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**The Radical Potentialities of Biographical Methods
for Making Difference(s) Visible**

by

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Visible

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November 1997

The common law of England has been laboriously built up by a mythical figure - the figure of the reasonable man.

(Herbert, Uncommon Law 1935)

Abstract

This paper is part of work in progress which explores the use of biographical methods and the radical potentialities there may be for making difference(s) visible. 'Radical potentialities' refers to the extent to which there are opportunities to effect change. This paper is primarily concerned with exploring prevailing narratives which generate epistemological assumptions creating a conceptual framework within which the law of provocation as it relates to women who kill their partners operates. The stories of Kiranjit Ahluwalia, Sara Thornton and Emma Humphreys, in particular, generate concern on a number of levels. They present poignant and disturbing tales of violence. These women have each killed abusive partners and their cases have received extensive attention. The focus of this paper is to explore, through the stories of these women, the extent to which it is possible to say that their experience is explained and determined by a legal system which has yet to recognise the reality of the circumstances in which such women kill. Explanations are advanced from a range of perspectives which construct the conceptual framework within which the experience of these women unfolds.

It may then be possible to identify precisely what is at stake and respond accordingly.

Introduction

This paper explores the radical potential of biographical methods for making difference(s) visible. Radical potential for this purpose is taken to mean the opportunity for effecting change in prevailing legal epistemology and its inherent narratives. Biographical methods are defined by Denzin as:

The studied use and collection of life documents. These documents will include autobiographies, biographies, diaries, letters obituaries, life histories, personal experience stories oral histories and personal histories. (Denzin 1989:7)

The biographies focused on here are of three women, Kiranjit Ahluwalia, Sara Thornton and Emma Humphreys. Each of these convey a story which generates concern about the framework of the law and the narratives it adopts when faced with women who unlawfully kill their husbands following long periods of abuse and humiliation. The biographical methods for the exploration of this concern include law reports, newspaper articles, journals, and academic texts. These methods are situated within a theoretical framework which illustrates the prevailing narratives of the law providing an opportunity to challenge them. The legal system has developed from a formal structure which evolves through its own 'ways of knowing'. Its discourse perpetuates a vocabulary of power, authority, control, command sanctions which constitute a traditional legal epistemology. The common law has developed over the past 800 years with only recent awareness of women as legal subjects. Assumptions that the law has emerged from a dominant male system and

the extent to which the discourse of the law when referring to women is problematic within a developing system which seems incapable of adopting a gender neutral application of the law are explored. Early liberal feminism sought egalitarian values based on the assumption that women should claim equal legal status with men. This perspective is refuted in terms of difference feminism which takes the debate wider, insofar as it is concerned with establishing universal status for all legal subjects as opposed to defining women's legal status subsumed within a male ethos or defined in terms of a male norm.

This paper considers how the law is defined and identifies the difficulty that women experience in seeking universal, or, as Lacey (1995) would assert, 'neutral' legal status. In so doing, the relationship between the law, women as legal persons and the social process of gender construction which creates a complex background against which difference is situated is considered. The aim is to explore the radical potentialities for biographical methods for making difference(s) visible and as such includes the following analysis:

- Narratives on what the law is.
- The defence of provocation.
- The stories of Kiranjit Ahluwalia, Sara Thornton and Emma Humphreys.
- Feminist epistemology with particular reference to difference feminism.

- Whether the stories of Kiranjit, Sara and Emma have radical potential for making difference(s) visible.

