SYDNEY UNIVERSITY LAW SOCIETY

2021

yemaya

reckoning

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Many thanks to everyone who made the production and publication of the 2021 Sydney University Law Society Law in Society Journal possible. In particular, we would like to thank the Sydney Law School and the University of Sydney Union for their continued support of SULS and its publications.

We acknowledge the traditional Aboriginal owners of the land that the University of Sydney is built upon, the Gadigal People of the Eora Nation. We acknowledge that this was and always will be Aboriginal Land and are proud to be on the lands of one of the oldest surviving cultures in existence. We respect the knowledge that traditional elders and Aboriginal people hold and pass on from generation to generation, and acknowledge the continuous fight for constitutional reform and treaty recognition to this day. We regret that white supremacy has been used to justify Indigenous dispossession, colonial rule and violence in the past, in particular, a legal and political system that still to this date doesn't provide Aboriginal people with justice.

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editor-in-chief foreword

Genevieve Couvret

It feels like times are changing, but perhaps it always does. What feels like a moment of reckoning could easily be nothing more than that; a moment. It is up to us to determine the curve of history and to shape it towards progress. I am made hopeful of this possibility by the brilliant ideas, sentiments and analysis enclosed in this journal.

Each submission to Yemaya this year provokes a thoughtful answer to the ever open question of how gender and sexuality underscore our lived experiences.

My piece offers a feminist reading of the classic debate between HLA Hart and Lord Devlin on whether the law is independent of, or directly informed by, morality. By inserting the female subject into the debate, it provides an introduction to feminist jurisprudence and illustrates how moral issues mired in the law invariably cut across gendered lines. For example, a feminist perspective which shatters the divide between the public and private spheres illuminates the pandemic of domestic violence which ravages in the shadows of COVID-19, casting skies of darkness over the lives of many women and families. Holly McDonald considers a particularly insidious form of abuse, how it is embedded into the legal system and how it impacts the most vulnerable women in her piece on the need to criminalise coercive control.

It is also powerful to recognise that although oppression is shared between marginalised groups in a broad sense, there are nuances in the faces it wears, the laws it underpins and the way this colour's an individual's experiences and expression of their gender and sexuality.

Lauren Lancaster, Sunanda Mohan and Nishta Gupta each reckon with the nuances of our understanding of gender and womanhood in uniquely different ways. Lauren's multimedia study of Del Kathryn Barton's work plays with colour and texture to elevate the human form, releasing gender and sexuality from naturalistic constraints.

Sunanda considers what it means to be a woman outside the arbitrary restrictions of cisgender society in her piece exploring key legal developments in the treatment of transgender women. Nishta again considers womanhood in a different way; by challenging the stigma surrounding menstruation in her piece 'Stain'. The figurative depiction of the menstrual cycle through cast-making processes and acrylic painting invites the audience to reckon with their preconceptions of periods without shame or taboo.

The nuances of our victories, of our misdeeds and the ability to create accountability are central to the idea of reckoning, and to the history of how homosexuality has been normatively shaped and treated by the law in Australia. Madeleine Gandhi provides a searing account of how the 2017 postal survey on same-sex marriage engendered hate speech against the LGBTQI+ community and how to moderate this kind of vitriol. This solemn judgement explores how the undercurrent of a seemingly progressive moment in Australian history flooded many Australians with pain. Rhian also confronts the way our legal history has demonised homosexuality in the context of the criminalisation of male homosexuality, specifically the the invented dichotomy between 'good' and 'bad' sex and the operation of the 'homosexual advance defence'. We are also grateful to Corrs Chambers Westgarth for their sponsorship of this year's journal and for contributing a fantastic timeline of LGBTQI+ milestones.

Each piece in this year's Yemaya is a reflection of the issues that are meaningful to this upcoming generation of legal minds. I am encouraged and inspired by all of our contributors, the team of editors and our future readers for actively and critically engaging with these issues of their own accord. I owe them my deepest thanks.

History of LGBTIQ+ legal rights in Australia

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'75
- Decriminalisation: SA
- Age of Consent: SA

'76
- Decriminalisation: ACT

'77
- Anti-discrimination: NSW

'78

'79

'80
- Decriminalisation: VIC

'81

'82

'83
- Decriminalisation: NT

'84
- Decriminalisation: NSW
- Anti-discrimination: SA

'85
- Age of consent: ACT

'86

'87

'88

'89
- Decriminalisation: WA

'90
- Decriminalisation: QLD

'91
- Age of consent: VIC
- Anti-discrimination: QLD, ACT

'92
- Anti-discrimination: NT, Commonwealth Military Service

'93

'94
- Decriminalisation: Commonwealth
  Toonen v Australia

'95

'96

'97
- Decriminalisation: TAS
- Age of consent: TAS

'98
- Anti-discrimination: TAS

'99

2000

'01
- Anti-discrimination: VIC
- Transgender people can marry (*Re Kevin*)

'02
- Age of consent: WA
- Anti-discrimination: WA
- Adoption: WA

'03
- Age of consent: NSW
- Civil unions: TAS
- Abolition of gay panic defence: TAS

'04
- Age of consent: NT
- Adoption: ACT
- Abolition of gay panic defence: ACT

'05
- Abolition of gay panic defence: VIC

'06
- Abolition of gay panic defence: NT

'07

'08
- Civil unions: VIC
- Abolition of gay panic defence: WA
- Surrogacy: VIC

'09

'10
- Civil unions: NSW
- Adoption: NSW
- Surrogacy: NSW, QLD

'11
- Civil unions: QLD
- Passports for x gender: Commonwealth
- Sex change without sterilisation (*AB v WA*)

'12
- Civil unions: ACT

'13
- Expungement of convictions: SA
- Guidelines for x gender: Commonwealth
- Court approval no longer required for Stage 1 treatment (*Re Jamie*)
- Anti-discrimination: Commonwealth
- Marriage: Commonwealth has constitutional power (*Cth v ACT*)
- Adoption and surrogacy: TAS
- Marriage: ACT

'14
- Expungement of convictions: NSW
- Abolition of gay panic defence: NSW
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- Registration of non-specific sex (*NSW v Norrie*)

'15
- Expungement of convictions: VIC, ACT
- Adoption: VIC

'16
- Age of consent: QLD
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- Apologies: NSW, SA, VIC
- Surgery not required for birth certificate change: SA

'17
- Expungement of convictions: QLD, TAS
- Marriage equality in Australia
- Apologies: QLD, TAS, WA
- Abolition of gay panic defence: QLD
- Court approval no longer required for Stage 2 treatment (*Re Kelvin*)

'18
- Expungement of convictions: WA, NT
- Adoption: NT
- Surgery not required for birth certificate change: NT
- Apologies: NT

'19
- Ban on conversion practices: QLD, ACT

'20
- Ban on conversion practices: VIC
- Surgery / clinical treatment not required for birth certificate change: VIC

'21
- Abolition of gay panic defence: SA

Future
- Surrogacy: WA, NT
- Civil unions: WA, NT, SA
- Intersex a protected attribute: NSW, VIC, QLD, WA, NT, ACT
- Ban on conversion practices: NT, TAS, WA, SA, NSW, Commonwealth
- Surgery / clinical treatment not required for birth certificate change: NSW, QLD, WA, ACT, NT, SA

The Hart-Devlin Debate: Timeless or Genderless

Genevieve
Couvret

i. introduction

The history of legal thought is a history of men. At the same time, a history of the law discloses its role as a consistent tool of female oppression. Laws condemned women to burn at the stake while protecting their immolators, and denied women the ability to hold their own property, dissolving their legal personality into that of their husbands. Only in 1991 did the House of Lords abolish the historical immunity for liability for intramarital rape.[1]

The debate between H.L.A. Hart and Lord Patrick Devlin, a seminal debate in the history of jurisprudence, is framed as a debate on law and morality. As such, issues of gender are overlooked; morality is human morality, something universal, disembodied, non-gendered. And yet, as this essay will show, implicit in both Hart and Devlin's conception of morality is an inherently masculine perspective, one which marginalises the historical experiences of women in their encounters with the law. Examining the intricacies of their debate through the lens of feminist jurisprudence can reveal how the history of the relationship between morality and the law in jurisprudence is central to the historical, and ongoing, subjugation of women in society.

Feminist jurisprudence inherently focuses on what the law does rather than what it is.[2] According to Amia Srinvasan, 'worldmaking' is the process by which our representations, which are themselves historically contingent, shape the world.[3] Although both Hart and Devlin provide an account of the function of the law as it is, neither effectively understands what it does; how the law 'worldmakes' women's place in society. In this way, they both take a view of the legal system as historically inevitable, natural, universal. This inhibits change. A purportedly universal discourse in an unequal social order is, according to feminist legal scholar Catherine MacKinnon, a ruse of power.[4] The history of jurisprudence is thereby essential in engendering change in how the law addresses female subjects.

In this essay, I will first outline and then argue for a historicised reading of the Hart-Devlin debate as situated within a shared liberal framework, which abstracts it from social considerations affecting the female subject. In explicating the debate, I will focus my analysis moreso on Devlin's characterisation of morality as this essay operates on the premise that there is a dialectic between prejudicial social mores and legislation. This will be exemplified in a close reading of Devlin which shows how Christian morality has informed both moral and legal perspectives on prostitution and marriage, which cut directly across gendered lines. I will then focus on the tension between public and private throughout the debate, which reiterates that the history of the jurisprudential relationship between morality and the law also portrays a history of how masculine systems of legal thought have oppressed women. This history is important to understanding how the legal system fails to reckon with the sexism embedded in our very ways of thinking and thus continues to fail women today.

ii. the debate

The debate between Hart and Devlin was, at its core, a debate about sex and the power of the state to regulate it. It began with Lord Devlin's Maccabean lecture in Jurisprudence at the British Academy in 1959, in which he commented on the Report of the Departmental Committee on Homosexual Offences and Prostitution (or 'Wolfenden Report'). The Report recommended that homosexual behaviour between consenting adults in private should no longer be a criminal offence. Despite Hart's hidden sexuality[5] and Devlin's manifest homophobia, both make appeals to general, abstract principles about the law. This ideological insistence on neutral knowledge, which assumes that knowledge is independent from social meanings, political systems, or personal history, is central to Western jurisprudence.[6] Yet the substance of Hart and Devlin's arguments and their views on sex cannot be divorced from their personal and broader social contexts, revealing bias rather than neutrality. This essay makes this charge in one respect in particular: the status of women within the liberal tradition.

A. Devlin

'The mind will ever be unstable that only has prejudices to rest on, and the current will run its destructive fury when there are no more barriers to break its force.'

Mary Wollstonecraft[7]

The Wolfenden Report declared that private immorality should not be within the sphere of the criminal law and that the law is not concerned with immorality as such.[8] Devlin argued, in contrast, that certain acts which offend public morality to the extent that they occasion 'intolerance, indignation and disgust'[9] amongst reasonable men are justified in being criminalised in society's self-defence against the disintegration of common morality. Devlin's argument is not only that the state may legislate on matters of morality but that this particular kind of *animus* is a proper basis for law.[10] This is because shared morality binds a functioning society together – 'the bondage is part of the price of society; and mankind, which needs society, must pay its price'.[11] Hence, 'the general abhorrence of homosexuality'[12] justifies its criminalisation because – whether as reason for disgust or corollary to it – it would radically upend the central social institution of the family.

