

# SOMETHING IS PUSHING THEM TO THE SIDE OF THEIR OWN LIVES:<sup>1</sup> A FEMINIST CRITIQUE OF LAW AND LAWS

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## INTRODUCTION

Two major propositions are central to this article. The first proposition is that feminism is concerned with a *process of exclusion* as well as the practical manifestation of discrimination against women. It is the former aspect of feminism which is of primary concern here. The second proposition is that *law and laws are inextricable from social relations* - that law is constituted by and constitutes social relations. The relationships of concern here are those between men and women. On the basis of these propositions the article seeks to show power relations between men and women are both reflected and maintained within claims to objectivity and neutrality of the law. That is, the law reproduces exclusion of women's experience. This thesis is elucidated by way of a detailed analysis of two criminal defences - provocation and self-defence.

The article attempts to address both theoretical and practical issues and this endeavour proceeds from the assumption that these two levels are in fact inseparable. That is, in order to understand a particular instance of exclusion of women in law, a theoretical understanding of women's subordination is necessary. Correspondingly, detailed examination of particular instances of exclusion in the law will reveal something of the general dynamics by which the law excludes women.

First, the particular theoretical approach to feminism taken in this article is outlined. Drawing on two major developments in feminist

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1. P Larkin "Afternoons" in *The Whitsun Weddings* (Chatham GB: Faber and Faber, 1971) (Original edn 1964) 44.

thought this century, the ideas of 'silence' and 'exclusion' are identified as central to the subordination of women. These ideas are illustrated by looking at the practice of domestic violence.

Secondly, the theoretical positions developed in the first part of the article are applied to an analysis of legal doctrine. The aim of this analysis is to examine the instances of silence embodied in laws which maintain the devaluated status of women. The analysis is not an attempt to reveal particular sexist intentionality which may exist *behind* the formation of these laws, for example, on the part of particular legislators, judges, counsel or even jurors. It is an attempt to reveal the power relations which are implicit within the very *structure* of the laws themselves - how what is claimed and understood to be objective in fact reflects the experience and serves the interests, of some and not others. The aspects of legal doctrine chosen for analysis are those which illustrate this most clearly. An exhaustive doctrinal account of the laws is not intended.

This analysis is of the laws of provocation and self-defence in the context of women homicide offenders who have killed their spouse. The article seeks to show that the primary structural requirements of these defences work to reproduce the silencing of women in domestic violence because the defences fail to contemplate the power dynamics involved in that violence. To begin an overview is given of spouse homicides. Following that an analysis is made of the conceptual distinction between provocation and self-defence. Then the relevant elements of provocation are analysed and finally, the relevant elements of self-defence are examined.

## FEMINISM

[T]he civil law, as well as nature herself, has always recognised a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood ... So firmly fixed was this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman has no legal existence separate from her husband, who was regarded as her head and representative in the social state....<sup>2</sup>

2. *Bradwell v Illinois* 16 Wall 442, 446 (1876).

Feminism disconcerts. It problematises, disturbs, points out (is accused of creating) fissures, precipices. It challenges coherencies. Man? Woman? It is the creation of eyes that see, re-interpret and criticise; a monumental turning to look at that which has been the looking. Personal and political universes are scrutinised. Yet feminism is not easy to define. According to Leslie Bender's working definition, feminism means "an analysis of women's subordination for the purpose of figuring out how to change it".<sup>3</sup> Or feminism may be "a commitment to the fundamental alteration of women's role in society".<sup>4</sup> There are many feminisms each with its own location: personal-political, social-political, economic, artistic, sexual, intellectual or physical. It is not a unitary movement and its diversity is vital to its nature. However, certain themes and insights can be recognised as pivotal to many of the developments in feminist theory.

