
The Illusions of Post-feminism, Ghosts of Gender and the Discourses of Law

Kathryn McNeilly*

Introduction

“Post-feminist” feeling, narrative and discourse can be viewed as a trend gaining significant traction over the past decade. Bloggers, the media, and even voices within the academy seek to assure us that gender equality has been won; law, policy and practice have acceded to feminist demands and that, if anything, it is masculinity which is on the receiving end of discriminatory gender constructions. This short article seeks to consider evidence of how these post-feminist and “post-equality” narratives have permeated legal discourse and are subtly transmitted. This transmission, centring around an emphasis on gender neutrality, encourages the invisibility of material operations of gender in the law and the discursive reinsertion of traditional gender stereotypes to the detriment of women as legal subjects.¹ Analysis of these narratives aims to renew and reinstate the focus of the legal feminist project and to offer three practical areas where, it is submitted, what appears to be absent regarding sex and gender in fact haunts law’s operation, and sustained feminist attention continues to be imperative. The three areas highlighted for discussion are current gender neutral policy approaches, legislative regulation of sexual crimes and gender narratives in judicial adjudication. Evidence throughout will be cited from contemporary UK and European law, policy and jurisprudence.

“Neutral Laws” and “Neutral Subjects”

The issue of gender-neutrality in legal instruments and texts is neither an unseasoned area of interest for feminism, nor one upon which feminist schools of thought have been

* PhD candidate, School of Law, Queen’s University Belfast. kmcneilly01@qub.ac.uk.

¹ The terms “post-feminist” and “post-equality” will be used interchangeably to refer to a collection of movements asserting that gender equality has been achieved and that in the twenty-first century the feminist project is redundant.

particularly united. Recent post-feminist and “post-equality” discourses, following presumptions that “feminism no longer has to be reiterated but simply breathed”² and that equal subjectivity under law is a juridical given in the context of liberalism, have renewed use of neutrality at the vertical, creational levels of law and policy. Following a Foucauldian-based horizontal conception of power, however, law does not vertically exercise authority over social relations and discourses but is informed by, and in turn informs, these systems. Resultantly, gender neutral approaches can be seen to obscure the multi-dimensional nature of power and its material effects upon gender, diverting attention from the reality of gendered interactions and practices, which inevitably inform the content of law and haunt its purpose.³

The liberal orthodoxy underlying modern law indeed stresses the principle of sexual neutrality as the paradigmatic standard for the articulation of legal issues, often even including those traditionally pertaining to sexed bodies and experience. This sexual neutrality has evolved to assume the form of gender neutrality in the “post-equality” era. This move away from formal equality based upon sex to an ostensibly more nuanced attention to gender has created the illusion that law is pursuing a feminist-informed agenda. However, it is submitted that in this neutrality a spectral presence of woman can be detected which is both distant and disembodied as the subject of law becomes overtly incorporeal, floating free of the discursive implications of the lived, material experience of gendered and sexed existence.

The concept of gender neutrality as an appropriate strategy following the perceived displacement of feminism “post-equality” is clearly exemplified in the UK policy definition of domestic violence. This issue, initially advanced by the feminist movement as rooted in gendered power relations, is now legally presented as involving “neutral subjects” interacting in “non-gendered” ways. Important implications beyond what is overtly provided

² Rosalind Coward, *Sacred Cows: Is Feminism Relevant to the New Millennium?* (London: Harper Collins, 1999) at p. 7.

³ See Margaret Davies, “Feminism and the Flat Law Theory” (2008) *Feminist Legal Studies* 16 pp. 281–304.

for by law, however, arise from this approach. Considering the text itself, following the UK Home Office, domestic violence in the UK is regarded as;

“Any incident of threatening behaviour, violence or abuse [psychological, physical, sexual, financial or emotional] between adults who are or have been intimate partners or family members, regardless of gender or sexuality.”⁴

Such a definition illustrates the primacy which law is increasingly giving to the post-feminist assertion that in a “post-equality” era legal approaches to traditionally gendered issues are justified in, and produce justice from, treating all victims as genderless. However, while the UK definition overtly seeks to include heterosexual male and LGBT victims of intimate partner violence, which are undoubtedly feminist aims in themselves, deconstruction of this definition beyond the ostensible reveals gender specific constructions haunting the language used as the objective truth of contemporary gender and family relations presented by the definition emerges as actually thoroughly unstable and gendered.