Absent from this argument is a meaningful consideration of the difference between lawfulness – as that which common morality dictates – and wrongfulness.[13] Even though he writes of morality, Devlin does not give an account of the right. He maintains that society has a right to 'follow its own lights'[14] – hence, if society functions according to a sexist morality, the laws are sexist. He claims that 'what [society] believe may be quite wrong: but it is quite contemporary and quite real'.[15] In this way, Devlin legitimises the role of prejudice in making law.[16] As Ronald Dworkin puts it, 'what is shocking…is not his idea that the community's morality counts, but his idea of what counts as the community's morality'.[17]

Dworkin explores how prejudice is inflected into Devlin's conception of moral judgement. Rather than as the result of logic or reason, Devlin takes an anthropological, intuitive view of moral positions.[18] They are 'largely a matter of feeling' of the reasonable man.[19] Thus, Devlin does not distinguish moral positions from emotional reactions. A certain level of public disgust, although presented as a threshold criterion for state intervention into the acts of free individuals, in fact becomes 'a dispositive affirmative reason for action'.[20] By describing the relationship between morality and the law as such, Devlin resists rational criticism about the rightness of the law. For Devlin, history is actually at the heart of our reflections on any legal system. The moral views of the time are the only viable explanation for its laws. As Hart puts it, for the law to change, 'we could only pray…that the limits of tolerance might shift.' [21]

B. Hart

Hart's response firmly invokes the distinction between public and private acts and an emphasis on individual freedom. His argument embodies John Stuart Mill's harm principle: - that the sole end for which mankind are warranted in interfering with liberty of action is self-protection and that that is the only purpose for which power can be exercised over any member of the civilised community.[22] Public

condemnation is insufficient to render an act a crime within traditions of ordinary liberty. In making this claim, Hart does not deny that the development of the law may have been influenced by prevailing moral rules.[23] However, he propagates a positivist description of the law as bearing no necessary connection to morality. He thereby rejects the claim that failing to uphold common moral values in the private sphere will lead to the collapse of civil society.

Despite this fundamental disagreement, Hart and Devlin share the same starting premise – a presumption in favour of liberty. They both query what *degree* of state interference is justified in a liberal, democratic state. Even though he does not consider there to be any limits to state power, Devlin states that 'there must be toleration of the maximum individual freedom that is consistent with the integrity of society'.[24] The focus on the coercive nature of the criminal law and the legislative paradigm within the debate can also be seen as a result of the discussion being centred around the liberal concept of individual autonomy.[25] Both Hart and Devlin perceived the law as a static, negative restraint on individual freedom rather than a dynamic mechanism for change.[26] However, liberty itself is a construct. It is part of the dominant Western ideology of the 20th century. As such, it is not a neutral, shared starting point.[27] As expounded below, a feminist interpretation of liberalism ruptures the shared premise on which the debate is staged.

iii. the reasonable man in the liberal tradition

Many feminist thinkers in the West rejected liberalism in the late 20th century as a gendered tradition inadequate to the needs of women.[28] The feminist charge is threefold: that it is too individualistic, that the ideal of equality is too abstract such that it does not engage with concrete harms in context, and that its focus on reason slights the role of emotion in the lives of women.[29] Since legal theory has empirically been the province of men in a highly gendered social context, the invocation of fundamental, genderless concepts are in fact contingent on this shared liberal ideology. The reasonable man, a foremost product of the liberal tradition, forms the crux of significant aspects of both Hart and Devlin's overarching theories – for Hart, the idea of a legal obligation; for Devlin, the idea of moral judgement.

Hart explores the idea of a legal obligation in *The Concept of Law* from the perspective of the ordinary citizen. Although this does not form part of his debate with Devlin, it is fundamental to his legacy in jurisprudence and provides valuable context to his position. According to Cunliffe, the ordinary citizen epitomises the 'disembodied, decontextualised man of liberal theory'.[30] Theorising through the eyes of the ordinary citizen embodied by a man thus obscures the ways in which differing social circumstances affect the ability for various citizens to engage with the law. For example, the assumption that legal subjects can control the extent to which they comply with or transgress the law underpins Hart's discussion of the difference between an obligation and being obliged. Cunliffe posits that this 'overlooks the question of whether differences exist in people's ability to obey the law'.[31] In this way, women forced into prostitution or unlawful abortions out of dire financial need or necessity are not contemplated within Hart's 'liberal rhetoric of choice'.[32]

Similarly, the reasonable man functions as proxy of the public morality of society in Devlin's argument. Although he makes the qualification that private acts must reach a high threshold of disgust and are adjudged based on the views of reasonable and high-minded men (rather than a simple majority) to justify criminalisation,[33] the reasonable man falls within this same construction predicated on masculine ideas. In *Hiding from Humanity*, Nussbaum argues that disgust should never be the basis of criminalisation.[34] She gives the example of Judy Norman, who was unable to plead battered women's syndrome or self-defence to the murder of her abusive spouse because she did not have a reasonable belief that her life was in *imminent* danger – she attacked her husband while he was sleeping.[35] The doctrine of reasonableness is not designed to confront the circumstances of the battered woman. Feminist jurisprudence thereby aligns with Devlin's view but reframes it as negative; the legal tradition is indeed premised on the intuitive power of the emotions – and the disgust – of the reasonable man, but this reproduces abject prejudices in the law.[36] Furthermore, where prejudice masquerades as moral judgement, legal concepts become a vehicle for paternalism. As Devlin wrote, rather disparagingly, 'the object of the law [which made carnal knowledge of a girl under the age of sixteen years a crime] ...is to protect young girls against themselves'.[37] So often in society, our means of protection are also our means of violence.

Nevertheless, according to Nussbaum, because liberalism is a theory opposed to the systemic naturalisation of hierarchy based on morally irrelevant differences, its concepts can be applied in a feminist framework.[38] For our purposes, Hart and Devlin's ideas resting on the reasonable man can be resituated into a history that informs our understanding of female subjugation. Values such as reason, rationality or neutrality can thereby be culturally associated with white, middle-class, educated men because they are a product of them.[39] Hart and Devlin's common appeal to a general, non-empirical definition of a legal subject or moral actor is only possible because this 'masculine liberal political subject is so familiar to English philosophy by the 1960s that it seems universal'.[40] This universality is a fallacy. Feminist anti-universalism urges us to begin theorising about morality and/or the law not with the sameness of human nature but the difference between groups, such as between men and women.[41] (Whilst this essay is framed through a somewhat binary lens in highlighting the distinctions between men and women historically enshrined in the law, there are myriad intersections of people from different backgrounds, identities and abilities who ought be distinctly recognised in the law through anti-universalist theorising). Indeed, any universalist project, such as Hart's *The Concept of Law*, relies on truths eternally fixed outside human history.[42] The apparent timelessness of Hart and Devlin's debate thus highlights that fallacious representations still shape the world in which we live and women's relationship to the law is often effaced by the shadow of the reasonable man in jurisprudence.

iv. christianity and the divine immorality of the feminine

'I have two daughters that have not known man; let me, I pray you, bring them out unto you, and do ye to them as is good in your eyes'.

Genesis 19:5-8

Devlin was right – even from a secular perspective, Christian morality largely underpins Anglo-Australian jurisprudence as a matter of history. Of course, sometimes Biblical references merely add colour to a judgement. Consider Edelman J's remark in an administrative law decision that 'Even with the benefit of omniscience, God still afforded Adam the benefit of the natural justice hearing rule.'[43] However, principles drawn from Christian ideology can inform genuine, intuitive decision-making on legal matters. This is particularly likely where there is no precedent. For example, in *CES v Superclinics*,[44] the NSW Supreme Court considered the first wrongful birth claim in Australia. The plaintiff claimed her

doctor was negligent in not diagnosing her pregnancy until it was too late to terminate. In assessing her claim for damages, which included the costs of an unplanned child, Meagher JA argued that there should be a discount for the 'joy, comfort and happiness to which the child might bring its mother'. He went on to say that:

Every child is a cause of happiness to its parents…In St John's Gopsel (16.21), it is said "A woman when she is in travail hath sorrow, because her hour has come: but as soon as she is delivered of the child, she remembereth no more the anguish, for joy that a man is born into the world".[45]

Legal matters which invariably affect women – such as abortion, reproduction, and sex – seemingly invite this kind of moralising and the invocation of intuitive principle. As Devlin made clear, the relationship between law and Christian morality is most manifest in relation to sexual offences.[46] These offences fall across not only moral but gendered lines. Notably, Hart argues that English popular morality does not owe its present significance to religion any more than to reason.[47] But Denike, who analyses the roots of Christian morality in Aquinas' natural law, reveals that the construct of reason in jurisprudence itself is part of a 'hegemonic imaginary' that valorises reason as a capacity associated with men which, in turn, is instrumental in aligning the feminine with the baser capacities of the material body.[48] As above, in the *Concept of Law*, Hart appeals to the reasonableness of the ordinary citizen and thereby gives credence to a masculine conception of human nature, harking back to ideas in natural law. Whether one takes the position of Hart or Devlin, the roots of Christian philosophy are central to Western thought in general and its characterisation of women. The interaction of the law with prostitution and marriage, as described by Devlin, specifically reveals the roots of Christian morality in English law – at least insofar as it affects the lives of women.

The crime of prostitution plays into 'the myth of uncontrollable male sexuality'.[49] Devlin characterises perceivably immoral sexual acts such as sex outside of marriage as an 'indulgence of the flesh,'[50] akin to how Christian doctrine tells of how Saints Anthony and Augustine 'fought against and survived with angelic and mythic stoicism insidious temptations of the flesh'.[51] This normatively imports into the Western legal system a natural law concept that men's reason is at risk of being weakened by the seductions of women.[52] As per Nussbaum, where disgust is a criterion used to identify types of acts to be regulated (in the way Devlin envisions), 'that which disgusts (at least in the area of sex) is that which (by displaying female sexuality) causes sexual excitement'.[53]

This is reflected in Devlin's account of prostitution, in which women are active seducers who lead men into sin. He claims that 'the prostitute exploits the lust of her customers'.[54] The woman herself can be exploited 'no more than an impresario exploits an actress'.[55] Devlin does not seem to think prostitutes are vulnerable at all – rather, the prostitute and client mutually exploit each other's weaknesses.[56] He claims that prostitutes choose this life because of a certain psychological makeup that makes it easier, freer and more profitable than other occupations.[57] This ignores the often dire economic circumstances of women supporting themselves by working as prostitutes in the mid-20th century. (Contrastingly, sex work today is seen by many as a viable option increasingly associated with autonomy). For Devlin, these women (like all women in Aquinas' world) 'embody the lure of sin of the fallen world'[58] – they transgress in this way *willingly*, making an immoral or irrational choice – and are thus located outside the law. The illegality of prostitution only makes sense to Devlin within the understanding that sex and sin are linked. Succumbing to sex, against the law, is foremost a moral, rather than legal, transgression. His treatment of this offence illuminates the inextricable relationship between Christian morality, the law and, in turn, how the law reduces and effaces female exploitation because of these religious importations.

Devlin extends the reach of his argument beyond the criminal law in analysing how marriage forms part of the basic structure of society in a dedicated chapter in *The Enforcement of Morals*.[59] He describes the treatment of adulterous offences in divorce proceedings to illustrate how the law of marriage is directly informed by Christian, moral obligations of spouses to one another. When considering how Parliament resolved to treat adultery by husband and wife identically in 1923, he remarked that 'if equality was imperative, society would have been better served by the restriction of the male rather than the liberation of the female'.[60] The use of the word 'if' suggests that, to Devlin, equality is not imperative. The liberation of the female, as a counterfactual to the restriction of the male, is cast in a negative light. He goes on to argue that a wife's earned income allowance, introduced to entice female labour in factories, is 'an undesirable expedient' because 'it is not a good thing socially or morally when a similar allowance is withheld from those who work in the home'.[61] Ostensibly, Devlin is supporting remuneration for domestic labour. But read in context, this ties into Devlin's support of existing familial structures rooted in Christian ideals where the woman's role is instrumentalised as part of the family unit. By explicitly identifying that he is 'concerned here not so much with economics as with the effect on the nation's morals,'[62] he suggests that the emancipation of women – outside of marriage, into the workplace – is morally significant in that it threatens social structures and is therefore within the purview of the civil law. This only serves to reinforce that marriage is a social – or sexual – contract into which women are coerced into subordination for social recognition.[63] Russell Hittinger argues that both Hart and Devlin artificially reduce their claims about morality and the law to society's survival.[64] In doing so, both fail to consider how the intersection between morality and the law operates in a real society in which our choices are not necessarily tied to morality nor always directed towards survival. But in the case of women, whom they both failed to consider, they may in fact be correct. For women, at the very least, the law of marriage is historically one of survival.

v. the dichotomy of public and private

"For women the measure of the intimacy has been the measure of oppression. This is why feminism has had to explode the private. This is why feminism has seen the personal as political."

