

REVIEW ARTICLE

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*SEX AND GENDER IN THE LEGAL PROCESS. By Susan Edwards.
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The first question which comes to mind on reading the title and contents page of Susan S.M. Edwards' text *Sex and Gender in the Legal Process* is whether this is another women *and* the law type text, or whether it is something more. Does it move the debate further along in terms of developing a feminist critique of law? The chapter divisions indicate this could almost be two unrelated texts, with the first four chapters focusing on issues of sex and sexual identity, and the rest of the book concentrating on various aspects of the criminal law with a view to assessing how its methodology is gendered. A clue as to the reason for the choice of an apparently eclectic series of chapter headings is provided by the fact that Edwards states the collective task of feminists is to render masculinity, masculinism, structures of patriarchy and heterosexism accountable and open to challenge.¹ It might have been helpful, if aside from the introduction, there had been some thematic focus to the sections or a final concluding chapter.

The kernel of Edwards' argument is found in the following passage from her introduction, where she says:

"It is said, so we are told, that reasonable *man* means the reasonable *woman* just simply by saying so, even though the experiences of women are otherwise immaterial, otherwise irrelevant, and unlike the male experience are rarely authenticated or given law's divine blessing. If such experiences are authenticated they remain specific to women without universal applicability."²

Much of Edwards' task in revealing the masculinism of legal method is executed in the field of criminal law, particularly in the second section of the text. Hence it is useful to remind ourselves of that context. Criminal law and procedure and criminology constitute relatively new territory for feminists. In fact it is fairly new territory for women whether as lawyers, judges, jurors or accused. The initial incursion and recognition of women in this context was as victims, and therein lies a tale. Early rape depictions and discussions fall readily into the male (aggressor)/ female (passive victim) paradigm. Within the study, rather than practice, of crime, women are similarly lacking. Rafter and Heidensohn in their volume on feminist criminology put it as follows: "Late 20th century mainstream criminology was the most masculine of all the social sciences, a speciality that wore six-shooters on its hips and strutted its machismo."³

¹ At page 6 of the text.

² At pp 2-3.

³ Rafter and Heidensohn (eds), *International Feminist Perspectives in Criminology: Engendering a Discipline* (1995) at p 5.

Criminal law was not all that different, nor were most criminal lawyers. Moreover, feminist lawyers face a difficulty identified by Smart, not faced, she suggests, by other feminists in academe:

“In all areas of the academe radical (i.e. at root) dissent from the dominant paradigm of knowledge production causes problems for the dissenter....[T]o follow radically different ways of thinking can amount to professional suicide. In the discipline of law there is almost a double suicide involved. Not only does the dissenter challenge academic standards, but also the standards of law as a profession. Inasmuch as law has a direct practical application, the dissenter in law is more subversive than in a discipline like sociology. The former challenges the standing of judges, barristers, and solicitors as well as academic lawyers. Little wonder then that feminism has such a hard time taking root in law.”⁴

In the course of her introduction, Edwards points to the endeavour of recent legal feminism to explore the relationship of gender to law, beyond the application by agents operating the law, and to look within, to the form and structure itself.⁵ The core of the argument here is that the issue is not so much that the empire of law is masculinist, or indeed that the application of legal rules is masculinist, but that the method of law itself is masculinist. This, Edwards claims, is not so easily or readily conceded.

The first chapter, which is entitled ‘Transsexuals in legal exile’, makes the point that the human body in law is, for the most part, biologically determined.⁶ Edwards points out that it is the social construction of the body and its meaning that is the primary source of enslavement. It is what the body has come to signify; it is these meanings that must be challenged. The significance of language is considerable. “A need for a concept to define transsexualism is overwhelming, for without language to define the transsexual then they are lost.”⁷ Edwards quotes Grbich, who explores the way in which language and legal language is a system of signification which gives authorisation to certain experiences.⁸ She also explores the way in which the legal organisation of sexual dimorphism and the gender roles attaching to it creates the surgeons prepared to operate on transsexuals and thereby creates the transsexual. Edwards points to the incongruity of law in terms of medical and scientific developments enabling transsexuals to undergo sex change operations, saying:

“Yet once surgically transformed the transsexual inhabits a legal ‘no man's land’, a barren terrain of sexual statelessness, where the only rights, obligations and duties are those pertaining to the form of sex, the sex renounced, the sex erased, leaving the transsexual in a state of ‘exile’.....Those who identify as a ‘third sex’, androgynous, neither male nor female, are similarly despised and misunderstood, outcasts in a society

⁴ Smart, *Feminism and the Power of Law* (1989) at p 21.

⁵ At page 6 of the text. Edwards there claims that the present work is a contribution to this enterprise, saying that it “aims to address the several levels of engagement which have characterised scholarship in examination of the legal method underlying the law, the content of the law, the application of the law by judges and the process of applying the law, and the symbolic function of law not merely as a product of social construction and power relations but in the authentication of these relations and the formation of the institutions of patriarchy and heterosexuality with which they are enmeshed.”

⁶ At page 8 of the text.

⁷ At p 10.

⁸ At p 11.

whose credo is the social and legal organisation and maintenance of sex difference and the reproduction of institutions premised on biological essentialism.”⁹

That the solution to this problem should simply be accedence to the demands that the transsexual be accorded legal status congruent with the post-operative sex is questioned by the author,¹⁰ for whom the way forward may be to limit surgical intervention and try alternate means of treatment. She suggests the silence of the law is of itself indicative of the marginalisation of this group.¹¹

In this chapter the author also pursues the issue of biological determinism and its impact on family law. Her examination of apparently neutral criteria such as “the best interests of the child”, and the conflict between such criteria and the priority of the child’s interest, reveals that when there is any conflict between the “best interest” principle (which in practice is judicial determinism) and the wishes and feelings of the child, the child’s wishes are invariably overruled. She makes the point that “rights to parenthood depend quintessentially on heterosexuality, on subscribing to fixed codes of social conduct and gender orientation within that gender role, requirements which are, arguably, social conventions unrelated to the caring function”.¹² Transsexuals in the context of family law disputes are thus regarded as wholly unfit parents.

