dimensions, particularly relating to height. If a male instructing solicitor sits opposite a male barrister, they have no difficulty in communicating with one another in the course of the trial. Sitting firmly in their seats, they can speak across the bar table without disrupting

³⁷ The 'book' is figurative: it 'exists' by reason of convention, conventional ideas, conventional 'wisdom' amongst those who 'rule' the legal system. No one needs to have the rules written down, in order to 'learn' what is in the book, so long as they belong to the circles in which legal establishment ideas and ideals are writ large. These are the circles to which few, if any, women have access and, even if they do, have it on sufferance only (and it is *never* full access). These women won't ask the questions that would elicit indiscreet answers, thereby becoming honorary members of the legal establishment — whereby they may even be repaid for their allegiance by appointment to the bench. Such appointments are premised on this very basis: that they never have asked, never will ask, and as judges never will tolerate the asking of the questions, much less require the answering of them with 'indiscretions'.

³⁸ See: Rosemary Hunter and Helen McKelvie, *Equality of Opportunity for Women at the Victorian Bar* (1998).

the proceedings, whatever it is they are saying to one another. If a female barrister sits opposite a female instructing solicitor, communication can generally be effected only by one or the other or both rising from their seats to lean across the bar table to confer. Rising, they create a disturbance at the bar table, however discreetly they do this. Leaning across to consult, they create 'noise': the appearance of disruption to proceedings where all are expected to stay seated, no one is supposed to lean across the bar table, and voices are not expected to be heard. For however quietly the women do this, they inevitably fall into the category of 'noisy women'. *Men* do not need to rise in their seats, lean across the table, whisper to be heard by the colleague opposite.³⁹

Ironically, albeit classed as 'disruptive', the women are more likely to be conferring on matters related to the case, and issues that require immediate clarification or elucidation. Because they are more likely to be running their cases with minimal resources, consultation is more likely to be necessary: there is no extra person available to line up witnesses, ensure documents are copied in sufficient numbers, mark transcript or consult with the client. In trials, last minute matters do arise. Someone has to deal with them.⁴⁰ Thus, in addition to the 'ordinary' need to confer with an instructing solicitor, circumstances are likely to impose 'extraordinary' requirements.⁴¹

In cases where women appear as barristers instructed by female solicitors, the 'conferring' at the other end of the bar table not infrequently involves *sotto voce* remarks about their appearance, sexuality, deportment, style, voice and dress, even perfume.⁴² This is a tactic used to discombobulate the female barrister or the team

³⁹ I once raised this, to be met with incomprehension, in a Human Rights and Equal Opportunity Commission hearing. It became an entry in the 'Obiter' column in the *Victorian Bar Journal* — reproduced from the transcript of the trial as, I understand, a piece of whimsy.

⁴⁰ I have in mind here discrimination claims, consumer credit cases, unfair dismissal, freedom of information and unconscionable conduct trials I have run, which have required considerable organisation and coordination, and involve sometimes difficult concepts and complications. In all of them, I have worked with a sole practitioner with few resources and onerous requirements in terms of affidavit material, production of documents, exhibits, frequently thousands of pages of transcript (and, in any case, never fewer than two or three A4 folders of densely packed transcript), and the like. In every instance, the respondent has been represented by a large law firm with substantial resources and, in some instances, huge resources. In one case, for example, a 'hockey team' of solicitors was present throughout the trial (which ran for weeks), with 24 hour a day wordprocessing available, people assigned to do photocopying, etc. I and my instructing solicitor ran the case with no resources other than ourselves.

⁴¹ It can also be that women may be more likely to work in a consultative manner, rather than adopting the authoritarian (or at least individualistic) approach favoured by many male barristers. This is ironic, in light of the continuing assertions made in management theory that women do not 'succeed' in management, or do not do 'as well' as men, because they have not learnt 'teamwork' — a peculiar notion in itself, in light (for example) of the huge numbers of women who learn teamwork, and practise it weekly, throughout their school years and after, in team sports such as netball, the sport with the highest participating numbers in Australia.

⁴² Sometimes the comments are not *sotto voce*. In one of my appearances in a tribunal, opposing counsel was in the habit of employing derogatory language about me in the course of his argument: for example, that I was conducting myself in a 'megalomaniacal manner'. In the general scheme, in regard to this member of counsel in his comportment in cases in which he and I were opposed, that was a most 'mild' remark directed at me. In official correspondence, this same individual has called me a 'scalphunter', informing the recipient of the letter (an statutory official) that if I thought I was 'about to take some

as a whole. Rarely, if ever, is it the subject of frowns, looks, or ‘slapping down’ remarks by the bench. Contrarily, the conferring done by the female end of the bar table, directed wholly to the issues in the case, *is* the subject of criticism from the bench — frowns, raised eyebrows, cries of ‘shush’, demands to ‘sit down’ and the like. This happens despite the women’s voices being kept to the lowest pitch, and lower than those at the other end. When ‘note passing’ is used as a first resort or a substitute — scribbling down issues of necessity in the course of the trial — this is equally disconcerting to a bench accustomed to male barristers and male solicitors, who can exchange comments and written epistles with ease, and whose shape, height and ‘look’ are expected at the bar table in any Australian courtroom, accommodated by the space and the furniture so that they will never be ‘noisy’.