Catherine MacKinnon[65]

Laws surrounding prostitution, abortion, rape, and marriage reveal that women's interaction with the law invariably takes place under the veil of the private realm. This distinction between public and private is a central tenet of liberal thought. For our purposes, exploration of this divide throughout the Hart-Devlin debate can be reframed to further understand the history of women's place in the law and its ongoing prevalence in legal thought. As above, Devlin does not believe that jurisdictional barriers should be raised between public morality and private sexual acts because it is possible that the challenge to established morality by such acts may be so profound that conformity to morals would be threatened.[66] In contrast, Hart staunchly affirms this liberal trope. He tears apart Devlin's analogy between treason and homosexuality as threatening the fabric of society – treason is necessarily public, whereas homosexuality in private does not corrupt the commitment to public morality.[67] However, putting Devlin's views

on homosexuality aside, his collapsing of the divide can be radically re-framed through a feminist lens to liberate women from the private sphere, an opportunity for reckoning.

The public/private distinction is cast as a 'villain' in feminist legal thought because it historically operated as an oppressive mechanism.[68] The history of Western society reflects the existence of a legal and normative difference between public and private life. Post Industrial Revolution, the divide between work and domestic labour was intensified, with the role of men and women being strictly ascribed to either side respectively.[69] The history of the binary itself is therefore a history of women's place in society. If it is accepted that cultural structures legitimate male domination,[70] the division of the social world into the spheres of public and private can be seen as an act of male domination. This is because the liberal formulation of civil freedom required that exercises of patriarchal power be relocated to the private.[71] The present, female legal reality is thus conditioned on the continued existence of this binary. Consider how the epidemic of domestic violence is shrouded in dubious notions of the paradigmatically private and intimate nature of these offences.[72] Of course, the very fact that the state routinely intervenes into the private realm to regulate abortion and maternity but neglects laws against marital rape and domestic violence illustrates the partiality and paternalism underpinning the separation.[73]

The repeated invocation of the concepts of public and private by Hart and Devlin 'worldmakes': it reinforces the ways in which this linguistic, descriptive choice is taken for granted rather than recognised as a social construction.[74] Nevertheless, Devlin destabilises the distinction in arguing that there is a case for intervention by the law into private acts (if the moral structure of society is threatened).[75] He argues that there are no theoretical limits on state power to legislate in matters of private morality: euthanasia, abortion and suicide are individual acts which bespeak a private morality and should not, as a result, be left outside the criminal law.[76] If anything, our intuition suggests the opposite. Many of these matters reach(ed) the limits of societal tolerance and are punishable by law.[77] As a necessary consequence, he rejects a firm dichotomy between public and private.

In an ironic inversion of Devlin's conservatism, the idea that what people do in private is a direct reflection of – and can threaten – societal norms directly maps onto feminist thought on this issue. A cornerstone of positivist thought is that there is a distinction between 'self-regarding' activities, which are an exercise of autonomy in private, and 'other-regarding' activities which are liable for legal sanction.[78] Hence according to Hart, the violation of a social norm in the privacy of one's own home may contribute to the demise of that norm, but this is different from a public violation of that same norm – only the latter threatens social cohesion.[79] Gavinson argues that, from a feminist perspective, no significant or controversial activity can be self-regarding.[80] For example, the family is not merely private because legal arrangements can affect marriages and children in profound ways. Moreover, many acts by women are not freely done by virtue of their taking place in private: 'When women 'choose' to marry…when women 'choose' to stay home… women are not choosing freely, but rather are selecting from choices mandated by social constraints and norms'.[81] Therefore, many private acts falling outside state regulation, like prostitution (at the time of the debate), are not seen as an authentic exercise of autonomy even though they take place in an intimate setting.

This somewhat perverse congruence between this feminist critique and Devlin's views can be reconciled when realising that it is all about the light in which you cast those norms. Devlin's central fear of democracy degenerating into tyranny is premised on a fundamental change in social institutions, out of step with widespread public outrage, being perceivably negative. Contra Hart, subverting heteronormativity and making, for example, rape within marriage a matter for public judgement (as it was not at the time) *does* profoundly disrupt normative structures. However, to the 21st century reader, this is rather a good thing, a step towards reckoning. Its only tyranny is progress.

vi. conclusion

'While there can never be a direct correspondence between law and morality, an attempt to divorce the two entirely is and has always proved to be, doomed to failure'.

Lord Hailsham, R v Howe[82]

'It is important…that society's notion of what is the law and what is right should coincide'.

Lord Lowry, Airedale NHS Trust v Bland[83]

The connection between morality and the law exists as a matter of fact in most Western legal systems. Whether they should or not, courts make judgements in a moral capacity.[84] This has – and has always had – real impacts for women. For example, Moss and Hughes consider advances in embryology and reproductive decision-making to consider how judicial decisions continue to be made on the basis of morality.[85] Devlin grapples with this reality, Hart does not. But neither considers the role of women when examining the normative function of the law as it is, rather than what it does and can do, and to whom. In a claim to objectivity, each holds steadfast to a theory of the law without engaging in any real social consideration of how the law affects certain subjects. As Foucault tells us, the exclusion of social considerations effaces the domination intrinsic to power.[86] So long as men dominate jurisprudence, theories of law can justify the domination of women. Hart and Devlin's theories regarding morality and the law therefore underlie the history of women's role in society. In this period of cultural reckoning, this history is of the utmost importance - by bettering our understanding of how morality and the law work together, perhaps we can pull at and unravel the threads of the patriarchy woven into jurisprudence today.

Considering Justice and Trauma in the Legal System in Light of Criminalising Coercive Control

Holly McDonald

i. Introduction

The criminalisation of coercive control in Australian jurisdictions is one necessary response to the pervasiveness of gendered violence in Australia. Coercive control is "a pattern of domination that includes tactics to isolate, degrade, exploit and control" victims.[1] It frequently precedes homicide in intimate partner violence and can be accompanied by other forms of sexual and domestic violence. Over the last couple of years, Australia has been reckoning with stories that have exposed the prevalence of gendered violence within every facet of society. From the Federal Parliament, the High Court, our high schools, and to the homes of families in and out of lockdown, we have heard the voices of those, past and present, whose stories highlight the need for scrutiny and accountability. However, we have also had to reckon with society's collective amnesia, as the stories that once swept the media are eventually relegated away from the national consciousness. Consequently, injustice is allowed to prevail and every day there are injustices and stories that never get legal recognition. This shows that a moment of reckoning needs to go further, beyond what the media and parliaments debate for a few weeks, and achieve structural change that will materially change the way that the Australian legal system deals with gendered violence.

The criminalisation of coercive control provides the opportunity to make these changes and highlights the necessity of legal and non-legal reform when considering whether the criminal justice system ("CJS") is currently equipped to handle these claims. This is particularly crucial in light of the well-documented retraumatisation of survivors of sexual assault and domestic and family violence who encounter the police and the CJS in legal processes.[2] Many of the issues stem from the inheritance of our legal system from the predominately white, male population that made up the early British and Australian legal systems, which has meant that the system was built to value the most privileged and safeguard particular class and gendered interests.[3] Consequently, the system was not designed to value women's voices, let alone hear the voices of women of marginalised backgrounds. Given this, the criminalisation of coercive control threatens to provide another avenue through which survivors, who are mostly women, are retraumatised by the CJS. In order for the criminalisation of coercive control to be an effective path to justice, rather than a force of traumatisation, the legal system and lawmakers need to go beyond this first reaction to the moment of reckoning and target the gendered dynamics which we inherited alongside the legal system.

ii. What is coercive control?

The associated behaviours and tactics within the pattern of coercive control vary and can be difficult to pinpoint. However, the National Domestic and Family Violence Bench Book has identified three features of coercive control; "Intentionality on the part of the abuser; the negative perception of the controlling behaviour on the part of the victim; and the abuser's ability to obtain control by use of a credible threat".[4] Examples of such behaviour include; manipulation, surveillance, isolation from friends and family, harassment, financial restriction, humiliation, threats, rape and sexual assault, physical assault, and 'revenge porn' among many others.[5] Further, dominating and controlling the victim's children can be indicative of a continuation of coercive control.[6] These behaviours deliberately entrap the victim within the relationship through diminishing the agency and autonomy which the victim would require to access support.[7]

It is almost exclusively men who perpetrate coercive control against women.[8] For this reason, this article will refer to "females" as

the victims and "males" as the perpetrators. However, it is recognised that coercive control can and does occur in same-sex relationships, and against and by non-cis gendered people.

The Australian Law Reform Commission and New South Wales Law Reform Commission have found that other forms of domestic and family violence, such as physical and sexual abuse, most often involve the same exercise of control and power that is categorised as coercive behaviour.[9] Coercive control preceded homicide in 99% (111 out of 112) of the intimate partner homicides which occurred in Australia from 2008 to 2016.[10] A recent study found that over half of the 1,023 Australian women who recently experienced coercive control by their partner had also experienced physical abuse (54%).[11] For 27% of the women, the abuse was severe, for example non-fatal strangulation, and for 30% of the women, the coercive control was accompanied by sexual violence.[12] For this reason, coercive control is referred to as the "golden thread" of domestic violence, meaning that the existence of controlling behaviour may indicate a risk of domestic violence and patterns that precede homicide.[13]

The effects of coercive control and the violence that may accompany it vary for each survivor, however the clinical psychologist quoted in the judgment of *R v Brown* [2015] ACTSC 65 provides an insight:

"Research into the cycle of domestic violence suggests that it is common for victims of domestic violence to blame themselves for the abuse and to experience major disruption in their self and world view. Domestic abuse can have a serious impact on the way a person thinks and interacts with the world around them. The chronic exposure to violence, or the threat of violence, and the stress and fear resulting from this exposure, can cause not only immediate physical injury, but also mental shifts that occur as the mind attempts to process trauma or protect the body.

Domestic violence affects a person's thoughts, feelings and behaviours, and can significantly impact on mental stability. While the effects of physical abuse are obvious, the effects of emotional abuse are easier to hide and harder to repair. It is common for victims of emotional abuse to blame themselves and minimise their abuse, particularly when they are repeatedly told that it is their fault that their partner becomes angry or aggressive."[14]

Coercive control evidently has detrimental and fatal effects for victims, and for this reason the New South Wales Parliament introduced and debated the *Crimes (Domestic and Personal Violence) Amendment (Coercive Control – Preethi's Law) Bill 2020* (NSW) which would criminalise this behaviour. Currently in New South Wales, perpetrators are only likely to be detected and charged if their conduct includes physical or sexual assault, stalking, breaching a domestic violence order, or damaging property.[15] The Bill aims to address these gaps; "By enabling abuse of various types which take place over a period of time to be prosecuted as a single course of conduct within a new offence of domestic abuse, the criminal law will better reflect how victims actually experience such abuse".[16]

iii. the system and systems abuse

Perpetrators of coercive control may also perpetrate "systems abuse", which is a use of legal processes with improper intent to reassert control and power, and Australian courts have recognised this as an example of coercive control.[17] The legal process poses a risk of "secondary victimisation", a term which recognises that a survivor's interaction with police, judges, and lawyers in the process of a legal action can be traumatising in itself after the primary trauma of being the victim of a crime.[18] Secondary victimisation is commonly researched in the context of sexual assault and has found that the adversarial nature of the trial, for example the cross-examination, exposes the complainant to a risk of experiencing secondary trauma.[19] This indicates that the legal system can already be re-traumatising for some survivors and this can be manipulated and enhanced by perpetrators of coercive control through systems abuse.

In perpetrating systems abuse, a perpetrator uses the structures and actors which are frequently sources of re-traumatisation in gendered violence proceedings and continues to disempower the victim. The trauma of approaching the police, giving evidence in court, spending significant time and/or money, and attaining costly legal advice and support, are exacerbated by the perpetrator's actions to deliberately make this process more complex and difficult. Actions may include; repeated applications to replete financial resources, lengthy and distressing cross-examination, reactionary applications for protection orders in response to the victim's original application, adding the survivor's relatives as parties to litigation, bringing vexatious claims, requesting numerous adjournments, evading service, and attempting to persuade the victim to withdraw allegations.[20] Recognising the potentially coercive power of these legal acts is a necessary step in meaningful law reform to address coercive control.