## Two feminist themes

One of the most important themes in feminist thought this century has been the articulation of the concept of gender, as distinct from sex. This was crystallised in Simone de Beauvoir's insight that one is "not born, but rather becomes a woman".<sup>5</sup> That is, whereas sex refers to our distinctive physiologies, gender is our learned identity, acquired through a socialisation process. We are born with certain genitalia, but are taught to be a man or a woman. This insight challenges the inevitable association of the almost mutually exclusive sets of attributes, roles and capabilities with one or the other sex. It makes problematic settled understandings about the construction of identity and makes social analysis of that construction accessible where only biological determinism was possible in the past.<sup>6</sup>

Another vital, and more recent, contribution to feminism (which flows from the identification of gender as distinct from sex) is the conceptualisation of the construction of sex/gender relations (relations between men and women) as a *fundamental* organising principle in society. This proposition recognises that the effects and consequences of

3. L Bender "A Lawyer's Primer on Feminist Theory and Tort" (1988) 38 J Ed 3, 5.
4. A Bullock (ed) *Fontana Dictionary of Modern Thought* (London: Fontana, 1977) 231.
5. S De Beauvoir *The Second Sex* (London: Pan Books, 1988) 295.
6. *Supra* n 3, 12-15.

sex/gender relations cannot be explained in terms of other relations or organising principles - for example, class, race or age. The sex/gender structure in society has a separate existence, being a primary reference for both individual and collective identity.<sup>7</sup>

### Silence<sup>8</sup>

Drawing on these insights - that gender is socially constructed and that sex/gender relations represent an irreducible organising principle in society - the approach taken to feminism here identifies the *silencing* of women as central to their subordination. Women are subordinated by being discriminated against in a practical way - by not being paid or being underpaid, or by being physically abused. But they are also subordinated, less obviously, by being silenced. By "silence" is meant the experience of being *excluded from participating in the production of social meaning*. And 'meaning', here, is used in a much broader sense than merely the definition of spoken and written words. Meaning refers to the shared understanding of the *significance* of language and social practices - which social practices are, and which are not, understood to be coherent and valuable. Women have been, and largely still are, excluded from the social process of determining what is significant and what is meaningless - from 'naming' the world, from according value to some and not other experience. This silencing of women - their exclusion - is evidenced in their positive absence as authors (in its broadest sense) of social and recorded history.<sup>9</sup> To a large extent 'history', for women, both past and present, has been the positive experience of inarticulation and non-reflection of self. Who, in our past history, (has not) formulated government policy? Who (has not) run the universities and mining companies? And who (has not) envisioned their shapes, functions and

7. S Harding "Why Has the Sex/Gender System Become Visible Only Now?" in S Harding et al (eds) *Discovering Reality: Feminist Perspectives on Epistemology, Metaphysics, Methodology and Philosophy of Science* (Dordrecht: D Reidel Publishing Co, 1983) 311. See also M Cain "Realism, Feminism, Methodology and Law" (1986) 14 Int J Soc L 255.
8. This notion of silence is gleaned from: E Grosz "The in(ter)vention of feminist knowledges" in E Grosz et al (eds) *Crossing Boundaries* (Sydney: Allen & Unwin, 1988) 92-104; E Grosz *Sexual Subversions: Three French Feminists* (Sydney: Allen & Unwin, 1989); H Cixous et al *The Newly Born Woman* (Manchester: Manchester University Press, 1986).
9. 'History', here, refers to Western history.

necessities?<sup>10</sup> Experience of internality and privacy is a central social reality for women. It is not a metaphor for that which is biologically female. Skills of observation and accommodation are social realities and not, essentially, chosen or innate attributes.<sup>11</sup> In this light the public/private, social/personal division itself ('men shine in public while at home women rule the roost' or 'women are private beings *therefore* they stay at home') collapses into an expression of who does and who does not qualify to interpret experience, or rather, whose standard for interpreting experience qualifies as our shared standard. The construction of the public/private division is only consequentially (though inevitably) a description of who works (or does not work) where. An important personal-social experience, then, for women, is silence and that is evidenced in an absence from what we understand to be society. That absence is (one) social reality.

The exclusion of women from interpreting and naming social experience is, however, also evidenced in women's attempted *expression* through history - for example in their attempted political, literary, or sexual expression of self. Instances of women's expression (of the experience of silence or other things), within a system of norms formulated by reference to male experience, fight meaninglessness. And that struggle is itself evidence of exclusion. Expression of a woman's experience "appears as if from nowhere".<sup>12</sup> And if it is a critical expression, "as if her politics were simply an outburst of personal bitterness or rage".<sup>13</sup> Such expression is perceived to be exceptional, somehow outside of an otherwise roughly coherent 'human history', or rather, a human history we read as roughly coherent. Whether simply an expression of experience or a conscious critique of social reality, women's voice has been understood to be tangential, mysterious and extraordinary *even if it*

10. Supra n 3, 12-15.

11. C MacKinnon "Feminism, Marxism, Method and the State: An Agenda for Theory", (1982) 7 Signs: Journal of Women in Culture and Society 515, 534.