Methodology

When considering the biographical stories which will be referred to, it seems necessary to contextualise them since at one level, they are poignant and disturbing tales of violence. On another level they raise questions about how the law and the judicial process creates its 'ways of knowing'. If we are to consider the radical potentialities of biographical methods for making difference(s) visible we need to understand the status quo so that we may challenge it. As a teacher of criminal law it has occurred to me on many occasions that there are complex gender issues to consider in understanding how judicial decisions are made and how they can be explained without reinforcing a stereotypical gender-referencing discourse. The methodological approach undertaken here situates biographical methods within a theoretical framework which seeks to generate radical potential for making difference(s) visible. This approach gains support from Mary Jane Mossman:

...there is no solution for the feminist who is a law teacher except to confront the reality that gender and power are linked in the legal method we use in our work, our discourse and our study. Honestly confronting the barriers of our conceptual framework may at least permit us to begin to ask more searching and important questions. (cited in Fineman and Thomasden 1991:298)

The opportunity to confront the barriers of 'our' conceptual framework is a part of the purpose of this paper; to examine that which is taken to exist and to analyse its potential for change in making difference(s) visible. A further paper could explore more extensive sources of biographical material which could critique contemporary 'ways of knowing'. This could be achieved by researching into the work of women's interest and pressure groups such as The Southall Black Sisters and Justice For Women. It might then be possible to undertake case studies and oral histories of those involved with the work of these organisations.

What the law is

A review of some leading perspectives on what the law is provides the starting point of the debate relating to the traditional narratives of the law. The fundamental theory of legal positivism is espoused through John Austin's 'law as command' theory and Hans Kelsen's 'pure theory of law'. Austin (1832) defines the law in terms of a command structure in which a sovereign body, the state, is superior and enforces the law through sanctions or punishments against the subjects who are inferior members of the state. This approach has been modified by H.L.A. Hart (1961, 1968) whose theoretical framework includes 'the rule of recognition' which sets aspects of command theory within the context of the legitimacy of the law based on acceptance by the community. Kelsen (1934:477) claims that the pure theory of law is a theory of positive law... it is a science and not a politics of law. This positive law perspective is a clear example of the difficult and somewhat insular context in which one seeks to make difference(s) visible. There is an authoritarian set of

assumptions which do not lend themselves willingly to wider debate. Law espouses the scientific method and makes claims about the universal application of its truth about what the law is. As more liberal approaches developed, they too perpetuated the accepted language of the law. Ronald Dworkin (1977). He asserts that the law becomes a legal history perpetuated by the judiciary. His overall approach to law is liberal insofar as he claims that the state must protect personal autonomy. But autonomy for whom? Men? Women? Persons? He refers elsewhere (1986) to Law's Empire in which we are all its subjects. As long as the law continues to sustain its position based upon the perceived legitimacy of its traditional framework there is difficulty in reconstructing its narratives.

The defence of provocation

Murder is a common law crime which carries a mandatory life sentence for those found guilty. As in all areas of law the accused may put forward a defence so as to seek an acquittal. Self-defence is one example. In murder cases there are statutory defences which may provide a partial defence which allows the charge of murder to be reduced to manslaughter. These are provided for by the Homicide Act 1957. They are diminished responsibility and provocation. These are unique defences to murder. If a person is charged with a non fatal offence they may argue provocation in mitigation but not as a defence to the actual crime charged. Diminished responsibility and provocation each consist of separate elements which must be established in order for the defences to succeed. Diminished responsibility includes the element of an 'abnormality of mind' whereas provocation is concerned with 'a sudden and temporary loss of self control'.

Provocation requires two questions to be satisfied. The subjective question is whether the accused was provoked to lose his self-control. the objective question is whether a reasonable man would have been provoked to do as the accused did. If there is evidence to support this the Act requires that the issue of provocation is left to the jury. It is the second element which has particular concern for the purpose of this study. In applying the subjective test the standard has been judicially formulated by Devlin J in the case of *Duffy* 1949 where a wife killed her violent husband. Provocation is some act or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him for the moment not master of his mind.

The language of this formulation is surprising given that the female accused is 'him'. The requirement of 'a sudden and temporary loss of self control' is problematic. There is difficulty for women to succeed with the defence of provocation especially in domestic violence cases where there is a cumulative development of provocation. The alternative is to make out a defence of diminished responsibility which reflects the woman's mental abnormality such as depression and other traumatic disorders following years of abuse. But there is a stigma associated with this. It is clear that the law will not recognise forms of retaliation or revenge per se. Provocation requires that the accused is not master of his mind due to a sudden and temporary loss of self control. Here we have a narrative which perpetuates male vocabulary, male patterns of behaviour and an apparent absence of universal terms of reference which are able to deal effectively with legal persons.

