

Anette Ballinger

‘Reasonable’ Women Who Kill: Re-Interpreting and Re-defining Women’s Responses to Domestic Violence in England and Wales 1900-1965

Summary

This article makes a contribution to current debates about gender and punishment by providing an historical analysis of the judicial fate of female domestic abuse victims who eventually killed their male abusers between 1900-1965 in England and Wales.

Utilising case-studies of women who stood trial for the murder of their abusive partner during this period when murder was still punishable by hanging – I argue that what at first glance appears to be a ‘lenient’ sentence, in fact came at a heavy price for which all women ultimately paid and still pay. That is the maintenance of a gender order which denied women the status of full citizenship. ‘Lenient’ sentencing is shown to be based on stereotypical images of femininity and while it may have appeared to benefit individual women it did nothing to improve the legal situation of battered women *generally*. These historical case-studies help widen our understanding of current debates about gender and punishment by re-interpreting the women’s act of violence. The paper seeks to shift the focus away from provocation, diminished responsibility and irrationality to issues of rationality and agency – *without* losing sight of the specific circumstances in which the killing took place, and therefore without inviting harsher punishment.

Introduction

In February 1990 Sara Thornton was sentenced to life imprisonment after being found guilty of murdering her abusive husband. Following one failed appeal, a strong feminist campaign

and a hunger strike, she was freed on bail in July 1995 after a second appeal in which she won the right to a retrial. New psychiatric evidence was heard during the retrial which led the judge to rule that a “personality disorder” drove Sara to kill her violent, drunken husband. Thus, while the appeal court judges had refused to accept Sara’s defence of provocation three years earlier, the retrial judge now ruled that ‘your responsibility for killing your husband was diminished by your abnormality of mind’ (*Guardian* 31st May 1996; *Independent* 5th May 1995). She was consequently freed in May 1996 after her murder charge was reduced to manslaughter (*Independent* 5th May, 29th May 1995; *Guardian* 31st May 1996).

Thornton’s case was one of a number of high-profile cases that emerged during the 1990s which highlighted not only the serious level of inconsistency in the sentencing between men and women who kill their partners¹, but also the legal difficulties involved in defending women who retaliate after having suffered a prolonged period of abuse and violence at the

1 Sara began her hunger strike after learning that two days after her appeal had failed, Joseph McGrail had received a two year suspended sentence after kicking his partner Marion Kennedy to death (Ballinger 2000: 205; 333).

hands of their partner.² As such these cases came to exemplify the reinterpreting – if not silencing – of the battered woman's own explanation of her actions in the particular circumstances she found herself in. For example, Sara explained the context within which she stabbed her husband in the following terms: that she had endured many months of drink-fuelled violence during which she had sought help from numerous agencies to no avail; that prior to his death, Malcolm had threatened to break the legs of Sara's daughter Luise, and that she believed his threat was a real one and therefore had acted to protect her daughter as well as herself (Nagel 1993; *Independent* 5th May 1996; *Guardian* 15th May 1996). Told in its unmediated form during her first trial it led to a murder conviction and a life-sentence. However, after being mediated by experts – in this case psychiatrists who claimed they had identified a personality disorder which could be held partly responsible for Sara's actions – a different outcome was produced – that of a manslaughter verdict and Sara's immediate release.

For feminist scholars the Sara Thornton case exemplifies two key problems facing battered women in contemporary England and Wales when they attempt to explain the killing of their abuser from their experiential standpoint – the masculinist nature of law, and the way in which expert knowledge – engulfed in the power and prestige of scientific discourses – is called upon to invalidate, mediate and/or translate the defendant's 'biographical claims and experiential truth claims' into a legal format stipulated by, and acceptable to law (Ballinger 2003: 221). As Worrall has pointed out, 'members of muted groups, if they wish to communicate,

must do so in terms of the dominant modes of expression' (Worrall 1990: 11).

Utilising case-studies from the period 1900-1965 I shall argue that these problems are not unique to modern trials, rather, battered women who eventually kill their abusers have a long history of offering rational and 'reasonable' explanations for the action they took, given the circumstances they found themselves in. I shall further argue that the criminal justice system has an equally long history of dismissing, invalidating or re-interpreting such explanations, the purpose being to 'render the women harmless'.³ That is, in replacing agentic explanations with pathological excuses the women's actions came to appear irrational – the product of a diseased mind – hence they could not be held fully responsible for their actions. I shall argue that this process takes place in order to neutralise the perceived threat battered women who kill their abusers present to the dominant discourses of heteropatriarchy. That is, they challenge its main institutions of the family and home as a loving place, instead exposing them as sites of threats, fear and violence (Morrissey 2003: 67). This undermining and re-interpretation of the women's own narratives can therefore ultimately be understood as minimising the opportunity for the creation of an alternative truth about violence against women, whilst simultaneously playing a key role in supporting and reinforcing patriarchal relations by reducing the threat battered women pose to the gendered social order.

The purpose of this paper is therefore not to provide a detailed review of the strengths and weaknesses of the various legal defences available to such women since this has been done

2 See for example the cases of Emma Humphrys (Stanko & Scully 1996; Bindel and Wistrich 2003; Ballinger 2000: 333-7) and Kiranjit Ahluwalia (Ahluwalia and Gupta 1997; Ballinger 2000: 333-7). See also Edwards 1996: 371-2.

3 I have borrowed this phrase from Allen, H. (1987) 'Rendering Them Harmless' in Carlen, P. and Worrall, A. (1987) *Gender, Crime and Justice* OU Press pp.81-94.

eloquently elsewhere (O'Donovan 1991; Chan 2001; Morrissey 2003). Instead my aim is to provide insight into the relationship between law's ability to define the 'dominant truth' about battered women who kill and the ability of those women to challenge that truth with their alternative accounts of events, and how successful that challenge might be in having a wider impact upon the social order within which the interaction between law and gender is conducted. More specifically, I wish to explore the extent to which it is 'possible to apply feminist-inspired law reform to the benefit of women ... given the deeply embedded masculinist attitudes' within the judiciary (Fox 1995: 180). As such the aim of the paper is to contribute to the feminist task of developing 'discourses and practices which are not yet there' (Cain 1993: 89) by unlocking and re-examining the biographical knowledge and experiences of women who resisted domestic violence by killing their abusers during the first half of the 20th century.

