

CRITIQUE AND COMMENT

DOMESTIC VIOLENCE, DISCOURSES OF ROMANTIC LOVE, AND COMPLEX PERSONHOOD IN THE LAW

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[The assumption that it is contradictory for women to love men who abuse them physically, psychologically and sexually is sometimes used in cross-examination of women who have been in abusive relationships to suggest that they are lying about the abuse, or to impinge their credibility as witnesses. This article challenges that assumption by considering selected dominant discourses of romantic love that constrain women's narratives of love and integrate domestic violence as part of love. The article then invokes the spectre of the jurisdiction of women's Courts of Love, highlighting the common law's repression of jurisdiction over matters of love, its lack of precedent within which to interpret women's statements of love, and its focus on relationships as functions of property. The constraints of discourses of love, the lack of common law precedents, and the paradoxical project of asserting agency in the act of constructing oneself as an object of love, all circulate in the courtroom dynamic in which women make statements of love about abusive men.]

I INTRODUCTION

Margaret Raby killed her husband after a history of abuse¹ which was described by the judge as 'effectively imprison[ing] ... [her] and then brainwash[ing] ... [her] physically, psychologically and sexually'.² Margaret Raby testified: 'I loved Keith very much with all my heart and I thought what I could give him, sir, with my love and psychiatric help, we could overcome what he did to me.'³

She also testified, 'I thought what I could give him — my love, anything he wanted, would [stop the abuse] ... but it didn't.'⁴ Later she testified, 'I loved

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¹ Therese McCarthy, 'Battered Woman Syndrome: Some Reflections on the Invisibility of the Battering Man in Legal Discourse, Drawing on *R v Raby*' (1994) 4 *Australian Feminist Law Journal* 141, 141:

Margaret Raby described her experience of torture at the hands of her husband in 59 pages of transcript. Her evidence contained graphic descriptions of Keith Raby's behaviour including constant sexual assaults, humiliation and degradation in the form of him defecating, urinating and vomiting on her. She was constantly threatened with the possibility of mutilation and death, as Keith Raby's modus operandi was to place lethal weapons throughout the home for ready accessibility to threaten and injure Margaret Raby.

² *R v Raby* (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994) 1–2.

³ Transcript of Proceedings, *R v Raby* (Supreme Court of Victoria, Teague J, commencing 17 October 1994) 362.

⁴ *Ibid* 349.

him,' to which the prosecutor replied, '[a]nd he wasn't really a bad fellow, was he?'⁵

Olga Runjanjic and Erika Kontinnen were both subjected to severe violence by Edward Hill, who forced them into prostitution and virtually made slaves out of them.⁶ When asked by the police, '[h]ow could you still love ... [Hill]?', Runjanjic replied, '[I]ove is strange, love is blind.'⁷ It also came out at the trial that 'Erika said, "[s]ometimes I felt like I loved him."⁸ A psychiatrist who testified as an expert witness was asked, '[w]hy is it that she can say that she loved this man Hill who beat her to the point of requiring hospitalisation?'⁹ After 11 years of often severe abuse and several attempts to leave, Gay Oakes killed her husband. At her trial the prosecutor stated, 'you spent the last 2 days telling us what a terrible man he was and yet you say you still loved him.'¹⁰

The assumption that it is contradictory for women to love men who abuse them physically, psychologically and sexually¹¹ is sometimes used in cross-examination of women who have been in abusive relationships to suggest that they are lying about the abuse,¹² or to impinge their credibility as witnesses. The (seemingly common sense) logic is that it is contradictory for the woman to love someone who abuses her. If she says she loves him, then he must not have abused her, or she must be abnormal or crazy, or, at a minimum, her testimony must not be credible. My experience as an activist in the women's movement to end domestic violence suggests the possibility that some activists may be influenced by this logic. Sometimes activists are uncomfortable with, or embarrassed for, women who state that they love their abusers. This reaction may also be based on assumptions that loving an abuser is inconsistent with the violence, a sign of unbalance, or inconsistent with feminist conceptions of gender relations.

Domestic violence occurs at alarming levels in New Zealand¹³ and in other countries. Overwhelmingly, the perpetrators are men,¹⁴ and the victims are

⁵ Ibid 386.

⁶ Joanna Brodie, "'All Youse Three Will Be Dead in the Morning": The *Kontinnen Case*' in Kerry Greenwood (ed), *The Thing She Loves* (1996) 44, 49.

⁷ Ibid 44, citing Transcript of Proceedings, *R v Runjanjic*; *R v Kontinnen* (Supreme Court of South Australia, Mohr J, commencing 20 March 1991) 20.

⁸ Brodie, above n 6, 44, citing Transcript of Proceedings, *R v Kontinnen* (Supreme Court of South Australia, Legoe J, commencing 26 March 1992) 432.

⁹ Brodie, above n 6, 44, citing Transcript of Proceedings, *R v Kontinnen* (Supreme Court of South Australia, Legoe J, commencing 26 March 1992) 24.

¹⁰ Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 150.

¹¹ Terry Threadgold, 'Performativity, Regulative Fictions, Huge Stabilities: Framing Battered Woman's Syndrome' (1997) 3 *Law Text Culture* 210, 222.

¹² See, eg, Notes of Evidence, *R v Wang* (High Court of New Zealand, Eichelbaum CJ, commencing 27 February 1989) 73.

¹³ Allison Morris, *Women's Safety Survey 1996* (1996) 66, found that 24% of women with current partners and 73% of women with recent partners reported at least one act of physical or sexual abuse by their partner. Morris also states that the level of violence against women by their partners in New Zealand is high compared with Australia and Canada: at 70. The National Collective of Independent Women's Refuges ('NCIWR') had over 122,000 beds occupied in the two years from 1 July 1996 – 30 June 1998: NCIWR, *NCIWR Statistics: 1 July 1996 – 30 June 1998* (1998). According to the Wellington Commissioner of Police, police attend 40,000 domestic violence incidents per year: Greg Ford, *Research Project on Domestic Disputes: Final Report*

women.¹⁵ Almost 40 per cent of all homicides in New Zealand are domestic-related,¹⁶ and the vast majority of these are committed by men who kill their intimate female partners.¹⁷ Women are more likely to be killed by a partner or former partner than by anyone else. Abusers often suffer no legal consequences as a result of their behaviour.¹⁸ Some battered women do strike back and kill their abusers, often after suffering many years of violence perpetrated by the men whom they kill.¹⁹

(1986). See also Hilary Haines, *Women's Mental Health: Research Issues in Women's Health Research: Report of Workshop* (1989) 52–5.

- ¹⁴ In its first two years of operation approximately 900 men and two women were referred to the Hamilton Abuse Intervention Pilot Project as a result of their use of domestic violence. These were referrals from Community Corrections, referrals from the Family Court and self-referrals: Ruth Busch and Neville Robertson, "What's Love Got to Do With It?" An Analysis of an Intervention Approach to Domestic Violence' (1993) 1 *Waikato Law Review* 109, 128. In 1986, New York State police reported a total of 52,568 incidents of intimate violence, including violations of existing protective orders; 74% of these were perpetrated against women by husbands or common law husbands and only 9% were perpetrated by wives or common law wives against men: Governor's Task Force on Domestic Violence, New York State Department of Criminal Justice, *New York State Domestic Violence* (1986). See also Angela Browne, *When Battered Women Kill* (1987) 8, who states that 94–95% of all partner assaults are women victimised by men.
- ¹⁵ Every week a woman in New Zealand is killed or dies as a result of injuries inflicted by an intimate partner: NCIWR, *Fresh Start: A Self Help Book for New Zealand Women in Abusive Relationships* (1993) 10.
- ¹⁶ In 1978–87, at least 39% of all homicides in New Zealand were domestic-related: Janet Fanslow, David Chalmers and John Langley, *Injury From Assault: A Public Health Problem* (1991) 10. In 1990, 28 of 67 homicides were domestic-related and 17 of the non-domestic homicides were the Aramoana shootings: Dave Smith, 'Abuse Intervention Overview: A Background Paper' (Paper presented at the Family Violence: Prevention in the 1990s Conference, Christchurch, 3 September 1991) 53–4. In 1993, 24 of 55 homicides in New Zealand were domestic-related. Of the 65 homicides committed in New Zealand in 1994, 24 (37%) were identified as the direct result of family violence: Rebecca Norris, 'Children's Death Most Tragic in Violent Year', *The Dominion* (Wellington, New Zealand), 7 January 1995, 10.
- ¹⁷ In New Zealand between 1978 and 1990, 126 women were killed by their male partners and 22 men were killed by their female partners: Paul Huggett, 'Sleeping with the Enemy' (1993) 1 *More Magazine* 31. In 46% of the 1994 homicides identified as resulting directly from family violence the victims were women and 16 out of 17 of the offenders were male: Norris, above n 16; Elizabeth McDonald, 'Provocation, Sexuality and the Action of "Thoroughly Decent Men"' (1993) 9 *Women's Studies Journal* 126, 127. For the Australian statistics, see Marianne James and Carlos Carcach, *Homicide in Australia 1989–96* (1997). In Canada, an average of 70 women are killed each year by their intimate partners. Of family-related homicides, 37% involve men killing their intimate partners while women are identified as suspects in only 12% of those homicides: fn 83 of Donna Martinson et al, 'A Forum on *Lavallee v R*: Women and Self-Defence' (1991) 25 *University of British Columbia Law Review* 23, 40. In the United States in 1987, out of a total of 3317 intra-family murders, 31.5% (1045) of the victims were female partners and 16.4% (543) were male partners: Bureau of Justice Statistics, United States Department of Justice, *Domestic Violence Statistics* (1989) 12; in 1997, women were almost three times as likely as men to be killed by intimate partners. In England and Wales, women are also more likely to be the victims of homicide than the perpetrators: Katherine O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18 *Journal of Law & Society* 219, 220. In 1989, 45% of female victims were killed by male intimate partners, while 7% of male victims were killed by female partners: Home Office, *Criminal Statistics England and Wales* (1989).
- ¹⁸ Ruth Busch, Neville Robertson and Hilary Lapsley, *Protection From Family Violence: A Study of Protection Orders Under the Domestic Protection Act* (1992); *Lavallee v The Queen* [1990] 1 SCR 852, 872; 55 CCC (3d) 97, 112: "[W]ife battering" was rarely spoken of, rarely reported, rarely prosecuted and even more rarely punished"; Lenore Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (1989) 241.
- ¹⁹ Mary Ann Dutton (review paper edited by Malcolm Gordon), 'Validity of "Battered Woman Syndrome" in Criminal Cases Involving Battered Women' in United States Department of Justice, *The Validity and Use of Evidence Concerning Battering and Its Effects in Criminal Trials*

Feminists have made heroic efforts to combat the myth²⁰ that women who 'stay' in abusive relationships are masochistic;²¹ we know that the assumption that women are autonomous actors with the resources necessary to leave these relationships at any point is often erroneous,²² and that, despite the often horrendous obstacles, many women do seek help and attempt to leave violent relationships repeatedly.²³ We also know that these attempts may be thwarted by the abuser and others such as family members, clergy and social workers. We know that interventions that are successful in stopping the violence are rare.²⁴

Feminists have also made heroic efforts spanning many centuries²⁵ to attempt to ensure that the legal system listens to, and responds to, domestic violence appropriately.²⁶ Most recently these efforts have included the creation of

(1996); Holly Maguigan, 'Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals' (1991) 140 *University of Pennsylvania Law Review* 379, 397. As A Renee Callahan, 'Will the "Real" Battered Woman Please Stand Up? In Search of a Realistic Legal Definition of Battered Woman Syndrome' (1994) 3 *American University Journal Gender & Law* 117, 125-8, observes, '[m]ost female related homicide defendants had been battered by the men whom they killed.'