The difficulties with regard to the sex specificity of offences under the Sexual Offences Act 1956 and the resulting implications under the Criminal Justice and Public Order Act 1994 are explored. In the context of prostitution the criminal liability of the male-to-female transsexual is an issue. The legislation here assumes that the offence of prostitution is committed by women only, and that when men solicit they are importuning other men.¹³ Further problems are posed by the sex-specificity of the offences committed by those who live on the immoral earnings of prostitution. Despite the case of *DPP v Bull*,¹⁴ where the Divisional Court held that section 1 of the Street Offences Act 1959 applied only to females, Edwards points out that it is only where a plea of not guilty is tendered that the appropriateness of using the charge against a transsexual prostitute is subject to scrutiny. Where the transsexual prostitute is charged with an offence of soliciting and pleads guilty the sexual status is not questioned, and a conviction for the female-only offence is duly recorded. It remains tantalising that, notwithstanding the sex-specific nature of the charge of loitering for the purposes of prostitution, so many males are being proceeded against for this offence.

The transsexual as victim of sex offences poses a particular problem, not least in that such a victim may be even less likely than a natal sex victim

⁹ *Ibid.*

¹⁰ At p 12.

¹¹ *Ibid.*

¹² At p 19.

¹³ While the English courts remain manacled to biological hegemony in respect of the sex-specificity of the offences of loitering and soliciting, and also in respect of the determination of the sex of the post-operative transsexual according to the pre-operative status at birth, courts in Australia have taken a more realistic approach. Thus in *Harris v McGuinness* [1988] *A Crim R* 146 Matthews J declared (at 161-162), “the time has come when the beacon of *Corbett* will have to give place to more modern navigational guides to voyages on the seas of problems thrown up by human sexuality”.

¹⁴ [1994] 4 All ER 411.

to report an offence. The issue of whether a rape can be committed on a person where that person's vagina is artificially constructed, as in the case of a male-to-female transsexual, remains to be decided. Certainly the whole issue of transsexuals in this context raises questions about the viability of laws relating to such crimes which focus unduly on anatomical definitions and furthermore draw a questionable equation between levels of anatomical interference and degrees of hurt. Likewise, in the context of employment, pensions and welfare benefit, the author points out that sex orders the entirety of our entitlement to employment benefits, to pensions and to social welfare.¹⁵

Having reviewed the relevant legislation and the refusal of the courts on grounds of public policy to give legal recognition to the changed position of transsexuals, Edwards moves on to consider the ethicality of current medical practice and nosology. An interesting economic dimension to this whole question is identified by the author where she suggests that debates as to the nature of illness and as to the most appropriate forms of treatment for certain conditions are not merely medical questions, but questions which exist in the context of competing needs and limited resources.¹⁶ Thus recent legislation in the United States regarding prison inmates has taken the view that transsexuality is a mere preference; indeed, a deliberate deviance which provides yet another manifestation of the offender's truculence.¹⁷ This view of transsexuality as lifestyle facilitates the denial of the right to any treatment at all, and presumably also further control and punishment.

In general, Edwards identifies a pressing need for a coherent policy on the question of intervention and therapy in a situation where surgical intervention has fast become the perceived panacea of all gender ills. The question of the justification of surgical intervention in the context of removing healthy living tissue, the implications for consent and the criminality of surgeons are all relevant to this particular issue. The author's thesis is that surgery and amputation would not have progressed this far in the absence of policy debate were it not for the fact that transsexuals are regarded as a less than worthy class, beyond the fringe even of politically powerless minorities. "A dilemma for the courts is whether or not to validate the transsexual in the new sex in private and public and whether now to place some limits on the amputation programme whilst a proper public debate is launched."¹⁸

There is no doubt that the notion of determining legal rights and duties on the basis of natal sex is eroding, yet the question still remains as to how far transsexualism is a social construct, the product of society's disapproval of those who refuse to align themselves with the gender demand predicated by anatomy.

The second chapter deals with gay prohibition, social engineering and the heterosexual hegemonies which regulate public and private rights. The legal construction of family life, which is what in Edwards' view precludes homosexual parenting, is, she states, a key site of conflict and at the heart of the contemporary struggle for gay rights. In this context she examines a number of discrete areas of the legal organisation of homosexual relations. The first is the role played by the criminal law as

¹⁵ Some of the case-law in this area is quite extraordinary: see for instance *White v British Sugar Corporation* [1977] IRLR 121 and *Collins v Wilkin Chapman* (EAT 945/93, 14 March 1994).

¹⁶ At page 47 of the text.

¹⁷ At p 49.

¹⁸ At p 51.

the vehicle of prohibition of gay sexual expression; the second is the role of family law, and in particular the construction of parenthood. The third area examined is the limits of public tolerance of homosexuality, and in this context the author critiques the more recent and specific struggle by gay men towards a recognition of sadomasochism as a viable and legitimate form of expression of consensual gay sex or homo-eroticism. In the latter context, and in particular in the analysis of the decision of the House of Lords in *Brown*,¹⁹ Edwards' critique, and the parallels that she draws with the area of rape and domestic violence, are illuminating. Edwards makes the point that the issue of consent is extremely problematic in the context of relationships where there may be power differentials.

In terms of family law and specifically the issue of parenting, Edwards makes the case that the homosexual parent almost inevitably fails the fitness test, and that where the mother is the homosexual parent, the maternal preference principle will be subordinated overwhelmingly to the hegemony of the heterosexual imperative.²⁰ The author here reviews the law's function as a mechanism of ideological control in the promulgation of certain attitudes and in the determination and sanction of the degree of tolerance of homosexuality both in the UK and in North America. She provides in this context an interesting analysis of Proposition 6 in California, Amendment 2 in Colorado, and section 28 of the Local Government Act 1988 in England.