The Phallogentric Nature of Law and Expert Knowledge

Smart has written that 'both law and masculinity are constituted in discourse and there are significant overlaps in these.' Consequently, 'law is not a free-floating entity, it is grounded in patriarchy, as well as in class and ethnic divisions' (Smart 1989: 86; 88). As such, it has a vested interest in reproducing and perpetuating 'the most secure foundations of patriarchal relations ... the family and gender divisions' (Smart 1995: 129). The term 'phallogentric law' is appropriate here because:

Phallogentrism attempts to give some insight into how patriarchy is part of women's (as well as men's) unconscious, rather than a superficial system imposed from outside and kept in place by social institutions, threats or force. It attempts to address the problem of the construction of gendered identities and subjectivities. Law must, therefore,

be understood both to participate in the construction of meanings and subjectivities and to do so within the terms of a phallogentric culture (Smart 1995: 78).

Similarly, Hudson has argued that the 'bedrock concepts of law are constructed from a male view of the world ... because the political-legal-cultural structure of modern societies is based on *masculine imaginary*':

That is to say, the cultural complex of which law is part is based on constructions of subjectivity based on masculine philosophies; it is based on masculine desires, masculine imaginings, of the life they would lead, and masculine fears about the structures and other subjectivities that are likely to obstruct the fulfilment of their desires and ambitions (Hudson 1998: 34; original emphasis).

To this overlap between law and masculinity we can add another layer, that of expert knowledge – a second key problem facing battered women who have killed their abusers. Despite several recent high profile cases of 'expert' evidence being discredited, it is nonetheless the case that such testimony is now virtually institutionalised within the courtroom, particularly in trials involving serious crimes such as murder.⁴ Whether heard on behalf of the prosecution or the defence, expert evidence 'lends medical and professional credibility' to the pathologising of battered women who retaliate, and by definition, therefore also minimises their agency (Worrall 2002: 57).

⁴ A recent example of the discrediting of an 'expert' is that of Sir Roy Meadows whose evidence played a crucial role in securing murder convictions for Sally Clark and Angela Cannings whose convictions were subsequently found to be unsafe as a result of Sir Roy's testimony. At least another 28 cases in which he gave evidence are currently undergoing review and may well result in further murder convictions being quashed (Independent 22nd December 2004). See also Guardian 4th February; 6th April; 21st September; 30th November 2004; 11th January 2005; Observer 12th December 2004.

As such, expert knowledge can also be seen to play a key role in securing the ongoing reproduction and perpetuation of patriarchal relations. This symbiotic relationship between law and expert knowledge works extremely well, because we know from numerous feminist critiques that science – from which expert knowledge is forged – is also masculinist in nature, built on the key Enlightenment principles of reason, rationality and objectivity, the same principles that law claims for itself (see for example Harding 1986; 1987; 1996; Smart 1995; 1989). Thus, while law is not a science, science is not objective and men are not necessarily rational, their alignment with the scientific discourses of reason, rationality and objectivity has ensured they are all constructed as such, the knowledge produced by experts can consequently be called upon to add 'neutral' scientific credibility to the already 'rational' procedures of law. Yet both are 'produced under conditions of patriarchy' (Smart 1989: 86), and as such can be observed to intertwine and support each other in the maintenance of patriarchal relations. For example, they can be identified as contributing to the undermining of personal accounts of events such as that provided by Sara Thornton by rendering them 'suspect and/or secondary':

Everyday experiences are of little interests in terms of their meaning for individuals ... So the legal process translates everyday experience into legal relevances, it excludes a great deal that might be relevant to the parties, and it makes its judgement on the scripted or tailored account ... parties are not always silenced, but ... how they are allowed to speak, and how their experience is turned into something the law can digest and process, is a demonstration of the power of law to disqualify alternative accounts (Smart p.11; p. 9)

This is not to suggest that law and expert knowledge 'conspire' to render violent women harmless. On the contrary, they can regularly be seen to argue from opposing perspectives,

single-handed or independently of each other. As Worrall explains:

... dominance does not require the active domination of one group by another nor does it require any one individual's structural position in a society to be constant. It is dependent, rather on a "sub-group ... of relevance at any one time" ... which produces ideas about "reality" and who is authorised to define it ... (Ardener cited in Worrall 1990: 11).

Thus, law does not always rely on, or even call upon, expert knowledge during the legal process. However, expert knowledge – like law – is phallogocentric at heart and as such is part of what constitutes dominant knowledge, hence it is a key player when it comes to defining reality. In that sense it can be understood to form a part of what O'Donovan has called the 'contest over knowledge between women's groups and a largely male judiciary with male definitions and understandings of human behaviour, which are claimed as universal' (O'Donovan 1993: 428). On the one side, women are fighting to establish authority over their own experiences and words by demanding that their accounts are validated (Ballinger 2003: 228). On the other side, phallogocentric law and expert knowledge – combined or separately – are seeking to maintain their power to define the dominant truth; what counts as 'knowledge' and the social order more generally. A crucial step in this process involves disqualifying alternative accounts by reinforcing gender stereotypes. That is, the use of expert knowledge (even when employed by the defence as in the Sara Thornton case), can be understood as working with law by turning the 'script' of the woman's crime into something much more recognisable than a rational woman killing in self defence – the emotional, overwrought, hysterical, mad woman who cannot be held responsible for her actions. In constructing women as 'the other' against the definitive male standard (Faith 1994: 52) – and thus

as everything that men are not – this process of rendering women pathological reinforces gender inequality, and therefore ultimately serves to maintain the dominant gendered social order.