By creating a single definition encompassing all categories of victims, the paradoxical result of neutrality is the continued bolstering of heterosexist structural outlooks. Policy discourse such as the Home Office definition is intended to inform wider law and practice, influencing how subjects of the law interpret their experiences. By providing a gender neutral definition, this text sends the message that domestic violence is not a historically or culturally gendered issue – it happens to everyone regardless of gender or sexuality. Such an assertion is contradicted, however, by experiences such as the policing of domestic violence which continues to significantly draw upon gender characteristics and stereotypes.⁵

As a result of the proliferation of such gender-neutral approaches, feminist assertions of law, policy and practice as sites of heterosexist, gendered power struggles are deemed an

⁴ UK Home Office, *Domestic Violence: A National Report* (London: The Stationary Office, 2005) at para. 10.

⁵ See research such as Shelia Seelau and Eric Seelau, “Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence” (2005) *Journal of Family Violence* 20(6) pp. 363-371 and Dena Hassouneh, “The Influence of Gender Role Stereotyping on Women’s Experience of Female Same-Sex Intimate Partner Violence” (2008) *Violence Against Women* 14 pp. 310-325.

anachronistic hangover; we have moved beyond a time when men abused women because of their culturally gendered position. Experiences of violence as a man, woman, transsexual, heterosexual and homosexual are considered *ejusdem generis*; all carrying the same social meaning. Such discourse conceals the specific gendered meanings that domestic violence imparts individually and collectively – messages about “women’s role”, about “being a man”, about family structures and the designation of power within the family, and the material implications of these constructions. Accordingly, looking more closely at the neutrality of law we can detect a distinct heteronormativity as law’s impoverished conception of the social meanings of gender and sexuality appears not to have been effectively exorcised.⁶

Gender neutrality in domestic violence policy is one example of how post-feminist narratives in legal discourse are haunted by the continuing reality of gender and are ironically sustaining traditional gender relations. A second area where it is submitted that post-feminist narratives should be investigated is that of legislative regulation of traditionally gendered crimes.

Legislative Provision/Censure

Prevailing modernist, and indeed self-perpetuated, constructions of the law as a coherent, socially apolitical and objectively imposed structure actively encourage belief that legislation is the epitome of legal certainty/truth/knowledge. The colour black traditionally used to describe the “black letter” of legislative law indeed signifies the finality and the undiluted nature of statute law which acts to remove it from the realm of question or challenge. However, poststructuralist rejection of the possibility of unchallengeable truth/knowledge and conceptions of law as a “plurality of discursive forums”⁷ serves to open space for assertions that legislation cannot be divorced or extracted from the material and discursive conditions in which it is formulated, and as such the language used is implicated with

⁶ Nicola Lacey, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998) at p.102.

⁷ Anna Yeatman, *Bureaucrats, Technocrats, Femocrats* (Sydney: Allen and Unwin, 1990) at p. 170.

specific gender presumptions and balances of power which actively create social resonances beyond the “inactive” black letter.

One example of gender ghosts spectrally circulating in legislative discourse can be found in the relatively recently introduced statutory offence of sexual assault by penetration. This offence appears to simultaneously disclose the nature of sexed gender relations through explicitly regulating sexual activity and also to conceal them through utilising a neutrality which makes invisible the gendered experience of such interactions. Thus, it is submitted that this offence, and the legislation in which it is contained, requires continuing feminist attention in order to encourage increased correspondence with the lived experiences of gendered and sexed subjectivities.

The offence of sexual assault by penetration was introduced in England and Wales by the Sexual Offences Act 2003, in Northern Ireland by the Sexual Offences (Northern Ireland) Order 2009 and in Scotland by the Sexual Offences (Scotland) Act 2009. The definition of this offence in the 2003 Act is outlined in Section 2;

2(1) A person (A) commits an offence if—

(a) he intentionally penetrates the vagina or anus of another person (B) with a part of his body or anything else,

(b) the penetration is sexual,

(c) B does not consent to the penetration, and

(d) A does not reasonably believe that B consents.