Edwards is unafraid to identify a fundamental flaw existing within current notions regarding gay lifestyle or homosexuality, namely the belief that there is an area which stems from the homosexual experience that is free from patriarchy and its master/slave power and equality resonances.²¹ Returning to *Brown* she comments:

"Surely it is the very inequality of law which means that violence against gay men by gay men can be made invisible or else denied and reconstructed as celebratory sex. The *Brown* judgment ensures that gay men have a right to protection in a world where the drawing of boundaries of legitimate and illegitimate conduct and the regulation of homosexual conduct is not of necessity homophobic."²²

The third chapter of the book deals with the issue of freedom from pornography in an age of sexual liberalism. Edwards points out that it has been a major consideration of the critique of law by contemporary feminists to transform law in a way which embraces women's experience and is more consonant with their lives. A major site of this has been the issue of pornography. Edwards points to the conflict between sexual liberals and feminists which has resulted in feminists and the moral right being seen to be in an unholy alliance. A contemporary feminist critique of pornography challenges sexual liberalism and formulates pornography as inequality, objectification and violence. It is not merely the objectification of women in pornography but the violence that constitutes the main objection. In this context, Edwards suggests that the generic application of the label "pornography" must be challenged, for "by signifying and encoding the text with sexual meaning, through labelling, the violence or perversion within its content is legitimated as part of the domain of the sexual".²³ The author draws on Lacan to make the point

¹⁹ [1993] 2 All ER 75.

²⁰ At page 78 of the text.

²¹ *Ibid.*

²² At p 89.

²³ At p 94.

that, at least in part, pornography precedes sexual relations and so communicates, largely to men, a particular meaning for sexual relations underpinned by the conflation of sex and violence and pleasure.

In relation to this topic, the author also argues that at the prosecutorial discretionary stage (often immune from scrutiny) the low standard of prosecution is a product not only of inherent difficulties with the relevant test for liability, but also of judgments made as to the public interest in pursuing such cases in that arena. The result is that obscenity and indecency are concepts constructed extra-judicially and outside the courts, and not by judges or by jurors, but by those producing pornography on the margins of prosecution, which the author terms “near porn”. Similarly, the growing ubiquity of “near porn” in the popular press lends further legitimacy to pornography and brings it into the mainstream popular culture.²⁴ Thus in the absence of any policy or commitment on the part of the authorities to prosecute threshold cases, pursuing only cases where conviction is certain, pornographers determine the boundary. This is a very significant point and it is to the author’s credit that she points to the underbelly of law, and to the practicalities of its invocation at a decision-making level, which is where women are losing ground.

In her attempts at reformulating pornography Edwards sees the influence of feminism in redefining the issue as one of women’s human rights. The draft Dworkin/ MacKinnon ordinance is typical of this approach, though its constitutionality has been challenged. According to the author, “...what we define pornography to be, e.g., depravity, sexual morality, or harm has consequences for the framing of any attempts at legislative regulation”.²⁵ Despite the lack of success of Dworkin’s civil measures they have in the author’s view reshaped the debate in a way which equates with women’s perceptions. However, Edwards neglects to address whether refocusing on civil rather than criminal remedies in this area is positive or not. It is arguable that any attempt at differential regulation in this context, particularly where it involves women, is as problematic as in the context of so-called “domestic” violence.

In the fourth chapter, Edwards looks at the issue of women’s work. In this context she is particularly concerned with prostitution, in relation to which she identifies a conflict of approach between that which constitutes prostitution as a question of morality and that which constitutes prostitution as a question of freedom. In other words, prostitution is variously constituted as sex and as a contract. As the author points out:

“Challenges to both arguments that prostitution is immoral and is a private contract voice a very different concern, *inter alia*, the failure to recognise the institutionalisation and the commercialisation on both a national and an international scale. ... Within this critique, prostitution is not about sex, although it is about what sex and power have become for men.”²⁶

For Edwards, the contractual argument is such an individualised perception of prostitution that it negates any recognition of the international scale of the problem and its connection with other forms of abuse of women and children. She makes the case that it is no longer appropriate or possible to consider prostitution in isolation from the institutions which support it, nor is it possible to limit an analysis to the domestic context alone. Edwards also raises the issue of sex tourism in this context, and argues that most analyses of prostitution banish the

²⁴ At p 116.

²⁵ At p 140.

²⁶ At p 143.

exploitation of Third World woman and children from consideration. In differentiating the position of the prostitute and prostitution as an activity from that of ordinary workers, Edwards makes the point that whereas alienation is anathema to the wage labourer, alienation is essential to the psychological survival of the prostitute. In the context of reviewing the domestic legal regulation of prostitution Edwards points out that prostitution itself has never been a criminal offence. Yet the law has asserted its influence on all women involved in prostitution, and most particularly the female street-walker. However, the number of women working in off-street prostitution is unknown and, comparatively speaking, such women are rarely the subject of prosecution. Street-solicitation by males has been restricted to homosexual solicitation in terms of prosecutions. Edwards also finds fault with the law in its failure to recognise the presence of coercion in prostitution except where there is financial gain and control. In any event, she comments, the reality of such control is that such prosecution unfairly penalises male members of the family, such as the sons and brothers of prostitutes, and anyone who might be living with them in a household or considered in some way to be receiving money from them.²⁷

The focus of policing has not been on the receiver or the consumer of prostitution. Where there has been such regulation, the focus has been on the visibility of his conduct, emphasising the law's preoccupation with the public nuisance factor and the visibility of the negotiation of the contract. An interesting conflict or conundrum is identified by Edwards in the context of legislation increasing regulation of on-street prostitution, in so far as she points out that those who support legal measures to control kerb-crawling include moral crusaders, feminists wanting safer streets for all women, and left-lobbyists wanting to improve the quality of life in run-down neighbourhoods. On the other hand, other feminists and supporters of the left oppose such proposals on the basis that they would legitimate the increased surveillance of marginalised men, especially men from the black community. It is also objected that the surveillance of both potential male kerb-crawlers and potential female prostitutes would increase the vulnerability of women, who would be forced into making snap judgments about potential punters. In terms of a changing debate on prostitution in recent years, Edwards points out that while right-wing moralists have called for greater legal regulation, more punitive sanctions, more policing and more prosecutions, civil libertarians and others on the left share the view that prostitution laws penalise working class women to an unacceptable degree.