The Paradox of Battered Women

While the intensity of this struggle over knowledge between women's groups and phallogocentric law is linked to the threat battered women who kill pose to the social order, that threat in turn is linked to the contradiction or paradox these women present:

... battered women must manage to maintain two mutually exclusive ideas *simultaneously* as essential conditions of their survival ... They must continue to exist in a world that still values the concept of marriage and family, while knowing that they live in a domestic war zone ... They know that marriage and family can be terrifying prisons from which there is no escape, yet they continue to validate the societal ideal of marriage just by remaining in the [relationship] ... (Morrissey 2003: 96 referring to Hart 1998: 177; original emphasis).

Due to their perplexing status as both victims and perpetrators – both guilty and blameless – these women force us to confront the inadequacy of a legal system 'constructed around the advancement of male pursuits and the resolution of male disputes' (Morrissey 2003: 70). The usual defences of provocation and diminished responsibility simply cannot accommodate the socially produced differences between male and female behaviour within heteropatriarchy where these defences are 'rigidly defined and structured to reflect male standards of behaviour and experiences ...' (Fox 1995: 178).

It is within this context that feminists are engaged in the creation of new discourses through which the agency of battered women who

kill can be heard and understood. So far, the most enduring alternative truth about battered women who kill is that of battered woman syndrome (BWS). Worrall explains that battered woman's syndrome 'was introduced to assist women's claims that their perceptions and actions were reasonable, given the circumstances' (Worrall 2002: 57). Fox agrees that the original aim of BWS was 'to challenge the generic concept of reasonableness which operates in ... criminal law by forcing it to include the perspectives of women' (Fox 1995: 182). Yet, the story of BWS provides a poignant example of the contest over knowledge between feminist activists and phallogocentric law because it was soon appropriated to support dominant discourses around female behaviour and is now mainly used to support the defence of diminished responsibility (Worrall 2002: 57). Indeed, several authors have suggested that the main reason BWS quickly gained popularity within courtrooms around Europe, North America and Australia may be precisely because it could so easily be made to reflect dominant stereotypes of female behaviour with which phallogocentric law was already familiar and comfortable (Downs cited in Morrissey 2003: 78; Stubbs and Tolmie 2005: 195). Schneider agrees:

the legal strategy which led to the introduction of expert testimony on battered woman syndrome has been subverted by the tenacity of ... sex stereotyping (cited in Fox 1995: 182).

Thus, while BWS originated from a perspective sympathetic to feminism, it soon became an example of how an alternative 'truth' can be neutralised and rendered devoid of agency – in turn facilitating its appropriation into dominant discourses of femininity – in this case the victimised, helpless, pathological woman who cannot be held responsible for her actions.

One explanation for this appropriation may be that despite its well-intentioned aim of

supporting the feminist cause, the authority to determine its presence has always rested firmly with the experts, resulting in a contentious and uneasy relationship between BWS and feminism. Understandably so, since, apart from the experts' role in translating female agency into pathology, the mere fact that experts are called upon at all suggests female inadequacy and incompetence (Fox 1995: 185) – women do not know their own minds, and therefore cannot be trusted to present their own testimony.

Some authors consider feminists themselves to be at least partly complicit in over-emphasising battered women who kill as helpless victims – 'more sinned against than sinning' – to be pitied rather than punished, hence playing their part in preventing the development of discourses within which such women can be regarded as responsible agents (Allen 1987: 93; Morrissey 2003). It is therefore not surprising that, in drawing heavily on the victim stereotype when analysing the predicament of battered women, the very theories which are meant to *explain* their violence, in fact do the exact opposite by contributing to existing stereotypes about female conduct and behaviour – that their actions were unintentional – the result of pathology rather than reason and rationality. In my analysis of the following case-studies I intend to challenge these accusations of feminist complicity. I shall propose strategies which are designed to take account of culpability and responsibility, yet construct the women as less blameworthy without losing sight of agency (Hudson 2002: 22). In short, the object of the analysis will be to create an alternative truth about battered women who kill which is robust enough to accept 'the production of an alternative battered woman subject who can be at once responsible and agentic, yet [also] vindicated and absolved' (Morrissey 2003: 68).

The Cases

The cases were identified by studying the *Royal Commission on Capital Punishment Report 1949-1953* as well as searching the National Archives data-base which revealed that apart from the five women who were executed for killing their partner which I have discussed elsewhere (Ballinger 2000), another 13 women were sentenced to death for killing their partners between 1900 and 1965 in England and Wales, but were subsequently reprieved. The case-files of all 13 women were studied and seven were identified as involving domestic violence.⁵ It is of course impossible to determine whether the women whose case-files did *not* contain evidence of domestic violence had ever experienced such abuse. However, we *can* say with certainty that it was not a feature of the trial and such cases were therefore excluded from this project.

Space does not permit in-depth analyses of all seven cases. Two have therefore been chosen as representative of the cases studied. Before embarking on these case-studies, it is however, possible to draw attention to a common feature – all seven cases indicated that the women killed their partners after a considerable time lapse since they were last attacked. Five of the women were suspected of having killed their sleeping partners, the very type of killing which was so widely debated during the 1990s and which popularised the concept of 'cumulative provocation', particularly with reference to the cases of Sara Thornton and Kiranjit Ahluwalia (*Guardian* 31st May 1996; Chan 2001: 156-9). This is noteworthy because such

5 In one case - that of Catherine Thorpe - the files were 'missing' - that is to say - The National Archives had misplaced them and could not say when they were likely to be available for public inspection. Newspaper accounts were therefore consulted instead; they confirmed that domestic violence had been a feature of the relationship between Catherine Thorpe and Herbert Musgrove (*The Times* 2nd, 22nd, 28th, 30th April 1925).

cases were the only ones to result in the death sentence being issued, although ultimately all the cases concluded with a reprieve from this punishment. These cases therefore also provide documentation of the long history of this type of killing being considered far ‘worse’ due to the ‘cooling off’ period between the last assault on the woman and her retaliation. That is, from a phallogocentric perspective the women’s actions suggested pre-meditation, and hence callous, cold-blooded murder in sharp contrast to the majority of partner-killings which took place during the so-called ‘heat of the moment’ – usually during an argument and/or fight.⁶