This formulation of provocation given in Duffy has been modified by the provisions of S.3 of the Homicide Act 1957 and as such is referred to by Lord Taylor C.J. in Ahluwalia 1993 [1992] 4 All ER 889 at p.894 as:

Provocation is some act, or series of acts done [or words spoken] ... which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his or her mind.

The law on provocation has proved a difficult area for women to succeed in establishing a defence since it has developed from masculine narratives (O'Donovan 1991, Wells 1990, Edwards 1990). There is another fundamental difficulty. Men are socialised differently from women; men are fighters, women do not fight. Men have fists, men punch, men fight back with bodily force. Women do not fight with fists, punches or use bodily force. This is one example of how the existing law on provocation has not taken account of women who respond with different disabling techniques. As Susan Edwards suggests:

Women very rarely use the body as deadly force, for reasons rooted in biology and in culture. Women's socialisation is deliberately disabling, the acquisition of defensive skills is discouraged, and the use of the body in defence of self and others negatively sanctioned in order to define and determine her subordination within patriarchy.(Edwards 1996:410)

These assumptions raise important issues which relate to the way in which women encounter difficulty with the defence of provocation. The stories of three women who have experienced difficulty in bringing their cases within such constraints are now considered.

The story of Kiranjit Ahluwalia

In 1989 Kiranjit Ahluwalia could take no more of her husband's violence. During the previous ten years he had beaten her and assaulted her physically and sexually. She had not wished to bring dishonour to her family being deeply mindful of Izzat the Asian code of family honour. An example of her distress is evidenced by an extract of a letter to her husband which is described in the law report [1992:892] as one of 'A number of self-denying promises of the most abject kind':

'Deepak, if you come back I promise you-I won't touch black coffee again, I won't go town every week, I won't eat green chilli, I ready to leave Chandikah and all my friends, I won't go near Der Goodie Mohan's house again, Even I am not going to attend Bully's wedding, I eat too much or all the time so I can get fat, I won't laugh if you don't like, I won't dye my hair even, I don't go to my neighbour's house, I won't ask you for any help.'

However, the time came when she decided to kill her husband. One evening, he told her their marriage was over and threatened to burn her with an iron. He said he would beat

her the next morning if she did not produce £200 for the telephone bill. They went to bed. She waited (an act fatal to the defence of provocation) until he had fallen asleep and got up at 2.30 a.m. Some days earlier she had bought some petrol. She poured some into a bucket and carried it to the bedroom. She threw the petrol into the room where her husband was asleep and then threw a lighted stick into the room to ignite the petrol. She picked up her child and left the house. He suffered serious burns from which he died some days later. Kiranjit was charged, tried and convicted of murder. In her defence, she stated that she had not formed the requisite criminal intent for the commission of the crime of murder and sought to rely on provocation but this was not accepted by the jury. She was found guilty of murder and sentenced to mandatory life imprisonment. Her case generated enormous support not least from the Southall Black Sisters. Eventually, grounds for an appeal were established. There were three grounds of appeal, including reference to a misdirection by the trial judge. The first two grounds related to the subjective question of whether there had been a sudden and temporary loss of self control, and, the objective test of how a reasonable, educated, Asian woman would have reacted. The third was that there was fresh evidence of diminished responsibility. The appeal was allowed; the Court of Appeal accepted that there was fresh evidence of diminished responsibility. However, the court was not willing to consider provocation since the requirement that there should be an immediate and sudden loss of self control was not present. If there was to be a change in this principle it would be for parliament to say so since such a change in the law was not open to the appeal court. The original decision of the trial court was unsafe and unsatisfactory and set aside. A retrial was ordered where Kiranjit was found guilty of manslaughter and sentenced to a term of 40 months which in fact she had already served.