12. A Scales "The Emergence of Feminist Jurisprudence: An Essay" (1986) 95 Yale L J 1373, 1399.

13. A Rich "Forward: On History, Illiteracy, Passivity, Violence, and Women's Culture" in *On Lies, Secrets, and Silence: Selected Prose 1966-1978* (New York: W W Norton & Co, 1979) 13-14 quoted in Scales, *ibid*.

*is not understood to be objectionable or specifically threatening.* Virginia Woolf, Sylvia Plath, the Brontes, Joan Didion, Judith Wright, Dorothy Hewett, Doris Lessing and perhaps all other women writers have something of the 'good but not great' quality about their public acclaim. 'Too anxious'; 'too close to their subject'; 'women's material', 'something mysterious or unreachable about their choice of content'. To a greater or lesser extent, this 'victims of passion' - or perhaps 'victims to their woman-hood' reputation has both explained their artistry and explained and maintained the isolation of their voices. And this is accurate criticism, because if sex/gender is a core constituent of identity, and if meaning in social reality is reproduced by reference to a standard from which women are systematically excluded, expressions of self will inevitably involve expression of the experience of non-existence - silence - and will necessarily (that is in *reality*) be tangential, extraordinary and irrational.

Being outside the shared network of meaning, expressions of exclusion will, at best, struggle to 'mean'. Experience may not appear real, sometimes even for the women who experience it.

Thus male dominance - in the sense of creation of standards which refer to a specifically male experience - is, as MacKinnon says, "meta-physically nearly perfect".<sup>14</sup> "Men *create* the world from their own point of view, which then *becomes* the truth to be described. This is a closed system, not anyone's confusion".<sup>15</sup>

It is this aspect of subordination, this exclusion from participation in investing meaning - these lacunae - which the particular approach to feminism taken here seeks to identify and examine. Not for what it may reveal about an inherent 'otherness', but for its *discursive invisibility*; its dynamic *lack*. If the occasional, apparently (and really) non-contextual outbursts are examined for the reality they reveal, if we investigate precisely the frameworks for interpreting experience there embodied - not only will the experience of silence and exclusion be 'communicated', but another, different, social reality will be realisable. Future directions will be implied.

14. C MacKinnon "Feminism, Marxism, Method and the State : Toward Feminist Jurisprudence" (1983) 8 Signs: Journal of Women in Culture and Society 635, 638.

15. *Supra* n 11, 537.

The practice of domestic violence is an important sphere in which women's experience is more or less unacknowledged. The silence in this social sphere supports, and in turn is supported by, the silencing of women embodied in the legal constructs of provocation and self-defence. It will therefore be useful to look briefly at the ways in which the exclusion of women's realities is effected by this social sphere.

## Domestic Violence

The use of physical violence against women in their position as wives is not the only means by which they are controlled ... but it is one of the most brutal and explicit expressions of ... domination.<sup>16</sup>

'Marital violence', gender neutral though the term is, is perpetrated overwhelmingly by husbands against wives and is not uncommonly systematic and extremely severe.<sup>17</sup> The extent of domestic violence is impossible to ascertain precisely. However the National Committee on Violence considers that it is probably "widespread, almost to the point of being a normal, expected behaviour pattern in many homes". Domestic violence may affect between one in three and one in ten families.<sup>18</sup>

Women who are the victims of marital violence are silenced not only by the physical suppression they suffer but they are also silenced by the construction of meaning of domestic violence. Two aspects of this are important:

(a) Marital violence is understood to be 'private' violence. Little is known about it (publicly) and social agencies have been, and largely still are, reluctant to intervene. The Western Australian Task Force on Domestic Violence reported:

The silence that has surrounded domestic violence has, in effect, condoned it and contributed to the reluctance of victims to seek legal and social remedies to protect themselves from their violent spouses.<sup>19</sup>

16. R Dobash et al *Violence Against Wives: A Case Against the Patriarchy* (London: Open Books, 1980) ix.

17. See for example *ibid*, 11-12; Western Australian Task Force on Domestic Violence *Break The Silence* (Perth: Government Printer, 1986) 31-39; National Committee on Violence *Domestic Violence* (Issues Paper No 2, 1989) 2. "Wife" and "husband" will be used throughout this article interchangeably with "spouse" and refer to both legal and defacto partners.