The Case of Emma Byron

The first case to be examined is that of 23 year old Emma Byron who stabbed her lover, 44 year old Reggie Baker, after he threatened to abandon her and threw her out of the lodgings they shared. Undisputed evidence was heard during the trial that during their four months together Reggie’s treatment of Emma ‘was cruel in the extreme’ (HO144/587). For example, their landlady Mrs Liard, testified that he was ‘a fearful drinker, drunk nearly every day, abusing, beating and threatening to kill the Prisoner.’ She had frequently heard Emma scream as a result of Reggie’s attempts to strangle her and ‘he was always knocking her down’. He had further provoked her by calling her a prostitute and a woman of ‘no class’ (HO144/587). Mrs Liard’s son Raphael also testified that:

Mr Baker was a shocking drunkard – a terrible drinker – in fact the witness never saw him sober... He constantly gave “Mrs Baker” “a good hiding,” and the witness had heard her cry and rush on to the landing in her nightdress through fear. The witness often heard Baker shout “I will kill you” (*The Times* 19th November 1902).

Emma did not stab Reggie immediately following his abusive behaviour, but instead left home after breakfast and had two or three drinks in different public houses. At 12.30pm she bought a knife. At 2.30pm she met Reggie at the post-office where she stabbed him shortly afterwards (*The Times* 19th November 1902). One witness, post office worker Philip Morley who had known Reggie and Emma for 18 months, testified that “she was perfectly sober and collected at the time’ of the stabbing (*The Times* 19th November 1902). Emma herself offered what appears to be a rational explanation for her crime immediately after her arrest when she said: ‘I killed him and he deserved it and the sooner I am killed the better’ meaning that she was aware she would receive the death penalty for her crime (HO144/687). Forty minutes later she added: ‘Inspector, I wish to say something to you – I bought the knife & hit him but I did not know I was killing him’ (HO144/687 Judge’s Notes p.26). However, Isobel Kinggett, the housemaid in the lodgings, alleged that Emma had said: ‘I will kill him before the day is out’ (*The Times* 20th November 1902). Despite this potentially damaging evidence, the Coroner’s jury appeared sympathetic to Emma’s account of her actions, because it refused to find her guilty of the charge of wilful murder, and instead declared a verdict of manslaughter, to the dismay of the Coroner:

Do you mean that there was no malice?

The Foreman – It was on the impulse of the moment. She did not go there with the intention of killing him.

The Coroner said ... there was no doubt that Mr Baker was killed ... unlawfully. If the knife – a deadly weapon such as this – was used on the man with a deliberately mischievous intent, then it was a case of wilful murder.

A juryman – Her behaviour in the morning does not justify that (Quoted in *The Times* 20th November 1902).

⁶ As noted in this paper, such ‘heat of the moment’ killings did not conclude with a death-sentence, hence they are excluded from this study.

The jurors' refusal to find Emma guilty of murder strongly suggests that they placed her retaliation within the wider context of Reggie's abusive behaviour which allowed them to conclude that the killing was compatible with a verdict of manslaughter. However, phallogocentric law – constructed around the resolution of male disputes – found itself incapable of making such a leap, and three weeks later Emma stood trial for wilful murder. Her defence that she had bought the knife in order to commit suicide was rejected, and she was found guilty of murder after eight minutes of deliberation by this second jury. During an era when a guilty verdict carried an automatic death sentence, the jurors appeared acutely aware of the harsh consequences of their verdict, and, like the Coroner's jury three weeks earlier, also considered the wider context of abuse when they entered 'the strongest possible recommendation to mercy' (HO144/687; *The Times* 18th December 1902).

The injustice of imposing the death sentence on Emma also seemed obvious to outside observers of the trial outcome. For example, staff from the Baltic Cafe submitted a petition to the Home Secretary stating that 'even though she committed murder, she was undoubtedly aggravated beyond all reason' (HO144/687). Another petitioner asked the Home Secretary:

'to save the life of a poor wretched, ruined girl.. a girl ruined by a married man and taken from her work[,] deceived[,] ruined and then thrown on the street after he satisfied his lust (HO144/687).

Yet another petitioner wrote:

... when a woman passionately loves a man & has sacrificed her reputation & all that makes life worth living to her for his sake, & then that man deliberately casts her off to sink to the lowest depths as under the circumstances, seems her only future, though not technically "insane", her mind is so unbalanced by the horror of the situation that it, for the time, ceases to be under the control of those

sentiments & principles which ordinarily regulate it (HO144/687).

In short, contemporary observers of the case consistently situated their arguments within the wider context of Emma's long-term victimisation which led them to provide a 'reasonable' explanation of her actions, and hence construct an alternative 'truth' which eliminated the need to deny her agency or rely on pathological excuses for her retaliation.

Even Reggie's friends and colleagues at the Stock Exchange recognised the context within which Emma had killed and pleaded for mercy on her behalf:

... Reginald Baker had for a long period been known to a large number of them who had opportunities of seeing and knowing the harshness and wickedness of his character and have no doubts whatever that the threat to cast her off had been made by him to the said Emma Byron. This is a point we humbly claim should receive the fullest of recognition as there can be little doubt that it did reduce this poor girl to a condition of such poignant shame and sorrow followed by a terrible loss of mental control as to make it well nigh impossible that she in any sense should realise the serious result of the offence she has committed (HO144/687).

Finally, Home Office personnel whose responsibility it was to advise the Home Secretary as to whether Emma deserved a reprieve from the death penalty, also demonstrated an initial willingness to place her crime within the wider context of the abuse she had suffered. They were thus able to acknowledge her guilt, and even account for the delay in retaliation without wishing to see her suffer the ultimate punishment:

The real question was provocation, and that was about as great as could be given to a woman in her position: continued, and brutal ill-treatment, with the selfish threat to abandon her, and turn her out of the lodging at which she was staying and in which he intended to remain himself, and though this

provocation did not immediately precede the commission of the crime, it was so deep, and rankling, that it must have been instantly present to her when she struck the fatal blows (HO144/687).