As stated above, not only is this provision a further example of “post-equality” gender-neutrality – perpetrators can be either male or female, yet this neutrality is juxtaposed with use of the pronoun “he” in reference to perpetrators – but despite the provision’s relatively progressive potential at first glance, it is shaped by hetero-gendered constructions concerning sexuality. These constructions can be seen to censor all other accounts and

maintain the illusion that law does not legislate on the nature of the body or sexual relations, but only responds to what bodies “naturally” look like and do.⁸

The victim of sexual assault by penetration in the legislative text is presented as violated, pierced, deprived of bodily integrity by a heteronormative penetrating force, which in contrast maintains its bodily integrity. Not only does this discursive construction present all victims of penetrative assault in a feminised light, haunted by lack and incompleteness, it places power entirely on the side of the penetrator and denies the affective reality of sexual relations as the perpetrator remains abstracted, placed within the parameters of heterosexual male aggression and agency and unaffected by the experience physically and emotionally. As such, gender neutrality in this instance discloses the bodily experience of sexual assault, but at the same time conceals not only material affective and gendered effects, but also the gendered power involved in the offence, a power which continues into legal adjudication.⁹

The offence of sexual assault by penetration carries, by virtue of Section 2(4), a maximum penalty of life imprisonment, as does the offence of rape outlined in Section 1 of the 2003 Act, which in contrast can only be perpetrated by a male. Such parity of punishment would appear to signify that both crimes are of equal severity in the eyes of the law. However, if this is so why was there a need to label the offence of sexual assault by penetration as something other than rape?

Consideration seems to suggest that male heterosexuality shapes this legislation – what is to be defined as top of the hierarchy of sexual crimes and labelled with the strongly connotative label “rape” is the male experience of sex – phallic penetration only by a male. All other sexual experience is “othered” based upon the primacy of the phallic. Victims of sexual assault with other objects, such as a bottle, a broom shaft or sex toys, may find the experience equally as degrading and traumatic as rape by penile penetration, yet their

⁸ Ngaire Naffine, “The Body Bag” in Ngaire Naffine and Rosemary Owens (eds.), *Sexing the Subject of Law* (London: Sweet and Maxwell, 1997) pp.79-93 at p. 83.

⁹ See for example, Rosemary Hunter and Kathy Mack, “Exclusion and Silence: Procedure and Evidence” in Naffine and Owens, *ibid.* pp. 171-192.

experience is denied the socially and symbolically significant definition of rape. For example, lesbian sexuality and the question of lesbian rape remains a spectral consideration on the margins of law; as Lacey observes, this experience for victims remains “legally unspeakable”.¹⁰

Gender neutrality in sexual offences is not an uncommon legal approach. For example, in jurisdictions such as Canada, Australia and New Zealand sexual assault law remains gender neutral.¹¹ Indeed, while it cannot be submitted that the sex-specific framing of sexual offences is guaranteed to lead to better experiences for women, as feminist work on the UK law of rape illustrates,¹² it is submitted that the possibilities for taking into consideration a more embodied and female-focused experience of sexual violation is significantly hindered by the neutrality of the offence of sexual assault by penetration.

The above analysis illustrates how legislation which appears to act to protect women and men in the same way is in fact spectrally haunted by traditional heterosexist constructions of sex and sexuality. Effects of these constructions impact the narrative positioning of the “victim” of such crimes, which is to be played out in the wider community and, as will be considered in the final section below, the courtroom.

Judicial Pronouncements

The courtroom has traditionally been regarded as an obvious site for power exchange, and more recently a site ripe for critical feminist analysis. Following logically from poststructuralist emphasis on the construction of meaning through language, there can be no neutral system of judicial precedent; each new judgment will not be a mere vehicle of legal rules or summary of previous judgments, rather it will constitute “no more or no less

¹⁰ Nicola Lacey, *supra* n. 6 at p.103.