²⁰ R Emerson Dobash and Russell Dobash, *Women Violence and Social Change* (1992) 158:

By the 1930s psychoanalysis had enshrined the myth of masochism into its conceptions of normal female psychology. Based on these speculations presented as scientific truths, it was argued that women derived sexual gratification from the violence they experienced. These professional discourses filtered into judicial thinking of the time both in Britain and in the United States, reinforcing and legitimating conventional perceptions of female victims (citation omitted).

²¹ Ibid 223-8. This myth lives on. Despite studies indicating that women survivors of domestic violence do not differ from other women, therapeutically oriented commentators and researchers continue to locate these women's problems in their personalities and backgrounds. These approaches reinterpret the problems for women living in a patriarchal society into evidence of masochism.

²² See generally Martha Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90 *Michigan Law Review* 1; Martha Mahoney, 'Exit: Power and the Idea of Leaving in Love, Work and the Confirmation Hearings' (1992) 65 *Southern California Law Review* 1283; Lee Ann Hoff, *Battered Women As Survivors* (1990) 42.

²³ Dobash and Dobash, above n 20, 230; Hoff, above n 22, 81-115. Maguigan, citing Stephen Schulhofer, notes that 'most battered women who kill report calling the police at least five times before the lethal incident': Maguigan, above n 19, 398 fn 68.

²⁴ See generally Cynthia Gillespie, *Justifiable Homicide: Battered Women, Self-Defence and the Law* (1989).

²⁵ For a discussion of feminists' work in this area generally in the seventeenth century, see Peter Goodrich, 'Epistolary Justice: The Love Letter as Law' (1997) 9 *Yale Journal of Law & the Humanities* 245.

²⁶ See, eg, Elizabeth Schneider, 'Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering' (1986) 9 *Women's Rights Law Reporter* 195; Elizabeth Schneider, 'The Dialectic of Rights and Politics: Perspectives from the Women's Movement' (1986) 61 *New York University Law Review* 589; Elizabeth Schneider, 'Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse' (1992) 67 *New York University Law Review* 520; Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241; Linda Ammons, 'Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome' [1995] *Wisconsin Law Review* 1003; Julie Stubbs and Julia Tolmie, 'Race, Gender and the Battered Woman Syndrome: An Australian Case Study' (1995) 8 *Canadian Journal of Women and Law* 122; Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Defending Battered Women on Trial: The Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369; Denise Bricker, 'Fatal Defense: An Analysis of Battered Woman's Syndrome Expert Testimony for Gay Men and Lesbians Who Kill Abusive Partners' (1993) 58 *Brooklyn Law Review* 1379; Ian Leader-Elliot, 'Battered But Not Beaten: Women Who Kill in Self Defence' (1993) 15 *Sydney Law Review* 403; Mary Ann Dutton, 'Understanding Women's Responses to Domestic Violence:

women's organisations such as coalitions of shelters for battered women. Efforts have also included: public education; policy-making; judicial, legal personnel and police training; law reform; and health initiatives.²⁷ Yet the quotes above tap into ongoing resistance to hearing the stories of battered women in all of their complexity. The complexity of the entanglement of the imagination with available stories is reflected in Avery Gordon's concept of complex personhood:

Complex personhood means that all people (albeit in specific forms whose specificity is sometimes everything) remember and forget, are beset by contradiction, and recognize and misrecognize themselves and others. Complex personhood means that people suffer graciously and selfishly too, get stuck in the symptoms of their troubles, and also transform themselves.²⁸

The stories of love that these women tell to make sense of their lives draw on discourses of romantic love:

[T]he stories people tell about themselves, about their troubles, about their social worlds, and about their society's problems are entangled and weave between what is immediately available as a story and what their imaginations are reaching toward.²⁹

The imagination is both shaped and constrained by the stories available; simultaneously it reaches beyond those discourses, exceeding their constraints.

Challenges to the credibility of women who love or loved abusive men are indications of the inability of society and the legal system to recognise the complex personhood of these women. Some strands of dominant discourses of romantic love facilitate domestic violence by portraying abuse of women as an integral part of romantic love. Analysis of discourses of romantic love, and the courtroom dynamics in which the statements of love are made, facilitates our

A Redefinition of Battered Woman Syndrome' (1993) 21 *Hofstra Law Review* 1191; Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58 *Albany Law Review* 973; Ruth Busch, 'Was Mrs Masina Really "Lost"? An Analysis of New Zealand Judges' Attitudes Towards Domestic Violence' (1993) 8 *Otago Law Review* 17; Nan Seuffert, 'Battered Women and Self-Defence' (1997) 17 *New Zealand University Law Review* 292; Nan Seuffert, 'Locating Lawyering: Power, Dialogue and Narrative' (1996) 18 *Sydney Law Review* 523.

²⁷ Many feminists and activists who work in this area and, to a much more limited extent, judges and other personnel in the legal system, have adopted an analysis of domestic violence as a series of tactics used by an abuser to gain and maintain power and control over a woman. See, eg, Ellen Pence, *The Justice System's Responses to Domestic Assault Cases: A Guide for Policy Development* (1989); Ellen Pence and Michael Paymar, *Power and Control: Tactics of Men Who Batter* (1986) 30; Mahoney, 'Legal Images of Battered Women', above n 22, 5. For discussions of a power and control approach to domestic violence in the New Zealand context, see Graham Barnes et al, *Domestic Violence* (1993) 2–9; Ruth Busch and Neville Robertson 'An Intervention Approach to Domestic Violence' (1993) 1 *Waikato Law Review* 109; Nan Seuffert, 'Lawyering for Women Survivors of Domestic Violence' (1996) 4 *Waikato Law Review* 1, 9–13. This analysis rejects the myth that battered women are masochists. However, it has little to say about women's statements that they loved their abusers.

²⁸ Avery Gordon, *Ghostly Matters: Haunting and the Sociological Imagination* (1997) 4, where Gordon further states: 'It has always baffled me why those most interested in understanding and changing the barbaric domination that characterises our modernity often — not always — withhold from the very people they are most concerned with the right to complex personhood.'

²⁹ Ibid. See also Margaret Davies, *Delimiting the Law: 'Postmodernism' and the Politics of Law* (1996) 117–20; Peter Goodrich, 'Law in the Courts of Love: Andreas Capellanus and the Judgments of Love' (1996) 48 *Stanford Law Review* 633, 636.

understanding of both the complex personhood of these women and the legal system's resistance to recognising this complexity.

In Part II of this article, I consider selected dominant discourses of romantic love. Kant's philosophical exposition of romantic love, Shakespeare's *Othello* and *Romeo and Juliet*, other literature, and popular culture all shape, and are shaped by, dominant discourses of romantic love. The examples that I have chosen reflect themes represented in the women's statements of love in court. Analysis of these discourses reveals the sedimentation of these themes over time. Women who are subject to physical, sexual and emotional abuse may position themselves within the sedimented layers of constructions of romantic love in order to 'make sense' of their situations and as coping strategies.³⁰ Terry Threadgold's nuanced analysis illuminates the paradox of these women's assertions of agency in positioning themselves within these discourses, at the same time as the discourses work to constrain their statements within a framework that condones the violence.³¹ Simultaneously, their statements may invoke a love that exceeds, or haunts, this narrow framework.³² These paradoxes and contradictions begin to reflect and refract complex personhood. The reductionist assumption that statements of love impinge on these women's credibility because they are inconsistent with abuse by the male partner denies this complex personhood.³³ It should be noted, however, that not all women who kill their abusers loved them, or so testify in court.³⁴ Indeed, dominant conceptions of romantic love, in addition to often perpetuating gender hierarchies, are also often racialised, culturally specific, heterosexual, and class-specific.³⁵ These limitations of the dominant conceptions may preclude their adoption by many women.

Part III of this article invokes spectres of jurisdictions that haunt the common law. The common law evolved to protect private property.³⁶ It addresses relation-

³⁰ Threadgold, 'Framing Battered Woman's Syndrome', above n 11, 222.

³¹ Terry Threadgold, 'Narrative and Legal Texts: Telling Stories about Women Who Kill' (1997) 3(1) *The University of Technology Sydney Review* 56, 67. See also McCarthy, above n 1, 144, 150.

³² A study of haunting may be a study about the return of that which is repressed: '[T]hat which appears absent can indeed be a seething presence': Gordon, above n 28, 17.

³³ Gordon states that the denial of complex personhood can result in the haunting of reductionist representations:

[T]he ghostly haunt ... [is] a form of social figuration that treats as a major problem the reduction of individuals 'to a mere sequence of instantaneous experiences which leave no trace, or rather whose trace is hated as irrational, superfluous, and "overtaken"': *ibid* 20 (citation omitted).

³⁴ 'I started not to love him': Notes of Evidence, *R v Zhou* (High Court of New Zealand, Anderson J, commencing 4 October 1993) 79. 'Even though I married him I have never loved him': Notes of Evidence, *R v Wang* (High Court of New Zealand, Eichelbaum CJ, commencing 27 February 1989) 61.

³⁵ With respect to class, see, eg, Judy Giles, "'You Meet 'Em and That's It': Working Class Women's Refusal of Romance Between the Wars in Britain' in Lynne Pearce and Jackie Stacey (eds), *Romance Revisited* (1995) 279.

³⁶ See, eg, J W Harris, *Property and Justice* (1996) 4-5; Kenneth Minogue, 'The Concept of Property and its Contemporary Significance' in Elizabeth Mensch and Alan Freeman (eds), *Property Law* (1992) vol 1, 3, 4; Peter Stein, *Legal Evolution: The Story of an Idea* (1980) 35-46; M D A Freeman, *Lloyd's Introduction to Jurisprudence* (6th ed, 1994) 139-41; P S Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 102-3.

ships as functions of private property.³⁷ Peter Goodrich's richly textured work on women's Courts of Love analyses the common law's repression of jurisdiction over matters of love.³⁸ Goodrich's work brilliantly highlights the margins and spaces between the ubiquitous dualisms of the common law. His work sheds light on the void of the common law precedent into which these women's stories of love and domestic violence fall. Feminists' historicisations of domestic violence law reform³⁹ and legal constructions of love⁴⁰ complete the picture of the common law's historical jurisdictional focus on women as property circulating among men, the preservation of gender power differentials, and the continued exclusion of jurisdiction over romantic love in the current common law. I argue that courtroom statements by abused women that they love or loved their abusers are constrained within the common law's narrow recognition of relationships as functions of property. At the same time, these statements haunt the common law's narrow jurisdiction, highlighting the lack of precedents concerning love or relationships beyond, or outside of, property relations. The invocation of the spectre of love threatens the myth of closure of the common law⁴¹ at the same time as it seems 'incredible'.

Part IV of this article considers the courtroom dynamics, within the context of the larger society, in which women make statements that they loved men who abused them. The combination of the constraints of discourses of romantic love, the lack of common law precedents of relationships and love into which these claims fall, and the paradoxical project of asserting agency in the act of constructing oneself as an object of love, results in a dynamic that occludes recognition of complex personhood and reproduces reductionist representations of love.

II ROMANTIC CONSTRUCTIONS OF LOVE

Statements of love in a courtroom evoke a sedimented history of constructions of love within which they are interpreted. This section considers selected discourses from that sedimentation in which women who kill their abusers may position themselves consistent with loving those abusers. It argues that denial of the complexity of such positioning, which may both draw on and exceed those discourses, and contradictorily requires the assertion of agency to produce

³⁷ See below nn 140–142 and accompanying text.

³⁸ See, eg, Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29; Peter Goodrich, *Law in the Courts of Love* (1996).