Altogether, the willingness to consider the wider context of the killing generated considerable sympathy and understanding towards Emma's crime, which in turn allowed for the possibility of new discourses being created about abused women who kill. Yet the 'failure' to pathologise her crime carried its own inherent danger, because if she was neither irrational nor hysterical her retaliation was once again in danger of being understood purely as cold-blooded, premeditated murder. Hence, having initially shown a willingness to participate in the construction of an alternative truth, Home Office advisers now reverted to traditional, phallogocentric explanations:

In many respects it certainly was a very bad case, looking to the premeditation and callousness with which the prisoner purchased the knife, and it is impossible to conceive that the three blows were given by her without the intention either to kill or to grievous bodily harm (HO144/687).

The shifting attitudes of Home Office personnel therefore reminds us that law does not consist of 'a rigid system of male domination' or patriarchal conspiracy (Smart 1995:130). The law does not operate solely in the interests of men, just as men do not operate solely in the interests of each other. Rather it is the production and re-production of the gendered subject in order to facilitate the maintenance of a gendered social order which constitutes an important aspect of law. Thus, in this case, the phallogocentric nature of law did not permit a simultaneous acknowledgement of – on the one hand – the helpless, victimised female, and, on the other – that same female forming a 'rational' decision to commit murder. The distance between the discourses of the passive, submissive female victim and the 'coldblooded

femme fatale' who calmly purchases the murder weapon before arranging a rendezvous during which she stabs her lover, was too vast to permit the reproduction of the gendered subject, and further opportunity for a contest over dominant knowledge within law itself was eliminated.

At this point expert opinion entered the deliberations. The medical officer at Holloway prison had kept Emma under 'careful observation' for six weeks before submitting his report, and whilst admitting that she did not show signs of mental illness during that period, he nevertheless pointed to a troubled past. Emma's father and brother had died from alcoholism and her 'brother [was] also a drunkard', while both her sisters were sterile 'and one of them an epileptic' (HO144/687). Moreover, Emma herself had 'been accustomed to alcoholic excess since the age of thirteen and had attempted suicide twice while still a teenager. Her sexuality was also problematised:

She has been sexually precocious, and from early years has consorted with youthful as well as older males for libidinous purposes, and later has engaged in unnatural practices with persons of her own sex (HO144/687).

The medical officer therefore considered her to be 'of warm temperament ... and prone to passionate outbreaks' and her 'family history ... together with her mode of life would no doubt predispose to mental unsoundness' (HO144/687).

Emma was further examined by psychiatrist Henry Maudsley who agreed that her crime did not have 'the character of homicidal mania in the medical sense of the term ...' Nonetheless:

the murder was done in a transport of passion, in consequence of the provocation she had received acting on passionate temperament perniciously

stimulated by the quantity of alcohol she had taken and perhaps constitutionally predisposed – if she has an epileptic brother as alleged – to impulsive outbreaks (HO144/687).

Thus, while on the one hand admitting that Emma was 'entirely coherent in conversation, free from delusion, showing no loss of memory nor any symptom of mental disorder', on the other hand, Maudsley proceeded to couch Emma's state of mind in purely pathological terms and even entered the realm of speculation when he suggested that *if* she had a brother who *allegedly* had epilepsy, this illness, *if* present, could be used to strengthen the evidence that she was prone to 'impulsive outbreaks' (HO144/687).

We have thus identified the specific point where expert knowledge performed the translation from agentic to pathological behaviour in its analysis of Emma's crime. In particular, we note that unlike the members of the public who petitioned the Home Secretary for a reprieve, Dr Maudsley made no reference to Reggie's abusive behaviour whatsoever. On the contrary, he drew attention to the fact that Emma had 'often brooded on suicide' (HO144/687). Yet, despite appearing to contradict legal discourses by attempting to pathologise Emma's actions, expert knowledge ultimately supported law in closing down the space around which new discourses were on the verge of being created and instead relied on conservative and traditional discourses which reinforced gender-stereotypes. An important aspect of this reinforcement focused on problematising Emma's response to Reggie's behaviour rather than on his violence and abuse, confirming Dobash and Dobash's claim that it is the victims of domestic abuse who are problematised rather than the abusers (Dobash and Dobash 1992: 214). Thus, while the petitioners ensured that Reggie was held partly responsible for Emma's retaliation by insisting on taking his history of vio-

lence into account, neither the medical officer's nor Maudsley's report made reference to this context of abuse within which Emma had acted. This failure to problematise male violence can ultimately be understood as one way of muting both Emma's individual experiences of victimisation as well as denying the oppression of women that domestic violence causes at a structural level. The refusal to acknowledge violence against women as an issue therefore also served to maintain the dominant truth about the nature of marriage/relationships between men and women and the gendered social order more generally.

The Case of Fanny Gilligan

The second case to be examined is that of 37 year old Fanny Gilligan, a married woman who had left her husband John, after meeting James Higgins whom she killed in 1911⁷. She had lived with James 'on and off' for four years (HO144/5499). Undisputed evidence was presented of James's violence towards Fanny at the trial. For example, his mother Elizabeth testified that 'he had knocked her about.' He had also been 'sent to prison for attempting to set fire to the house' and had struck his mother 'with his fist' (HO144/5499). The judge himself wrote in his notes: 'I doubt not there had been violence used by the deceased ...' (HO144/5499). Indeed, James had been imprisoned previously for assaulting Fanny:

... on previous occasions the deceased had ill treated the prisoner by assaulting her ... as late as July 1911, the prisoner, who had returned to her husband when the deceased had been sentenced to a term of imprisonment, resumed co-habitation with him, on his release only because of his threats to injure her on which occasions the deceased also assaulted the prisoner's husband (HO144/5499).