The story of Sara Thornton

Sara had been married for 10 months to Malcolm. She was charged, tried and convicted of murdering him as he lay drunk on a sofa at their home. This had been the culmination of a turbulent marriage. He had a history of alcohol abuse and violence. Shortly after being subjected to another tirade of abuse and violence she went to the kitchen, took out a knife which she then sharpened. She stood over him and slowly brought the knife down and stabbed him through the stomach. She had suffered from a history of difficult personal circumstances and mental illness. At her trial the defence of diminished responsibility was argued. However, this was not accepted by the jury and she was convicted. In 1991, her appeal against conviction was dismissed.

Sara, like Kiranjit, attracted a good deal of support from such groups as Justice for Women. In 1995, the Home Secretary referred her case to the Court of Appeal on the basis that there was fresh evidence to consider on the basis of suffering from 'battered woman syndrome'. The court decided that such a condition would still need to satisfy the sudden and temporary loss of self control required to succeed with provocation at the time of the killing. The argument was put forward by Michael Mansfield QC supported by the evidence of medical experts. It was argued that there were two characteristics to be considered at the time of the killing. First, her personality disorder and second the effect of her husband's abuse on her personality. This would have enabled the trial jury to be directed to consider whether a reasonable woman with the characteristics of the accused

would have lost her self control and behaved as the appellant, Sara Thornton, did. There were further submissions based on previous judicial decisions. The court decided that the original verdict was unsafe and unsatisfactory. A retrial was ordered. Sara was retried at Oxford Crown Court where she was convicted of manslaughter and sentenced to five years imprisonment.

The story of Emma Humphreys

Emma had experienced a traumatic and difficult childhood which has been described in graphic detail by Duncan Campbell (1994:4). Her despair was such that she turned to prostitution at the age of 13. At 16, she formed a relationship with Trevor Armitage. He was violent and abusive towards her. When she could take no more she fatally stabbed him. She was charged, tried and convicted of his murder. Because of her age she was detained at Her Majesty's Pleasure. Her case has also been taken up by the group Justice For Women. Campbell identifies the plight of Emma, Kiranjit and Sara and is critical of their stories within the legal system. Russell Miller (1993) also highlights the plight of these women and their stories. He cites Julie Bindell of Justice For Women who claims,

The law is grotesquely unfair...How can anyone possible say that enduring years of torture and humiliation does not amount to provocation?...And why should a woman be expected to leave her home? I have not heard of a single case of a husband provoked into killing his partner being asked by a judge, 'Why didn't you leave?' (Miller, 1993:6)

A developing study which helps our understanding of the behaviour of battered women is that of Lenore Walker (1977, 1979, 1989) an American psychologist who has looked at what she calls Battered Woman Syndrome (BWS). She identifies two elements, 'cycle theory' and 'learned helplessness'. Cycle theory has three stages. First, the accumulative anger of the male causes increased tension. He becomes more angry while she becomes more pacifying. Second this creates rage and he will physically batter her. Finally, there is the 'honeymoon' phase where he experiences feelings of guilt, pleads forgiveness and she forgives. This cycle is repeated. The second element 'learned helplessness' manifests itself by the woman's increased passivity, low self-esteem, self-blame, anxiety and depression.

The radical potential for making difference(s) visible

The cases we have considered generate important questions about making difference(s) visible. Nicolson and Sanghvi (1993) explore the implications of the decision in Kiranjit Ahluwalia's case and the development of Battered Woman Syndrome (BWS). They argue:

BWS will always actively shift the emphasis from the reasonableness of the defendant's actions to her personality in a way which confirms existing gender stereotypes, silences battered women and conceals society's complicity in domestic violence...BWS suggests reliance on personal incapacity. (Nicolson and Sanghvi, 1993:734)

They then say that the difficulty seems to be that battered women find arguments for their defence do not fit easily within the definition of provocation. Although they may be able to adduce evidence of BWS it has implications of bias and sexist stereotyping:

BWS suggests reliance on personal incapacity. This might lead not only to battered defendants being treated as mentally abnormal but also to the therapeutisation of domestic violence...Ten rugged man who instinctively lashes out to defend his honour is replaced by the passive woman who can only be helped by doctors and psychiatrists.(1993:734)