³⁹ Reva Siegel, "'The Rule of Love': Wife Beating as Prerogative and Privacy' (1996) 105 *Yale Law Journal* 2117; Clare Dalton, 'Domestic Violence, Domestic Torts and Divorce: Constraints and Possibilities' (1997) 31 *New England Law Review* 319; Dobash and Dobash, above n 20, 146–213; Linda Gordon, *Heroes of Their Own Lives, The Politics and History of Family Violence* (1988).

⁴⁰ Jane Larson, 'Women Understand So Little, They Call My Good Nature "Deceit": A Feminist Rethinking of the Seduction' (1993) 93 *Columbia Law Review* 374; Anthony Cook, 'The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence' (1994) 82 *Georgetown Law Journal* 1431; Laurence Tribe, 'Revisiting the Rule of Law' (1989) 64 *New York University Law Review* 726.

⁴¹ Goodrich, *Law in the Courts of Love*, above n 38, 137, states that '[t]he claim to the unity of judgment or to the closure of law at best represents a fiction and at worst a symptom of a confused forgetting or a deeply unhappy repression.'

oneself as an object within those discourses, is a denial of the complex personhood of these women.

In her recent discussion of prohibitions on 'hate speech', Judith Butler is careful to recognise the reality of the wounds of hate speech.⁴² At the same time, she emphasises that the wounding requires, for its injury, citation to a sedimented history⁴³ of racism, sexism or homophobia.⁴⁴ These histories are part of the ability of the words to wound. The statement of love of an abusive man by a woman who has killed him is a citation to a sedimented history and social practice, as well as social construction,⁴⁵ of love:

[Romantic love] is one of the most compelling discourses by which any one of us is inscribed; throughout the world there are cultures in which individuals are educated in the 'narratives of romance' from such an early age that there is little hope of immunity.⁴⁶

The citation to a history of racism, sexism and homophobia in hate speech is a matter of much current philosophical and political debate.⁴⁷ However, these women's citations to a sedimented history of romantic love constrain their assertions of agency at the same time as they are arguably not heard in the courtroom, and are not the subject of widespread debate. This section therefore analyses the sedimented history of love that these women cite, focusing on a few texts that reflect themes of love and abuse. Unravelling these narratives reveals the interweavings of the women's statements of love with sedimented tales of romance.

Shakespeare's love tragedies and comedies are powerful and both timely⁴⁸ and timeless reflections of dominant discourses of romantic love. At the same time, they can be interpreted as challenging and reshaping those discourses. *Othello* and *Romeo and Juliet* are particularly relevant to my analysis of discourses of romantic love: *Othello* for its construction of female romantic love as constant in the face of abuse, and *Romeo and Juliet* for its tale of the tragic inevitability of sacrifice and suffering. These plays are also examples of the ways in which discourses of love are gendered, working in particular to bind women to men: 'love in Shakespeare ... [is] something that women feel for men.'⁴⁹ Loving men is the reason for women's existence and requires their complete devotion, body

⁴² See, eg, Judith Butler, *Excitable Speech: A Politics of the Performative* (1997) 50: 'That words wound seems incontestably true, and that hateful, racist, misogynist, homophobic speech should be vehemently countered seems incontrovertibly right.'

⁴³ Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (1990) 139.

⁴⁴ *Ibid* 46–54.

⁴⁵ Irving Singer, *The Pursuit of Love* (1994) 49, observes that 'sexual love is itself a social phenomenon'.

⁴⁶ Jackie Stacey and Lynne Pearce, 'The Heart of the Matter: Feminists Revisit Romance' in Pearce and Stacey (eds), above n 35, 12.

⁴⁷ For a survey of this debate, see, eg, Threadgold, 'Framing Battered Woman's Syndrome', above n 11, 212–13. See also Mari Matsuda et al (eds), *Words That Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (1993).

⁴⁸ See, eg, Gabriella Martinelli and Baz Luhrmann (Producers), *William Shakespeare's Romeo & Juliet* (20th Century Fox Home Entertainment, 1997).

⁴⁹ Evelyn Gajowski, *The Art of Loving: Female Subjectivity and Male Discursive Traditions in Shakespeare's Tragedies* (1992) 25.

and soul.⁵⁰ The orientation of women's whole identity around loving a man in heterosexual discourses of romantic love is not reciprocated by constructions of heterosexual masculine love;⁵¹ men retain their autonomous identity even though they are 'in love'.

As Threadgold has argued, *Othello* can be read as a play about a jealous, insecure, abusive husband and a wife who is loving and empathetic in the face of abuse.⁵² Desdemona's character provides a good example of the paradoxes forced on abused women by the constraints of the dominant discourses within which they construct their love. Desdemona's love remains constant in the face of Othello's jealous insecurity, suspicion and abuse. These themes, especially an exaggerated jealousy, are reflected in many of the cases that I have quoted. For example, Gay Oakes testified that some severe beatings were explained by her abuser in terms of exaggerated jealousy triggered by trivial acts.⁵³

Othello can be interpreted as consistent with patriarchal constructions of relationships, within which women are constructed as objects of desire or as property,⁵⁴ and in which women submit to men's authority and act only as passive mirrors of men,⁵⁵ reflecting them back at twice their size.⁵⁶ Within these patriarchal discourses, some commentators have interpreted Desdemona's character as passive, dumb and dazed.⁵⁷ The tendency among commentators is to deny her complex personhood in the same manner in which women who kill their abusers are denied complex personhood.⁵⁸ This construction ignores the possibility of Desdemona's agency in choosing to construct her love as constant in the face of adversity, consistent with an idealised version of love:

⁵⁰ Ngairé Naffine, 'Possession: Erotic Love in the Law of Rape' (1994) 57 *Modern Law Review* 10, 13: '[T]here is no loss of sovereignty for (the real) man when he loves a woman. He remains a free, unitary and whole subject. While she devotes herself utterly to him, he remains utterly himself.'

⁵¹ Ibid. See also Gajowski, above n 49, 25.

⁵² Threadgold, 'Framing Battered Woman's Syndrome', above n 11, 214. *Othello* is also a play about race. For current discussions of *Othello*, race, gender and law in the context of the O J Simpson case, see, eg. Jami Floyd, 'The Other Box: Intersectionality and the O J Simpson Trial' (1995) 6 *Hastings Women's Law Journal* 241; Terry Kay Diggs, 'Liars and Lycanthropes: Cultural Images in *People v Simpson*' (1995) 6 *Hastings Women's Law Journal* 157.

⁵³ Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 100–1, 108.

⁵⁴ According to Nietzsche, women wanted to be taken and possessed. Friedrich Nietzsche, *The Gay Science* (first published 1882, Walter Kaufman trans, 1974) 319: 'Woman wants to be taken and accepted as a possession, wants to be absorbed into the concept of possession, possessed.'

⁵⁵ Gajowski, above n 49, 21:

The progress of the lover's ennoblement demands that he overcome a series of obstacles or pass a series of arduous trials. He is most often active, and the lady passive, throughout this process. The legacy of male description in praise of female beauty is, ... 'a legacy shaped predominantly by the male imagination for the male imagination' ... 'the product of men talking to men about women' (citations omitted).

⁵⁶ Virginia Woolf, *A Room of One's Own* (first published 1929, 1981 ed) 35–6; Andrea Dworkin, *Pornography: Men Possessing Women* (1979) 14, 23–4.

⁵⁷ Evelyn Gajowski, 'The Female Perspective in *Othello*' in Virginia Mason Vaughan and Kent Cartwright (eds), *Othello: New Perspectives* (1991) 100.

⁵⁸ Gajowski, above n 49, 53 observes that 'the tendency is not to view her as a complex character.'

If she continues to love Othello because she denies his cruelty, her love is not an idealised love. If she continues to love him despite her admission and acceptance of that cruelty, her love is an idealised love, indeed.⁵⁹

The ambiguities of these possible interpretations recognise an active role for Desdemona in constructing her love.⁶⁰ Idealising it is a choice⁶¹ that both constructs and perpetuates patriarchal discourses of romantic love in which women endure abuse. At the same time, her exercise of agency in some sense exceeds those patriarchal constructions of love,⁶² allowing our imaginations to reach beyond the constraints of these available stories. The purity of her love and her steadfastness in it invokes a spectre of love⁶³ that haunts the categories that attempt to constrain it.⁶⁴

The depth of Margaret Raby's conviction that her love could overcome the horrific abuse perpetrated upon her parallels Desdemona's steadfastness. Like Desdemona, she maintains her conviction under severe pressure from the prosecution:

Is that going to be your stock, standard answer every time I ask you why you didn't tell anyone[?] [T]hat you loved him and that you thought your love would overcome all? — Yes — Is that what you are telling these members of the jury, that you put up with the behaviour that you say ... was inflicted upon you because you thought love would overcome all? — I thought it would get better — Tell me this: when did you first see a psychiatrist yourself?⁶⁵

Rather than recognising Raby as a heroine, the prosecution labels her as psychologically unfit, a transformation enabled by discourses on women who testify against men in court, which is discussed below. Nevertheless, her testimony cannot be fully contained within a narrow psychological discourse. Raby's quiet conviction resists the attempt to consign her to madness, challenging our imaginations to reach beyond the constraints of that discourse.

Desdemona's exercise of agency also occurs within discourses that position women who construct themselves as objects of desire as whores. The definition of women as property and of male love as the possession of women⁶⁶ constructs

⁵⁹ Ibid 77.

⁶⁰ Ibid 22: '[T]o view the deaths of the tragic females as victimizations by patriarchy — and no more than that — is to ignore the commentary that Shakespeare's texts make upon masculine impulses of possession, politics, and power.'

⁶¹ Ibid 26: 'Shakespeare is capable of managing the delicate balance between choice and chance'.

⁶² Ibid 51–2:

It is no accident that Shakespeare endows them [Desdemona and Juliet] with the intelligence and wit to make choices, the independence and courage to take risks, the confidence and faith to give and accept love without hesitation or qualification, and particularly in Desdemona, a constancy that is absolute and a generosity that merges into charity.

⁶³ Ibid 69: 'Human intercourse ... is haunted by a spectre' (citation omitted).

⁶⁴ Desdemona's statement that she has no lord is an assertion beyond the narrow constructions of patriarchy — her inability to comprehend what this might mean reflects the difficulties that women face in a patriarchal society of constructing themselves beyond relationships with men: E A J Honigsmann (ed), *Othello* (1997) 102.

⁶⁵ Transcript of Proceedings, *R v Raby* (Supreme Court of Victoria, Teague J, commencing 17 October 1994) 363.

⁶⁶ Margaret Davies, 'Feminist Appropriations: Law, Property and Personality' (1994) 3 *Social & Legal Studies* 365, 385.

women who assert any form of sexual agency as abnormal or not real women. The act of agency in constructing oneself as an object of desire may therefore be interpreted as rendering the woman a whore. Desdemona's agency in constructing her love as absolute and idealised does not assist her in escaping her husband's conviction that she is guilty of adultery, nor his power, in a misogynist society, to construct her as a whore.⁶⁷ It is with remarkable ease that he so constructs her,⁶⁸ labelling her '[i]mpudent strumpet!'⁶⁹ and asking in disbelief, '[w]hat, not a whore?'⁷⁰ He even suggests that she is inhuman: 'Oh thou weed, ... wouldst thou had never been born!'⁷¹

These themes of ownership and construction as whore, responded to with idealised love, are clear in *R v Runjanjic*; *R v Kontinnen*, where Hill literally made Runjanjic into a whore:

The relationship was undoubtedly marked by Hill's dominance and Runjanjic's subservience. He put her to work as a prostitute. There was a consistent pattern of domineering and violent conduct by Hill towards Runjanjic. She was expected to attend to his every need, including quite trivial needs, and the price of disobedience was severe beating. Nevertheless it is clear that she loved Hill and was intensely loyal to him.⁷²

It is the *connection* between these themes of prostitution, ownership and romantic love that is important in both *Othello* and *Runjanjic*. This connection circulates within dominant discourses and is available to women attempting to 'make sense' of the domestic violence in their lives.