⁷ Also (wrongly) reported to be 42 years old (HO144/5499 - Judge's letter to Home Secretary).

On 16th September 1911 the couple had been drinking together after which they had a quarrel, and by 1a.m. James's brother found him sitting at the kitchen table – unconscious and on fire. He died several hours later from shock (HO144/5499). Fanny was found in a drunken stupor in the wash-house with 'a beer bottle in her hand and one of James's boots next to her. She said: 'He kicked me with his hob-nailed boot, I poured paraffin over him, and set him alight' (*Birmingham Daily Post* 8th December 1911). On the way to the police station she said:

He asked me to take his boots off. Little did he think that while I was taking them off I poured a pint of lamp oil down his legs, put a match to it, and out I came (HO144/5499).

When charged she said:

I wilfully intended to murder that man. I poured the lamp oil on him. I got the box of matches and set him on fire; and I will do it again. Wilful murder I meant to do, and I done it. His mother fetched the lamp oil and I poured it on him, but he kicked me first. I got my own back for my husband and myself. I don't care if I swing for it ... I did do it. I would do anything to murder him. I hope I have made room for a better man (HO144/5499).

At the inquest she added: 'All I have to say is that I didn't want to live with the man whatever' (HO144/5499). At her trial the jury heard evidence from Edward Higgins – James's brother – that he had 'heard her say on many occasions that she would burn him' but admitted that 'the last time was after he had been knocking her about' (HO144/5499).

The Fanny Gilligan case thus provides a powerful example of the determination of a victim of domestic violence to offer a rational explanation for her actions based on her lived experience. However, medical experts proved to be equally determined to translate Fanny's rational explanation into the language of pa-

thology. Thus, medical evidence was heard that 'she had had fainting attacks 14 years ago.' Yet, despite the fact that these attacks had taken place solely in connection with a number of miscarriages, and despite Fanny's adamant denial that 'she ever had any fits', the medical officer maintained her symptoms pointed 'to epileptic attacks, minor epilepsy' (HO144/5499). Thus, while the doctor admitted Fanny had 'had no epileptic symptoms' since he had first examined her, and that his diagnosis was based on symptoms which had taken place 14 years previously, and despite Fanny's denial of ever having suffered from the disease, the doctor nevertheless based his report on the assumption that she *was* epileptic:

Epileptics are advised not to drink alcohol because it excites them, & may bring on an attack of excitement[,] an attack of minor epilepsy [,] mild without convulsions, manifesting itself by a sudden loss of consciousness & followed by eccentricities of conduct.

Having thus constructed Fanny as an epileptic, Dr Brown concluded that Fanny was a 'monoidieist', and 'alcohol intolerant', that she was 'insane' at the time of the crime, and therefore 'did not know the act was wrong' (HO144/5499). As had been the case with Emma Byron's medical report, Fanny's report also relied on speculation and probabilities rather than actual evidence:

[although] she is at present apparently of sound mind, at the time of committing her crime, if she committed it, she was in all *probability* suffering from a true mental derangement due to the action of alcohol upon a nervous system inherently unstable (HO144/5499 emphasis added).

The ambiguity of the report was noted by the judge who, in his summing up, stated that 'he found great difficulty in following the arguments which brought the doctor to the conclusion that the prisoner was insane at the time'; that the evidence did 'not fit' with the doctor's

diagnosis and that 'her own statements' were evidence of her sanity (*Birmingham Daily Post* 8th December 1911).

The jurors appeared to share the judge's scepticism of expert knowledge for after thirty minutes of deliberation they found Fanny guilty of wilful murder with a recommendation to mercy on the grounds of provocation (HO144/5499). Thus, as had been the case with Emma Byron's jury a decade earlier, Fanny's jury too resisted pathologising her crime. Instead, its recommendation to mercy signalled a desire to rationalise her behaviour, yet sympathise with her – simultaneously recognising that while Fanny must take responsibility for her crime – within the wider context of her victimisation she should not suffer equal punishment to that of other murderers.

In view of the ambiguous nature of the initial medical reports, the Home Secretary now called for a new medical inquiry to take place after the trial had ended. The doctors involved conceded that they had been:

unable to discover the existence of any delusion or other deviation from normal in her mental condition, and we are of [the] opinion that Fanny Gilligan is at the present time of sound mind & responsible for her actions ... As to the state of her mind at the time the murder was committed, we have been unable to elicit from her anything that would point to the existence of epilepsy or insanity. She has no recollection whatever of the murder itself or of the circumstances immediately associated therewith, & we have formed the opinion ... that the oblivion in which the crime is enveloped as far as prisoner is concerned is genuine in spite of certain utterances of hers, which must appear to point to the contrary. We have no doubt that she was very drunk at the time of the murder & that her brain was so paralysed by the toxic action of the alcohol that her mental faculties were obscured to such an extent that she was incapable of exercising her normal self control. We further believe that she had no sober intention of killing the deceased & that her act of setting him on fire was referable only to the effects of drink (HO144/5499).

Once again the ambiguity and contradictory nature of the report is noteworthy. Fanny was deemed to be rational and responsible for her actions, showing no signs of either epilepsy or insanity. Yet, her 'oblivion' was considered genuine, her mental faculties were severely impaired by alcohol, hence there was no 'sober intention' to kill. In short, her crime lacked intention, therefore, ultimately, she could not be held fully responsible. Thus, the point at which a retaliating woman's agency was translated into pathology has again been identified..

At first glance it appeared that law – in the form of the trial judge – challenged expert knowledge and thus validated Fanny's own account of events, for 'he thought the prisoner intended to take away the life of the man ... she had said so herself, her own mouth was the mouth that convicted her' (HO144/5499). Similarly, Home Office personnel advising the Home Secretary as to whether Fanny's case merited a reprieve, also indicated strong scepticism about the medical evidence:

I do not think this is a case where drunkenness can be allowed to mitigate the penalty ... The prisoner knew where the paraffin bottle was + must have fetched it from the pantry shelf. The process of pouring it over the man's trousers + setting a lighted match to the soaking stuff was one requiring some amount of calculation (HO144/5499).