¹¹ See Sections 271 - 273 of the Canadian Criminal Code, New South Wales Crimes Act 1900 Division 10 and the New Zealand Crimes Act 1961 No. 43, Part 7, Section 128B.

¹² For example, Sharon Cowan, “All Change or Business as Usual?: Reforming the Law of Rape in Scotland” in Clare McGlynn and Vanessa Munro (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge, 2010) pp. 154-169.

than another text".¹³ As social actors (mostly male) in socially valued positions, the judiciary across the court hierarchy occupy a front line position in the practical (de)construction of legal text, language and discourse. However, as feminists have ardently emphasised, the judiciary are themselves social subjects and will generate understandings of law which are influenced by their complex affiliations of sexuality, ethnicity, gender, religious identity and class.¹⁴ Although subject positioning will always preclude fully objective judicial decision making, in the "post-equality" era formal sex equality protections enshrined in legislation and policy often have the effect of making invisible the material effects of gender on litigants. As a result, feminist legal attention should continue to thoroughly investigate judicial decision making, especially on sex-specific issues where judgments under closer scrutiny can be seen to be axiomatically haunted by perennial gender discourses which are damaging for women.

An example of post-feminist constructions affording such analysis can be found in the recent European Court of Human Rights case *A, B and C v. Ireland* which adjudicated on the issue of access to services for termination of pregnancy.¹⁵ In Ireland abortion is illegal except in strict circumstances where a real and substantial risk to the life, as distinct from the health, of the mother can be detected.¹⁶ The Irish position on this matter has been an issue of considerable international concern in recent years, and the *A, B and C* case adds to a number of European legal pronouncements on termination of pregnancy in the Irish jurisdiction.¹⁷ In *A, B and C* all three applications sought to utilise, *inter alia*, Article 8 of the European Convention of Human Rights, which seeks to protect family and private life, asserting that legislation regulating interruption of pregnancy is an unacceptable violation of

¹³ Michèle Barrett, "Words and Things: Materialism and Method in Contemporary Feminist Analysis" in Michèle Barrett and Anne Philips (eds.), *Destabilizing Theory: Contemporary Feminist Debates* (Cambridge: Polity Press, 1992) at p. 203.

¹⁴ See Davies, *supra* n. 3 at p. 299. See also Katherine O'Donovan, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985), Peter Fitzpatrick (ed.), *Dangerous Supplements: Resistance and Renewal In Jurisprudence* (London: Pluto Press, 1991) and Eileen Fegan, "'Ideology' after 'Discourse': A Reconceptualisation for Feminist Analyses of Law" (1996) *Journal of Law and Society* 23(2) pp. 173 - 97.

¹⁵ (2010) ECHR Application No. 25579/05.

¹⁶ The Offences against the Person Act 1861 Sections 58 and 59 criminalises the "procurement of a miscarriage", and subjects the offence to penal punishment.

¹⁷ See also *Open Door and Dublin Well Woman v. Ireland* (1992) ECHR Application No. 14234/88, *D v. Ireland* (2005) ECHR Application No. 26499/02 and European Court of Justice Case C-159/90 *The Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others* [1991] ECR I-4685.

a woman's private life. Applicants A and B drew upon the health and well-being implications of having to travel abroad to access abortion services, while Applicant C's case focused on failure to implement the Irish constitutional right to abortion in the case of risk to the life of a woman.¹⁸

Although breach of Article 8 was ultimately found - albeit only for the final applicant - the Grand Chamber's reasoning throughout has a gendered intonation, despite the Court's attempt to place the issue within gender-neutral paradigms of medicine/well-being and privacy. The Court ultimately refuses to define reproductive determination within the context of gender discrimination.¹⁹ As such, upon closer analysis the judgment does not appear to be the victory for women that it has been perceived to be²⁰ and remains haunted by the law's traditional failure to declare women's reproductive agency *qua* agency.