Romeo and Juliet depicts another form of love, a tragic scenario in which 'the pleasure lies in the heightened value of love in the light of its loss.'⁷³ Juliet enacts the irrationality of a love that illogically increases even as she gives it, a reflection of gendered constructions of love which expect infinite, bottomless giving from women. These types of tragedies also often involve a 'sexual division of suffering' in which 'the romantic heroines must suffer, if not die, for the tragic heroes to achieve their aspirations of universal transcendence.'⁷⁴ This story of infinite giving, lost love, sacrifice and suffering, is one that women who kill abusers might find particularly appropriate to their situation. Margaret Raby's conviction that the abuse in her life could be overcome by her giving 'anything he wanted' reflects this theme of infinite giving.⁷⁵ Faced with men they love who will not stop abusing them, little or no support from the legal system, the church, or family or friends to make him stop, and few, if any, options for 'leaving', these

⁶⁷ Gajowski, above n 49, 65–6, notes that Desdemona's chastity does not help in saving her life.

⁶⁸ Ibid 64.

⁶⁹ Honigmann, above n 64, 278.

⁷⁰ Ibid.

⁷¹ Ibid 277.

⁷² (1992) 56 SASR 114, 115 ('*Runjanjic*').

⁷³ Stacey and Pearce, above n 46, 17. See also Gajowski, above n 49, 16: '[L]ove tragedies emphasise the obstacles the lovers must overcome by exacerbating the social differences between them.'

⁷⁴ Stacey and Pearce, above n 46, 17.

⁷⁵ Transcript of Proceedings, *R v Raby* (Supreme Court of Victoria, Teague J, commencing 17 October 1994) 349.

women often live a tragedy. Killing the men they love as the only means of survival may actually heighten feelings of love and loss; the tragic inevitability of the situation, from which there was no other way out, may evoke romantic tragedies such as *Romeo and Juliet*. In these situations, as Terry Threadgold has said, the abusers 'in some sense, had to be killed,'⁷⁶ their deaths were tragically inevitable. It is, however, generally taboo for women to try to usurp heroic (active) status.⁷⁷ Asserting agency by killing their abusers is inconsistent with this taboo. I will come back to this inconsistency in the next section.

In the philosophical tradition, Kant is credited with the eighteenth century's most rationalised expression of love.⁷⁸ He constructs woman as the object of love, man as the subject of love.⁷⁹ Gendering Kant's theory⁸⁰ reveals:

[M]en are the Subjects in question, are the cultural authors as well as the cultural audience; and ... this might lead us to inquire more deeply into the nature of the feeling of life, of delight and pleasure that is the hallmark of the aesthetic. Might the disinterested aesthetic pleasure perchance be gendered?⁸¹

Kant's 'transcendental exposition' of aesthetic judgements structures love ('sexual pleasure'⁸²) as a connection to the beautiful. It is the male subject's feelings of pleasure which determine whether the female object is beautiful; we do not ask women for their opinions of beauty.⁸³ Kant is at pains to make claims to universality for his ideal of the beautiful:

[W]here any one is conscious that his delight in an object is with him independent of interest, it is inevitable that he should look on the object as one containing a ground of delight for all men. For, since the delight is not based on any inclination of the Subject ... but the Subject feels himself completely *free* in respect of the liking which he accords to the object, he can find as reason for his delight no personal conditions to which his own subjective self might alone be party.⁸⁴

His claim that disinterested⁸⁵ delight in the (male) subject is a sign of universal beauty facilitates constructions of men as the universal arbiters of love: 'Kantian

⁷⁶ Threadgold, 'Narrative and Legal Texts', above n 31, 57.

⁷⁷ Stacey and Pearce, above n 46, 17.

⁷⁸ Gerald Butler, *Love and Reading: An Essay in Applied Psychoanalysis* (1989) 62.

⁷⁹ Susan Kappeler, *The Pornography of Representation* (1986) 54–7. 'She is necessarily the object of his knowledge, he is the knowing subject': Naffine, 'Erotic Love in the Law of Rape', above n 50, 20. 'Kant's subject, like Hegel's, is male': Margaret Davies, *Asking the Law Question* (1994) 223.

⁸⁰ Kant's subject is not only gendered, but also raced. Those who cannot 'rise' to his disinterested ideal of pleasure have not attained the required level of civilisation, and are mired in 'barbarism', which may be taken as a thinly veiled coding for 'are of the wrong race': Immanuel Kant, *The Critique of Judgement* (first published 1790, James Creed Meredith trans, 1952) 65.

⁸¹ Kappeler, above n 79, 57.

⁸² Gerald Butler, *Love and Reading*, above n 78, 74.

⁸³ Kant, above n 80, 11.

⁸⁴ *Ibid* 50–1.

⁸⁵ Feminists have thoroughly critiqued the assumption of objectivity (or disinterest) on the part of the historically disproportionately white, male decision-makers in law. See, eg, Catharine MacKinnon, *Feminism Unmodified* (1987) 55, who states that '[o]bjectivity is a stance only a subject can take ... Anyone who is the least bit attentive to gender since reading Simone de Beauvoir knows that it is men socially who are subjects, women who are objects.' Catharine

aesthetics ... locate the beauty of women in the [male] subject — in the artist and the perceiver.⁸⁶ It empowers individual men as the spokespeople for the universal aesthetic.

The power and control analysis of domestic violence⁸⁷ sheds light on the manner in which the objectification of women for male desire facilitates abuse. One of the tactics of abuse is emotional abuse, which often includes attacks on self-esteem,⁸⁸ including critiques of the woman's looks, or beauty, by the male abuser. Gay Oakes testified that her abuser 'had taken my self-esteem and sense of self-worth.'⁸⁹ The abusive nature of male power to construct women as beautiful, or, perhaps more importantly, as lacking in beauty, is masked by the social circulation of philosophical discourses that construct men as the arbiters of beauty and the subjects of love.

The role of the discipline and practice of psychology in pathologising women's responses to domestic violence is well documented.⁹⁰ Consistent with Kant's construction of women as objects, these discourses also often construct women as lacking agency. Some of the more recent literature, however, may be attempting to redress this problem through recognition of social constructions of gender. For example, the ambivalence of Desdemona's agency in constructing herself as an object is reflected in this statement: 'The work of becoming female is shaped by the necessity of learning how to become ... an "object of male desire," which inevitably must conflict with the task of becoming a subject in one's own right.'⁹¹

The contradiction of women's constructions of themselves as objects of desire, and as subjects of love, is also highlighted by discourses of love. The statements of women who have been in abusive relationships, such as '[l]ove is strange, love is blind'⁹² and the ambiguity in the statement '[s]ometimes I felt like I loved him',⁹³ may reflect not only these women's honesty with themselves regarding the abuse, but also an uneasiness with the ambiguity of constructing themselves as agents of love, especially in the face of abuse.

MacKinnon, *Toward a Feminist Theory of the State* (1989) 121–2, explains that '[t]he male epistemological stance, which corresponds to the world it creates, is objectivity: the ostensibly non-involved stance, the view from a distance and from no particular perspective, apparently transparent to its reality.' MacKinnon notes that not all men have power equally, mentioning African-American men specifically as a group with less power: at 45. See also Maureen Cain, 'Realist Philosophy and Standpoint Epistemologies or Feminist Criminology as a Successor Science' in Loraine Gelsthorpe and Allison Morris (eds), *Feminist Perspectives in Criminology* (1990) 124.

⁸⁶ Gerald Butler, *Love and Reading*, above n 78, 73–4.

⁸⁷ See references in above n 27.

⁸⁸ For a diagram illustrating eight tactics of abuse used to gain and maintain power and control see Julie Stubbs (ed), *Women, Male Violence and the Law* (1994) 232.

⁸⁹ Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 137.

⁹⁰ See, eg, Dobash and Dobash, above n 20.

⁹¹ Virginia Goldner et al, 'Love and Violence: Gender Paradoxes in Volatile Attachments' (1990) 29 *Family Process* 343, 349.

⁹² Brodie, above n 6, 44, citing Transcript of Proceedings, *R v Runjanjic*; *R v Kontinnen* (Supreme Court of South Australia, Mohr J, commencing 20 March 1991) 20.

⁹³ Brodie, above n 6, 44, citing Transcript of Proceedings, *R v Kontinnen* (Supreme Court of South Australia, Legoe J, commencing 26 March 1992) 432.

The song 'Every Breath You Take' by 'The Police'⁹⁴ has been known among some activists in the movement to end domestic violence as 'the batterer's song.' The convergence of love and what have been identified as abusive tactics in this song is a reflection of the manner in which popular constructions of love facilitate abusive relationships. Women survivors of domestic violence sometimes describe the abuser at the beginning of the relationship as the perfectly attentive lover: '[W]omen do not fall in love with batterers, but with individuals who often treat them with an almost exaggerated respect and attention, and can be extraordinarily appealing.'⁹⁵ One study has found that when couples in relationships where the male is violent describe the beginning of the relationship it is characterised by 'electrical connection' and 'extravagant illusions of romantic love.'⁹⁶ Others have noted that abusive relationships may begin with the man lavishing attention on the woman, always wanting to be with her and always wanting to know where she has been and what she has done.⁹⁷ This attention, especially in the context of social constructions and lived realities of women as caretakers, attention-givers, and the ones responsible for keeping relationships going,⁹⁸ can be very seductive. However, due perhaps to the common law's lack of jurisdiction over love, or to a perceived inconsistency of these behaviours with abuse, these aspects of the relationship are rarely the focus of court cases. It can only be speculated, then, that some women who testify that they love their abusers may be reflecting back to a period of extravagant romance.

The high level of attention during an early romantic period of a relationship turns abusive when it shifts from caring to control:

The perpetrator's first goal appears to be the enslavement of his victim, and he accomplishes this goal by exercising despotic control over every aspect of the victim's life. But simple compliance rarely satisfies him; he appears to have a psychological need to justify his crimes, and for this he needs the victim's affirmation. Thus he relentlessly demands from his victim professions of respect, gratitude or even love.⁹⁹

⁹⁴ Hugh Padgham and The Police (Producers), 'Every Breath You Take' (A & M Records, 1983).

⁹⁵ Dalton, above n 39, 336.

⁹⁶ Goldner et al, above n 91, 360. This study may be limited in that it fails to consider the possibility that the man, traditionally constructed in an active role, especially in the beginning of relationships, may unequally construct the relationship in these romantic terms.

⁹⁷ See, eg, NCIWR, above n 15, 29, 35.

⁹⁸ Hoff, above n 22, 43, states that 'women are expected to be the nurturers and healers in conflicted family relationships'. See also Carol Gilligan, *In a Different Voice* (1982); Nancy Chodorow, *The Reproduction of Mothering: Psychoanalysis and the Sociology of Gender* (1978); Sarah Ruddick, *Maternal Thinking* (1989); Robin West, *Narrative, Authority and Law* (1993); Robin West, 'Jurisprudence and Gender' (1988) 55 *University of Chicago Law Review* 1; Robin West, 'The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory' (1987) 3 *Wisconsin Women's Law Journal* 81. See generally Mary Belenki et al (eds), *Women's Ways of Knowing: The Development of Self, Voice and Mind* (1986).