Some feminists argue that prostitution is about sexual choice and that women should be free to sell their sexual services unhampered. On this view, "sound prostitution" is possible. The author, however, holds little sympathy with the pro-prostitution lobby. She sees its politics as naïve and confused, taking the principles of *laissez-faire* to the point of absurdity, and is particularly scathing when it comes to the adoption of the language of human rights to further the cause of what is seen as the emancipation of prostitute women. In the author's opinion, to propose that prostitute women should have a right to self-determination which facilitates further prostitution seems to be an abrogation of that self-determination, to say nothing of dignity and respect. For those who view prostitution as a human rights violation Edwards argues that there is a need to move away from the moral basis of prostitution legislation, and to frame future legislation on the basis of exploitation and harm. The European dimension, and in particular the incoming tide of what Edwards terms Europe's "sex market", is considered. The author makes the point

²⁷ At pp 159-160.

that the trade in sex has already begun to make an impact on European Community law in the name of freedom of movement of goods and services. She points to licensed sex shops, soft porn satellite television stations, and the ability of European prostitutes to function in the UK sex industry. Her commentary here is rather strange in its desire to preserve English law from the influence of this European sex industry. Having identified the global dimension, Edwards here expresses concern solely in relation to English women.

The following five chapters focus on the issue of criminal justice and women, and it is in this area that one can best form a view as to whether Edwards is making a truly radical contribution to feminist jurisprudence or whether in fact she is simply documenting the great volume of material which exists to date. While the latter is useful, it is arguably more urgent to have an account which moves the debate further along, giving an indication of the directions for future reform and thought.

At the beginning of chapter 5, which focuses on domestic violence and the issue of privacy, the author concedes that law is only one of several ways in which male violence against women can be addressed, but claims that its importance remains as a powerful symbolic statement and barometer of society's unwillingness to tolerate such violence. For this reason the reform of the law, including its more effective application and implementation, has been a major task of contemporary feminism. Notwithstanding recent developments such as spousal compellability and relaxation of the rules of evidence, the victim of domestic violence, according to Edwards, is still very much unprotected within the criminal process. Sentencing tends to be derisory. In sentencing negotiations counsel for male abusers frequently invoke ideologies which promulgate a divide between domestic violence and other crimes of violence in minimalizing the criminality and perceived dangerousness of their clients.²⁸ With regard to the phenomenon of victim impact statements and the question of acquainting the court with the victim's needs, defence lawyers regard them as an opportunity to reduce sentence by placing justice for victims back in the family domain. Once again it is ironic that a supposedly feminist and woman-friendly reform, for which indeed many women's groups agitated, is discovered on application to have had not quite the effect it anticipated. In this context Edwards reviews a number of decisions supporting the thesis that the impact of victim statements at the sentencing stage has negative rather than positive indications from the point of view of prosecuting and sentencing of domestic violence offenders, and comments:

"If, as some of these cases clearly indicate, the 'apparent' wishes of victims have a varying impact on the sentencing process in domestic violence, this is a most disturbing trend. Women are 'got at' by the men themselves, by their relatives and by their lawyers, the victims are encouraged to believe that only they can make a difference to the sentence. Women's sense of responsibility is absolute and overwhelming and women never escape from this cycle of duress."²⁹

The author unfortunately does not pursue the implications of this finding in relation to supposed women-friendly reforms for future feminist stratagems for change.

Another indication that domestic violence is being trivialised and privatised is the documented trend towards mediation in North America

²⁸ At p 208.

²⁹ At p 212.

and in England and Wales. Edwards gives particular attention to civil remedies in the context of domestic violence and, with a particular resonance for the Irish context where the civil remedies have been the ones that have received most recent attention, comments that the existence of a specific civil legal remedy to address domestic violence outside the general arena of the remedy for assault in tort serves to reaffirm the belief that domestic violence is a civil and not a criminal matter.³⁰ She also makes the point that such legislation in providing a very restrictive view of the range of applicants eligible for protection merits a concept of a legal rather than a social family. Thus the civil remedies are largely restricted to cohabiting or married couples so that partners living apart, ex-cohabitees, ex-spouses and girlfriends are not protected by such legislation. Definitional difficulties also arise in respect of living together where some parties may spend only part of the week cohabiting. The suggestion is that the concept of a family, as embraced by these provisions, is both outdated and incongruous. While the author's critique of the appropriateness of civil or criminal remedies is well made, it would have been useful if in this or in an overall thematic chapter she had linked and reviewed these recurrent issues.

Chapter 6 examines the so-called "battered woman syndrome". Edwards makes the point with regard to the use of the battered woman syndrome defence strategy as it has been developed by defence lawyers in North America and Australia that whilst evidence of the syndrome may assist in acquainting the jury with the long-term effects of persistent violence on the mental state, particularly the defendant's perception of imminence, this accommodation is achieved within a conceptual framework which ditches a woman's rights back into a pathological straightjacket focusing on her mind instead of the man's prior conduct.³¹ Many of the issues raised here are not restricted to the particular question of battered women syndrome, but raise the more general question of whether such adjustments truly engage with the legal system or simply become an additional adjunct designed for women. As the author comments, transcending the way a masculinist legal system, legal method and legal structure constructs law and utilises feminist insights as attempts at prosthetic rather than a root and branch treatment of law is one of the key feminist objections to engaging with the law at all.³²

An interesting dimension to this particular argument focuses on the manner in which battered women's syndrome is brought before the courts. In order to comply with the rules of evidence, which limit law's knowledge, testimony about battered women and the effects of battering has to be categorised as expert testimony. This has two consequences, in that it may imbue the evidence with greater authority, but at the same time the stance of that evidence becomes reified and not part of the common domain. As Edwards remarks, if knowledge about men is common sense and knowledge about women requires experts to speak to it, what does that say for the relevant status of that knowledge and its relevant ubiquity and exceptionality?³³ Within any jurisdiction the battered women's struggle is by no means over once this theory has been accepted by the courts, for she must then show that she fits the category in every respect that is going to assist her.³⁴ Edwards comments that it would appear that women are more likely to fit the model of battered woman syndrome

³⁰ At p 214.