It is crucial that actors within the justice system recognise how perpetrators harness the system as a tool to continue control.[21] If these dynamics were better understood, police, lawyers, and judges could shift away from the assumption that a legal application is a neutral behaviour.[22] Instead, acts such as cross applications for protection orders and applications for disallowing matters to proceed could be considered bearing in mind the risk that the legal options are being used for abusive purposes. Recognising this would help reduce these opportunities for systems abuse and prevent an unchecked legal system which can effectively operate as a secondary form of abuse.[23]

Lawmakers are in the process of creating a new offence - "coercive control" - without addressing the existing opportunities for "systems abuse" and the potential opportunities that a new offence may pose. This new offence captures a wider "cohort" of survivors who may be retraumatised throughout the legal process.[24] Research by Australia's National Research Organisation for Women's Safety into violence against women found:

"Existing evidence already expounds that women are frequently not believed or supported when reporting abuse by an ex-partner and are often worse off financially and psychologically for their contact with the legal process (Salter et al., 2020). Feeling disempowered by the justice system can be a substantial barrier to future help-seeking, and sits at odds with trauma-informed responses that seek to reaffirm women's agency and autonomy after Intimate Partner Violence."[25]

Women have many valid and well-documented concerns for not engaging with the CJS, yet the criminalisation of coercive control has not attempted to address these issues.[26] This is particularly problematic when considering the successes and failures of the creation of this offence in other jurisdictions. In Tasmania, the *Family Violence Act 2004* (Tas) introduced the offences of economic abuse (section 8) and emotional abuse (section 9), which are common tactics of coercive control. Prosecution of these offences has increased, however its use is still minimal. In 2015-16, Tasmanian Police laid 4,174 charges of family violence and only eight of these prosecutions were for economic or emotional abuse.[27] It has been suggested that this can be attributed to inadequate police training and investigation, lack of community awareness about these types of abuse, and the six-month limitation period for pressing charges.[28]

In England and Wales, section 76 of the *Serious Crimes Act 2015* introduced the offence of "controlling or coercive behaviour in an intimate or family relationship". The United Kingdom Government has recognised the limitations of this offence as it only refers to non-physical behaviour, and therefore narrowly excludes physical and sexual assault as a mechanism of control.[29] Consequently, one study found that police did not recognise coercive control in situations where there was physical violence.[30] Continuing to focus only on isolated events of physical violence also meant that police officers conducting investigations have been challenged in their gathering of evidence related to patterns of prolonged abuse through non-physical means.[31] Both of these examples demonstrate that criminalisation alone does not lead to increased rates of charges or prosecution which accurately reflect the prevalence of the crime.

By contrast, the *Domestic Abuse (Scotland) Act 2018* has been referred to as "a new golden standard" by Professor Evan Stark, a leading academic in coercive control research.[32] The Scottish Act not only provides the legal remedy of criminalisation, but it also ensures that criminalisation is underpinned by providing effective services, preventative measures including reducing reoffending, and participation by abuse survivors.[33] Further, the framing of the legislation is crucial. The first condition is that the abusive behaviour is behaviour which a reasonable person would consider is likely to cause physical and psychological harm. Additionally, the perpetrator must intend to cause such harm or be reckless as to causing the harm.[34] By contrast, the New South Wales Bill is focused on the reasonable and likely effects on the victim. It is too early to determine how the differences will materialise in the courtroom, however it is hopeful for survivors in Scotland that shifting the focus to the perpetrator's behaviour and away from the effect on the survivor may result in a less traumatising court experience as processes such as cross-examination would naturally have a different focus on the impact on the victim.[35] Further, before the law came into force, 26,000 Scottish police officers were trained specifically to respond effectively to these laws.[36] However, further time and research is required to reveal the full implications of the Act, as conviction rates are low. Within the first three months of the Act commencing, Police Scotland recorded 400 such crimes, 190 of which were referred for prosecution, yet there were only 13 convictions.[37]

Both the Scottish and the NSW legislation may be well-intentioned, however this can always be undermined without additional mechanisms to ensure effective enforcement, prosecution, and application. Legislation alone is not enough, rather implementing educational and training programs which are informed by best practice and the experience of survivors will go further to achieving what a Bill alone hopes to achieve.[38]

iv. exclusion from the system

The introduction of a new offence is premised on the assumption that the legal system as it currently exists will be able to provide an avenue for justice. However, for many women, the police and other legal actors are not viewed as a place for protection, particularly for Indigenous women, women from culturally and linguistically diverse backgrounds, women with disabilities, and LGBTQI+ women. One piece of legislation, the criminalisation of coercive control, will not result in police and the CJS being open to every woman's experience of abuse. Therefore, it has been argued that for some women, "more law is not the answer", particularly for those who the CJS already excludes.[39] The criminalisation of coercive control presents many concerns for those women who experience compounding discrimination and marginalisation. Australia's National Research Organisation for Women's Safety reported that the offence of coercive control is not a solution for Aboriginal and Torres Strait Islander women who already "fear reporting their experiences of violence and seeking help because of the ongoing social and cultural marginalisation, racism, and lack of culturally sensitive services, as well as the extremely high rates of the removal of their children".[40] For this reason, research partnered between Indigenous women and the Australian Human Rights Commission recommends community engagement and community-led initiatives over increasing the power and prevalence of law enforcement.[41] In Indigenous communities, it is not uncommon for police to misidentify female victims of coercive control as the primary aggressor in an isolated incident of self-defence.[42] This highlights just one example of a specific issue which will need to be addressed through meaningful training and changing police culture in order to alleviate the potential unwanted impacts of criminalising coercive control.

It is essential that criminalising coercive control is accompanied by meaningful reform that, while encompassing law reform, goes beyond the CJS to target the exclusion of certain women from avenues of justice. This is not only for the impact upon the survivor of coercive control, but also for the success of prosecution, because substantial involvement from the survivor in the court process is required for an offence which is framed around the impact on the victim and which requires proof beyond reasonable doubt, as is the criminal standard.[43]

v. the path forward

The criminalisation of coercive control may have adverse effects on survivors who go through the CJS, particularly women from marginalised backgrounds, if the creation of a new offence is the only strategy to address the prevalence of coercive control. Professor Evan Stark presents an ambition about what laws criminalising this behaviour could achieve:

"For the millions of women who are… coercively controlled by their partners, the law is just when it becomes part of women's safety zone, when they experience a synchronicity of their struggle to be free of their partner and their larger struggle to realise their capacity as women, when being in the law, calling the police or appearing before a judge… becomes for them a moment of autonomy, in which their voice is not only heard but magnified and when their personal power… is recognised as a political asset."[44]

To get to this stage, significant reform and initiative is required. There is extensive research which proposes various solutions which go beyond the few that this article can summarise. Australia's National Research Organisation for Women's Safety has suggested a "social entrapment framework" which is an approach that actively includes various evidence of existing disadvantages and barriers to seeking help in order to assist legal and non-legal actors to better understand a survivor of coercive control.[45] This has numerous benefits and purposes, including: providing a focus for police training to move beyond incident-based policing to investigate patterns of events and consider future implications; enabling police to better respond to women who "fight back" or who are not "ideal" victims; assisting in police and community recognition of non-physical forms of violence; enhancing the integration culturally-specific training to address the marginalisation of particular groups within the CJS; and enhancing trauma-based training of legal actors to reduce re-traumatisation through the CJS.[46] Others have proposed justice reinvestment initiatives, particularly for Indigenous women,[47] or consulting with survivors to shift

funds from courts, police and prosecutors into community programs and Non-Government Organisations.[48] Importantly, what each solution ultimately aims to do is in some way address social, cultural and legal norms, given that the behaviour of coercive control and certain experiences in the CJS are embedded in gender inequality.[49] Further, it is recognised that cross-sector solutions which encompass diverse groups of women are required to initiate systemic change, and may require approaches which do not involve criminal justice as the main focus.[50]

The criminalisation of coercive control may provide some justice to certain vulnerable women, particularly as it can validate and provide a language for the various experiences of violence, which is crucial for people experiencing trauma.[51] However, to avoid adverse impacts and to ensure that there is an avenue to justice which is available to all women, particularly those from marginalised backgrounds or communities, the introduction of a new offence needs to be accompanied by systemic reform to transform the way that the criminal justice system recognises domestic and gendered violence.

DKB Study

Lauren
Lancaster

This piece is inspired by a study of a section of Del Kathryn Barton's come of things (2010), a diptych of massive proportions currently held in the Art Gallery of NSW. It is a fascinating and hyper-detailed work. I was drawn to her ephemeral depiction of the human form and attentive composition. Each dot, colour and shape are so carefully considered and I endeavoured to use this approach in my own art-making, where previously I have largely undertaken much more naturalistic oil and watercolour works.

Both my study and Barton's entire piece capture a primordial yet psychedelic energy, with the hands and bodies of the figures translucent with watercolour washes, and animals exploding from the canvas. The alien-like slenderness of the hand in my work elevates the human forms Barton so beautifully renders beyond gender or classification, instead focusing on the linear and shape-based construction of the human body. The bird offers a seemingly concrete contrast to the floating hand, while the snake-like (or perhaps plant-like) being that encircles the hand literally roots it in the surrounding environment. To me, the graphic elements in the corners of the work resemble sexual organs, reminding us that we, as sexual beings, are embedded in nature just as it is embedded in us.

In a practise-based sense, this work challenged me to experiment with media – watercolour, pastels, gel-pens, impasto and gouache. Having little experience with multimedia works beyond your standard paint and pen, I found it freeing to be able to expand the visual effects I could create with fun new combinations. That's often why I feel myself drawn to studies of works I really admire – it gives me the confidence to try something new and be guided by their vision first and then I can go create my own things using the knowledge I gleaned!

I hope this work draws you in just as I was entranced by Barton's work. Barton's original piece can be accessed via the Art Gallery of NSW website (you won't regret it): https://www.artgallery.nsw.gov.au/collection/works/74.2010.a-b/

Moderating the Megaphone: Lessons from temporary hate speech legislation during the same-sex marriage postal survey

Madeleine Gandhi

i. Introduction

Public discourse during the 2017 Australian Marriage Law Postal Survey exposed our society's capacity for homophobic speech. Despite the success of the Postal Survey, we must recognise that the advancement of LGBTQI+ rights is an ongoing social and political struggle rather than 'a product of inevitable progress in a liberal democracy.'[1] This argument was illustrated during the 2017 Postal Survey. The rate of sexuality-based hate speech in 2017 prompted the Federal Government to introduce a temporary federal law penalising hate speech in relation to the Postal Survey.[2] This marked the first federal regulation of sexuality-based hate speech in Australia. However, for LGBTQI+ Australians, the experience and impact of hate speech is not temporary. This essay outlines the prevalence and impacts of sexuality-based hate speech, and critiques the existing patchwork of inconsistent state-based laws in place of a federal prohibition.

A. Defining Sexuality-Based Hate Speech

Homophobic hate speech is prevalent, damaging, and must be reckoned with. In a 2018 report, the Australian Human Rights Centre (AHRC) defined sexuality-based hate speech as speech that targets and vilifies members of society on the basis of 'their sexual orientation, gender identity, (or) sex characteristics'.[3] The AHRC warns that sexuality-based hate speech may delegitimise relationships and '[diminish] the dignity, self-worth and integration' of LGBTQI+ people into the broader community.[4] Moreover, if unregulated, undocumented and unpunished, 'hate speech can embed discrimination and provide an 'authorising environment' for the escalation to violence.'[5]

In recent history, LGBTQI-status has been perceived as a mental illness and systematically punished. Today, in Western democracies where homosexuality is no longer criminalised, linguist Fabienne Baider suggests that the legacy of 'exclusion and ghettoisation' lives on through public discourse.[6] Baider argues that everyday and online conversations are one of the most visible ways to perform heterosexuality, and denigrate or even deny the existence of sexual and gender minorities.[7] Public discourse plays a powerful role in reaffirming the heteronormative social order, especially when that order is threatened by an event such as the 2017 Australian Marriage Law Postal Survey.[8]

ii. Public discourse during the 2017 postal survey

In late 2017, the Australian Government announced a non-compulsory, non-binding survey on whether same-sex marriage should be legalised. The ensuing national debate provided unprecedented insight into the appetite for anti-LGBTQI hate speech in Australia. Historically, the issue of hate speech has been 'under-researched, poorly understood and almost impossible to effectively respond to'[9] due to the lack of accurate and disaggregated data arising from under-reporting to police.[10] The Postal Survey was an expensive and unnecessary mechanism to confirm that the Australian public supports the legalisation of same-sex marriage by a significant margin.[11] Between September and November 2017, almost 80% of Australians participated in the non-compulsory Postal Survey and 61% of respondents voted 'Yes'.[12] In response, parliament amended the *Marriage Act 1961* (Cth) to permit same-sex marriage on 7 December 2017.[13] Despite this positive result, the divisive process impacted the wellbeing of many in the LGBTQI+ community.