Considering the judgment more closely, inadequate gender awareness can be detected in two specific areas. Firstly, as women appealing to the law for help have so often experienced, the distinction between *de jure* and *de facto* protection is ignored.²¹ Professional requirements on doctors in Ireland to provide medical treatment post-abortion, and the previous European Court decision to ensure access to information on abortion facilities outside Ireland,²² are viewed as sufficient evidence to rebut meaningful consideration of the applicants' experience of difficulties and discrimination in both these areas.²³ Legal discourse thus constructs the gap between formal legal protection and actual

¹⁸ In 1983 the Irish Constitution was amended to grant constitutional protection to the fetus, inserting Article 40.3.3 which reads "*the State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate that right*". There has been much debate over the scope to which this provision permits abortion in cases such as pregnant women expressing suicidal feelings. The Irish Supreme Court decision of *Attorney General v. X* [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992) upheld access to termination in such circumstances, yet the debate remains ongoing.

¹⁹ *A, B and C v. Ireland*, *supra* n. 15 at para.269 -270.

²⁰ See, for example, commentary from the Irish Family Planning Association <<http://www.ifpa.ie/eng/Media-Info/News-Events/News-Events/IFPA-Welcomes-Landmark-Decision-for-Women>> (accessed 14 February 2012).

²¹ Namely, the gap between formal legal protection on the one hand, and actual realisation of legal protection on the other.

²² *Open Door and Dublin Well Woman v. Ireland*, *supra* n. 17.

²³ *A, B and C v. Ireland*, *supra* n. 15 at para.127 and 130.

realisation of legal rights as negligible and evades the idea that gender might be relevant in experience of this gap.

Secondly, women appear as ghostly objects rather than embodied subjects of law in the judgment in what is defined as harm. The applicants' invocation of Article 3 guarantees of freedom from torture and degrading treatment stemming from their denial of straightforward access to abortion services is dismissed on the basis that "ill treatment must attain a minimum level of severity if it is to fall within the scope of Article 3".²⁴ We are left questioning what kind of body in what kind of circumstances would reach this calculable and "universal" level. Is the female body capable of experiencing torture and degrading treatment in its reproductive capacity beyond experiences of rape, or is the bearing of children under all other circumstances viewed as too natural to be conceived of as torturous or degrading?

From the above, we can see that the gendered issue of lack of adequate abortion services in the "post-equality" era is judicially (re)presented as one which does not derive from social constructions of gender, leading to a veiling of the gendered nature of reproductive choices and experience. Such legal discourse in which gender is inadequately considered in the name of equality conceals the relevant issues facing women as sexed subjects, and requires sustained challenge.

Challenging Illusions

From this brief analysis of three elements in current legal cultures – gender neutrality in policy, the legislative presentation of sexual crimes, and the adjudication of gendered issues by judges – we can see that gender is at all times presented as absent, but can still be detected in a place beyond what is overtly being said. The post-feminist revolution, therefore, appears to be an illusory misnomer for the continuation of gendered constructions in legal discourse, albeit in a slightly altered manner. Sustained and engaged critique with tangible texts of law must be encouraged in contemporary feminist legal

²⁴ *Ibid.* at para. 164.

research in order to reveal and resist post-feminist narratives which simultaneously embrace and deny gender equality. Notions of post-feminism have proven particularly challenging to the current feminist movement, however, this article has sought to illustrate that continuance of a back to basics approach to feminist legal critique which focuses on the core tenets of law offers many opportunities for challenging the illusions that seek to present the feminist movement as the poltergeist of 1970s activism.

Bibliography

Ashworth, Andrew and Temkin, Jennifer, "The Sexual Offences Act 2003 (1) Rape, Sexual Assaults and the Problems of Consent" (2004) *Criminal Law Review*, pp. 328-346.

Barrett, Michèle and Philips, Anne (eds.), *Destabilizing Theory: Contemporary Feminist Debates* (Cambridge: Polity Press, 1992).

Cole, David, "'Going to England': Irish Abortion Law and the European Community" (1993) *Hastings International & Comparative Law Review* 17 pp. 113-142.

Coward, Rosalind, *Sacred Cows: Is Feminism Relevant to the New Millennium?* (London: Harper Collins, 1999).