³¹ At p 227.

³² At p 231.

³³ At p 234.

³⁴ At p 248.

where they are non-assertive and passive and conform to the legitimate victim stereotype:³⁵

“A question which inevitably arises is whether the syndrome perpetrates injustice against women who deviate from the syndrome’s mould, accommodating only those women who conform to the stereotype and thus diverting attention away from the extent of their victimisation onto the demands of a fixed psychological reaction to it.”³⁶

In sum, the author questions whether battered women syndrome is a panacea for masculinism in the law, or whether it further “psychiatrises” women and by doing so excludes many women from having their battering background considered by the courts. Battered women syndrome in the author’s view addresses only one aspect of the law and injustice to women; what is required is a root and branch treatment.

“The feminist critique of law must not be content with the piecemeal and highly controversial gains achieved by the admissibility of battered women syndrome....Emphasis should be placed more on the experience of being battered and less on establishing whether a defendant meets a pre-determined construction of the effects of battering on women.”³⁷

Chapter 7 deals with the sexual abuse of children. This is an issue of concern to feminism given that men are in large part the abusers of both children and women. Edwards does not seem to see the use of the criminal sanction in this context as problematic. It would have been useful to have had her justification of a position that is by no means uncontroversial. Zedner, for example, expresses the concern that criminal proceedings and penal sanctions are far from being an unproblematic solution to sexual offences against women and children:

“Insensitive intervention by the criminal justice system risks inflicting yet further harm on the victim. Whilst punishing sexual offenders may serve the purposes of public condemnation, retribution and temporary incapacitation, custodial sentences do little to review offending behaviour and may do much to exacerbate it.... Whether indeed it is reasonable or realistic to look to the criminal justice system to tackle the underlying problems that lead to sexual offending must remain open to doubt.”³⁸

In this connection, a recent report³⁹ emphasises the need for a multifaceted approach to these issues of concern. As the report points out, the problem of child abuse raises uncomfortable questions about adult power and responsibility, the structure of the western nuclear family, fatherhood, masculinity and male sexuality, as well as about the myths and fictions surrounding childhood.⁴⁰ It would have been useful if these thematic questions could have been linked throughout the text and further pursued.

Recent developments in this area have been marred or characterised by a number of scandals relating to over-zealous professionals and their

³⁵ As in *US v Whitetile* 956 F 2d 857 (1992).

³⁶ At page 253 of the text.

³⁷ At pp 262-3.

³⁸ “Sexual Offences”, in *Criminal Justice Under Stress* (Stockdale and Casale, 1992), at pp 282-3.

³⁹ *The Irish Report of the Working Party on the Legal and Judicial Process for Victims of Sexual and Other Crimes of Violence Against Women and Children* (National Women’s Council, Dublin, October 1996).

⁴⁰ *Op cit* at p 36.

identification of sexual abuse. The newer battleground of the 1980s and the 1990s is in the area of “recovered memory”. The problem of what has been called “false memory syndrome” has provided fresh ammunition for defence teams to discredit child sex abuse victims and rebut their allegations, thus, in the author’s words, “bringing us full circle once again to the denial and refutation of child sexual abuse, as a problem of the narrative of false allegations..”⁴¹ It is hard to deny the accuracy of her comment that the new battleground will be fudged by polarising the positions of the two camps, rather than listening to their valid claims and criticisms. Yet the broader implications of these scandals, and the issues posed for feminism and for justice, are not explored by Edwards, nor is the problematic nature of some of these proceedings explored.

In England, as in Ireland, there have been concerted efforts by those working with children and within the legal process to reform the rules of evidence in order to provide support and assistance to children in the giving of testimony. Edwards is quite justifiably cynical of some of these changes, particularly where they leave the remit of discretion to the judiciary. In relation to the recent changes with regard to corroboration, for example, she comments that this does not mean in considering general principles of justice that judges will refrain from offering a warning, but simply that they are released from a straightjacket of recitation of a set form of words. What they say may amount to the same thing.⁴² She notes that the perpetrators of child abuse frequently try to allocate blame to social and other family factors, to unhappy marriages, to unemployment, to the stresses and strains of life and to alcoholism. In mitigation of sentence the courts have also considered the effect on the victim and the willingness of the family, invariably the wife, to stand by the abuser. Where wives are willing to stand by their partners in the face of sexual abuse, the abuse is redefined as an episodic rather than a long-term problem. As the author concludes:

“The sexually abused child faces a social construction of child sex abuse which denies the reality and a legal system which perpetrates further violence. The ideology of the family as a safe haven from the demands of the public world continues to resist the reality of abuse. It is not a masculinist construction of child sexual abuse per se but a construction of the sanctity and implacable sanctuary of family life and the indelible, universal truth of parents as protectors which are the precepts that need continually to be challenged.”⁴³

Whatever one’s views on the appropriateness of the criminal sanction in this context, Edwards’ analysis of the role of the family and its mythology is fairly damning. Once again it is unfortunate that this critique is not linked with the issue of the family ideology documented elsewhere.