B. Harmful Impacts of the Postal Survey on the LGBTQI+ Community

During Australia's 2017 debate, opponents to same-sex marriage were highly mobilised online, focusing their arguments on issues of free speech, religious freedoms, and child welfare. Unsurprisingly, LGBTQI+ Australians reported increases in hate speech and hate conduct.[14] One poster in Melbourne, citing the widely discredited research by American Catholic priest Donald Paul Sullins, exemplified the distressing claims and unsubstantiated research broadcasted by the "NO" campaign.[15]

Image I: A poster sighted in Hefferman Lane, Melbourne, in 2017.

Correspondingly, 'specialist mental health services reported a spike by up to 40% in people seeking counselling and support.'[16] Indeed, medical evidence demonstrates that discriminatory public messaging by opponents of same-sex marriage can starkly impact the psychological wellbeing of LGBTQI+ couples and families.[17] Halfway through the 2017 Postal Survey, the Medical Journal of Australia (MJA) advised medical professionals on the dangers of 'homophobic campaign messages' and misinformation in the public domain.[18] The authors expressed concern that 'homophobic and stigmatising material' during the Australian same-sex marriage debate placed the entire LGBTQI+ community, particularly families and young people, at increased public health and mental health risk.[19] The MJA's warning aligned with joint Australian-Irish research conducted after the 2015 vote on same-sex marriage in Ireland, which found that 60% of LGBTQI+ respondents reported anxiety and depression as a result of the campaigns.[20] Moreover, a 2016 econometric analysis by consultancy firm PwC estimated that a stand-alone vote on same-sex marriage in Australia would cost AU$20 million in negative mental health costs, comprising medical costs and lost productivity.[21]

In February 2018, the Senate Finance and Public Administration Committee (the Senate Committee) published an inquiry into the format of the Postal Survey. After considering a significant volume of testimony and evidence, the Senate Committee concluded that 'questions of human rights for minority groups should not be resolved by a public vote'.[22] One submission to the Senate Committee testified, 'After the survey was announced, my world [became] hell. It was the hate and vitriol of the 1990s that I experienced, but this time our Prime Minister gave this hatred a name – respectful debate'.[23] This "respectful debate" traumatised the LGBTQI+ community. The Postal Survey gave licence to public ventilation of derogatory and offensive material, which was seemingly awaiting a politically and legally endorsed outlet.

C. Attitudes Towards LGBTQI+ Australians

Sexuality-based hate speech in Australia is not confined to 2017. In 2010, the Australian Human Rights Commission (AHRC) reported that 60% of LGBTQI+ Australians had experienced homophobic abuse in the past 12 months.[24] Verbal harassment is consistently the most commonly reported form of harassment encountered by LGBTQI+ Australians.[25] An online survey of over 6,000 Australians aged between 14 and 21 who identify as LGBTQI+ in 2019 determined that verbal harassment or assault was more prevalent than physical or sexual harassment or assault.[26] Approximately 57.6% of participants had experienced verbal harassment or assault based on their sexuality or gender identity, and 40.8% of participants had experienced verbal harassment or assault in the past 12 months.[27] Comparatively, 22.8% had experienced sexual harassment or assault, 9.6% had experienced physical harassment or assault, and 15.4% of respondents had experienced physical harassment or assault in the past 12 months.[28] This trend is substantiated by the following table, which contains findings of the 2021 national survey by La Trobe University – the largest ever survey of young LGBTQI+ Australians.[29]

Table 35 Experiences of verbal, physical, and sexual harassment or assault based on sexuality or gender identity, in the past 12 months, by setting

	Verbal (n = 6,178)		Physical (n = 5,461)		Sexual (n = 5,588)	
Setting	n	%	n	%	n	%
Educational institution	1,250	21.2	245	4.7	358	6.7
Home	637	10.3	127	2.3	109	2.0
Public	1,125	18.3	185	3.4	473	8.5
Sport	71	1.8	17	0.5	13	0.4
Work	183	4.9	15	0.5	117	3.5
Somewhere else	511	8.3	87	1.6	567	10.2
One or more of the above	2,524	40.8	529	9.7	1,273	22.8

Figure I: Research by the Australian Research Centre in Sex, Health and Society at La Trobe University.[30]

D. Temporary Legislation During the Postal Survey

When launching the Postal Survey, then Prime Minister Malcolm Turnbull optimistically claimed that Australians can be trusted to engage in respectful and civil debate, asking: 'Do we think so little of our fellow Australians and our ability to debate important matters of public interest?'[31] However, the Commonwealth Parliament soon recognised the unsustainable proliferation of uncivil speech.

Merely 36 days after the survey period commenced, Parliament enacted the

Marriage Law Survey (Additional Safeguards) Act 2017 ('Safeguards Act') which introduced fines for vilification, intimidation, and threats related to participation in the Postal Survey.[32] The operation of the *Safeguards Act* expired at the conclusion of the Postal Survey on 15 November 2017. Recourse under the *Safeguards Act* was available to both sides of the political debate. However, as demonstrated by the following table, hate speech was overwhelmingly directed by the "NO" campaign towards LGBTI individuals, groups, campaigners and campaign organisations.[33]

TABLE 7 Uncivil and hate speech, targets

%	Political party or politician	LGBTI people or groups	Religious People/ Denominations	Campaigners/Campaign organisations
Total	0.2	0.4	0.3	1.6
"No" pages	0.0	1.3	1.0	4.0
"Yes" pages	0.3	0	0	0.6

Figure 2: Research into the targets of hate speech during the 2017 Postal Survey.[34]

Submissions to the Senate Committee criticised the *Safeguards Act* for various reasons, including its delayed introduction and three-month limitation period.[35] Additionally, the requirement to obtain the Attorney-General's consent prior to commencing legal action was criticised for 'over-politicising' the *Safeguards Act*, and it was reported that individuals and small non-profits were deterred by the risk of adverse costs orders.[36] Regardless, the survey-specific statute is significant because it represents the first federal protection of LGBTQI+ people from hate speech.[37] When drafting permanent legislation, community consultation and a more extended drafting process could avoid such technical shortcomings.

iii. the existing legal framework in australia

A. State Legislation

Currently, sexuality-based hate speech is regulated through an inconsistent patchwork of state-based legislation. Following the legalisation of same-sex marriage in 2017, it is prudent to consider the utility of a federal prohibition on sexuality-based hate speech. Such a law would align with international best practice; almost three years ago, the United Nations Independent Expert on Sexual Orientation and Gender Identity recommended that all countries adopt hate speech legislation.[38] More importantly, however, a federal law would fill gaps in the current patchwork of protections across the country. The following table outlines the various degrees of protection from sexuality-based hate speech in different

Existing protections from hate speech in Australia[29]

	Federal	ACT	NSW	NT	QLD	SA	TAS	VIC	WA
Lesbian	✗	✓	✓	✗	✓	✗	✓	✗	✗
Gay	✗	✓	✓	✗	✓	✗	✓	✗	✗
Bisexual	✗	✓	✗	✗	✓	✗	✓	✗	✗
Trans	✗	✓	✓	✗	✓	✗	✓	✗	✗
Intersex	✗	✓	✗	✗	✗	✗	✓	✗	✗

Figure 3: Overview of existing legislative protections from hate speech in Australia in 2014.[39]

Australian states and territories.

Notably, Figure 3 illustrates the absence of any legislative protections in Western Australia, Victoria, South Australia, and the Northern Territory. I note that a Victorian parliamentary inquiry recently recommended the extension of anti-vilification laws to the LGBQI+ community.[40] The most glaring absence of legal protection, however, is at the federal level. The Tasmanian *Anti-Discrimination Act 1998* is cited as a positive template for federal regulation, as it contains the most comprehensive protections and the least exemptions.[41] Accordingly, in a submission to the Senate Inquiry into the Postal Survey, the group Tasmanians United for Marriage Equality urged the Federal Parliament to legislate permanent legal protections for LGBQI+ Australians.[42]

Given the absence of legal protection in multiple states and the lack of consistency across the country, the absence of Commonwealth legislation prohibiting incitement to hatred and offensive conduct on the basis of sexual orientation has been described by activists as 'one of the major gaps in Australian national law'.[43] The objective of a federal law would be to provide certainty and consistency to a deficient patchwork of state laws.

iv. what can we learn from the temporary federal prohibition?

A. Advancing Sexual Citizenship

The momentum towards LGBTQI+ equality in Australia must not stall after the achievement of same-sex marriage. Complex tensions and shortcomings exist within the LGBTQI+ rights movement. For example, leading queer theorist Emma Russell highlights the influence of class and race on societal acceptance. Russell observes that select LGBTQI+ people, who are generally white, middle-class and cis gay men or lesbians, are perceived by media and law enforcement as 'good queer subjects' or 'respectable sexual citizens' and therefore 'worthy of compassion'.[44] The 'privatised and 'respectable' version of homosexuality does

not extend to protect more "transgressive" versions of homosexuality such as transgender individuals, who do not 'reinforce (the same) normative notions of respectability'.[45] For these reasons, Russell argues that sexual citizenship within Australia remains 'tenuous.' This is the context in which the *Safeguards Act* was introduced. Accordingly, the question arises: Did the *Safeguards Act* hinder or advance the sexual citizenship of LGBTQI+ Australians? The answer becomes clear when we compare the treatment of LGBTQI+ Australians to their treatment of racial minorities in Australia. I am referring to a politicised and controversial law: section 18C.

B. The Precedent of Racial Vilification Laws

The *Racial Hatred Act 1995* (Cth) amended the *Racial Discrimination Act 1975* (Cth) and inserted section 18C, which makes it unlawful to publicly commit an act that is likely to 'offend, insult, humiliate or intimidate' an individual or group (subject to notable exceptions)[46] and is motivated by the victim's race, colour, nationality or ethnicity.[47] Although racist insults are distinctly harmful, the logic underpinning racial vilification laws also applies to sexuality-based hate speech laws. _____ Columbia Law School Professor Kent Greenawalt argues that group-identity-based hate speech can be equally distressing to groups defined by gender, religion or sexual orientation as groups defined by race. In particular, Greenawalt points out that the 'history of homophobic discrimination and violence' predisposes victims of sexuality-based hate speech to 'special psychological hurt or emotional distress.'[48]