Crown Prosecution Service, *Policy for Prosecuting Cases of Domestic Violence* (London: CPS, 2009).

Davies, Margaret, "Feminism and the Flat Law Theory" (2008) *Feminist Legal Studies* 16 pp. 281-304.

Farrel, Warren, *The Myth of Male Power: Why Men are the Disposable Sex* (N.Y.: Simon & Schuster, 1993).

Fegan, Eileen, "'Ideology' after 'Discourse': A Reconceptualisation for Feminist Analyses of Law" (1996) *Journal of Law and Society* 23(2) pp. 173-197.

Fegan, Eileen and Rebouche, Rachel, "Northern Ireland's Abortion Law: The Morality of Silence and the Censure of Agency" (2003) *Feminist Legal Studies* 11 pp.221-254.

Fitzpatrick, Peter (ed.), *Dangerous Supplements: Resistance and Renewal in Jurisprudence* (London: Pluto Press, 1991).

Foucault, Michel, *History of Sexuality, Vol. 1*, (trans. Robert Hurly, London: Harmondsworth, 1979).

Gordon, Avery, *Ghostly Matters: Haunting and the Sociological Imagination* (Minneapolis MI: University of Minneapolis Press, 2001).

Hassouneh, Dena, "The Influence of Gender Role Stereotyping on Women's Experience of Female Same-Sex Intimate Partner Violence" (2008) *Violence Against Women* 14 pp. 310-325.

Hoff Sommers, Christina, *The War Against Boys: How Misguided Feminism is Harming Our Young Men* (N.Y.: Simon & Schuster, 2001).

Home Office, *Domestic Violence: A National Report* (London: The Stationary Office, 2005).

HM Government, *Call to End Violence Against Women and Girls: Action Plan* (London: Cabinet Office, 2011).

Lacey, Nicola, *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* (Oxford: Hart Publishing, 1998).

MacKinnon, Catharine, "Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence" (1987) *Signs*, 8(2) pp. 635-658.

McGlynn, Clare and Munro, Vanessa (eds.), *Rethinking Rape Law: International and Comparative Perspectives* (London: Routledge, 2010).

McLaren, Margaret, *Feminism, Foucault and Embodied Subjectivity* (SUNY Press: Albany, 2002).

Munro, Vanessa and Stychin, Carl (eds.), *Sexuality and the Law: Feminist Engagements* (London: Routledge-Cavendish, 2007).

Naffine, Ngaire and Owens, Rosemary (eds.), *Sexing the Subject of Law* (London: Sweet and Maxwell, 1997).

O'Donovan, Katherine, *Sexual Divisions in Law* (London: Weidenfeld and Nicolson, 1985).

Seelau, Shelia and Seelau, Eric, "Gender-Role Stereotypes and Perceptions of Heterosexual, Gay and Lesbian Domestic Violence" (2005) *Journal of Family Violence* 20(6) pp. 363-371.

Schweppe, Jennifer (ed.), *25 Years of Protection? Article 40.3.3, The Unborn Child and Abortion in Ireland* (Dublin: Liffey Press, 2008).

Smart, Carol, *Feminism and the Power of Law* (London: Routledge, 1989).

Yeatman, Anna, *Bureaucrats, Technocrats, Femocrats* (Sydney: Allen and Unwin, 1990).

Wicks, Elizabeth, 'A, B and C v Ireland: Abortion Law under the European Convention on Human Rights' (2011) *Human Rights Law Review* 11(3) pp. 556-566.

Zalewski, Marysia, *Feminism After Postmodernism: Theorising Through Practice* (London: Routledge, 2000).

Cases

The Society for the Protection of Unborn Children Ireland Ltd v. Grogan and others [1991] ECR I-4685, C-159/90.

Attorney General v. X [1992] IESC 1; [1992] 1 IR 1 (5th March, 1992).

Open Door and Dublin Well Woman v. Ireland (1992) ECHR Application No. 14234/88.

D v. Ireland (2005) ECHR Application No. 26499/02.

A, B and C v. Ireland (2010) ECHR Application No. 25579/05.