Dress is important.

In the 1980s, women appearing in the Sydney Registry of the Family Court of Australia were ‘not heard’ or ‘not seen’ where they:

- wore no stockings;
- wore a raincoat over their regular clothes;
- wore bare arms (in the height of summer);
- wore trousers.

At the end of the decade, Ariel Couchman featured on the front page of *The Age* when she was admitted to practice in the usual ceremony in the Banco Court of the Supreme Court in William Street. She wore trousers, the first woman ever to do so in that court. It caused a sensation in the profession, although what the judges thought was not made known, publicly. Later, Anna Crotty was admitted wearing a skirt — the only woman in that group of admissions to do so: everyone else was wearing trousers.⁴³

Early in the 1990s, a further sensation occurred, this time in the Family Court in Melbourne. Sue McGregor appeared, her clothing including polkadot stockings, her hair tinted with red vegetable dye. Closing his eyes and breathing deeply, the judge ‘tuned out’ for some minutes then, informing her that her appearance caused him feelings of physical illness, he refused to hear her.⁴⁴

About this time, women were being subjected to criticism in respect of their court-dress, in ways that would never be visited upon men. In the County Court of Victoria, the judge adjourned the court, although the barristers were lined up at the bar

scalps, [his] would not be the first’. That, too, is mild in contrast to the tone and epithets used in correspondence direct to me, written by him in an official capacity.

⁴³ She had been admonished by the barrister who was to move her admission that she should not wear trousers. He had been alerted to the possibility she might do so, through her fight to wear them at the legal admission course in which she enrolled in Hobart, having graduated in law from the University of Tasmania. When the head of the school said ‘no trousers on women allowed’ and the other female students would not join her in lobbying to change the rule (or ignore it) she left to complete her articles (or pupillage) at a law firm that countenanced the wearing of pants by women.

⁴⁴ This was written up in ‘Stand Up Girlie’, a regular column in the *Alternative Law Journal* (originally the *Law Bulletin*), published through Monash University Law School.

table, instructing solicitors at the ready, and clients congregating in their respective positions behind them. Why? Barristers, solicitors and clients exchanged mystified glances, only to be enlightened by the court attendant, who approached the female barrister. An impeccable dresser, she was clad in black gown, freshly dry-cleaned, no tears, patches or verdigris. On her head — wig, flush with her forehead, locks tied back, fringe pushed up under the wig's foreline.

His Honour will not hear you until you fix your wig.

She touches it briskly, fumbles with the curls at the back. It's straight. Set firmly. What's wrong?

His Honour will not hear you ...

Fumbles again. Finds nothing.

His Honour ...

She blushes. Red. Her clients mumble. On the other side, her opponent's puffing up, like a pouter pigeon. His clients react with positive paroxysms of delight. They've won already, they think. She can't be much chop. Not much of a challenge if she can't get her headdress right.

She looks at the tipstaff, enquiring. He gestures toward the foreline of the wig. She raises a hand. Touches her forehead. Ah! That's it. A tiny strand of hair has come adrift, whisped its way down from under the wig, lies almost invisible against her skin. Surely invisible from the bench?⁴⁵

Male barristers' wigs are notoriously skewiff, the corkscrew curls uncorked or unscrewed, their gowns falling from their shoulders, torn, crumpled, adrift at the yoke, the smell of drycleaning spirit long since departed, if ever it touched the cloth. Never has there ever been any report or any sighting of any reprimand or even a nod in the direction of such apparel. Never has such a garment drawn criticism or comment from the bench. Never has either stood in the way of a male barrister's being seen — or heard.

Nor has being male impeded barristers being 'seen' or 'heard'. Being female has. Sex/gender matters.

In the Family Court, Melbourne Registry, in the late 1980s a mature woman solicitor (of middle-ing years) rose, when the matter immediately before hers had concluded, so that she could announce her appearance and get on with making her submissions.⁴⁶ 'Sit down, girlie,' was the response from the bench.⁴⁷ In the early

⁴⁵ Her years of experience did not prevent this barrister from experiencing feelings of humiliation and ridicule — which she reported to me (and no doubt others) upon her return from court.

⁴⁶ Appearances are taken in order of seniority — date of admission to practice; similarly if there is a large number of cases ready to go forward for directions, etc. But if a barrister or solicitor does not 'get in' quickly to establish their priority in the list, they may miss their turn, having to wait until the case immediately before them is concluded. Particularly when this is a long list of cases, barristers and solicitors must be quick to ensure they are heard immediately counsel ahead of them finishes submissions and obtains orders from the judge or registrar, etc. This is what happened here: the woman was ensuring she was 'quick off the mark'.

1990s, a Federal Court judge addressed the bar table as ‘gentlemen’ throughout the entirety of a case which went for some two days. All bar one member of counsel *were* men; it was the female barrister’s application; she made the vast bulk of the submissions; there was no mistaking her sex/gender; and the judge, as he acknowledged, finally, at the conclusion of the proceedings, knew not only that she was a woman, but who she was — which undoubtedly confirmed that knowledge.⁴⁸

Are women necessary?