There seems to be a fine line between issues which go to 'the abnormality of mind' within diminished responsibility and issues which suggest a change of personality which may go to provocation. There is the additional problem for defence counsel who may neither wish to raise issues related to the defence of provocation nor for the judge to give the jury a direction which might prejudice the case for the defence in circumstances where they think the prosecution will have difficulty in establishing guilt. Provocation is a matter for the jury to decide on the facts of the case. The trial judge may be minded to give the jury a direction on the elements of provocation but this may be objected to by defence counsel for the above reason. In any event it seems that women are likely to be treated a good deal more sympathetically if they comply with judicial stereotyping whereby reliance is placed on medical-based defences rather than aggressive- male defences. In order to make difference(s) visible, we need to show that the current position is capable of reconstruction. The three given cases have identified key issues in the construction of the

law. It seems that the law continues to authorise itself and is slow to admit the real experiences of women. Feminist lawyers have sought to challenge the status quo but are often seen as anarchic and resisted. Susan Edwards (1996) claims that the law is holistically, root and branch, viscerally, temporally male.

Feminist legal epistemology

Liberal feminism espouses men and women should be treated equally. The difficulty is that the language of the law and its narratives seem to create equalisation in one direction that is towards a male norm. It seems that we need to find an argument which enables us to adopt a more effective strategy for making difference(s) visible and to identify cases which provide the radical potential for doing so. The egalitarian perspective of liberal feminism did not go far enough in challenging the status quo. Lacey argues:

...it is clear that in several important respects liberal feminism contained the seeds of its own deconstruction, and these were quickly identified by difference feminism.(Lacey 1995:5)

Difference feminism (Smart 1989, 1995, Naffine 1990, 1994,) regards difference as a complex social construct. Sex may be genetically determined but gender is constructed. This feminist perspective seeks ways in which the law could be reconstructed to recognise universal legal status. Lacey states,

Difference feminism is concerned with the analytical focus on a problematical assimilation of women to a substantially male conception of legal subjectivity, and in which the normative emphasis is on the recognition and of difference.(Lacey, 1995:5)

She identifies the sort of feminist practice that difference feminism implies. It enters a debate about how the legal subject is conceptualised, it considers the place of psychoanalysis in feminist thought and pursues the desirability of special rights for women. Although liberal feminism has responded to the exclusion of women from the public arena of the law it fell short of extending the debate beyond sex difference. Lacey argues:

...it is clear that in several important respects liberal feminism contained the seeds of its own deconstruction, and these were quickly identified by difference feminism...the radical potential inherent in the idea of 'treatment as equal' was not realised because the debate issued in by liberal feminism was highly circumscribed.

Far from engendering a substantial reconsideration of the way in which the world was organised, the public standards already in place were assumed to be valid and the feminist conceptual tools of bias, discrimination, equal worth measured against them. (Lacey, 1995:5,6)

It seems that this position reflects the inadequacy of the law to deal with provoked women who kill. It seems impossible to assume that the behaviour of a provoked woman can be understood or accounted for within a paradigm of male narratives established through the

tests of male characteristics. Scutt (1981:11) argues that the difficulty for women who rely on provocation is social conditioning. Women do not suddenly lash out. In some ways the law has sought recognition of the plight of provoked women by considering cumulative provocation whereby their reaction is accepted as chronic rather than acute. There has been recognition of slow burn as opposed to a sudden and temporary loss of self control. The Court of Appeal in Thornton (No.2) has recognised the admissibility of BWS within the law of provocation.