The eighth chapter, which looks at sex crime, sets out to explore the nature and extent of the sexual abuse of women and the negotiation of legal defences by perpetrators. At the beginning of this chapter the author adopts the mechanism used to great effect by Estrich,⁴⁴ whereby she personalises the experience feared by most women of exposure, literally, to the indecent behaviour of males. The main focus in this chapter is the law on rape. The author points out that fundamental assumptions about male and female sexuality are played out in rape law, the legal method

⁴¹ At page 289 of the text.

⁴² At p 314.

⁴³ At p 321.

⁴⁴ At (1986) 95 *Yale LJ* 1087.

governing rape, and the conduct of the cross-examination of the complainant in the rape trial, in which the law perpetrates further an ultimate violation on complainants. The thesis is a familiar one, but the discussion is characterised by a quality and amount of statistical and empirical information often absent from such work. One really interesting point made by the author is that in the 1990s a new approach has opened up to constructing violence and abuse. Her claim is that the comments made by the courts in the name of sexual liberalism indicate that what otherwise would have been in the domain of the violent is now considered part of the sexual. It is unfortunate that she does not expand on this point.

In the context of sentencing, Edwards points out that in sexual assault as elsewhere, the length of the sentence depends largely on the presence or absence of a prior relationship between the parties. She poses the interesting question of whether, now that the offence of rape in England applies also to men, male complainants will receive the same shoddy treatment as women. The author suggests that stereotypes and presumptions about male sexuality will no doubt be implied only where the complainant is homosexual, though in what way this will be done in practice we have yet to witness.

Chapter 9 focuses on the gender politics of homicide. Feminist critique of homicide in recent years has been focused on concern for the battered woman who kills. This has resulted in a focus on the woman's state of mind, often to the exclusion of the man's violence. In this context the author deals with the question of spousal homicide, examines the relevant law, and contrasts the availability of defences for men and women. Then she gets to the kernel of the matter, saying

“Whilst men utilise superior strength...killing through the use of brute force, women's physical incapacity means that they will often resort to a weapon to effect their purpose. The law's response to women's innate and conditioned incapacity is to deem certain methods of killing to be more or less indicative of heinousness and cold blooded intent and other methods to indicate passion and loss of self-control.”⁴⁵

The result of this is that women are more likely to be convicted of murder, or manslaughter on the grounds of diminished responsibility, and are less likely to be convicted of manslaughter on the grounds of provocation, than their male counterparts. It is the comparative dimension to Edwards' work here that is most gratifying. “Battered women who kill” defence analysis very often focuses solely on the woman and her accommodation by theories of justification and excuse. So the comparative analysis given by Edwards of men who kill and the contexts in which relative adjudications are made by the courts makes for interesting reading. The author precedes this analysis with a “flat statement of what the law is” on homicide. Whether this is really necessary is questionable, and one might take issue with some aspects of that account, but it is more than compensated for in the detailed and informed critique of decisions like *Ahluwalia*⁴⁶ and *Thornton*.⁴⁷ Edwards makes the case, for example, that an enormous significance attaches to the words used by the defendant to describe the state of mind at the moment of killing and in relation to *Thornton* comments: “Sara Thornton said, ‘there was no loss of self- control’...and by failing to explain herself in *the appropriate linguistic terminology*, she neglected the second element of the subjective test necessary for a

⁴⁵ At page 370 of the text.

⁴⁶ [1992] 4 All ER 889.

⁴⁷ [1992] 1 All ER 306.

successful defence of provocation”.⁴⁸ Interesting parallels could be made here with the tyranny of language in cross-examination in rape cases. These are alluded to by Edwards in the chapter on rape, but are not pursued here.⁴⁹

With regard to how much loss of self-control is required in provocation, Edwards comments that judges have become the exponents, arbiters and gatekeepers of traditional notions of what constitutes loss of self-control. Loss of self-control, as it is bound by a masculinist construction, is seen reflected in rage and anger rather than despair, exhaustion, isolation and hopelessness.⁵⁰ With regard to the requirements of English law as to the kinds of conduct likely to elicit a loss of self-control, the test requires jurors to consider how a reasonable man presented with the same facts might have reacted. In Ireland there have been attempts to soften the test,⁵¹ while in England recent cases such as *Ahluwalia*,⁵² *Humphreys*,⁵³ *Morhall*,⁵⁴ and *Dryden*⁵⁵ have all contributed to moving the debate forward in terms of interpretation of what constitutes a “characteristic” of the accused sufficient to be attached to the reasonable man. The notion of “cumulative provocation”, which allows for the inclusion of the background circumstances in assessing whether the reasonable man might have reacted in the same way, has also prospered. Edwards makes the point that the weapon used is relevant to the assessment of the defendant’s state of mind and loss of control. Thornton, she suggests, failed in provocation because of the time lapse caused by the need to obtain the weapon. Edwards suggests that whether the body or a weapon is used to perpetuate the violence is a consideration which disadvantages women.

While the weakest part of this chapter is probably the author’s “flat statement of the law”, its strength lies in gendering law’s underbelly. Edwards makes the point that that facts are indefatigably social and historical, which in the process of assimilation into legal rules lose their social facticity and acquire the guise of truths which have authority *sui generis*.⁵⁶ The problem with provocation for Edwards is simply its masculinism:

“Although not a rule of law, loss of self-control is acknowledged through rage, anger, passion and indignation. By contrast, there is no accommodation of a concept of loss of self-control through fear, panic, hysteria, and trauma, emotions which may not necessarily manifest themselves in the typified explosive outburst.”⁵⁷

The relationship Edwards documents between the recognition of the factual scenarios seen as provocation, the law, and the behaviour and language of men and women, is insightful as to its circularity:

⁴⁸ At page 379 of the text (emphasis added).

⁴⁹ Cf Matosesian, *Reproducing Rape - Domination through Talk in the Courtroom* (1993).

⁵⁰ At page 380 of the text.

⁵¹ *DPP v MacEoin* [1978] IR 27 purported to adopt an entirely subjective test, though the court also rather illogically maintained the requirement of a reasonable correlation between the provocation and the retaliation to it.

⁵² [1992] 4 All ER 889.