If women must appear in the courtroom, it is well for them to conform to the role of the ‘good girl’ — never asking the question which, if answered, will result in the indiscreet answer. The ‘good girl, bad girl’ paradigm is alive and well in Australian courtrooms. The pressure upon women barristers to ‘be good’ is most evident where male barristers are performing in a manner that is, or is potentially, disruptive. This can occur where the male barristers take constant procedural points, object continually to questions put by their opponents, challenge witnesses with a barrage of questions, make accusations that witness are not being ‘responsive’ in their answers, contend that female members of counsel are ‘making speeches’ (rather than submissions), imply that their opponent’s instructing solicitor is incompetent or even unethical, and so on.⁴⁹

Faced with this approach, the woman barrister needs to respond. Allowing this conduct to continue unanswered means that her client will not have the case put properly, and that the male barrister’s ‘bluff’ will persuade the court (or tribunal) toward his client’s case. However transparent procedural attacks are — for they indicate that the side taking this approach does not want the substantive issues in the case to be addressed — they can affect trials so badly, that the substantive case never gets before the court.

When she does respond, the barrister faces stereotypical expectations of ‘what women do’ and ‘how women *should* act’. Women are not supposed to stand up for themselves against attacks, including words; women are expected to be quiet, succumb, ignore, sit still, be ‘nice’ and not answer back. Yet this is a recipe for defeat in the courtroom, where standing up to object to these sorts of tactic is essential. Some attacks have to be let ‘go through to the keeper’, but all cannot. The role of a barrister is to put the client’s case. If the client’s case cannot be put, because the opposing barrister is using ‘shutting up’ tactics, that client’s barrister *must* respond.

It is impossible to play the ‘good girl’ in these circumstances, if the client’s rights to a full and proper hearing are to be met. If judges and tribunal members fail to con-

⁴⁷ This episode gained such notoriety it provided the title for a column in the *Alternative Law Journal*: the ‘Sit Down Girlie’ column. It features in a less orthodox way in Melissa Chan’s novel *Guilt*: not prepared to ‘go along to get along’, there, refuge workers wear teeshirts labelled ‘Stand Up Girlie’.

⁴⁸ Further on the position of women in the courtroom, see: Jocelyne A Scutt, ‘Judicial bias: Confronting prejudice in the courtroom’ in Sandy Cook and Judith Bessant (eds) *Women’s Encounters with Violence — Australian Experiences*.

⁴⁹ I and my female instructing solicitors have experienced all of these tactics in trials. I (and they) have also observed them.

trol these overweening tactics in the courtroom, barristers are obliged to respond. In so doing, women barristers fail to conform to their expected 'good girl' role, becoming 'bad girls', deserving of being called into line. Judges and tribunal members are not averse to controlling female barristers in these circumstances, for the stereotypical expectations of how women 'should' act are far more likely to come into play. After all, it is easier to require women barristers to conform to the role of the 'good girl', than to require male barristers to resile from bully-boy tactics.⁵⁰

In her research into proceedings in Victorian courts, Rosemary Hunter found:

... responsibility must rest with the bench and senior barristers to tackle courtroom bullying. All of the judges and magistrates interviewed considered that they did have a role in controlling any inappropriate behaviour from barristers in their courtrooms ... However they also, evidently, displayed a wide range of tolerance for such behaviour before they would intervene. One female barrister said that in her experience, 'judges are removed from it. They don't say 'cut it out boys' or anything like that. They don't get involved' ... And judges describe situations where they had not intervened because they thought the woman in question was handling it OK, or had brought it on herself [sic].

... bullying of women in the courtroom or in negotiations does not stand alone as a practice of exclusion at the Bar. It is just one of the ways in which the masculinity of the Bar is reinforced and women are made to feel like outsiders. Tackling bullying ... cannot be separated from broader efforts to address the gender politics of the Bar.⁵¹

Bullying is not limited to barristers or witnesses. Women on the bench can be bullied and intimidated into not calling male barristers into line, so that they can continue their bullying tactics against witnesses and female barristers with impunity:

... barristers bully tribunal members too, particularly when the barrister is a senior male, and the tribunal is presided over by a woman who is a more junior practitioner and/or is a less experienced advocate. In the course of my observations of sexual harassment proceedings, I saw the (mostly female) tri-

⁵⁰ See: Rosemary Hunter, 'Evidentiary Harassment: The Use of the Rules of Evidence in an Informal Tribunal' in Mary Childs and Louise Ellison (eds) *Feminist Perspectives on Evidence*, 2000; Rosemary Hunter, 'Zealous Advocacy or Trial by Battle? Barristers as Courtroom Bullies' in *Workplace Bullying, Schoolyard Bullying — Unacceptable Behaviour*, 2000, conference papers, Anti-Discrimination Commission, Tasmania. I once requested that the Human Rights Commission, in a hearing, ask 'the hockey team' from the other side to leave, and was slapped down in no uncertain terms, with the proposition being put that the Commission would 'report me' to the Bar Council. This was in circumstances where the barrister to whom I was opposed had continually taken procedural points, failed to produce affidavit material, and had taken up days and days with tactics designed to prevent the substantive issues being heard. My request related to circumstances where my client's medical records were admitted (over my objection) and my counterpart made it clear that he intended to delve into every aspect of them — as it turned out, even into my client's mother's menopausal symptoms. When the court was closed, at my request upon instructions from my client, there were some three (at least) additional people from the solicitors representing the respondent present. This was the 'hockey team' to which I referred. On numerous occasions in courtrooms the expression 'football team' is used as a descriptor in similar circumstances, without even an eyebrow being raised by the bench.