Whether the stories of Kiranjit, Sara and Emma and perspectives of difference feminism have the radical potential for making difference(s) visible

Having considered these women's stories there seems to be a reluctance on the part of the jury to allow battered women the defence of provocation. There seems to be a fear of generating a license to kill. If during the course of the trial there is evidence of provocation then the jury are entitled to consider it. The social construction of gender assumes certain behaviour and women who behave violently are viewed with caution. The legal system is geared to stereotypical behaviour which assumes an imbalance where the focus is on the woman's state of mind rather than the actual violence and humiliation she has endured. If found guilty of murder she moves from a metaphorical prison to a real one. The obstacle seems to be the degree of calculation involved where there is a 'cooling off period' between the provocation and the killing. You can be excused for killing in the heat of the moment but not when you prepare to do so. There have been recent developments in the criminal law in the cases of Morhall (1995) and Humphreys (1995) which allows the

mental characteristics of the accused to be considered within the subjective element of provocation but of course ultimately it will be for the judges to decide the relevance of such characteristics to the defence.

Helena Kennedy QC is a practising barrister and familiar with cases of women who kill.

She states:

It is wrong to characterise the courts as unsympathetic to the plight of women in violent relationships...However, the vocabulary of the discourse is limited, and the criteria are inflexible, because of a fear that juries will apply provocation too freely. (Kennedy, 1993:205)

We may ask why this should be so. This study has shown the extent of the limitation on discourse. The law is slow to respond to challenge on gender; the law is 'his' and women are somehow accommodated within the system. Fineman and Thomasden claim:

The law is too crude an instrument to be employed for the development of theory that is anchored in an appreciation of differences in the social and symbolic position of women and men in our culture. (Fineman and Thomasden 1991: xii)

This proposition has some merit but the law on provocation is at least developing to the extent that the court may consider BWS within the characteristics of the accused. The arguments which were submitted during and prior to the appeals of Sara Thornton and

Kiranjit Ahluwalia have assisted in making difference(s) visible in that the law at last considers the characteristics of the reasonable woman. However there is still some way to go in arriving at a position of certainty in terms of the ability of the law to recognise provocation in cases such as those considered here. Kiranjit Ahluwalia's appeal was allowed on the basis of fresh evidence being available in relation to diminished responsibility. The issue of delay continues to fail to satisfy the requirements that there is a sudden and temporary loss of self-control. In Sara Thornton's case (No.2) Battered Woman Syndrome is recognised as a characteristic which may be taken into account but the loss of self-control in accordance with existing rules has still to be satisfied. There is some recognition of the history of the accused in Emma Humphreys case being taken into account which may suggest a case for recognising cumulative provocation but it is still necessary to identify the point at which the provocative taunt can be relied upon as a trigger.

Conclusion

This paper has explored a range of biographical methods in order to identify the radical potentialities for making difference(s) visible. The fundamental difficulty in terms of the identification of radical potentialities lies within prevailing assumptions about what the law is and how it is situated within a society which determines its terms of reference to women according to stereotypical standards. At the time of writing, this fundamental difficulty continues to operate. The murder trial of Tracie Andrews raises disturbing issues of the experience of the accused within the trial process. Beaumont (1997) is concerned that

having been found guilty of unlawful killing Tracie is punished twice - for the crime as charged and by a society in which she has failed to fulfil her expected feminine role. Not only did she kill but she had a taste for Malibu and pineapple and wore fake snakeskin boots. The law operates within a society in which incomprehensible attitudes to women have developed. Although this paper recognises that there has been some positive development in the law, there continues to be concern. A range of legal narratives have been discussed, developments in understanding Battered Woman Syndrome have been identified, and the stories of Kiranjit, Sara and Emma have been partly told. The claims that difference feminists make have been discussed. In all that, it has been possible to make difference(s) visible. But the most vital question has yet to be answered; the question of radical potentialities. Having made difference(s) visible where do we go from here? It has been possible through this paper to explore some key issues about the conceptual framework of the law and the difficulties women face. The key concern which continues is that any positive move in respect of the law of provocation is tainted by a prevailing narrative in which there is an implicit shift of emphasis from the woman's actions to her state of mind. Perhaps there is an optimistic note. Making difference(s) visible raises awareness. This necessarily involves a consciousness about the vocabulary we use and an awareness of the extent to which we may ourselves perpetuate stereotypical behaviour. Should we acquiesce in the existing legal framework we will be effectively disabled from exploring radical potentialities.

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s.3 Homicide Act 1957 (Provocation)