18. National Committee on Violence, *ibid*, 3. It should be noted that the definition of domestic violence used by the Committee includes family violence outside the marital relationship.

19. Western Australian Task Force on Domestic Violence, *supra* n 17, 43.

Where women do seek help they report being disbelieved, either entirely or as to the severity of the abuse, advised to return to 'try harder' or inadequately helped by both friends, family and social agencies. Furthermore, the privacy of marital violence is maintained by the sometimes insurmountable social and economic difficulties women face when they contemplate leaving the violent relationship. Where the abusing partner has control of family finances, setting up a new home is extremely difficult or impossible. If the woman is caring for children this is exacerbated. Another major reason for the private nature of domestic violence is the realistic fear of serious reprisal women feel they would receive if they sought help or attempted to leave.<sup>20</sup>

(b) The fact that marital violence is culturally (and, in the past, legally) entrenched as behaviour within the sphere of normal marriage relationships also contributes to the silencing of women's experience of it. If not common practice, domestic violence is within the realm of normalcy.<sup>21</sup> What may be experienced as torture is understood to be 'chastisement'.

The right of a husband to abuse his wife is embedded in our legal history. Until the legislative reforms of the nineteenth century a woman, in marriage, had no separate legal existence from that of her husband. Her "very being or legal existence" was "suspended" during marriage.<sup>22</sup> One of the rights accruing to a husband at common law was the right to 'chastise' his wife. In 1765, Blackstone wrote:

The husband also ... might give his wife moderate correction. For, as he is to answer for her misbehaviours, the law thought it reasonable to entrust him with the power of restraining her, by domestic chastisement.<sup>23</sup>

20. See J Crancher et al "Battered Women", in M Findlay et al (eds) *Issues in Criminal Justice Administration* (Sydney: Allen & Unwin, 1983) 43-52; supra n 16, 161-206; C Ewing *Battered Women Who Kill: Psychological Self-Defense as Legal Justification* (Massachusetts: Lexington Books, 1987); Wallace infra n 33, 99.
21. R Dobash et al "Wives: The 'Appropriate' Victims of Marital Violence" (1977-78) 2 *Victimology* 426, 426-427.
22. W Blackstone *Commentaries On The Laws of England* Vol I 15th edn (London: Strahan, 1809) (rep 1982) 441.
23. Ibid, 444.

Views differed as to what constituted chastisement, but it is clear that what was tacitly condoned then, as now, went far beyond that which was endorsed by the law.<sup>24</sup> By the end of the eighteenth century the express right of a husband of 'correction' of his wife no longer existed but it was not until 1891, in the case of *R v Jackson*,<sup>25</sup> that the express legal right of a husband to restrain his wife of her liberty in any circumstance was removed.

That a husband has no legal right to demand obedience of his wife does not, however, mean that society is against its practice. Straus writes:

[T]he social definition of the family as non-violent causes a perceptual blackout of the family violence going on daily around us in "normal" families.<sup>26</sup>

Women's learned physical helplessness (inability to fight back), vulnerability and sexual submissiveness (rapability), the exclusion of women from control of financial resources (financial deprivation) and the social isolation and 'privatisation' of women in the role of wife and homemaker are all elements of legitimate desired marriage relationships, and they are also conditions for wife *abuse*. Thus, women are not only the most frequent victims of marital violence, but they are also the 'appropriate' victims.<sup>27</sup>

So women, as wives, are not only controlled by physical violence but their experience of that abuse is silenced insofar as it is understood to be private and insofar as the meaning of marital violence is positioned, culturally and in our legal history, within the realm of normalcy.

24. The Western Australian Task Force on Domestic Violence supra n 17, 40-43 traces the history of marital 'discipline' and chastisement.

25. [1891] 1 QB 671. However, two judges in that case envisaged the possibility that in certain circumstances a husband might restrain his wife, for example, if "the wife were on the staircase about to join some person with whom she intended to elope": *ibid*, 679; or if "a wife were about immediately to do something which would be to the dishonour of her husband": *ibid*, 683. There is still therefore a faint suggestion that this is part of the common law: A Dickey *Family Law* (Sydney: Law Book Co 1985) 218.

26. M A Straus "Foreword" to R J Gelles *The Violent Home: A Study of Physical Aggression Between Husbands and Wives* (Beverly Hills: Sage Publications, 1972) 13.