⁹⁹ Judith Lewis Herman, *Trauma and Recovery* (1992) 75. Hoff, above n 22, 39, quotes a woman interviewee as stating that: 'Love makes you stupid and vulnerable. Men use your love against you: "If you really loved me you wouldn't give up on me so easily." I don't give up easily.'

As abusive relationships progress, batterers may demand an accounting of all of the women's actions, sometimes literally every minute of every day.¹⁰⁰ Othello's irrational jealousy, with no basis in fact, can operate coded as love to facilitate control:

Every single day
Every word you say
Every game you play
Every night you stay
I'll be watching you.¹⁰¹

Read as obsession with control, masked by discourses of romantic love, these lines from 'Every Breath You Take' have an ominous ring.

Another tactic of power and control is 'using male privilege', which includes such moves as treating women like servants¹⁰² or what has been called 'the possessive individualism of patriarchal romance'.¹⁰³ Gay Oakes testified that:

[A]ll sorts of things aggravated him, if the dishes weren't done, if the bed wasn't made, or the kids brought in dirt from the garden. I tried to keep the house spic and span. There were outbreaks of violence because I couldn't keep everything just so all the time.¹⁰⁴

The lines '[o]h can't you see, you belong to me?''¹⁰⁵ seem perfectly consistent with this type of abuse. This song, probably written and certainly largely heard as a love song, illustrates the convergence of love and tactics of abuse perpetrated by men on women. It provides an illustration of how love can be constructed consistently with abuse in a relationship.

The major romantic scenarios of novels also deserve mention here. One theme of these relevant to my discussion is the power of transformation of romantic trajectories. This potential for transformation is often tied to other changes, such as a journey to a new and exotic place.¹⁰⁶ The hopes of women who have abusive partners are sometimes tied to the ability of their love to transform the abuser into a better person or to the overcoming of barriers or obstacles in the name of

¹⁰⁰ See, eg, Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 102–3. See also Seuffert, 'Lawyering for Women Survivors of Domestic Violence', above n 27, 10–12; Ellen Pence and Melanie Shepherd, 'Integrating Feminist Theory and Practice: The Challenges of the Battered Women's Movement' in Kersti Yllo and Michelle Bograd (eds), *Feminist Perspectives on Wife Abuse* (1988) 282, 284.

¹⁰¹ Hugh Padgham and The Police (Producers), 'Every Breath You Take' (A & M Records, 1983).

¹⁰² Naffine, 'Erotic Love in the Law of Rape', above n 50, 12–13. 'The similarities between the origin of the institution of marriage and the origins of slavery are inescapable': Dianne Post, 'Why Marriage Should be Abolished' (1997) 18 *Women's Rights Law Reporter* 283, 289. 'Supposing that women are voluntary slaves — slavery of any kind is unfavourable to human happiness and improvement': Mary Wollstonecraft, *Vindication of the Rights of Women* (first published 1792, 1975 ed) 126.

¹⁰³ Stacey and Pearce, above n 46, 13.

¹⁰⁴ Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 102.

¹⁰⁵ Padgham and The Police (Producers), above n 101.

¹⁰⁶ See, eg, Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 17–18.

love.¹⁰⁷ The abuser's violence may be constructed as a psychological barrier that can be overcome with love. These themes are evidenced by Margaret Raby's statement above that her partner's abuse could be overcome with her love and psychological counselling. Batterers sometimes construct their violence in these terms by making arguments that:

[J]ust one more sacrifice, one more proof of her love, will end the violence and save the relationship. Since most women derive pride and self-esteem from their capacity to sustain relationships, the batterer is often able to entrap his victim by appealing to her most cherished values.¹⁰⁸

It is social constructions of gender and of relationships that saddle women with responsibility for sustaining relationships.¹⁰⁹ Women may be asked, implicitly or explicitly, to demonstrate their commitment by moving to a new geographical location, to allow a fresh start.¹¹⁰ These moves may represent hope for starting anew to the woman. Gay Oakes testified that:

[His] letter told me ... that he was sorry for the way things had gone in Australia but he wasn't happy there and he wanted to be there in New Zealand with his family. He wanted me to come and join him in New Zealand. ... I loved him at that stage. I did want to try again. All the time we had been together he had always blamed me for what had gone wrong and by him saying he had been miserable in Australia and he was OK now in New Zealand it made me think he realised it wasn't all my fault after all.¹¹¹

The moves may also result in isolation from the woman's former community, helping to consolidate the power of the abuser.

My argument is not that women in violent relationships are masochists; nor am I denying that in a society structured by gender power differentials these constructions of romance and desire create, perpetuate and facilitate the subordination of women to men. In a situation of severely limited options, when women declare that they love the men who abuse them, they may be making sense of their situations in part by positioning themselves within these discourses. A prosecutor's challenge to a woman's statement that she loves or loved the man who abused her, which implies that such love must logically be inconsistent with abuse, forces the woman's statement into a narrow strand of constructions of love which pose it as inconsistent with male consolidation of power and control, through physical, psychological and sexual violence. The prosecutor's challenge, and the adoption of its logic by the legal system, feminists and activists, denies the complex personhood of these women, who may be both positioning themselves within constrained discourses and invoking spectres of love that exceed those discourses.

¹⁰⁷ Stacey and Pearce, above n 46, 15–16.

¹⁰⁸ Herman, above n 99, 82–3.

¹⁰⁹ See references in above n 98.

¹¹⁰ See references in above n 100.

¹¹¹ Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 103.

III THE COMMON LAW'S LACK OF LOVE

The common law presents obstacles to the invocation of love within its walls. Peter Goodrich has recently convincingly argued that among law's repressions is its inability to hear, or lack of jurisdiction over, matters of love.¹¹² Repression of any jurisdiction over love results in the return of love as a spectre haunting the jurisdiction of the common law.¹¹³ Statements of love by abused women in court fall into this void of jurisdiction at the same time as they invoke the spectre of a jurisdiction over love. The spectre of the jurisdiction of love is important to the discussion of statements of love by women in court for at least two reasons. First, the possibility of legal jurisdiction over matters of love highlights the common law's void of jurisdiction and its consequent inability to deal with these women's statements. The lack of legal discourses with which to negotiate the implications of these statements leaves the statements open to interpretation, for example, as admissions of complicity, as discussed in Part IV. The judgments of the Courts of Love suggest other possible approaches. Second, the possibility that Courts of Love existed historically disrupts hegemonic conceptions of law as the absolute embodiment of 'reason' to the exclusion of 'emotion'. This disruption, combined with the particular focus of the Courts of Love, opens possibilities for imagining jurisdictions capable of representing all of the complexities of personhood.

Historically, the common law has lacked jurisdictional and literary ability to hear matters of love, or emotions more generally, focusing instead on marriage and on women as functions of property. Nineteenth century legal discourses of marriage tended to preserve the dominant proprietary status of husbands while transforming the language of possession into a language of private affective relationships.¹¹⁴ These privacy discourses continue to perpetuate the law's repression of love and emotions more generally today, for example in the controversy over the federal *Violence Against Woman Act* in the United States.¹¹⁵ The common law generally lacks legal discourses and precedents of love within which to interpret women's statements that they love the men who abuse them.

It is commonplace to introduce a study of the history of the common law¹¹⁶ with brief reference to the historical plethora of courts and jurisdictions:

In institutional terms, the profession of secular law or in England of common law, was simply one of numerous legal jurisdictions, a pluralism of laws which

¹¹² Goodrich, *Law in the Courts of Love*, above n 38; Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29.

¹¹³ Goodrich, 'Epistolary Justice', above n 25, 283–4; Penny Pether, 'Principles or Skeletons? *Mabo* and the Discursive Constitution of the Australian Nation' (1998) 4(1) *Law Text Culture* 115.

¹¹⁴ See generally Siegel, above n 39.

¹¹⁵ 42 USCA s 13981 (West 1995). See generally *ibid* 2200–6.

¹¹⁶ See, eg, J F Burrows, Jeremy Finn and Stephen Todd, *Cheshire and Fifoot's Law of Contract* (8th ed, 1992) 1–2. A W B Simpson, *A History of the Common Law of Contract* (1987) 4–5, states that:

In medieval England there were many courts of law in addition to the courts of common law. Some, like the courts Christian, were run by professionals, and administered a doctrinalized system of law; others such as the courts of piepowder held in the markets and fairs, applied relatively unsophisticated systems of customary law. ... in medieval England the law applied in non-common law courts could be different [from the common law].

reflected the hierarchy and diversity of the sources of knowledge and representations of truth. The courts spiritual, the courts of conscience and of the church, courts of honour and of equity as well as of specific localities and activities, of cities and forests, of trade and matrimony, of war and of the seas all subsisted under different laws, forms of knowledge or sources of justice.¹¹⁷

These various jurisdictions were eventually all absorbed into one set of courts of the common law, a process brought to a logical conclusion with the merging of common law and equitable jurisdiction.¹¹⁸ Goodrich argues that this process of unification was achieved through the repression of the 'plural epistemological frame' which characterised the earlier system of multiplicity.¹¹⁹ The rhetoric of the common law developed to justify this repression through statements such as '[the] common law is the appropriate measure of all issues tried in England and should be kept free of canon and civil law which are "but beggarly baggage, and arguments of brawling braines"'¹²⁰ and 'the common law is the absolute perfection of reason'.¹²¹ While the first statement clearly privileges the common law over other named jurisdictions, the second statement defines the common law as 'the perfection of reason', relegating emotion to *not law*. This distinction between love and reason, or justice, is reflected back to the law in discourses of love. Shakespeare's point in *Othello* is that love is beyond reason.¹²²

Emphasis on the common law's perfection of reason refers only through absence to the possibility of jurisdictions not focused absolutely on reason. Goodrich discusses one such possible jurisdiction, that of the Courts of Love, which created and applied 'an alternative law of the feminine public sphere, concerned exclusively with disputes over the art of love and relationships between lovers'.¹²³ This jurisdiction challenges current dominant corresponding dichotomies between reason and emotion, and between law and lifestyle,¹²⁴ providing us with a means of interrupting the mutual exclusivity of these dichotomies.¹²⁵

¹¹⁷ Goodrich, *Law in the Courts of Love*, above n 38, 10.

¹¹⁸ Burrows, Finn and Todd, above n 116, 2.

¹¹⁹ Goodrich, *Law in the Courts of Love*, above n 38, 10.

¹²⁰ Ibid 15, quoting John Leslie, *A Defence of the Honour of the Right Highe, Mightye and Noble Princesses Marie Queene of Scotlande and Dowager of France* (1569) 97, 120.

¹²¹ Goodrich, *Law in the Courts of Love*, above n 38, 15, quoting Thomas Wood, *An Institute of the Laws of England* (1720) 6–7.

¹²² Gajowski, above n 49, 53, 75, states that: '[T]he imperatives of reason and justice are irrelevant to the realm of love and jealousy.'

¹²³ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 635. See also Georges Duby, 'The Courtly Model' (Arthur Goldhammer trans) in Georges Duby and Michelle Perrot (eds), *A History of Women in the West* (1992) vol 2, 250. My reliance on Goodrich for accounts of these courts is due in part to his reliance on French texts.

¹²⁴ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 636–7.

¹²⁵ However, an argument that the common law's jurisdiction should now be reformed to adjudicate matters of love would clearly be controversial: 'Some commentators bemoan the law's increasing intrusions into sexual practice as foreshadowing "the end of love and laughter"': Larson, above n 40, 438, citing Naomi Wolf, 'Feminist Fatale', *The New Republic* (New York, United States), 16 March 1992, 23, 25.