A second Home Office adviser shared this view:

I agree with Mr B... that the way in which the murder was committed was too deliberate and purposeful to admit of the plea of insanity + drunkenness being acceptable (HO144/5499).

However, a closer examination reveals that this challenge to expert knowledge was not rooted in a desire to understand Fanny's experiential standpoint and hence create new discourses within which she could be held responsible and agentic – yet also vindicated of and absolved

from her crime. On the contrary, rendering Fanny sane was a necessary first step towards justifying her execution – for both advisers agreed that this was ‘not a case for interference’, and ‘the law should take its course’ (HO144/5499).

Thus, while initially a difference of opinion between legal and medical experts appeared to exist, that difference merely revolved around the particular strategy to be implemented to achieve the end result in which they were united – the silencing of Fanny’s experiential account. In that sense, they both insisted on interpreting Fanny’s case through phallogocentric discourses which reinforced dominant knowledge and the social order, and conversely, left no space for subjugated knowledge to be heard. For example, phallogocentric discourses were encapsulated in an early 20th century version of the modern cliché – ‘why didn’t she leave’ when one adviser wrote: ‘I doubt if it was immediate provocation, in any case, if the man treated her badly, it was open to her to leave him and go back to her husband’ (HO144/5499).

Thus, both legal and expert knowledge problematised Fanny’s retaliation rather than James’s violence – medical experts by rendering Fanny insane, thereby reproducing the gender-stereotype of the irrational, hysterical, irresponsible woman who is not to be taken seriously. Law, which, despite the judge’s specific reference to the violence she had suffered, still judged her retaliation entirely from its inbuilt phallogocentric value system – oblivious to the fact that then – as now – women cannot avoid violence simply by leaving a violent partner. On the contrary, the actual act of leaving may itself be regarded as provocation (Fox 1995: 175). Indeed, as indicated above, evidence was presented that this was exactly what had happened on a previous occasion when Fanny tried to leave James, which re-

sulted in him assaulting both her and her husband. Furthermore, questioning why Fanny did not leave suggests that she was culpable in the violence committed against her, and as Morrissey has noted: ‘Emphasising female culpability makes it unnecessary to concede that domestic violence constitutes serious criminal assault’ (Morrissey 2003:70).

In short, while on the surface law and experts may have appeared to disagree about the specific method with which to mute Fanny’s account, they were united – consciously or unconsciously – in the overall aim of producing and re-producing the gendered subject – whether that was through rendering Fanny insane and irresponsible and therefore not to be taken seriously, or whether through rendering her punishable, and therefore taking her extremely seriously – ignoring the socially produced gender differences and inequalities which existed between the sexes and instead treating her *as if* she were a man and executing her. In either case the final outcome would be the maintenance of the gendered social order with the power to define knowledge and reality firmly remaining in the hands of the powerful while the voices of the powerless remained subjugated (Sawicki 1991: 57). The struggle over knowledge would almost have been over before it began had it not been for another consideration which needed to be taken into account – that of legitimacy.

As noted above, this article rejects the notion of a conspiratorial legal process. On the contrary, the importance of maintaining legal hegemony through popular consent should not be underestimated, and relieving women who were perceived by many as having already suffered enough, can be seen to play an important part in achieving this goal. As Connell has noted, the state’s non-intervention into domestic violence cases is maintained only ‘up to the point where a public-realm scandal is created and

state legitimacy is at issue' (Connell 1996: 156). Thus, intervening into the legal process by granting a pardon in cases such as Emma's and Fanny's can be understood as a way of demonstrating the *moral* justness of law while simultaneously *preventing* legal changes to the handling of domestic violence cases. That is to say, executing women in such cases posed a real risk to legitimacy since the phallogocentric nature of law would have become dangerously exposed – demonstrating the 'impossibility of achieving justice through a strict application of its rules and regulations ...' (Morrissey 2003: 95). In contrast, reprieving women in such cases ensured the continued individualisation of domestic violence by representing 'these women's abusive relationships with their male partners as unusual, and their murders as extraordinary, rather than as the worst results of an institution of marriage which historically and traditionally has enshrined unequal relations between men and women' (Morrissey 2003: 20). In short, the strategy of showing mercy towards battered women who killed can be understood as a reactionary one since it ultimately ensured the inequalities inherent within relationships between men and women remained unchallenged. As such, this strategy contributed to the maintenance of the gendered social order.

Conclusion

This paper began by arguing that law and expert knowledge are built on the Enlightenment principles of reason, rationality and objectivity, hence are masculinist in nature, and as such, are concerned with the reproduction of heteropatriarchal relations. Within this context O'Donovan has described the construction of the 'reasonable man':

The construct possesses the ability to respond immediately to violence necessary to repel an invader of his bodily integrity, or to vindicate an insult to

his masculinity. He can remain reasonable whilst losing mastery of his mind under provocation. In short, in his physical ability, in action and response, he is embodied as a male. He feels powerful enough to defend himself or to lose his temper. This construct is built into the law as a definition of the defences to homicide. His existence does not have to be justified by expert evidence. He is taken to be part of the common sense experience of us all (O'Donovan 1993: 428-9).

The construction of the 'reasonable man' is thus built upon an inherent contradiction – commonsensically constructed as universal – yet, in reality it only applies 'to those with power over knowledge' (O'Donovan 1993: 429). This is hardly surprising since the foundations of law were established long before women gained legal rights and formal equality. Consequently, the contradiction upon which 'reasonable man' is built only became apparent – indeed only became a *contradiction* after women won formal equality. Hence, it is at the very point of this contradiction that feminists are engaged in challenging phallogocentric law by creating discourses applicable to those who are still excluded from this construction – women. In doing so feminists are requiring the definers of knowledge 'to adopt a different consciousness' – one in which law no longer considers it necessary to perform the legal gymnastics of rendering retaliating women harmless, but instead is prepared to render them 'reasonable'. In that sense, feminists are not demanding an abandonment of all Enlightenment principles, rather they are arguing for full participation in *defining* those principles; hence they are engaged in 'a struggle over meaning in which challenges to traditional knowledge (power) require no less than a major change in forms of subjectivity and understanding' (Smart 1989: 2).