⁵³ [1995] 4 All ER 1008.

⁵⁴ [1995] 3 All ER 659.

⁵⁵ [1995] 4 All ER 987.

⁵⁶ At page 390 of the text.

⁵⁷ At p 394.

“Only certain grounds for provocation are given authority ... These archetypal scenarios serve to exculpate man, and such accounts are reproduced in law thereby becoming ‘authority’ in a reified form in two ways.... Men who kill learn to utilise and articulate the more socially acceptable and legally enshrined rationalisations in their own defence. Men’s pleas and defences are negotiated in the knowledge of the nature of legal rules and precedents, being guided by defence lawyers.”⁵⁸

The author points to a litany of cases where the less than model acquiescent wife is murdered and the loss of control alleged by the defendant receives the courts empathy. She reviews some of these cases, showing how it is victim precipitation which becomes the dramatic focus when men kill. By contrast, she points out, “when wives kill husbands, their reasons for killing are not given a voice”. In a passage full of potential for further development Edwards suggests that motives for murder become linguistic devices in the arena of developing a defence to murder. There is an interesting circularity here whereby what is defined or recognised in law becomes factually valid, which in return affects the assessment of the facts:

“The image of the troublesome husband does not exist within society and the comparison for the adulterous female or the nagging wife in the adulterous husband or the nagging husband does not have the same cultural meaning and is not considered in society or in law to be imbued with the same degree of provocation such as to make killing understandable or justifiable.”⁵⁹

Thus lawyers defending women in such cases face a tactical challenge: when building up the case for the defence the scene constructed must be one capable of convincing a jury of the congruence between social and legal accounts.⁶⁰

Women are similarly disadvantaged in raising self-defence, and as Edwards cogently points out, the central issue for battered women is that they know the offender, he has hit them before, he has threatened them and their anticipation of attack is grounded in empirical experience. In defending themselves they lose out, since the court is not satisfied that the attack is imminent.⁶¹ Again, the author’s most interesting insights here are on the *modus operandi*, which she identifies as a gendered question, in so far as it is the use of a weapon which disadvantages women. “Men who use the body to perpetrate deadly force, find that the method itself serves to obscure and conceal the ‘intent’ for practical legal purposes.”⁶² Again, in relation to sentencing she notes that when women kill it is only when the wife kills the violent husband that mitigation or exoneration is adduced. “Whether at the point of defences or at the point of sentencing, the accommodation of women can be likened to a poor prosthesis. Women can only succeed if they behave more like men, exploding in the heat of the moment.”⁶³ Notwithstanding the results in some recent cases,⁶⁴ Edwards’ conclusion is a somewhat depressing one:

⁵⁸ At p 396.

⁵⁹ At pp 398-399.

⁶⁰ At p 400.

⁶¹ At p 410.

⁶² At p 411.

⁶³ At p 417.

⁶⁴ *Thornton, Ahluwalia and Humphreys* (*supra* notes 47, 52 and 53). The author suggests that these decisions do justice first and law second.

“[L]aw authorises the particular statements of the male experience and the construction of reasonableness which it elevates into precedents, largely impervious to the experiences of women which are now beginning to challenge, if not falsify, the masculinist universal truths upon which the homicide heresy is built.”⁶⁵

As law itself and indeed legal method is selective or partial, feminists or writers in the areas of sex and gender in the legal process make decisions as to selection and focus. Feminists disagree as to how that focus should be formed, and whether lawyers or non-lawyers, may argue, as Smart suggests, that there has long been too great a focus on law. Undoubtedly many women lawyers feel the conflict of law and feminism and the difficulty of reconciling the two.⁶⁶ Is there even a distinct feminist method? Edwards sees the feminist perspective as grounded in feminist experience, insights and knowledge. She recognises that there are also many forces of feminist jurisprudence, and that it cannot speak for all women.⁶⁷

It is certainly true to say that *Sex and Gender in the Legal Process* does not speak for all women. Perhaps it does not purport to, but it particularly neglects those feminists whose focus is not only on the treatment of women and children by the legal system, but also on constructing the face of the legal system as women would have it to be. Although this is arguably a topic falling outside the proper purview of the present text, it does have ramifications for the subject matter, not solely because of what Edwards says and does not say in relation to issues of justice and rights for those accused, but also because so much of the public debate to date has ignored these issues. Yet their time may now have come. Many supposedly feminist concerns have been defined, if not hijacked, by conservative law and order politics, which hears only those (albeit legitimate) expressions of concern regarding particular crimes, such as rape, and “domestic” violence, and their impact upon women. A more radical feminism, which would address alternative ways of dealing with offenders and focus on the causes of crime, is ignored. To this extent, as feminism has moved to the centre, it has been tamed. Edwards’ text does not challenge that taming.

Part of the task of feminism, certainly in the criminal law field, must be to reclaim that territory. Superficial portrayals of clashes or conflicts, such as lawyers being concerned solely with fairness and feminists with prosecution, need to be revealed as just that. To accept such ready classifications and dualities is not just mistaken, but an impoverishment of the potential of feminist concepts of justice. It is as foolish as retaining a view of criminality structured along gender lines, in which men do violent acts, and women steal. Just as we need rather to understand why it is that *men and women* in certain situations commit crime, we need to avoid the easy demonisation of those who break the rules and their ready classification as abnormal. We need to be alert to the hijacking of legitimate fears on the part of women and men as part of government campaigns of moral panic and media portrayals of folk devils who can bear both male and female forms. Feminist lawyers and women activists need to carve a better response. A lead can be taken perhaps from a comment made by Supreme Court Justice Susan Denham in the context of a recent case: “When women and children come to the legal system it

⁶⁵ At page 419 of the text.

⁶⁶ Mossman, “Feminism and Legal Method” (1986) 3 *Australian Journal of Law and Society* at 30-52.