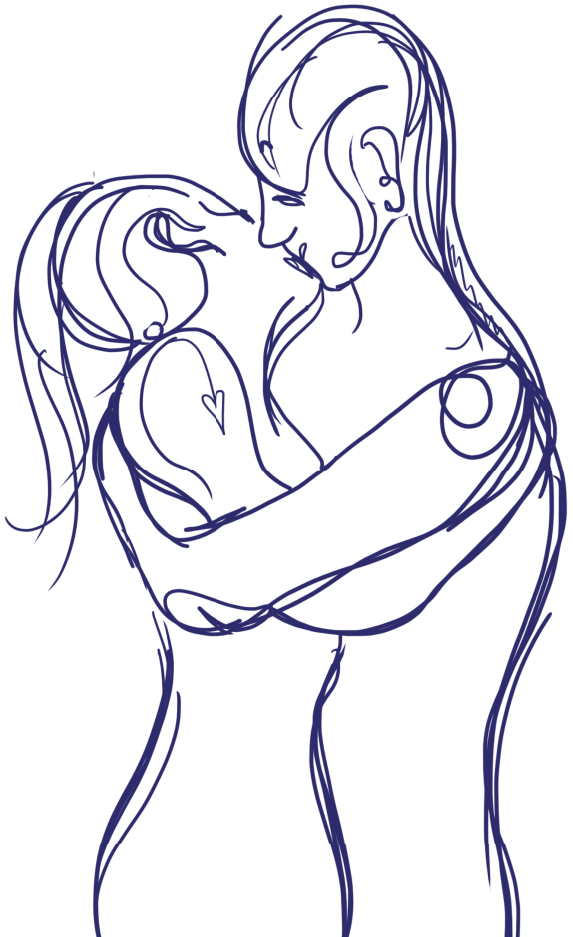
Given that Australia has an existing framework for prohibiting racially motivated hate speech, it seems inconsistent and unfair to withhold such protections from LGBTQI+ people who have a comparable history of persecution in Australia.[49] LGBTQI+ communities are comparably stereotyped and stigmatised on the basis of an attribute that they are powerless to change. As Brown observes, 'an official message of equal standing' is even more significant when some groups benefit from legal protections against hate speech and others do not.[50] At worst, this disparity could convey to LGBQI+ Australians that they are 'second class citizens' who are not protected equally before the law.[51] In line with Richardson's notions of sexual citizenship and the right to publicly propagate one's sexual identity, a federal law would – once again – communicate the urgent statement that 'everyone should be able to advance through life on their own efforts and abilities.'[52] Just as there was a mandate for the legal protection of racially diverse Australians in the 1990s, in 2021 there is a mandate to legislate in favour of LGBTQI+ Australians.

vi. conclusion

The Postal Survey represents a turning point for advancing LGBTQI+ rights in Australia. Today, we have documentation of harmful homophobic materials distributed to the doorsteps, public transport and public streets of LGBTQI+ Australians. Not only were these acts initially sanctioned by the Government as "dialogue", they went largely unpunished by the ineffective, delayed and temporary *Safeguards Act*. We have documentation of the medical toll on the LGBTQI+ community of sexuality-based hate speech. We know that legislation would be likely to increase reporting, and therefore increase the availability of comprehensive disaggregated data. A federal law would strengthen and streamline the existing "patchwork" of inconsistent state laws. In doing so, it would confront and reckon with the prevalence and harm caused by sexuality-based hate speech.

Stain

Nishta Gupta

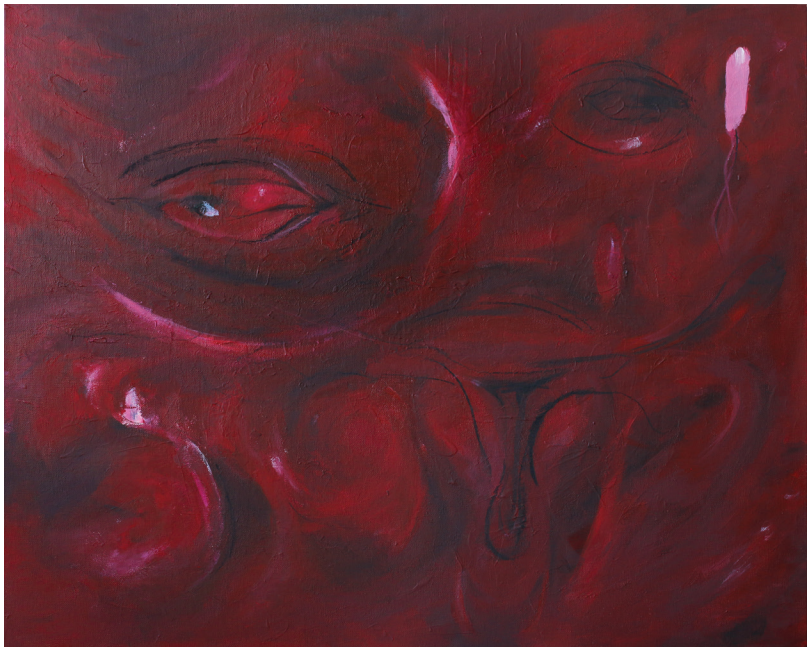


Periods remain taboo for all genders: they are discussed in hushed tones, a “dirty” secret, where feminine hygiene products are kept hidden from view before being promptly discarded. Behind this silence, there is an ugly history of gendered violence and oppression. Historically, women and non-binary people have been stigmatised, unfairly taxed, barred from participating in society, and even killed due to the ‘dirtiness’ associated with menstruation. A cycle of preparation: blood and tissue, removal and replacement, pressure and pain.

In “Stain”, I shamelessly invite audiences of all genders to reckon with their own conceptions of periods as well as its bloody history. I integrate abstract expressionist techniques to create a highly textured acrylic painting that figuratively examines the menstruation cycle. Deep red gestural strokes hint at turbulence while maintaining a tranquil beauty. The colours flow into each other. Charcoal lines offer whispers of a uterus - it is celebrating, rather than demonising, the bodies of those with this magnificent, muscular organ.

Cast-making processes have been used to create pads and a vulva with red and pink hues of wax, turning a functional object into one that is decorative. Something that is sneaked into pockets, hidden from society’s gaze, given a podium. The ability for these casts to be mass produced also draws parallels to the commercial status of feminine hygiene products, with controversies around the period tax and the inaccessibility of products leading to period poverty. They are no longer “luxury goods” in Australia but access to them remains a hurdle throughout Australia and the world. Moreover, it speaks to how femininity itself has become a commodified asset that can be bought and exchanged, equating to a sense of achievable ‘womanhood’.

Those obsessed with upholding patriarchal norms cramp up at the sight of a blood stain, something that half the population can acknowledge as a monthly reminder of bodily function. Continuing to silence and hide away from the site and sound of the cycle of menstruation denies power to those whose bodies endure a crimson war. Gendered violence is a stain on our history to be reckoned with: its imprint is felt by women whose bodies continue to house socially manufactured shame and act as an arena for political debate.



Disgust, Violence and Rebellion: Criminal Law and the Regulation of Male Homosexuality

Rhian Mordaunt

i. 'good sex' vs 'bad sex'

The criminal law has historically classified sex into 'good sex' - heterosexual sex - and 'bad sex' - homosexual sex - and has punished those who deviate from heteronormative sexual behaviours. However, this essay will demonstrate that these heteronormative binaries of 'good sex' and 'bad sex' are slowly being eroded by widespread societal acceptance of homosexuality. This essay will first explore why the criminal law deemed it necessary to classify male homosexual sex as 'bad sex' through a consideration of the socio-historical factors which led to the criminal law perceiving male homosexuality to be 'disgusting' and 'threatening', and therefore in need of regulation. This essay will then highlight how even after all Australian states and territories repealed their male homosexual specific offences, the criminal law still classified male homosexual sex as 'bad sex' as it punished those who engaged in male homosexual acts through the 'homosexual advance defence' ('HAD'). However, with South Australia recently becoming the last state to abolish the HAD,[1] this indicates that the criminal law no longer vilifies the male homosexual body and thus does not consider male homosexual sex to be 'bad sex'. This essay will then examine the criminal law's regulation of male homosexual public sex, as homosexual encounters in public spaces were historically perceived as 'wounds' and signs that public order had been 'violated'.[2] The criminal law has continued to regulate male homosexual acts in public spaces through laws which regulate 'obscene' or 'indecent' behaviour,[3] and whilst these laws make no statutory distinction between homosexual and heterosexual sex, the problem lies in the fact that their enforcement is shaped by heteronormative conceptions of 'public indecency'.[4] This demonstrates that whilst the criminal law has drastically changed its views on male homosexuality, the boundaries of 'good sex' and 'bad sex' have not been entirely eroded.

ii. the 'disgusting' and 'threatening' homocriminal

The criminal law has long labelled male homosexual sex as 'bad sex', as illustrated by the 16th century *Buggery Act 1533* (UK), which prescribed the death penalty for sodomy and remained in place until 1861.[5] The regulation and punishment of male homosexuality was deemed a necessary response to the archetype of the 'disgusting' and 'threatening' male homosexual, which will be referred to in this essay as 'the homocriminal': a term coined by Derek Dalton, which combines 'homo' (an abbreviation of homosexual) and 'criminal', to remind the reader that 'in the juridico-cultural imagination, homosexuality and criminality are often attached to each other'.[6]

Senthorun Raj notes that the criminal law has an extensive history of 'gesturing with disgust in order to contain offensive or injurious conduct'.[7] Male homosexuality was once considered synonymous with disgust, as it greatly exceeded the heteronormative limitations imposed on sexual behaviours.[8] The immense disgust once held by the criminal law in relation to male homosexuality is reflected in the commentaries of English jurist William Blackstone, who referred to sodomy as being an 'offence of so dark a nature' that 'the very mention of it is a disgrace to human nature'.[9] It is important to integrate why the female homosexual body was never deemed to be 'criminal' in Britain or its colonies like its male counterpart. It could be said that the criminal law did not perceive female homosexuality to be as 'disgusting' as male homosexuality or that the criminal law was oblivious to the fact that female homosexuality even existed, as evident by the views of Queen Victoria who supposedly refused to believe that women could do 'such things'.[10] However, Caroline Derry provides a far more convincing explanation as to why the criminal law did not regulate female homosexuality.[11] Derry

argues that the absence of a specific crime which punished female homosexuality should not be confused with 'benign neglect',[12] as the criminal law purposefully chose to remain silent on the 'issue' of female homosexuality because this silence was 'central to a policy which aimed to keep lesbianism outside the knowledge of... 'respectable' white British women of a higher class'.[13] This indicates that the criminal law still considered female homosexual sex to be 'bad sex' but chose to remain silent due to British society's anxiety surrounding female sexual autonomy, as relationships between women were seen as a 'threat to the patriarchal family'.[14]

The association of male homosexuality with 'disgust' travelled from England to Australia in the process of colonisation, during which 'not only were English laws transferred to Australia, but English attitudes and perceptions came too'.[15] This is evident from the early years of Australia's white history, where there is clear evidence of continued homophobia and persecution of male homosexuals.[16] The criminal law continued to perceive male homosexuality as 'disgusting' throughout the 20th century, as reflected by the language used in the legislation which punished male homosexuality. For example, prior to 1984, section 79 of the *Crimes Act 1900* (NSW) stated that 'whosoever commits the abominable crime of buggery, or bestiality, with mankind, or with any animal, shall be liable to penal servitude for life, or any term not less than 5 years'.[17] This description of male homosexual acts as 'abominable' and comparable with bestiality illustrates the immense level of disgust associated with male homosexuality and why punishment was considered necessary, as it prevented these 'disgusting' acts from 'polluting' society.

The criminal law also perceived the homocriminal to be a threat to natural and social order. The homocriminal violated natural order by defying gendered expectations surrounding sex, engaging in sexual acts which are traditionally assigned to women (e.g. being penetrated.) This led to the homocriminal being labelled: 'unmanly',[18] 'a figure of failed masculinity'[19] and a threat to 'Australia's sense of masculine identity'.[20] The homocriminal also threatened natural order by contaminating the 'reproductive, matrimonial, monogamous imaginary that sustains the social order of heteronormativity'.[21] This is because he disobeyed the heteronormative expectation that sex was reserved for heterosexual married couples for the purpose of reproduction. Therefore, in comparison to 'good' heterosexual sex, 'bad' homosexual sex was seen as 'lustful' and 'wasteful'.[22] The perceived 'threat' of the homocriminal was particularly heightened during the Cold War era, a time where those who failed to 'conform to idealised social and political norms' were viewed as a 'threat to Australia's sensibility.'[23] As male homosexuality violated heteronormative expectations, this rendered those who engaged in male homosexual acts at the receiving end of an 'intense campaign to stamp them out',[24] which included: new laws, harsher penalties, diminished civil liberties, isolation in public institutions and government-funded inquiries to discover the 'causes' of homosexuality, so that a 'cure' could be found.[25] The public hysteria surrounding male homosexuality during this period is reflected in the legislative changes designed to 'deal with the homosexual wave' in 1954.[26] This included enacting new laws such as s 81B of the *Crimes Act 1900* (NSW), which made it a crime if a 'male was caught soliciting or inciting or attempting to solicit or incite another male to commit or be a part of any crimes' involving the 'abominable crime' of buggery.[27] Additionally, the penalties for a range of homosexual offences were dramatically increased, as 'whilst charges under the old s 4 of the *Vagrancy Act* had a maximum sentence of 6 months jail, the new s 81B, its nominal replacement, had a 12 months' prison term attached'.[28] This illustrates how the criminal law used legislation to send out a clear message that if one were to deviate from heteronormative expectations they would be severely punished.