27. Supra n 21.

## EPISTEMOLOGY

Feminism comprehends that what counts as truth is produced in the interest of those with power to shape reality.<sup>28</sup>

The idea of silence and exclusion of women from being the authors, so to speak, of social meaning, can be taken one step further. If women are people who do not have their description of reality endorsed, then one way in which that exclusion is effected and perpetrated can be understood by reference to epistemology, in other words, by reference to our theories about the way we understand what truth or reality is. Certain epistemologies, or certain ways of apprehending what is true and real, support the silencing of women's perspective or experience. It is suggested here that one implicit strategy which supports the exclusion and devaluation of women may be termed "objectivist epistemology".<sup>29</sup> By this it is meant, a way of understanding truth or objective knowledge as being outside of, and logically antecedent to, ourselves as historical human beings.

Much Western thought has encompassed the idea of objective truth as being that which is essential, abstract and separate from social practices, as that which is outside time. Society and social relations are, in this way of thinking, produced by, and can be measured against, an essential truth. For example, what women do (or what is done to them) will be understood in this view to be produced by what is true about women; not what is true about women primarily produced by what women do. Objective truth, once discovered or formulated, can be understood to apply universally to all humanity regardless of the historical context from which it emerges and the social practices and relations within which an individual is situated.

It is suggested that this model of truth or knowledge maintains power relations - whatever power relations exist. It helps to maintain the power relations within which women are subordinated because it instantiates and legitimises one dominant perspective (the prevailing, male perspective) as that which is to be regarded as universally true. It functions to prevent access to and scrutiny of the social mechanisms which operate to construct 'the truth' about who women are. In one sense there is nothing necessarily sexist about this way of apprehending truth. It also prevents

28. C MacKinnon *supra* n 14, 640.

29. This term is Catherine MacKinnon's (*ibid*, 645 and *passim*) though it is used here in a slightly different way.

access to the mechanisms which go to construct the truth about who men are. It is just that insofar as society is constituted through the differentiation of male and female, male is on top.

Other alternative epistemologies encourage the recognition of the silencing and exclusion of women and are therefore potentially liberatory. A world view which gives epistemological primacy to social practices and social relations (as opposed to an abstract essential truth) involves an idea of truth and objective knowledge as that which *emerges from*, or is *produced by* society. Thus, what is true about men, for example, will be understood to be a function of what men do; not what men do a product of what is essentially true about men. What is to be regarded as true (or false) is, in this view, true (or false) by reference to its social, historical situation. Rather than truth being that which is to be striven for, divorced from social relations, this world view implies that radical access to knowledge and truth is available through human relations and activity. That is, to actually participate in human activity (paid work, unpaid work, owning, mothering, being abused) provides access to the truth of that practice. This model of truth supports the recognition of women's exclusion because it necessarily implies a plurality of truths or perspectives, providing for scrutiny of the source of each claim to truth and inherently challenging claims to universally applicable truths.

Michel Foucault's concept of the symbiotic relationship between power and knowledge is one such epistemology.<sup>30</sup> According to this theory objective knowledge is the product of, and the reflection of the power relations which it, in turn, maintains. Far from being the issue of an independent, apolitical truth, knowledge itself produces and embodies its own criterion of true/false. Power, in this sense, is inherently neither positive nor negative. It is not a commodity possessed by an integral subject but is ontologically (in other words, in its being) inseparable from practice, action and relations. It is that which activates and is activated within social relations and it is the dynamic configuration of those relations which produces the truth which describes, and constitutes,

30. This account of Foucault's theory is drawn from M Foucault "Truth and Power" in C Gordon (ed) *Power / Knowledge, Selected Interviews and Other Writings 1972-1977* (Brighton: Harvester Press, 1980) 109-133; M Foucault *The Archaeology of Knowledge* (London: Tavistock, 1972) 3-55; and M Foucault *Discipline and Punish: the birth of the prison* (London: Penguin, 1977).

social reality. To return then to Catherine MacKinnon: "... what counts as truth is produced in the interest of those with power to shape reality ...".<sup>31</sup> Knowledge embodies power.