⁵¹ Hunter, 'Zealous Advocacy or Trial by Battle? ...', above n 50, 4.

bunal become visibly intimidated by intense displays of male barristerial bluster. I also observed male barristers engaged in a robust contest between themselves treat a male tribunal chair with much greater respect.⁵²

Principles founded in discrimination law continue to apply in relation to women-in-court. This time, however, it is not women-as-witches who bear the brunt, but women in other roles — as barristers, tribunal members or judges, and witnesses. The evidence is that women are treated less favourably than men: they are met with bullying tactics that are not employed, or not employed in the same way or with the same intensity, against male barristers, tribunal members, judges or witnesses.⁵³ Alternatively (or simultaneously), they can be subjected to differential impact discrimination: the bullying tactics of bluster and bellicosity in the courtroom are the milieu in which all barristers (and judges, tribunal members, etc.) are required to work. This culture impacts differentially upon women barristers, judges, tribunal members, etc. for they are generally not attuned to this sort of treatment or being expected to 'live with it'. 'Sledging' is not a practice women generally engage in, or are generally expected to put up with.⁵⁴ Just as professionalism in the workplace requires the removal of 'girlie' posters from around the walls, professionalism in the courtroom requires an end to bullyboy tactics exhibited from the bench or the bar table.

Yet bullying is not only tolerated within the legal system. It is accepted as a legitimate part of the adversarial process.⁵⁵ So, with differential impact discrimination and less favourable treatment being directed at women as barristers holding some authority in the courtroom, are women as accused treated any better than in the days of witches and Chief Justice Hale?

III KILLING NEUTRALITY

In criminal law, self-defence and provocation laws are set in the category of comfortable neutrality manufactured by male lawyers, male courts, male judges. Occasionally, in recent times, a judge may speak out, professing to recognise some imbalance in the way these laws operate vis-a-vis women.⁵⁶ Yet women continue to

⁵² *Ibid* 6.

⁵³ This is 'direct discrimination' or 'less favourable treatment' discrimination, where the discrimination happens to women qua women — that is, it is directly based in the sex/gender of the woman, and her sexuality.

⁵⁴ The argument was employed in *Horne v Joint Clough Venture* (1988) EOC #92. There, two women took jobs in a male dominated workplace where (amongst other matters) the walls of the workplace were festooned with pictures of women in various positions and states of nakedness. They complained to the union, which did nothing, then to the employer, who said they had come into a male dominated workplace and had to live with it. Discrimination was found by the Equal Opportunity Tribunal, Western Australia, with both the union and the employer being held liable.

⁵⁵ The answer is not to 'get rid of' the adversarial system — but to reject the notion that the adversarial system requires or necessarily imports bullying, badgering, sledging. Argument put by two sides, or a 'one side against the other' approach, does not have to involve these tactics.

⁵⁶ In 1999, for example, in a speech to the Victorian Women Barristers Association, the Chief Justice of the Supreme Court of Victoria, Justice Phillips, called for changes in self-defence and provocation law vis-a-vis women accused of unlawful killing of their husbands. General bias against women in the legal

be killed, and men continue to plead guilty to manslaughter on the spurious ground that they did so provoked. The woman shouted 'fuck off', or simply had the temerity to leave.⁵⁷ Rarely, if ever, is there any enquiry by the bench as to the basis of the plea of guilty in these circumstances. If any questions are asked, they are not of the indiscreet kind, such as may elicit answers that are not wanted. 'Indiscreet answers' would make clear the wrongfulness of the guilty plea and its lack of any reasonable legal basis. In these cases, the crime is classed as manslaughter, but without any foundation such as might be required by a jury if the plea of guilty were not accepted without demur. But because the law does not hold women's lives in equal regard as those of men, the crime wears a title that downgrades its actuality and discounts the way in which the lives are 'lost'.⁵⁸

At the same time, women continue to be forced into living in fear of their lives, whilst not being regarded as killing in self-defence when they strike to save their own lives. If, in these circumstances, they wish to avoid conviction for murder, they must be prepared to abide by a story concocted in the minds of lawyers who see these women as 'sick' and victims of something called the 'battered woman syndrome' — a convenient concept that avoids looking at the conduct of the men these women kill, and enabling governments, courts and legislatures to avoid their responsibility for criminal assault at home and other domestic violence that create the conditions under which women must kill or, more often, are killed.