Goodrich notes that the Courts of Love were women's courts.¹²⁶ The twelfth century Court of the Countess of Champagne, for example, was composed of about 30 women who collectively 'delineated and adjudicated the distinct principles of love and marriage.'¹²⁷ The High Court of Love, established on St Valentine's Day in 1400, was to have jurisdiction over the rules of love, to hear disputes between lovers, and to hear appeals from other Courts of Love.¹²⁸ It was organised in a non-hierarchical manner and the judges were selected by women after reciting poetry. Judgments were made collectively.¹²⁹ The subject matter of the Courts of Love included contracts of love, remedies for amorous betrayal, deceit and slander of lovers, responsibilities of separated lovers and punishment of violence against women.¹³⁰ Further, Goodrich argues that the courts often considered disputes between women lovers and between male lovers. What we might today call transgendered identifications may also have been common.¹³¹

The Courts of Love are said to have emphatically distinguished between love and marriage.¹³² Also significant was their consistent acknowledgment of the role of love in law and law in love.¹³³ They may have dealt with relationships of love outside of marriage and unrelated to proprietary issues:¹³⁴

[The] judgment is remarkable for its sensitivity to the space between the lovers: It addresses the relationship, rather than either party. There is no conventional victor, and no pronouncement of past fault; the judgment is neither punitive nor retributory; it speaks instead of future possibilities of the lovers' relationship.¹³⁵

Goodrich suggests that rather than rewarding a 'winner' with tangible monetary damages as a substitute for a property interest, the jurisdiction of love focused on the intangibles of emotions created through relationships.

The jurisdiction of the Courts of Love is contrasted with the jurisdiction of canon law, from which the common law of marriage developed.¹³⁶ The precedent

¹²⁶ Goodrich, *Law in the Courts of Love*, above n 38, 1. See also Doby, above n 123, 258–64.

¹²⁷ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 633.

¹²⁸ Goodrich, *Law in the Courts of Love*, above n 38, 1.

¹²⁹ Ibid.

¹³⁰ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 637.

¹³¹ Ibid 640.

¹³² Andreas Capellanus, *Andreas Capellanus on Love* (first published 12th century, P G Walsh trans, 1982) 257–9.

¹³³ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 634.

¹³⁴ Post, above n 102, 306, observes that '[t]he state, by the institution of marriage, is protecting men's private property interest in their wives.'

¹³⁵ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 638, referring to a judgment from 1460 recorded in French in Martial D'Auvergne, *Les Arrêts D'Armours* (1949).

¹³⁶ Post, above n 102, 284–5. See also Simpson, above n 116, 4:

Much of the law concerning marriage, especially Anglo-American jurisprudence, is derived from canon law ... Ancient Roman culture was the most thoroughly patriarchal society of all time ... Canon law, in spite of proclaiming to be 'enlightened' about marriage and law, borrowed many juristic institutions from Roman legal thought.

Sir Henry Maine, *Ancient Law* (10th ed, 1909) 162–3, explains that '[a]ctions for breach of promise of marriage ... only began to be heard at common law under the Commonwealth, having previously been the exclusive concern of the courts Christian.' See also Peter Riga, 'Residue of Romano-Canonical Marriage Law in Modern American Law' (1983) 5 *Whittier Law Review* 37; Joseph Snee, 'The Canon Law of Marriage: An Outline' (1958) 35 *University of Detroit Law Journal* 309.

of the Courts of Love defined love and marriage as mutually inconsistent.¹³⁷ The distinction between the two jurisdictions is apparent in this passage:

The Christian institution of marriage was ... an essentially spiritual love ... A love invariably attached to an eternal being, a pure love ... The secular institution of marriage was to be a temporal shadow or emulation of its spiritual exemplar and was to be based upon an imitative obedience to an earthly father and conjugal hierarchy. The relationship of lovers adjudicated by women in the courts of love was, by contrast ... both spiritual and profane ... an investment of the soul inscribed ... in mundane and corporeal rules.¹³⁸

Legal history tended to recognise love as part of canon law, incident only to the regulation of marriage¹³⁹ and its reproductive function.¹⁴⁰ Relationships were often defined in terms of possession, prohibition and power; women were defined predominantly as property¹⁴¹ circulating among father, husband and son,¹⁴² functioning primarily as adjuncts to husbands or fathers. Feminists in the nineteenth century critiqued the common law for treating women as slaves.¹⁴³

The canon law's tradition of asceticism¹⁴⁴ is reflected in the common law's conscious separation of law and the domestic sphere:

The sphere of relationships and of sexual exchanges, inside and outside of marriage, inhabit an opaque zone of cultural neglect: They exist in law only as offences or as indices of propriety.¹⁴⁵

Feminists have long critiqued the law's reliance on the public-private dichotomy¹⁴⁶ as justification for so-called non-intervention in the private sphere of the

¹³⁷ Goodrich, *Law in the Courts of Love*, above n 38, 29–32.

¹³⁸ *Ibid* 31.

¹³⁹ Historically, marriage was a major tool for the organisation of property interests: Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 650. Larson, above n 40, 382, notes that the canon law is the root of the common law of sexual crimes and that it recognised a distinction between rape and seduction in the twelfth century.

¹⁴⁰ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 652.

¹⁴¹ Post, above n 102, 292, states that, '[a] dowry was an inducement for a man to marry another man's daughter. The woman was converted along with the dowry into the husband's property'. M B W Sinclair, 'Seduction and the Myth of the Ideal Woman' (1987) 5 *Law and Inequality* 33, 72–4, also observes that, in the eighteenth and early nineteenth centuries, women were seen as property.

¹⁴² Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 652. 'Like the law of rape, the seduction tort developed as a means to enforce men's property interests in women's bodies and sexuality': Larson, above n 40, 382. 'Upon marriage, a woman passed from the control of her father to that of her husband, both of whom literally had life and death power over her': Post, above n 102, 285. 'Marriage has been a legal market and sexual capacity a commodity': Ann Riseley, 'Sex, Housework, and the Law' (1981) 7 *Adelaide Law Review* 421, 434.

¹⁴³ Elizabeth Clark, 'Religion and Rights Consciousness' in Martha Fineman and Nancy Sweet Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (1991) 188, 197, records that an official 'Memorial' of a women's rights meeting in Ohio in 1850 stated:

[W]e believe the whole theory of the common law in relation to woman is unjust and degrading, tending to reduce her to a level with the slave, depriving her of political existence, and forming a positive exception to the great doctrine of equality as set forth in the Declaration of Independence.

Post, above n 102, 293, observes that '[w]omen have rebelled against slavery from the beginning. Men bought and sold women, just as they did slaves.'

¹⁴⁴ Maine, above n 136, 161.

¹⁴⁵ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 652.

household which condones domestic violence.¹⁴⁷ The silencing of women, especially in relation to courts, was central to the foundation of the common law and its subsequent privatisation of the domestic sphere: 'Thou art none attourney at law ... nor pleadest not in courte ... Holde thou thy peace as bowldly as other speake in court.'¹⁴⁸ A major strand of feminist theory and literature responds to the silencing of women in a variety of spheres and contexts, not the least of which are legal.¹⁴⁹

The religious Christian strand of love reflected in canon and common law¹⁵⁰ emphasises the evilness and other shortcomings of women as justification for the privileging of (platonic) relationships between men, and chastity, over romantic servitude to women.¹⁵¹ The existence of these two strands of love reflects the co-existence of these two discourses of love, courtly and Christian, throughout history.¹⁵²

Repression of jurisdictions alternative to the common law, with its absolute privileging of reason and the dominance of a unity of positive law, may always leave room for an analysis that suggests the return of that repressed:

[T]he repressed returns ... the contemporary crisis of the legal form, its modern history of positivisation, irrationality and injustice are symptoms of the return of a distant and traumatic past, that of the ... exclusion or closure of law to those knowledges which were inherent in its classical designation as being also a form of justice.¹⁵³

Goodrich's argument is that reference to the Courts of Love provides us with inspiration to imagine alternative jurisdictions beyond the common law, with its absolutist privileging of 'reason'. This inspiration might lead to re-recognition of multiple or alternative epistemological frameworks for law. The Courts of Love may, however, provide glimpses of possibilities for jurisdictions that eschew a public-private dichotomy and that are capable of representing ambiguities and

¹⁴⁶ See, eg, Frances Olsen, 'The Myth of State Intervention in the Family' (1986) 18 *University of Michigan Journal of Law Reform* 835; Susan Boyd (ed), *Challenging the Public-Private Divide: Feminism, Law and Public Policy* (1997); Margaret Thornton (ed), *Public and Private: Feminist Legal Debates* (1995).

¹⁴⁷ See, eg, Martha Fineman and Roxanne Mykitiuk (eds), *The Public Nature of Private Violence: The Discovery of Domestic Abuse* (1994).

¹⁴⁸ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 652. See also below nn 189-192 and accompanying text.

¹⁴⁹ See, eg, Australian Law Reform Commission, *Equality before the Law: Justice for Women*, Report No 69, pt 1 (1994) 28, where a female victim is quoted thus: 'I never got to tell my story. It was as if what happened to me did not matter ... I felt like the player in a game that I had never played before, and was treated as if I was cheating in some way'. See also Seuffert, 'Locating Lawyering', above n 26, 541-51; Ellen Pence and Tineke Ritmeester, 'A Cynical Twist of Fate: How Processes of Ruling in the Criminal Justice System and the Social Sciences Impede Justice for Battered Women' (1992) 2 *California Review of Law & Women's Studies* 1; Joan Brockman, 'Social Authority, Legal Discourse and Women's Voices' (1992) 21 *Manitoba Law Journal* 213; Mahoney, 'Legal Images of Battered Women', above n 22.

¹⁵⁰ Duby, above n 123.

¹⁵¹ Walsh in Capellanus, above n 132, 287-325, calls this '[t]he condemnation of love'.

¹⁵² See Gajowski, above n 49, 17-25.

¹⁵³ Goodrich, *Law in the Courts of Love*, above n 38, 11. Goodrich's argument here is that these courts challenge our current 'boundaries of positive law and categories of public reason.'

complexities in relationships that are crucial to recognition of the complex personhood of women in violent relationships.

Unearthing the genealogy of the Courts of Love sheds light on what is at stake in the law's traditional insistence that it does not enter the private realm or the 'domain into which the King's writ does not seek to run.'¹⁵⁴ The law's distinction between public and private realms,¹⁵⁵ and the law's refusal to enter the private, can be conceived as strategies to repress a jurisdiction of love or, more simply, as repression of the 'other' within the law.¹⁵⁶ Highlighting the multiplicity of jurisdictions subsumed into the common law also highlights and clarifies the common law jurisdiction's preoccupation with property. The common law 'grew up' around the protection of private property and tends to view human relations, when it considers them at all, as functions of property. The limitations of this approach are foregrounded, for example, when Jane Larson's recent argument for re-recognition of the tort of seduction¹⁵⁷ is read through the lens of Goodrich's discussion of the jurisdiction of the Courts of Love. Courts' refusals to recognise emotions by awarding damages for emotional distress,¹⁵⁸ and the limitation of remedies in general to the award of monetary compensation, both highlight the lack of jurisdiction over emotion¹⁵⁹ and the use of property as the central organising concept.

Perhaps not surprisingly, Goodrich notes that legal history has effectively erased the existence of the Courts of Love; legal historians seem unanimous in their conclusion that the courts were at most an amusing literary fiction¹⁶⁰ or, at worst, 'an offense to the reality of the past ... and ... an obstacle to the understanding of related literature.'¹⁶¹ More importantly, courtly love as a tradition has been critiqued as concealing male domination through the illusion of the male lover serving a female, which lures women into servitude.¹⁶² Courtly, or romantic, love and spiritual, or Christian, love have been described as twins in the sense that both objectify women.¹⁶³ My purpose is not to take up either the question of whether the Courts of Love actually existed, or the question of whether they created and perpetuated gender power differentials.¹⁶⁴ Rather, I am concerned with shedding light on, and interrupting, the inability of the courts today to hear the claims of love made by women who have killed abusive partners. The Courts

¹⁵⁴ *Balfour v Balfour* [1919] 2 KB 571, 579.