Furthermore, the idea that homosexuality could be 'passed on' to others like a disease 'long held currency in cultural constructions of homosexuality'.[29] This increased public hysteria surrounding male homosexuality, as the homocriminal was perceived to be a vampiric figure who spread homosexuality through each 'contact' he made.[30] Derek Dalton states that the 'association between homosexuality and disease prevailed for so long that it continued to hold currency in social and legal discourse' even after homosexuality was removed from the Diagnostic Statistical Manual of Mental Disorders in 1973.[31] This indicates that the criminal law used legislation as a symbolic and literal quarantine to stop homosexuality from 'spreading' and contaminating Australian society: a society which was seen as being dependent on the 'continuation of heterosexual relationships'.[32]

However, it can be said that the archetype of the homocriminal no longer exists, as the vast majority of Australian society believes that male homosexuality should be accepted.[33] This dramatic change in the societal perception of male homosexuality has had a profound impact on the criminal law, as indicated by consensual male homosexual sex no longer being a criminal offence.[34] Therefore, it is arguable that these rigid binaries of what the criminal law considers to be 'good sex' and 'bad sex' have been eroded and are merely a thing of the past. This erosion is perhaps best demonstrated by the recent abolition of the 'homosexual advance defence'.

iii. 'Straight panic': the homosexual advance defence

It would be false to state the criminal law stopped viewing male homosexual sex as 'bad sex' immediately after all Australian states and territories repealed their male homosexual specific offences. Evidently, the criminal law still remained frightened by the homocriminal as it justified violence on those who deviated from heteronormative norms through the HAD: whereby a defendant accused of murder could downgrade their charges to manslaughter by raising the partial defence of provocation and arguing that they lost 'self-control' when the victim made an unwelcome homosexual advance towards them.[35]

The Australian states and territories share similar elements with regards to establishing the partial defence of provocation, consisting of both objective and subjective elements.[36] As summarised by Anthony Gray and Kerstin Braun, in order to rely on the partial defence: 'the defendant must have been provoked by the victim through conduct recognised as provocative conduct by the law; the defendant must have acted while having lost self-control due to the provocative conduct before there is time for the passion to cool; and an ordinary person who was provoked with the same gravity as the accused would have lost self-control and formed an intent to kill or cause grievous bodily harm'.[37] The problematic nature of applying the 'ordinary person' test in the context of the HAD is that by accepting that an 'ordinary person' would kill in response to a homosexual advance 'ascribes homophobia to the representative 'ordinary person''.[38] By characterising the 'ordinary person' as homophobic, this demonstrates that the criminal law continued to view male homosexual sex as 'bad sex' even after male homosexuality was deciminalised, as extreme violence was seen as the 'ordinary' response to a homosexual advance. This is evident in *Green v The Queen ('Green')*,[39] which stood as High Court authority that a 'non-violent homosexual advance can provoke an ordinary person into killing their would-be seducer'.[40] In *Green*, the victim, Donald Giles, invited the

offender, Malcom Green, to his house where they consumed a large quantity of alcohol. The offender stayed over at the victim's house and whilst he was in bed, the victim began touching the offender. Despite the offender telling the victim to stop, the victim ignored him and continued touching him. The offender 'lost it', stabbing the victim with scissors until he was unrecognisable. The offender's lawyers argued that Green was particularly sensitive to Giles' advances because he grew up in an abusive environment where his father sexually abused his sisters. Therefore, when Giles made unwelcome sexual advances towards Green, he snapped and experienced flashbacks to his traumatic childhood. The issue facing the High Court was whether the partial defence of provocation should have been left for the jury to consider and by a bare majority of 3-2, the High Court held that the partial defence should have been left to the jury. Kirby J, in his dissenting judgement, was the only member of the Court who discussed the injuries suffered by the victim.[41] Comparatively, the majority portrayed Green as being the 'true' victim in this case and quoted Smart J, the dissenting justice in the lower court, who described the sexual advance as a 'revolting' and 'terrifying' experience for Green.[42] These words, 'revolting' and 'terrifying', indicate that the majority was still haunted by the archetype of the 'disgusting' and 'threatening' homocriminal. This illustrates how in HAD cases the offender used the archetype of the homocriminal to portray the victim as an 'evil, sex-crazed aggressor' who sought to 'attack the honour of the masculine, heterosexual man'.[43] This therefore reframes the narrative of the offence: transforming the offender into the victim and the victim into the offender.

The High Court continued reframing the narrative of HAD cases until as recently as 2015, as illustrated by the case of *Lindsay v The Queen ('Lindsay')*.[44] The offender in Lindsay was able to rely on the HAD because the events took place in South Australia, which had not yet abolished this defence. In *Lindsay*, the victim offered to pay the offender for sex to which the offender responded violently: kicking, punching and stabbing the victim. Similar to *Green*, the High Court considered whether the partial defence of provocation should have been left open to the jury. The High Court unanimously concluded that the defence should have been left to the jury and continued the trend of reframing the narrative of the offence, portraying the offender as the 'true' victim in this case and emphasised the 'insult' the offender must have felt when the victim propositioned him rather than the pain suffered by the victim.[45] When describing the offender's reaction to the victim's sexual advance, Nettle J used the words 'anguish' and 'loathing'.[46] As emphasised by Gray and Braun, in disciplines such as law 'words matter' as 'they can send messages with much greater significance than the mere resolution of the particular case before the judges.'[47] The words 'anguish' and 'loathing' highlight the stigma still surrounding male homosexuality, as it likely that a response to an unwanted heterosexual advance would not be one of 'anguish' and 'loathing', but rather to politely decline. Commentators have expressed similar concerns regarding Nettle J's language, doubting whether he would have described a 'lesbian's response to an unwanted sexual advance by a heterosexual man that involved telling him that she was a lesbian and not to approach her again or she would use violence as involving 'anguish' and 'loathing''.[48]

Central to cases involving the HAD is the 'familiar narrative' of the heterosexual male offender's masculinity being 'under attack'.[49] This is reflected in the language used by the offender. Malcolm Green, after turning himself in to the police after killing Donald Giles, stated, 'yeah, I killed him, but he did worse to me... he tried to root me'.[50] David Donaldson argues that homosexual advances are seen as a threat to an offender's masculinity because a 'straight man sexually approached by another man risks becoming the one who is penetrated' thus resulting in 'losing his privileged position as a sovereign man' and becoming a 'non-man'.[51] The immense fear surrounding losing one's masculinity upon being penetrated was reflected in R v Murley ('Murley'), where in response to an unwanted homosexual advance the offender stabbed the victim 17 times, hit him with a chair and slit his throat.[52] The defence counsel in Murley emphasised the severe consequences of a straight man being penetrated, asserting that 'this attack was not the usual case where he's going to be killed; it's an attack where he's going to be sodomised, which is almost as grave'.[53] By equating male homosexual sex with death, this illustrates how in the eyes of society a heterosexual man's value is defined by their masculinity: a trait of such fragility that it can be immediately destroyed upon engaging in 'feminine' acts such as male homosexual sex. Therefore, the HAD was used by heterosexual men to protect their most 'prized possession', masculinity, by justifying violence on those who threatened to take it away. The HAD has commonly been referred to as the 'gay panic' defence, however, this is a misnomer as it should be called the 'straight panic' defence: it is the straight man, and not the gay man, who is in a state of panic that his masculinity and honour will be diminished by engaging in homosexual acts.

However, as the HAD has now been abolished in all Australian states and territories it is evident that the criminal law now recognises that the 'true' victim in these cases is the gay man who has been murdered. This indicates that the criminal law no longer prioritises the 'honour' of straight men over the lives of gay men. Australian states and territories took differing paths with regards to abolishing the HAD. For example, Tasmania,[54] Victoria[55] and Western Australia[56] abolished the defence of provocation entirely, whilst the Australian Capital Territory,[57] the Northern Territory[58] and New South Wales[59] explicitly excluded non-violent sexual advances as constituting provocative conduct on their own. Queensland recently abolished the HAD in 2017 by introducing new subsections into s 304 of the *Criminal Code (Qld)*, making the defence of provocation unavailable if it is based on an unwanted sexual advance.[60] Whilst South Australia was the first state to legalise male homosexual acts, it was the last state to abolish the HAD, only abolishing the defence on 1 December 2020 when it passed legislation removing partial defence of provocation.[61] The demise of the HAD strongly indicates that the criminal law no longer considers male homosexual sex as 'bad sex', as it has ceased to justify violence on those who deviate from heteronormative norms.

iv. the regulation of male homosexual public sex

The criminal law has an extensive history of regulating male homosexual acts in 'beat spaces': public spaces where 'men gather to seek out or arrange casual sexual encounters with other men'.[62] Beats have existed in Australia since the 1830s,[63] with the most common and notorious beats being public lavatory blocks in railway stations, parks and shopping malls.[64] It was considered necessary to prohibit male homosexuality from occurring in beats, as homosexual encounters in public spaces were seen as 'wounds' and signs that public order had been 'violated'.[65] This is because male homosexual encounters in beats subverted the socially authorised use of public spaces, as homosexual acts transformed public lavatories from being a place where bodily wastes are disposed of into a site of sexual expression. The disposal of bodily wastes and engaging in homosexual sex are inherently conflicting acts, as the disposal of waste is a 'form of bodily subtraction' whilst homosexual pleasure is a 'form of addition' as it involves the 'conjoining of bodies and the exchange of pleasure'.[66] Furthermore,

homosexual encounters in beats blurred the distinction 'public' and 'private' spaces, as it placed a private act (i.e. sexual intercourse), into a place of public domain in a way that was 'partially privatised' e.g. behind closed lavatory doors or in the bushes.[67] In response to the hysteria surrounding male homosexual acts occurring in beats, the late 1960s saw an increased use of the police to prevent this 'pollution' of public spaces,[68] resulting in 1,187 men being arrested for 'indecent behaviour' in public conveniences in Sydney in 1968.[69] In a seminar on 'Male Sex Offences in Public Spaces' conducted by the Institute of Criminology in 1970, Detective Sergeant V. Green stated that 'the greatest benefit provided to the community by police actions against homosexuals is that it deters them... from introducing their immoral practices to the young and weak minded'.[70] This provides a clear rationale as to why the criminal law deemed it necessary to regulate male homosexuality in public spaces, as the dangers of male homosexuality stem from its supposed 'contagiousness' and capacity to 'infect' vulnerable individuals if they were to encounter these 'immoral' acts. Police officers went to great lengths to stop this 'spread' of male homosexuality, using 'plain-clothed' agents to enter beats and mimic 'gay bodily appearances, gestures and mannerisms' in order to entrap gay men.[71] This form of 'masquerade' involved 'plain-clothed' agents 'performing a pretend homosexual desire in order to provoke expressions of real desire so that the latter might be repudiated and punished.'[72] This use of 'plain-clothed' agents continued into the 21st century, with ABC radio reporting that in 2002, 'plain-clothed' officers arrested over 100 men for 'obscene' and 'indecent' behaviour in a Melbourne public lavatory over the course of two weeks.[73]

Even after the decriminalisation of male homosexual acts in private, the United Kingdom and Australia continued to regulate male homosexual acts in public as these acts 'offended public morality'.[74] In England and Wales, whilst the *Sexual Offences Act 1967* decriminalized 'buggery' and 'gross indecency' between males over 21 years old, it specified that 'such acts must be conducted in private'.[75] Many Australian states and territories similarly distinguished between 'public' and 'private' male homosexual sex, with the Australian Capital Territory, the Northern Territory, Queensland, Tasmania and Western Australia having legislation which criminalised homosexual behaviour which, whilst legal in private, was illegal in public.[76] This demonstrates that the decriminalisation of male homosexual acts did not stop the criminal law as labelling male homosexual sex as 'bad sex', as it was still considered necessary to hide male homosexuality from the public.