⁶⁷ At page 5 of the text.

would be a disservice to them if it was perceived that they sought vengeance rather than the rule of law and justice.”⁶⁸ The complexity of women’s lives, whether as victims of crime, people accused of crime or the relatives of those caught up in the criminal process, must surely be reflective of a broader and deeper concept of justice than that now so crudely offered.

Other feminists, of course, would take the view that either concern cedes too much to law. Thus Smart, for instance, feels that feminists like Mossman and Lahey take law too seriously, and makes a strong case for ignoring academic legal method and focusing on the law in practice.⁶⁹ By stressing how powerless feminism is in the face of law and legal method, we simply add to the power of the latter. Smart contends that it is important for feminism to sustain its challenge to the power of law to define women in legal terms. Whilst it is important that feminism should recognise the power that law can exercise, it is axiomatic that feminists do not regard themselves as powerless. It is easy to sympathise with Smart’s thesis that feminists have too often ceded power to law, seeing it as a more effective feminist instrument. In this way, far too much feminist energy has been used to introduce more and not necessarily better law, as in the fields of rape and sex abuse. But regardless of whether law reform should be a priority issue for feminist activists in general, and the not unrelated question of how they should go about it, there remains the dilemma posed to feminists within law as to where to take a stance when their feminism and legal training take different positions. Recent challenges are posed, for example, by issues of fair trial and due process in relation to cases of sexual abuse.⁷⁰ Is it as simple as considering fairness only in terms of fairness to the victim? Or the accused? Do feminists and lawyers necessarily line up on opposite sides? Do feminists lose out if they rank up on only one side, not only abandoning any concern for men accused of such crimes, but identifying such issues as off their agenda? Where does Edwards stand on these issues? Her very decision to exclude them from the purview of her text indicates the weight she places on their importance, and her view as to their irrelevance in relation to her task of exposing the masculinisms of what is, rather than what might be or ought to be. Yet this risks the interpretation that our concern in law, and within criminal law particularly, is with one side only: that of the (female) victim. Even the woman accused has a victim’s past. But do we have a philosophy wide enough to accommodate more than “victims”? Is feminism inextricably linked to conservative “law and order” politics?

It has been pointed out by Klein⁷¹ that the accommodation of feminist thinking in criminal law and criminology has often been of the “add women and stir” variety rather than involving any conceptual paradigm shift:

“The narrow high beam focused on deterring and punishing street crime has engulfed criminology and eclipsed most radical approaches to social problems including feminism. In this climate, the pro-feminist position that has succeeded best has been the advocacy of criminalizing individual violations (e.g. battering, sexual assault) and arresting and punishing the identified offenders. Law and criminology have accepted with relative

⁶⁸ In *G v DPP* [1994] 1 IR 238.

⁶⁹ *Op cit* at n 4.

⁷⁰ As in *G v DPP* [1994] 1 IR 238, *D v DPP* [1994] 2 IR 456, and *Z v DPP* [1994] 2 IR 476. The first two of these involved the problem of delay, and the third the problem of pre-trial publicity.

⁷¹ “Crime through Gender’s Prism,” in Rafter and Heidensohn, *op cit* at n 3.

willingness, albeit ill grace, those pro-woman perspectives centred on violent crimes, especially those involving relatively powerless offenders and respectable or 'legitimate' victims. These can be incorporated into the traditional paradigms. Less successful has been the advocacy of alternatives to punishment and incarceration for female and other offenders."⁷²

Klein makes the case for a new kind of feminist criminology and points the way, saying that feminists must refuse to play a game whose rules are not on their terms. We must instead question the construction of the fundamental dichotomies: feminine versus masculine, black versus white, stupid versus smart, criminal versus law-abiding, abnormal versus normal.⁷³ Perhaps we would also wish to share Klein's optimism: "Whatever a feminist vision of justice might incorporate, I predict that it would bear little resemblance to the present system of cyclical processing and confining of people at the economic bottom of our society."⁷⁴

Despite the criticisms that may be made of Edwards' thesis, she does succeed in exposing the inter-relationship of facts, law, truth and how we construct reality. She brings to light ways in which the law's power in a forgotten, or often not perceived way, colours all of our world vision and vocabulary. The challenge this poses is truly enormous. It is of the order of reconstructing not just reality but our way of viewing and interpreting it. The latter is deeply engrained, and vital. If it is to be removed in its entirety, and not just vestiges of it, it must be replaced. As Marina Warner points out about myths, they are not always delusions, and deconstructing them does not necessarily mean wiping them, but they represent ways of making sense of universal matters, like sexual identity and family relations, and they enjoy a more vigorous life than we perhaps acknowledge, and exert more of an inspiration and influence than we think.⁷⁵ Feminists bear a responsibility for what they have demystified, for the possibilities they have opened up, and for the crises they have engendered with their queries.

To gain control of, to further focus and to expand the debate, the feminist perspective or methodology needs to find terms which do not just address that which is given to women, in the sense it has been defined as ours, by the current status quo. To paraphrase MacKinnon, that is a definition which is not ours. Ours is a broader canvas entirely. It is here that the next work must be done.

The next stage will not be easy. It may not be as marked with the ready certainty or consensus as to injustice as hitherto. There may be dissonance and diversity as to choices and priorities, and uncertainties as to what justice might comprise. But this does not detract from the importance of the task. As Lahey succinctly puts it, the ambiguities and ambivalence which are in male thought the hallmarks of uncompleted or imperfect theory, are within a feminist praxis crucial aspects of moments of knowing.⁷⁶ To the extent that the task is difficult it will bring reward. Facing a road heading into uncharted territory should not fill feminist travellers with fear. Edwards demonstrates how well it has been mapped to date. Her text is a worthy milestone on the way.

⁷² *Op cit*, pp 218-219.

⁷³ *Op cit*, p 225.

⁷⁴ *Op cit*, p 233.

⁷⁵ *Six Myths of our Time* (1994), at pp xix-xx.

⁷⁶ [1985] 22 *Osgoode Hall Law Journal* 519.