¹⁵⁵ Olsen, above n 146; Larson, above n 40, 439.

¹⁵⁶ Davies, above n 79, 171, 217; Luce Irigaray, *Speculum of the Other Woman* (Gillian Gill trans, 1985).

¹⁵⁷ Larson, above n 40.

¹⁵⁸ Ibid 404.

¹⁵⁹ Larson states that '[c]ourts nervously caution that it is not their role to step in whenever a romance might fail': ibid 404–5.

¹⁶⁰ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29, 642.

¹⁶¹ Ibid 642.

¹⁶² Ibid; Slavoj Žižek, 'Courtly Love, or, Woman As Thing' in Slavoj Žižek, *Metastases of Enjoyment: Six Essays on Woman and Causality* (1994) 89, 108.

¹⁶³ Gajowski, above n 49, 19, citing C S Lewis, *The Allegory of Love* (first published 1936, 1958 ed) 145.

¹⁶⁴ Goodrich, 'Andreas Capellanus and the Judgments of Love', above n 29.

of Love may also provide glimpses of possibilities of alternative jurisdiction that may kindle feminist imaginations.

It is the precedent of the canon or Christian jurisdictions that have lived on to inform the common laws related to domestic violence that feminists have challenged in the nineteenth and twentieth centuries. Reva Siegel has written a useful and comprehensive history of the evolution, or 'preservation through transformation', of gender power differentials in the common laws related to domestic violence.¹⁶⁵ Siegel notes that in the nineteenth century common law cases a husband's ownership of property in his wife, and corresponding prerogative to chastise her, were characterised as a 'vestige of another world, an ancient legal precedent of increasingly uncertain legitimacy.'¹⁶⁶ It was gradually and unevenly transformed into the 'rule of love' portrayed in discourses of companionate marriage.¹⁶⁷ This transformation involved a reorientation from a marital regime in which 'a husband ruled and represented his wife into one predicated in significant part on the juridical individuality of its partners.'¹⁶⁸ Marriage was transformed into a relationship of affection characterised by cheerful and voluntary submission on the part of the wife.¹⁶⁹ Love featured prominently in this discourse, as Mrs Henry Ward Beecher argued:

If all could fully realise the true difference between the service rendered by woman to authority and that poured out unceasingly, spontaneously, for love, what a difference would be found in many homes!¹⁷⁰

This love, which resulted in women yielding to the care and supervision of their husbands, was most closely related to altruism. Under this construction of affectionate marriage, the husband's 'impulsive' violence, if kept out of the public realm, would properly be forgiven by the altruistic wife.¹⁷¹ Violence and love within these discourses are clearly consistent. Moreover, this discourse of 'love' within marriage operated as justification for courts to refuse jurisdiction over these matters.

The doctrine of marital privacy developed to rationalise the continuance of the common law prerogative under a new name.¹⁷² Under this doctrine, courts refused to inquire into the privacy of the home on the basis that the negative effects of publicity on domestic harmony would be worse than the temporary harm inflicted by the violence.¹⁷³ The illogical assumption here is that domestic harmony is consistent with abuse of the wife by the husband. Characterisation of the wife's appropriate response as love justifies 'non-interference' on the part of the court.

¹⁶⁵ Siegel, above n 39, 2119.

¹⁶⁶ Ibid 2122.

¹⁶⁷ Ibid 2142–61.

¹⁶⁸ Ibid 2142.

¹⁶⁹ Ibid 2145.

¹⁷⁰ Mrs Henry Ward Beecher, *The Home: How to Make and Keep It* (1883) 246.

¹⁷¹ See, eg, *State v Rhodes*, 61 Phil N C 453, 457 (1868), cited in Siegel, above n 39, 2150, 2155.

¹⁷² Siegel, above n 39, 2150–3.

¹⁷³ Ibid 2154–61.

The history of the jurisdiction of the Courts of Love sheds light on these constructions of domestic violence, the discourse of marital love and affection, and the protection of marital privacy. The 'love' reflected in the nineteenth century decisions is a specifically narrow conception employed in the service of marriage, reflecting Christian spiritual love and based on obedience.¹⁷⁴ It is a mere shadow of either spiritual love, the romantic love of the Courts of Love or literary traditions of nineteenth century romantic love. It also retains a proprietary character.

Siegel's argument is that reforms of the common law related to domestic violence have preserved and perpetuated the privileged status of men in marriage, even while specific discourses of relationship have been transformed and women have made some gains measured in dignity and material goods.¹⁷⁵ The most recent of these transformations in the United States is reflected in the controversial federal *Violence Against Women Act*¹⁷⁶ which creates a civil rights remedy for domestic violence as a form of sex discrimination. Siegel argues that the controversy surrounding the Act reflects the continuing power of the nineteenth century privacy discourses of domestic violence, at the same time as these discourses of gender status are modernised.¹⁷⁷ The 1991 Conference of Chief Justices opposed the Act in part, using language that attempted to preserve a public law–private law distinction, and the relegation of domestic disputes to the impliedly inferior state family courts. Chief Justice Rehnquist based his objection, in part, on the Act's potential to involve the federal courts 'in a whole host of domestic relations disputes', which raised the spectre of contamination of the public sphere with private disputes.¹⁷⁸ As Siegel states:

[A]s we examine the claim that marriage is a state-law concern, it begins to appear that federalism discourses about marriage bear strong family resemblances to common law privacy discourses about marriage, and in some instances are even direct descendants of the discourse of affective privacy.¹⁷⁹

In some instances this controversy explicitly revolved around the lack of jurisdiction of these courts over love, causing Siegel to invoke the maxim that 'where love is, law need not be.'¹⁸⁰ Legal discourses that construct the common law as

¹⁷⁴ See above nn 137–143 and accompanying text. Gajowski, above n 49, 18, explains that:

The personal nature of romantic love — as a relationship between two individuals — distinguishes it from the impersonal nature of both classical *eros*, or sexual desire, and Christian *agape*, or spiritual love, wherein the individuality of the female object of desire or love is of little consequence to the male producer of the text.

¹⁷⁵ Siegel, above n 39, 2119.

¹⁷⁶ 42 USCA s 13981 (West 1995).

¹⁷⁷ Siegel, above n 39, 2196–206.

¹⁷⁸ Ibid 2198–9, citing William Rehnquist, *Chief Justice's 1991 Year-End Report on the Federal Judiciary* (1992) 1, 3. See also Judith Resnik, 'Housekeeping: The Nature and Allocation of Work in Federal Trial Courts' (1990) 24 *Georgia Law Review* 909, who examines constructions and understandings of value operating in the allocation of jurisdiction and authority in United States federal trial courts.

¹⁷⁹ Siegel, above n 39, 2202.

¹⁸⁰ Ibid 2205–6.

lacking jurisdiction over love continue to be powerful enough to intrude into, and shape, discussions of federal legislation.

The exclusion of love from the law related to domestic violence is also apparent today in other areas of law.¹⁸¹ The common law legal system is characterised as unable to evaluate complex human emotions; sexual disputes are seen to be 'uniquely beyond the scope of ordinary reason and judgment.'¹⁸² A 1985 case in New York notes, '[r]elationships may take varied forms and beget complications and entanglements which defy reason.'¹⁸³ Love is irrational¹⁸⁴ and therefore beyond or outside the perfect reason that is law.¹⁸⁵ Assumptions about the distance between law and love, and therefore the inherent silliness of legislating or codifying rules of love, underlie a recent, rare piece of humorous scholarship in the *Yale Law Journal*.¹⁸⁶

The nineteenth century courts' refusal to adjudicate matters defined as belonging to the private domain on the basis of the potentially negative impact on domestic harmony is consistent with the common law's lack of jurisdiction over love, or its repression of the jurisdiction of Courts of Love. It is important to note that these nineteenth century cases construct the private domain at the same time as they exclude it from their jurisdiction; the jurisdiction of the Courts of Love should not be equated in a simplistic manner with a jurisdiction of what is later constructed as the private.¹⁸⁷ My argument is that the repression of the jurisdiction of the Courts of Love (or even its potential), combined with the common law's limited jurisdiction over relationships as property and the development of the doctrine of marital privacy, leaves a void in the discourses and precedents of the law with respect to romantic love. When a woman states in court that she loves, or loved, an abusive partner, the court has no jurisdiction to hear her statement and no lens of precedent through which to reflect and refract this love. Her statement falls into a legal void at the same time as it invokes the spectre of jurisdiction over matters of love, which haunts the common law.

IV COURTROOM DYNAMICS: WOMEN WHO LOVE AND KILL

In this section, I hope to raise some issues which highlight the complexities of the dynamics of the courtroom as a scene of interpretation where women who

¹⁸¹ Cook, above n 40, 1491:

The secularisation of the modern era holds the proper province of law to be a public realm in which formally equal persons compete for the scarcities of life within fairly neutral and determinate legal boundaries regulating the behaviour of each for the average benefit of all. The province of love is seen as a private realm of soft and mushy sentimentality; love is a force whose utility is in ameliorating the harshness and cruelty sometimes characteristic of public life.

¹⁸² Larson, above n 40, 451.

¹⁸³ *Douglas R v Suzanne M*, 487 NYS 2d 244, 246 (NY Civ Ct, 1985).

¹⁸⁴ Camile Paglia, *Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson* (1990) 4.

¹⁸⁵ Larson, above n 40, 452.

¹⁸⁶ Gretchen Craft Rubin and Jamie Heller, 'Restatement of Love: Tentative Draft' (1994) 104 *Yale Law Journal* 707.

¹⁸⁷ Goodrich, *Law in the Courts of Love*, above n 38, 70.

have killed abusers make statements of love. I have suggested in Part II of this article that women who claim to love, or to have loved, men who abuse them may be positioning themselves within one or more of a variety of discourses of romantic love which are consistent with, or may be interpreted to be consistent with, violent behaviour on the part of the man. Denial of the complexities of these discourses and of the women's acts of positioning themselves within these discourses is denial of their complex personhood. In Part III of this article, I have suggested that a woman's statement of romantic love in a court of the common law falls into a void of precedent, at the same time as it invokes the spectre of the jurisdiction of love. In this part, I consider how the women's statements of love in the courtroom, despite their intentions, may be constructed as unreasonable. First, the assertion of agency as a speaker in court, and as a witness, is contrary to the tradition associating women with silence and with not bearing witness. Speaking in court both transforms her into something other than a woman (or a proper woman) and makes hearing her problematic. Second, her assertion of agency as a subject rather than an object of romantic love contradicts many discourses of love (objects of desire do not have agency).¹⁸⁸

As I have mentioned above,¹⁸⁹ the jurisdiction of the common law both constructs women as silent and silences women, which is consistent with their status as objects of property. Many legal scholars have documented the numerous ways in which women are disadvantaged by and through the law. Here I provide only a few illustrative examples of the myriad forms this disadvantage takes. The sixteenth and seventeenth century roots of the common law clearly state that women are not to be attorneys or witnesses in court. Feminists' long battle to be admitted to the practice of law in the United States, Britain and other Commonwealth countries is well documented and illustrates the resistance of the law to women in courts.¹⁹⁰ The law of rape's traditional requirement of a second witness to corroborate the rape victim's testimony has also been the focus of feminist efforts for reform.¹⁹¹ Requiring a corroborating witness both indicates that the court will not hear what the rape victim has to say¹⁹² and that what she has to say is not credible. It is also a reflection of the assumptions that the law makes about women's agency; the construction of women as objects is inconsistent with the

¹⁸⁸ Her act of agency in killing the abuser and in speaking as a witness also renders her liable to dominant constructions of women who kill as monsters such as 'lesbian, vampire, witch, black widow, female castrator, monstrous mother, [and] dangerous daughter': Barbara Creed, 'Bitch Queen or Backlash?: Media Portrayals of Female Murderers' in Kerry Greenwood (ed), *The Thing She Loves: Why Women Kill* (1996) 108, 108. The popular mythology is that 'women kill for reasons related to their bodies and hormones, or — contradictorily — that those who do kill psychologically and anthropologically belong more to the male than to the female sex': at 117. In sum, 'media images transform female killers into scapegoats, on whom a phallogocentric culture projects its deepest beliefs and darkest fears and desires about women': at 120. The din of this discourse may contribute to drowning out women's statements that they loved the men who abused them.