The criminal law has arguably continued in its attempts to 'hide' male homosexuality through laws which regulate 'obscene' and 'indecent' behaviour, which are found in all Australian states and territories.[77] Whilst these laws make no statutory distinction between homosexual and heterosexual sex, the problem lies in the fact that their enforcement has been shaped by heteronormative conceptions of 'public indecency'.[78] For example, s 227 of the *Criminal Code Act 1899* (Qld) renders it a criminal offence to commit any 'indecent act' in 'any place to which the public are permitted to have access'.[79] If sexual 'indecency' is to be defined as that which is 'contrary to the ordinary standards of morality of respectable people in the community',[80] male homosexual acts are more likely to fall into this category than heterosexual acts due to male homosexuality's extensive history of being considered contrary to public 'morality'. Comparatively, whilst New South Wales has not made a distinction between homosexual acts in public and homosexual acts in private since 1984, Paul Johnson argues that the 'lack of a specific provision for regulating homosexual activity in public should not be seen as a sign of an absence of regulation of homosexual sex'.[81] This analysis holds merit, as whilst the *Summary Offences Act*[82] does not distinguish between homosexual and heterosexual public sex, it has been used by police to target and 'prosecute men engaged in homosexual acts in public'.[83] The police have used this legislation as a 'basis to penetrate private encounters in beat spaces, allowing the police to employ protracted arrangements and techniques to detect suspects'.[84] However, it must be noted that there have been significant changes to the culture of policing in Australia with regards to male homosexuality. For example, the NSW Police Force have introduced Police Gay and Lesbian Liaison Officers and have published various policy commitments focused on the LGBTQI+ community.[85] This change in policing practices and recognition of wrongdoing, may indicate that police officers will no longer use laws which regulate 'obscene' or 'indecent' behaviour as merely a method of targeting and punishing male homosexuality.

V. conclusion

Through an exploration of the socio-historical factors which led to the criminal law perceiving male homosexuality as 'disgusting' and 'threatening', this essay has demonstrated that the criminal law has historically classified sex into 'good sex' and 'bad sex'. Whilst male homosexual acts once fell into the latter category, increased societal acceptance has meant that this heteronormative binary is slowly being eroded. As noted in 'Queering Criminology', queer perspectives on the criminal law are about 'disrupting, challenging and asking uncomfortable questions that produce new ways of thinking in relation to the lives of LGBTQI+ people and criminal justice processes.'[86] I hope that this essay, by asking 'challenging' and 'uncomfortable questions', will encourage scholars to consider the ways in which the law can harm marginalised groups and spark discussions about how the law can be changed to ensure that it acts as a source of protection rather than a cause of pain.

Reckoning with the Definiton of Womanhood

Sunanda Mohan

i. introduction

Humanity is making large strides in creating an inclusive world for women, where they are treated equally with the same rights and opportunities afforded to other members of society. Today, feminists are reckoning with what womanhood is and who it includes; specifically, with how the feminist movement can become more inclusive towards transgender women. Two examples of how humanity is grappling with the notion of womanhood is the Maya Forstater Case in the UK Employment Tribunal (*Maya Forstater v Centre for Global Development*)[1] and the Caster Semenya Appeal in the Switzerland Federal Court.[2] These cases explore whether 'womanhood' can be reduced to physiological traits, and if such a restrictive biological definition of womanhood is arbitrary and unfair.

While these examples are from other countries, they reflect and intersect with important thoughts within the Australian psyche. Key tenets of Australian culture include sporting as an avenue for wellbeing and healthy competition, as well as the importance of a Fair Go. The way opportunities for female participation in sports progresses alongside human rights for transgender individuals is a vital consideration within the Australian Human Rights landscape.

ii. the maya forstater v centre for global development case

The 2019 *Maya Forstater* UK Employment Tribunal decision can be seen as the law's denunciation of transphobic assertions that trans women are not women. This case is linked to the polarising debate of whether the feminist movement includes transgender women. In December 2019, Maya Forstater contended in the UK Employment Tribunal that her consultancy employment contract was wrongly terminated because of her own deeply held beliefs regarding human rights and the feminist movement. Ms Forstater's belief is that biological sex is immutable, that it is impossible for humans to be anything other than a male or a female, and it is not possible to change one's gender identity and be publicly accepted and acknowledged as per their self-identification. Ms Forstater articulated her strong views through tweets, which included:

"....but I don't think people should be compelled to play along with literal delusions like transwomen are women..."[3]

"Please stand up for the truth that it is not possible for someone who is male to become female..."[4]

"avoiding upsetting males is not a reason to compromise women's safety, dignity and ability to control their own boundaries".[5]

Ms Forstater's own reasoning on why she could not accept transgender women as women was, at its core, linked to her own interpretation of feminism, and the importance of preserving single sex services such as family planning, change rooms and aged care.

The Tribunal held that the consultancy agreement had not been wrongfully ended, because Ms Forstater's views were not a protected belief within the meaning of the UK Equality Act Section 10, which provides in subsection (a) that a reference to a person who has a protected characteristic is a reference to a person of a particular religion or belief .[6]

Central to this case is that Judge Tayler noted that Ms Forstater's view was absolutist in nature and was not compatible with contemporary understanding of human dignity and fundamental rights of others.[7] The

other statements, such as the importance of single sex services for women, were not found to be a 'protected belief' but it was held to be no more than a justification for Ms Forstater's view that sex should be immutable and binary.[8] Judge Tayler held that this was not a valid justification, as advancing the inclusivity and humanity of transgender women is not mutually exclusive to protecting cisgender women's safety and wellbeing in a manner proportionate to the *Equality Act*.[9] The example provided by Judge Tayler was public restrooms and changing rooms, and how keeping these spaces exclusive to cisgender women and transgender women who have transitioned could be a proportionate measure and address the trauma of women who have felt unsafe in these spaces.[10]

Outside the legal decision of this case, there were large repercussions and debate that arose out of this confusion of who is to be included as a woman. Ms Forstater had received support from the CEO of Index on Censorship, Ms Ginsburg, who affirmed that Ms Forstater's public expression of her views is not a wrongful act to result in termination of her employment.[11] While this seems like a compelling argument, it is difficult to accept Ms Forstater's proposition that a person can never identify with a gender other than they have been assigned to at birth. Whilst this seems like a 'scientific truth', it ignores the realities of gender dysmorphia and intersex conditions that people face. Therefore, the Employment Tribunal's decision is a small victory towards making the concept of womanhood more inclusive at the institutional level.

Whether or not mainstream feminism is a platform that includes transgender women is far from settled. One example in mainstream media follows the allegations in mid-2020 that author J K Rowling was sharing transphobic opinions in her platform.[12] Her essay *'Reasons for Speaking out on Sex and Gender Issues'* provided support for Ms Forstater, and affirmed that it is dangerous to erode the concept of biological sex.[13] She stated that excluding transgender women in feminism is not transphobic, because it welcomes transgender men who were born female. Rowling contended that she was subject to online abuse from trans activists for speaking out her views.[14] Rowling's essay proves there are internet users who create an unsafe space for discussion but does not provide a compelling argument that transgender women should not be recognised as women. Rowling described her own heartbreaking experiences of being physically abused by her partner, and how the difficulty of being a cisgender woman in a patriarchal society is exponentially increasing the rates of gender dysmorphia amongst teenage girls. While Rowling cited extensive research of this social phenomenon in her essay, it is still difficult to understand why it is justifiable to exclude trans women from the concept of womanhood. Including transgender women within the feminist movement will not erase the hardships and struggles experienced by women because of their physiology, but will make the movement itself more progressive.

iii. implications of this in our homeland

This is not just an example of a contentious conversation in the UK, but an issue that is far reaching and very much present in the Australian psyche. Australian lawyer, writer and activist Dale Sheridan noted in her Sydney Morning Herald opinion piece that contemplating whether transgender women are women is deeply hurtful. She eloquently expressed that human rights for transgender women and the feminist movement progress toward the same goals, and are not a "fight over the last Tim Tam".[15]

We are still reckoning with the fears, arguments and deep hurt surrounding the inclusion of transgender women into womanhood.

iv. the caster semenya appeal in the switzerland federal court

The field of sporting is heavily dominated by binary divisions of "men" and "women", and its restrictive definition of a "female athlete". Sporting institutions are struggling to dismantle gender binaries and stereotypes that systemically exclude transgender women.

Consider Caster Semenya, a female athlete and Olympic gold medallist, who, as per the DSD Regulations of World Athletics, was required to artificially lower her testosterone level to below 5 nanomoles per litre to compete in a range of running events.[16] These rules apply to her because this regulation came into effect for women who were naturally born with the 46 XY DSD genetic variant. This rule was affirmed in the Court of Arbitration for Sport, and was appealed in the Switzerland Federal Court ('SFC'). The appeal against this requirement was rejected on the basis that it was not a violation of bodily integrity, it preserved the fairness of sport, and these rules were proportionate to prevent an unfair advantage for female athletes with average levels of testosterone.[17]

This decision means that Semenya is not eligible to compete in these events unless she artificially lowers her hormone levels, something she has not decided to do as it contradicts her own personal values of not taking any artificial hormones for sport. It is also difficult to ignore that these rules appear arbitrary, and do not transform sporting for women into a fairer landscape. Lena Holzer, in her *Opinio Juris* article, argued that these rules are reflective of an intersex phobia in sporting events.[18] This article also noted that there are a multitude of other factors that can provide an advantage in female sports, such as socioeconomic background, height and access to nutrition. It is tenuous that a few extra naturally produced nanomoles of testosterone provides a formidable advantage as held by the SFC. World Athletics advanced an argument that such naturally higher levels of testosterone in women would *possibly* lead to an advantage of 0-3%.[19]

The SFC's apparent decision to protect female sports ignores the implications this rule has for transgender inclusivity in sports. This emphasis on testosterone levels strongly reflects the view that womanhood is determined based on biological features rather than an open and dynamic concept. This would create a restrictive scope for womanhood, one that is not inclusive. The new DSD regulations have been justified on the basis that the hard-earned avenue for women to compete in competitive sports could be eroded by women with natural intersex variations[20] that provide them with traits that are perceived as masculine, and hence biologically superior.

This is similar to some of the arguments proposed by individuals such as Maya Forstater and J K Rowling, who view biological traits as central to the concept of womanhood. Nevertheless, this once again strongly reflects a fear of the "other", that is, people who do not fit within the traditional and strictly defined gender binary. Lena Holzer's *Human Rights Law Review* paper emphasised that the Caster Semenya case reflects how sporting authorities derive their power from being able to strictly define a gender binary of men and women.[21] This is relevant to the concept of "womanhood" and how we are reckoning with a strictly biological definition and gender binary that poses challenges for inclusivity and fairness.

These implications of having a "binary" in sports, and intersex women and transgender women being excluded from female sports,

directly affects Australia too. A piece in The Australian recommended that even while acknowledging the importance of female sports as a protected class, sports does not have to exclude intersex or transgender athletes if there was an “open” category and a “women” category rather than a binary “men” and “women” category.[22] This would be a fair and progressive step for sport, as it would address the biological disadvantages that cisgender women overcome to play sport, and could provide an accessible avenue for all humans to play sport. In Australia, under the Human Rights Commission Guidelines for Inclusion of Transgender People in Sport, there is an exemption to the rule of not treating a person less favourably because of their gender identity for competitive sports over the age of 12.[23] This means that it is still not unlawful under the *Sex Discrimination Act 1984* (Cth) to not include a transgender woman in a competitive sport for women. This clearly reflects that Australia too is reckoning with the concept of womanhood not only broadly, but also specifically in sports inclusivity - something central to our culture.

V. conclusion

It is clear that in this moment we are reckoning with transgender inclusivity within the definition of womanhood. The feminist movement is slowly expanding to include transgender women. The Maya Forstater decision in the UK is a positive step and can be seen as the institutional recognition that transgender women are part of womanhood. Nevertheless, powerful feminist voices in the media, the current binary division of sports and the unsuccessful Caster Semenya appeal reflect the narrow and biological characterisation of womanhood that is deeply entrenched in our world. The concept of womanhood is still far from being inclusive of transgender women, and we are beginning to become more aware of how the feminist movement can move in a progressive direction.

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Moderating the Megaphone

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Reckoning with the Definiton of Womanhood

Sunanda Mohan

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