While feminists have experienced a large measure of success in terms of the *outcome* of individual cases as that of Sara Thornton and

many others illustrate⁸, it is nevertheless the case that the *discursive* battle is still ongoing, and will only have been won when women can successfully plead self-defence after killing an abusive partner. As Jackson has argued:

Legal reform, without a fundamental overhaul of the interpretative background, amounts to little more than tinkering with the edges of systematic and structural injustice (Jackson 1994 cited in Chan 2001: 169).

Within this context the purpose of these new discourses is to challenge 'law's ability to impose its definition of events on everyday life' (Smart 1989: 4), and instead create spaces on which the subjugated knowledge within the lived experiences of battered women can be heard and understood. For example, we need mainstream discourses – *outside* as well as *within law* – which recognises 'gendered fear' (O'Donovan 1993: 429), because they would help us overturn the commonsensical phallogentric question of 'why didn't she leave', and instead celebrate the success of women who, despite grave danger, manage to escape violent relationships. We also need mainstream discourses – outside and within law – which allows an understanding that the level of brutality experienced by abused women represents the 'extreme end of a continuum of allowable domestically violent behaviour from men ... rather than isolated, individual events' (Morrissey 2003: 92).

Whilst recognising that 'feminist discourses lack the social power to realise their versions of knowledge in institutional practices, they can offer discursive space from which the individual can resist dominant subject positions' (Weedon 1987 cited in Smart 1989: 25). Thus, we have already witnessed feminism's ability to place the criminal justice system under strain when processing individual cases of retaliat-

ing women such as Sara Thornton, and more recently Donna Tinker (*Observer* 24.11.02). Feminism therefore continues to challenge law's imperviousness 'to feminist perspectives' (Mossman cited in O'Donovan 1993: 432), and will only be able to claim success in overturning masculinist discourses when battered women are no longer judged – either inside or outside the courtroom – through the phallogentric construction of the 'reasonable man', and are no longer judged through the equally phallogentric discourses of the unreasonable, irrational, psychologically impaired 'or just plain crazy' woman who lacks agency and has no control over her actions (O'Donovan 1993: 431).

Fox agrees that to achieve such a fundamental ideological shift it is necessary 'to adopt a position outside of law', first, by campaigning for resources to fund adequate refuges, a process which should also help to vastly increase public awareness of the current inadequacy of such funding as well as the widespread nature of domestic violence. It should also ensure that all women have the option of leaving violent relationships. Second, sex-stereotyping can be combated in practical terms, for example by empowering 'young girls by educating them in self-defence tactics' which would 'subvert the perceptions of their male peers that they are weak and passive' (Fox 1995: 188).⁹

Third, and of particular relevance to the arguments presented above, there is the issue of language itself. If the muting of women's own experiential accounts of events is to cease, we must ensure that a language exists within which they can adequately convey the reality of their lives:

⁹ It may of course be argued that this strategy of teaching girls self-defence tactics involves potential victims taking responsibility for their own safety, or 'manage' the danger around them, rather than challenging the aggressive behaviour of the would-be offender (Stanko 1988). As such, this strategy is not unproblematic.

⁸ For example Kiranjit Ahluwalia and Emma Humphrys (Ballinger 1996; 2000).

Only when women can articulate their experiences and render visible to society and juries the extreme physical and emotional abuse to women's bodies which the oxymoronic term 'domestic violence' obscures, can we begin to formulate a more effective strategy for legal interventions which really protects women and prevents men from inflicting such violence (Fox 1995: 188-9).

This would involve shifting the focus away from the victim towards the perpetrator of violence, for example by framing questions in terms of 'why does the man batter' or 'why does society tolerate men who batter?' (Fox 1995: 189), or indeed, 'why doesn't *he* leave' if he is finding his partner's behaviour so problematic, rather than asking 'why doesn't the woman leave'?

It is within this context that Fox suggests it may be possible to also subvert the role and nature of expert knowledge. Thus, rather than rejecting expert knowledge altogether, a feminist strategy may involve campaigns to replace masculinist expert knowledge with our own expert knowledge – for example in the form of refuge workers' testimony or the testimonies of those who work in rape crises centres. If successful, such a campaign could undermine BWS style evidence 'which is commonly interpreted as focusing on the pathology of the particular offender ... and easily read as an exercise of compassion for individual tragedy', towards a more structural explanation which attempts 'to highlight systemic inequalities faced by women who are seeking to argue a defence such as self-defence' (Stubbs and Tolmie 2005: 196).

Within this new discursive framework, the actions of women who retaliate by killing their abusers would be judged through discourses which recognise their agency without necessarily resulting in harsher punishment. That is to say, 'battered women would be considered to have made a rational choice in killing

abusive, life-threatening partners, yet to have been coerced into that decision through lack of societal support and recognition of their situation' (Morrissey 2003: 102). This would allow for the recognition that battered women have agency 'in the sense that they are not acting out of mental or physical compulsion.' However, they do 'have a very restricted range of choice' (Hudson 2002: 37) due to the long history of 'western heteropatriarchy's allegiance to the doctrine of the public/private split' which is at the root of the reluctance to accept societal responsibility for violence against women (Morrissey 2003: 87).

Only when such discourses are in place will women stop paying the heavy price for 'leniency' as demonstrated in the case-studies of Emma Byron and Fanny Gilligan – that is – exchanging culpability and agency with irrationality and mental illness. Indeed within such a discursive framework there would be concern to prevent domestic violence from occurring in the first place because we will have begun the journey to locate violence against women within the context of the wider, structural power inequalities between men and women.

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