According to Hale, if a man killed his wife intending to end her life, he could be found guilty of murder. Yet the wife who killed her husband stood guilty of *petit treason*:

For whatsoever will make a man guilty of murder will make a woman guilty of *petit treason*, if committed upon the husband, or the servant, if committed upon the master ... If the husband kills the wife it is murder, not *petit treason*, because there is subjection due from the wife to the husband, but not the husband to the wife.⁵⁹

The penalty for murder was hanging; but:

The judgment of a woman convict of *petit treason* is to be burnt ...⁶⁰

This distinction effectively lives on in the way the law of murder and manslaughter is applied to men who kill their wives and women who kill their husbands. Self-defence and provocation laws will not operate fairly towards women so long as the

system has sometimes been commented upon — most notably by Justice David Malcolm, Chief Justice of the Supreme Court of Western Australia, who in the early 1990s established the Chief Justice's Task Force on Women and the Law, which has produced two reports, so far, with recommendations and proposals for change. See, for example: David Malcolm, 'Judicial Education' in Anne Thacker (ed) *Women and the Law* (1998) 83-8.

⁵⁷ For a personal account of the killing of his sister in these circumstances and the court outcome, see: Phil Cleary, 'Murder by Any Other Name' in *Cleary — Independent!* (1998) Chapter 6, 203-48.

⁵⁸ For a telling example of the judicial notion that women's lives are 'lost' rather than ended by the men who kill them, see: Jocelynn A Scutt, 'Marital Murder' in *Even in the Best of Homes — Violence in the Family*, (1990) Chapter 6.

⁵⁹ *Hale's History of the Pleas of the Crown* (1778) 372 and 380.

⁶⁰ *Ibid* 382.

law is interpreted in reference, albeit unconsciously, to the historical difference applying to men who kill their wives (and so are granted greater latitude by the law because their wives are in subjection to them, and therefore any resistance or rejection on the woman's part is in itself a 'provocation' or 'insult' warranting or at least ameliorating the seriousness of the killing) and women who kill their husbands (who are their masters). Thus in doing the killing women commit a more grievous sin so are rendered less likely to be covered by arguments of self-defence or provocation.

In the 1980s, expert evidence relating to the effects on a woman of criminal assault at home and other forms of domestic violence was allowed into trials where women were accused of murder, on the basis that it took more than 'common sense' for jurors to comprehend the meaning for women of lives lived in this way, and lives taken by them, because of it.⁶¹ However, it is not sufficient to simply allow expert evidence to be given. The trial judge is under an obligation to ensure that the jury is properly instructed as to the use/s to which such evidence may be put. Although this is accepted in the United States of America and Canada,⁶² Australian courts do not appear to understand the principle.⁶³

This was evident in the trial of Heather Osland in 1996, when the so-called 'battered woman's syndrome' was a feature of her defence. During the trial, provocation and self-defence were referred to by the court in the context of Ms Osland and her participation in the killing of Mr Osland,⁶⁴ but the focus on 'battered woman syndrome' indicates a confusion about:

- what, if anything, 'battered woman syndrome' is;
- what, if any, relevance 'battered woman syndrome' had to Ms Osland and her trial;
- what, if any, relevance the 'battered woman syndrome' had to self-defence;
- what, if any, relevance the 'battered woman syndrome' had to provocation.

On appeal against her conviction, the Victorian Court of Appeal provided no guidance on the way in which the violence inflicted by Frank Osland upon Heather Osland, which it contemplated as caught up in the notion of 'battered woman syndrome', might be used by a jury or incorporated into directions by a trial judge to a jury. This was despite the problems it created in the trial, for the judge and (as it

⁶¹ See Scutt, 'The Politics of Violence' in above n 58, Chapter 13.

⁶² *State of Washington v Allery* 683 P 2d 312 (Wash, 1984); *R v Dziduch* 47 A Crim R 378, 379 (1990); *R v Lavelle* (1990) 55 CCC (3rd) 97; *Malott v The Queen* (Unreported, Supreme Court of Canada, 12 February 1998, No 25613).

⁶³ *Osland v The Queen* (1999) 173 ALJR 173; Jocelyne A Scutt, 'Justice, Self-Defence and Women's Lives: Reflecting on Reality and Unreality in Criminal Justice: A Case Study in Self-Defence and Saving Women's Lives' (Paper presented at Asia Women's Fund, Meeting of International Experts, Hakkone, Japan, November 2000).

⁶⁴ David Albion, Ms Osland's son, killed Mr Osland. In the joint trial of Ms Osland and Mr Albion, Heather Osland was convicted of murder. The jury was undecided as to Mr Albion. At his retrial before a different judge several months later, a fresh jury acquitted him.

seems apparent) for the jury.

At the trial, the term ‘battered woman syndrome’ was a term with multiple meanings, some of them contradictory. It was never explained so that a jury could understand what was meant — which may be indicative of its lack of usefulness, anyway. Thus, the ‘battered woman syndrome’ (or, on one occasion ‘battered syndrome’)⁶⁵ was:

- a ‘set of symptoms’/‘nothing but a set of symptoms’/‘not an illness’/‘collection of signs and symptoms’;⁶⁶
- something which had not been a part of the opening — instead ‘Stockholm Syndrome’ had been;⁶⁷
- a category into which Ms Osland had to bring herself or ‘fall within’;⁶⁸
- something into which it ‘may not matter’ ‘whether she fits ... at all’;⁶⁹
- something that might be used by the jury to ‘reach a conclusion that the Crown had not satisfied [them] ... that she had not finally snapped’ or ‘lost control’;⁷⁰
- a ‘defence’;⁷¹
- *not* ‘a defence’;⁷²
- something supporting provocation or self-defence/to be used if the jury ‘accept the facts of the abuse, physical and psychological, when [considering] the defences of self-defence and provocation’;⁷³
- ‘connected with and forming part of the defences [sic]’ of self-defence and provocation;⁷⁴
- something other than related to provocation or self-defence;⁷⁵
- something upon which the defence for Ms Osland ‘relied’, without signifying or stipulating in what manner, or for what purposes (in law) it was

⁶⁵ AB 2048/Trns 1764. (‘AB’ is High Court Appeal Book citation; ‘Trns’ is Supreme Court of Victoria Transcript (trial) citation.)

⁶⁶ AB 820B/Trns 919, 2046/Trns 1762, AB 2152/Trns 1893 (per Dr Byrne, expert witness for the defence), AB 2153/Trns 1894 (per Dr Byrne), AB 2156/Trns 1897 (per Dr Byrne).

⁶⁷ AB 820B/Trns 919 (jury absent).

⁶⁸ AB 2005/Trns 1716, AB 2006/Trns 1717, AB 2047/Trns 1763, AB 2048/Trns 1764; AB 2050/Trns 1766, AB 2153/Trns 1894 (per Dr Byrne), AB 2155/Trns 1896 (per Dr Byrne).

⁶⁹ AB 2049/Trns 1765.

⁷⁰ AB 2050/Trns 1766.

⁷¹ AB 2029/Trns 1745, AB 2182/Trns 1923 (commenting on the Crown’s address – ‘the battered woman defence did not give her a defence to murder’).

⁷² AB 2046.

⁷³ AB 2046/Trns 1762.

⁷⁴ AB 2045/Trns 1761.

⁷⁵ AB 2014/Trns 1730.

relied upon;⁷⁶

- ‘now being recognised by the law’ although ‘the ramifications of this defence, which in terms of personal experience I only derived from reading fairly limited cases about it ...’;⁷⁷
- ‘your battered woman syndrome’ (‘your’ being a reference to counsel for Ms Osland);⁷⁸
- an ‘unusual matter’ (or connected in some way to ‘unusual matters’) ‘littering the legal landscape’;⁷⁹
- as providing self-defence and provocation with ‘features that are peculiar to her case’ or ‘special features’;⁸⁰
- as being ‘hardly necessary’ evidence.⁸¹

The vast majority of these appear in the charge to the jury. Even where they do not, in the main they were said in the presence of the jury. Those said in the jury’s absence could not directly affect jurors. However, they indicate difficulty or confusion as to precisely what ‘battered woman syndrome’ is or purports to be, its relevance to Ms Osland’s trial, its application to the law generally, and in particular its relevance to the law of self-defence and/or provocation. This is bound to have an effect upon the jury, insofar as the judge controls the trial and the judge’s disposition and understanding impose themselves upon it.

Amongst other statements directing the jury toward the ‘battered woman’s syndrome’, the trial judge said:

... there are innumerable facts. Some of them are very important, some of them are important and some of them are not all that important. I think it may be said that inevitably there has been some lingering on some insignificant facts by reference to events more than a decade ago, but allowances have to be made. There were some important background matters about the life in Karratha, in particular perhaps the early days in Bendigo. While far distant from the criminal matter here, they are bound up with facts of importance which also came out. They are all put before you because the task of trying to winnow the wheat from the chaff is not undertaken. The matters are put before you for you to determine for yourselves what you believe to be important.

It must be said, many of the old facts were unearthed to establish and support the battered woman syndrome, upon which in particular counsel for Mrs Osland rely.⁸²

Crucially, the evidence of Frank Osland’s violence was employed differently for

⁷⁶ AB 2001/Trns 1712.

⁷⁷ AB 236/Trns 204.

⁷⁸ AB 216/Trns 184, 219/Trns 187, AB 484/Trns 475, AB 912/Trns 1022 (jury absent), 1052/Trns 1166.

⁷⁹ AB 2017/Trns 1733.

⁸⁰ AB 2029/Trns 1745, AB 2042/Trns 1758.

⁸¹ AB 2047/Trns 1763.

⁸² AB 2000-1/Trns 1711-12.

Ms Osland and Mr Albion. For Heather Osland, it was tied up in 'battered woman syndrome'. For David Albion, it was both seen and acknowledged as directly related to self-defence or provocation:

... for the reasons I have just mentioned, the legal landscape in this case is littered with some unusual matters; the life and times of Osland, arguably connected with the battered woman syndrome which the Heather Osland defence says is relevant to self-defence and provocation. And, battered woman syndrome or not, the David Albion defence says it is entitled to rely upon Frank Osland's past violence, linked to his threats, as forming part of the self-defence and provocation arguments.⁸³

There does not appear to be any argument advanced that in terms of complicity that they should be treated differently one from the other. *As will appear the defence raised by Heather Osland is in respect of self-defence and provocation has some features that are peculiar to her case because of her reliance upon the battered woman syndrome defence.* I emphasize, however, in case there is any doubt that there is no battered family defence, although you could be forgiven for thinking it was being run at one stage. However the way in which the defence is put for David Albion, while not battered woman defence, relies upon a related concept.⁸⁴