¹⁸⁹ See above n 148 and accompanying text.

¹⁹⁰ Albie Sachs and Joan Wilson, *Sexism and the Law: A Study of Male Beliefs and Legal Bias in Britain and the United States* (1978).

¹⁹¹ Ngaire Naffine, *Feminism and Criminology* (1997) 104–11.

¹⁹² *Ibid* 111.

assumption of agency required to testify on the witness stand. As Alison Young has argued, 'inured within legal discourse is a ... formidable conviction that a woman is both sexual and indifferent, functioning more as a signal to others than as an autonomous agent.'¹⁹³

Traditionally, when women spoke in court their agency was transformed into psychosis, as reflected in Wigmore's statement from 1924, which was reprinted in a highly authoritative evidence treatise until well into the 1970s:

Modern psychiatrists have amply studied the behaviour of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangement or abnormal instincts, partly by bad social environment, partly by temporary physical or emotional conditions. One form taken by these complexes is that of contriving false charges of sexual offences by men. The unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is the heroine or victim. On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps to give easy credit to such a plausible tale.¹⁹⁴

Wigmore's influential treatise inscribes into the judicial process the negative stereotype of women and girls who come before the courts as liars who are psychologically abnormal. This construction paves the way for the transformation of women's assertions of agency 'in all sorts of cases' into abnormal psychological behaviour. Women as witnesses¹⁹⁵ are therefore often not heard by the law, but rather are expelled from the law through construction as the law's opposite: emotional, irrational and mad. Here the law explicitly adopts literature's account of sexual relations between men and women. Glanville Williams, as academic interpreter of the modern English law of rape, explicitly draws on Byron in stating that men are 'masterful' and women 'welcome' their advances, despite the fact that they may be 'putting up a token resistance.'¹⁹⁶ Nor is this type of transformation only an historical phenomenon. As recently as 1991, Williams has argued that girls and women lie about rape.¹⁹⁷ For women, the act of bearing witness may be transferred into evidence of madness or other psychological abnormality. This dynamic is clearly at work in at least some of the cases in which women state that they love the abusers whom they have killed. For example, Margaret Raby's statements that she loved her abuser result in the judge

¹⁹³ Alison Young, 'The Waste Land of the Law, the Wordless Song of the Rape Victim' (1998) 22 *Melbourne University Law Review* 442, 445.

¹⁹⁴ John Henry Wigmore, *A Treatise on the Anglo-American System of Evidence* (1970) vol 3A, [924a].

¹⁹⁵ Donna Haraway, *Modest-Witness, Second-Millennium: Femaleman Meets Oncomouse: Feminism and Technoscience* (1997) 23–39, analyses the development of modern science as predicated on the exclusion of women from bearing witness, or acting as the 'modest witness' of scientific experiments.

¹⁹⁶ Naffine, 'Erotic Love in the Law of Rape', above n 50, 28, citing Glanville Williams, *Textbook of Criminal Law* (2nd ed, 1983) 238.

¹⁹⁷ Naffine, *Feminism and Criminology*, above n 191, 106–7, citing Glanville Williams, 'The Problem of Domestic Rape' (1991) 141 *New Law Journal* 205, 205–7.

concluding that she has been 'brainwashed' — her act of agency in speaking in court is thus transformed into psychosis.¹⁹⁸

Both Catharine MacKinnon¹⁹⁹ and Judith Butler²⁰⁰ have discussed the transformation of women's assertions of agency as witnesses in a manner that undercuts their statements. This transformation occurred with the testimony of Anita Hill before the United States Senate Judiciary Committee (an all white, male body).²⁰¹ Hill's act of speaking in bearing witness is constructed as an assertion of agency;²⁰² her act of speaking of sexuality is constructed as an assertion of sexual agency.²⁰³ An assertion of sexual agency is interpreted through the lens of pornography in a manner that undercuts what she is trying to say.²⁰⁴ Her sexual agency is inconsistent with the necessity that she claim the status of a victim of sexual harassment in order to make her point: 'As Hill utters the sexualized discourse, she is sexualized by it, and that very sexualization undercuts her effort to represent sexualization itself as a kind of injury.'²⁰⁵

Hill's testimony about sexual harassment is taken as a sign of agency. By definition, within dominant discourses that construct 'good' women as passive objects or victims, that sign of agency can be misconstrued as a confession of complicity. It is the act of testimony, as a sign of agency, and the confession of complicity with the abuse, that is relevant to interpretations of women's statements of love in court. The response to the women's statements of love that challenges their credibility is consistent with the assumption that they have made a confession; she has confessed to complicity with the man's abuse by stating that she loves him. This construction of complicity may be resisted by women in court; Gay Oakes resisted the suggestion that she loved her abuser.²⁰⁶

MacKinnon states that neither the law of sexual harassment nor the law of rape has found a way to challenge women's lack of sexual credibility, and suggests that the goal is for women to gain a 'voice that cannot be used against us.'²⁰⁷

¹⁹⁸ *R v Raby* (Unreported, Supreme Court of Victoria, Teague J, 22 November 1994) 746. McCarthy, above n 1, 144, states that: 'Margaret Raby's own version of the events within the marriage, including her experience of those events, were ultimately subordinated to the "psy" disciplines, those discourses of psychology and psychiatry. She appears to have almost entirely lost her agency.'

¹⁹⁹ Catharine MacKinnon, *Only Words* (1993) 64–8.

²⁰⁰ Judith Butler, *Excitable Speech*, above n 42, 82–6.

²⁰¹ Although Butler and MacKinnon's discussions are about sexual harassment and rape, they are relevant here for two reasons. First, it is a discussion of how women's own voices as witnesses are used against them, which is relevant to the dynamic surrounding the statements of love that I am discussing. Second, the statements of love that I am discussing all happen in cases where sexual abuse is also a prominent factor.

²⁰² Judith Butler, *Excitable Speech*, above n 42, 83–4.

²⁰³ *Ibid* 82–6.

²⁰⁴ *Ibid* 84. Butler argues that such an assertion, as an act of speech, 'produces a meaning that undercuts the one it purports to make.' Language does not produce meanings, it is interpreted in contexts, and within dominant discourses.

²⁰⁵ *Ibid* 83.

²⁰⁶ Gay Oakes replied to the prosecutor's assertion that she still loved him with 'not at the end I didn't': Notes of Evidence, *R v Oakes* (Court of Appeal of New Zealand, Fraser J, commencing 29 August 1994) 150. See also Gerald Butler, *Love and Reading*, above n 78, 154.

²⁰⁷ MacKinnon, above n 199, 68.

Butler critiques as inherently liberal what she takes to be MacKinnon's assertion that:

[O]ne ought to be in a position to utter words in such a way that the meaning of those words coincides with the intention with which they are uttered, and that the performative dimension of that uttering works to support and further that intended meaning.²⁰⁸

Butler would disagree that this goal is possible. She states:

[O]ne always risks meaning something other than what one thinks one utters, ... [and one is always] vulnerable in a specifically linguistic sense to a social life of language that exceeds the purview of the subject who speaks. ... The effort to come to terms is not one that can be resolved in anticipation but only through a concrete struggle of translation, one whose success has no guarantees.²⁰⁹

Butler seems to be suggesting that one can never be confident about conveying any particular meaning through language; testimony in court is open to interpretation through lenses ground, shaped and polished in the dominant discourses,²¹⁰ which tend to be gender-biased against women.²¹¹ The rules of evidence do not counter the manner in which these dominant discourses reflect, refract and perpetuate gender power differentials. Nor, of course, does the legal system provide a manner of redressing or countering the gendered aspects of the law's narrative.²¹² Butler suggests that giving meaning to assertions of love in the context of domestic violence involves a complex process of translation in the context of dominant and shifting legal and social discourses. Law's lack of precedent in the area of love, its tendency to construct women as psychologically abnormal, and its failure to redress the gender bias of dominant discourses, are all stacked against the possibility of the law reflecting the complex personhood of women who assert that they love the men who abuse them.²¹³

Desdemona's story provides an example of the difficulty of conveying complex concepts, such as love in the context of domestic violence, in the English language. The constraints within which Desdemona constructs her love reflect the constraints within which women who kill abusers make claims of love in the courtroom. These claims are assertions of agency open to interpretation through lenses coloured by dominant discourses, which may result in the transformation of the women's statements into evidence of madness or other psychological abnormality, or may construct their assertion of agency as an admission of complicity with the abuse perpetrated against them. Circulating with these dynamics is Desdemona's difficulty with actively constructing herself as an

²⁰⁸ Judith Butler, *Excitable Speech*, above n 42, 84.

²⁰⁹ *Ibid* 87–8.

²¹⁰ Seuffert, 'Locating Lawyering', above n 26, 537.

²¹¹ *Ibid* 13–25.

²¹² Regina Graycar, 'Telling Tales: Legal Stories about Violence against Women' (1996) 7 *Australian Feminist Law Journal* 79, 81, argues that, 'while it is clearly essential to find ways for new stories and new facts to be told and heard, this is not a sufficient response to law's disregard of violence against women.'

²¹³ *Ibid* 92; Seuffert, 'Locating Lawyering', above n 26, 528–35.

object of desire within discourses of romantic love, in which her act of agency risks interpretation as evidence that she is a whore, and therefore inherently 'incredible'.

V CONCLUSION

A woman's statement in court that she loves or loved the man who has abused her is unlikely to be interpreted within the discourses of love in which she may very reasonably be attempting to position herself. There are at least three obstacles to her self-positioning. First, her assertion of agency in the act of positioning herself within these discourses may be contradictory to the discourses' constructions of women as passive objects of property, or desire, and as capable of infinite giving, sacrifice and suffering. Second, the common law legal system has repressed its actual or potential jurisdiction over matters of love and therefore has no precedent for hearing statements of romantic love and no framework within which to interpret such statements. Paradoxically, the statements also invoke the spectre of love beyond patriarchal discourses and highlight the common law's lack of jurisdiction over romantic love. Third, the very act of agency by which the woman asserts her love is, through the dynamics of the courtroom and the context in which it operates, likely to be transformed into evidence of psychosis, or perhaps misappropriated as a confession of complicity with the abuser. These obstacles circulate and interweave, denying the recognition of the complex personhood of these women who, as both agents and victims, suffer graciously and selfishly and who embody contradiction, paradox and the potential for transformation.²¹⁴ The injustice of the transformation of these assertions of agency into denials of complex personhood haunts the common law's aspirations to justice. At the same time, these statements invoke alternative epistemologies with the potential to reflect both complex personhood and plural justice.

²¹⁴ See generally Gordon, above n 28.