When it came to the medical evidence of the expert witness, Dr K. Byrne, employed by Heather Osland's defence to 'confirm' 'battered woman syndrome', immediately after going through that evidence and without any further elucidation, the trial judge said:

I have already told you how you may use the battered wife syndrome. By and large, the support for it was said to arise from the evidence given about the matters and in terms of the expert sense, reliance was placed upon Dr Byrne's description of it and his own opinion.⁸⁵

In its judgment, the Court of Appeal adopted without any critique the proposition that the 'battered woman syndrome' was relevant insofar as the question was whether or not Ms Osland 'fell within' it, or within the 'classification of battered woman':

... the contentions [on appeal] challenge the sufficiency of the directions as to the matter in which the jury should approach the issue of provocation as it related to the evidence *suggesting that the applicant, at the time when the killing occurred, fell within the classification of a battered woman.*⁸⁶

This is not the issue. 'Battered woman syndrome' is a shorthand way of referring to what is better described as 'battered woman reality' or (in longhand) 'the external circumstances which exist in the life of this particular woman that may show that when she killed, she did so in self-defence (or by reason of provocation)'. That is,

⁸³ AB 2017/Trns 1733.

⁸⁴ AB 2029/Trns 1745 (emphasis added).

⁸⁵ AB 2157/Trns 1898.

⁸⁶ AB 225 (emphasis added). Court of Appeal references to the 'battered woman syndrome' appear at AB 2222 (re Dr Byrne's evidence), AB 2225-29, 2231, 2232, 2236, 2239, 2240.

contrary to the trial judge and the Court of Appeal⁸⁷ that 'battered woman syndrome' is or has 'peculiar' or 'special' features in some way distinguishing it from self-defence or provocation, *it is directly about self-defence and provocation*. The terminology should not be employed to deny women access to self-defence and provocation in the same way as men gain access to them — in the very same trial, for example, as David Albion gained access to them.

Because 'battered woman syndrome' has been employed as a 'poor me' defence — the proposition of the 'poor' woman 'suffering' from 'learned helplessness' who is 'sick' and has no control over her life — women have been denied the right to have the law apply to them as they are entitled to, if the evidence is not looked upon as 'battered woman syndrome' (the 'sick' 'explanation'), but is recognised as being directly about the circumstances (the violence, abuse, etc.) in which the killing took place and whether the Crown has established that:

- in the circumstances (of continuing violence, abuse, sexual aggression/violation etc.), the woman claiming self-defence had no belief that it was necessary for her to act in self-defence (she was going to be killed or raped/sexually violated),⁸⁸ and
- in the circumstances (of continuing violence, abuse, sexual aggression/violation etc) her killing of the deceased was not reasonable; or
- in the circumstances (of continuing violence, abuse, sexual aggression/violation etc), the woman claiming provocation was not in fact subjected to any wrongful act or insults or series of acts or insults -
 - that could have provoked an 'ordinary person' (of her age) with powers of self-control within the range or limits of what is ordinary for persons of her age, in those circumstances, to have killed the deceased; or
 - whether there is a reasonable doubt (a reasonable doubt raised) that she killed in this way.

As was said in *Malott v The Queen*:

A ... 'battered woman syndrome' is not a legal defence in itself such that an accused woman need only establish that she is suffering from the syndrome in order to gain an acquittal ...

How should the courts combat the 'syndromization' ... of battered women who act in self-defence? The legal inquiry into the moral [sic] culpability of a woman who is, for instance, claiming self-defence must focus on the reasonableness of her actions in the context of her personal experiences, and her experiences as a woman, not on her status as a battered woman and her entitlement to claim that she is suffering from 'battered woman syndrome' ... By emphasizing a woman's 'learned helplessness', her dependence, her vic-

⁸⁷ Citing *Ahluwalia* (1993) 96 Cr App R 133 and *R v Thornton (No. 2)* [1996] 1 WLR 1174 — cases which have come under serious challenge and sustained critique in feminist jurisprudence: the Court of Appeal indicates no awareness of this.

⁸⁸ *Zecevic v DPP (Vic)* (1987) 162 CLR 645.

timization, and her low self-esteem, in order to establish that she suffers from 'battered woman syndrome', the legal debate shifts from the objective rationality of her actions to preserve her own life to those personal inadequacies which apparently explain her failure to flee from her abuser. Such an emphasis comports too well with society's stereotypes about women. Therefore, it should be scrupulously avoided ...⁸⁹

The court in *Malott* went on to note that not only juries have difficulty in dealing with the prolonged history of violence to which women may be subjected and in the context of which they kill, then wish to have their claims self-defence taken seriously:

How should these principles be given practical effect in the context of a jury trial of a woman accused of murdering her abuser? ... where the reasonableness of a battered woman's belief is at issue in a criminal case, a judge and jury should be made to appreciate that a battered woman's experiences are both individualized, based on her own history and relationships, as well as shared with other women, within the context of a society and a legal system which has historically undervalued women's experiences. A judge and jury should be told that a battered woman's experiences are generally outside the common understanding of the average judge and juror, and that they should seek to understand the evidence being presented to them in order to overcome the myths and stereotypes which we all share. Finally, all of this should be presented in such a way as to focus on the reasonableness of the woman's actions, without relying on old or new stereotypes about battered women.

Concerns have been expressed that the treatment of expert evidence on battered woman syndrome, which is itself admissible in order to combat the myths and stereotypes which society has about battered women, has led to a new stereotype of the 'battered woman' ... It is possible that those women who are unable to fit themselves within the stereotype of a victimized, passive, helpless, dependent, battered woman will not have their claims to self-defence fairly decided. For instance, women who have demonstrated too much strength or initiative, women of colour, women who are professionals, or women who might have fought back against their abusers on previous occasions, should not be penalized for failing to accord with the stereotypical image of the archetypal battered woman ... Needless to say, women with these characteristics are still entitled to have their claims of self-defence fairly adjudicated, and they are also still entitled to have their experiences as battered women inform the analysis.⁹⁰

So long as 'battered woman syndrome' is projected through the courts as an 'answer' for women who kill violent husbands, the woman who cannot fit herself within the 'helpless, hopeless and lost' paradigm — because she is a real, live woman having to live and work in the world outside the home, whatever happens within it⁹¹ — will be categorised as 'wicked'. This characterisation will persist

⁸⁹ Unreported, Supreme Court of Canada, 12 February 1998, No 25613, 12 and 13.

⁹⁰ *Ibid* 13.

⁹¹ Predictably, that Heather Osland held down paid employment throughout the course of her marriage to Frank Osland was used to support the proposition that she was 'not' a 'battered woman' — despite incontrovertible evidence not only from Heather Osland and her children, but from neighbours, work-

against a reading of the law which sees men who kill their wives as understandably 'provoked' by what women do (leave them), or what women say ('I'm leaving').

Trial judges must make clear in the charge to the jury that it is not the law that for a woman to 'escape' conviction for murder, she has to 'fit herself within' the 'battered woman syndrome', nor that this evidence is given in order that the jury can make such a determination. Rather, the jury's job is to determine whether the woman acted in self-defence: that is, whether, after a history of violence and abuse, she believed she was in danger of being killed, and killed to save her own life.

Self-defence is about a rational act of the person who kills in order to save her (or his) own life. Rather than about the sickness inherent in a 'battered woman syndrome', the claim for self-defence when a woman who kills in the fear that the history of violence has taught her to take seriously is about the 'battered woman reality'. Here, the focus is on the reality of the circumstances in which the woman has lived, the reality of the violence inflicted upon her over years, and the reality of her recognition that unless she kills, it is she who will be killed.

IV BEYOND WITCHCRAFT: RECOGNISING WOMEN AS HUMAN

For women to gain equal rights in the courtroom as accused, as litigants in civil cases, as lay and expert witnesses, and as lawyers, it is necessary first that women be afforded equal status as human beings. For all that the law is founded in notions of justice and fairness, neither have extended to women — at least not in equal measure as to men.

Women's reality has not been a feature of the British nor the Australian legal system. This has deprived women of just laws and just treatment in law.⁹²

Less favourable treatment discrimination recognises that singling out individuals or groups because of their sex/gender, race/ethnicity, disability or other identities or attributes, so that they are deprived of equal access to systems or resources is unlawful. Differential impact discrimination is about recognising that imposing rules, practices and requirements upon 'everyone' regardless of sex/gender, race/ethnicity, disability or other identities or attributes can lead to negative treatment for particular groups because of their sex/gender, race/ethnicity, disability or other identities or attributes, and that this should equally be regarded as unlawful.

As was pointed out in *Malott*, expert evidence was accepted in *R v Lavelle*⁹³ for two basic reasons:

- to dispel the myths and stereotypes inherent in understandings of a battered

mates, a local minister and others that Frank Osland was violent, and that she was threatened, beaten and abused.

⁹² And of access to law generally. See Jocelyne A Scutt, 'Access to law in an age of mean spiritedness' in Linda Hancock (ed) *Women, Public Policy and the State* (1999) 124-43.

⁹³ (1990) 55 CCC (3rd) 97.

woman's experiences, and of the reasonableness of her actions; and

- because women's experiences and perspectives in relation to self-defence may be different from the experience and perspectives of men, and the perspectives of women must now equally inform the 'objective' standard of the reasonable person.

Founded upon a history where still-revered judges resorted to hypocrisy in order to condemn women as witches, the law is still struggling with the notion that women are equally entitled to have the legal system work fairly for them.

As Judith Resnick, United States lawyer, has said:

... the temptation to avert one's eyes from seeing the ways in which gender, race, ethnicity, class and sexual orientation frame judgments is powerful ... What does not do in the face of pervasive gendered and racialized interpretations of fact, of credibility, and of legal doctrine? How does one run a court system?⁹⁴

There is no such thing as an indiscreet question, only indiscreet answers.

⁹⁴ 'From the Senate Judiciary Committee to the Country Courthouse: The Relevance of Gender, Race, and Ethnicity to Adjudication' in *Race, Gender and Power in America* (1995).