To return also to Foucault:

[P]ower produces knowledge (... not simply by encouraging it because it is useful); ... power and knowledge directly imply one another; ... there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.<sup>32</sup>

Knowledge is an exercise of power in that it implies participation in the ordering and actuation of reality. Thus, within this theory of knowledge the concept of truth itself occupies an inherently political field. Laws are a manifestation of the configuration of power relations which constitute society. And to stress, 'power' here is inherently neither negative nor positive. It is rather the motivation of interests. Within this epistemological frame, law and laws are therefore within a profoundly political sphere. Further, it follows from this position that enquiry into, and analysis of, a body of knowledge (including a body of laws) is irrevocably concerned with the questions: who knows? who speaks? whose knowledge? whose laws? whose terms? whose truth? Rather than it being merely *appropriate* or *permissible* to examine a body of knowledge, including law, taking account of its authorship (in the broadest sense), an adequate understanding of a body of knowledge, actually *requires* these questions to be asked as part of the investigation into the nature of the object. Their omission reduces the efficacy of an enquiry.

It is on this basis that the analysis of the laws of provocation and self defence proceeds. That is, on the assumption that to know the nature of these laws the question 'Whose laws?' is a necessary enquiry. The standpoint from which this question is asked is a feminist one.

31. Supra n 14, 640.

32. Foucault *Discipline and Punish: the birth of the prison* supra n 30, 27.

## PROVOCATION AND SELF DEFENCE

What follows is an analysis of the laws of provocation and self defence in the context of women homicide offenders who have killed their spouse. An attempt is made to show that the primary structural requirements of the defences work to reproduce the silencing of women in domestic violence because the defences fail to contemplate the power dynamics involved in that violence. A woman's experience of her marital relationship and the killing itself is likely to be systematically skewed. This skewing may preclude access by the woman to the defence; however, even where the defence is available (and even where it is successful) her experience may be presented and understood in a distorted way.

First, an overview is given of the context within which spouse homicides occur. This overview outlines statistical information as to prevalence, the extent of reported domestic violence and the utilisation of the defences by women offenders. Four different studies - the New South Wales study, the Victorian study, the Bacon and Lansdowne study, and the Western Australian study - have been relied upon.

### (i) The New South Wales Study<sup>33</sup>

This is a study of all homicides in New South Wales between 1968 and 1981. The definition of homicide used in this study was that embodied in section 18 of the New South Wales Crimes Act 1900: namely, murder (including the equivalent of the Western Australian Criminal Code 1913 section 278 wilful murder) and voluntary and involuntary manslaughter (the equivalent of the Western Australian section 280 manslaughter offence). Infanticide was included but homicides resulting from motor vehicle accidents were excluded. The data sources for the study were police records (predominant source) and court records.

33. A Wallace *Homicide: The Social Reality* (Sydney: NSW Bureau of Crime Statistics and Research, 1986).

(ii) The Victorian Study<sup>34</sup>

This is a study undertaken by the Law Reform Commission of Victoria of all homicide prosecutions in Victoria between 1981 and 1987. The definition of homicide includes the common law offences of murder (including the equivalent of the Western Australian wilful murder) and manslaughter, including infanticide but excluding culpable driving causing death. The data source was the files of the Director of Public Prosecutions.

(iii) The Bacon and Lansdowne Study<sup>35</sup>

The aspect of this study relied on is the investigation of seventeen cases of women homicide offenders who had been convicted of murder or manslaughter of their husband or boyfriend in New South Wales before 1980. The data sources were court records and interviews with the women.

(iv) The Western Australian Study<sup>36</sup>

This is a study of all women who were prosecuted under the Western Australian Criminal Code 1913 ("the Code"), for wilful murder, section 278; murder, section 279, and attempted murder, section 283; in Western Australia between 1983 and 1988. The study also included data collected from 70 randomly selected male offender files covering the same period and the same charges. The data sources were court records and interviews conducted with four of the women.

Secondly, an analysis is made of the conceptual distinction between provocation as an excuse and self-defence as a justification. Thirdly, the relevant elements of the law of provocation are analysed. Fourthly, the relevant elements of self-defence are examined. Conclusions are drawn by way of proposals for reform.

34. Law Reform Commission of Victoria *Homicide Prosecutions Study* (Research findings 1989) (Report forthcoming) Only the information which was made available to the writer is referred to in this paper. At the time of writing, the Report had not been published.

35. W Bacon et al *Women Homicide Offenders in New South Wales* Report for the Feminist Legal Action Group (NSW) 1982.

36. This is research undertaken by the writer for the purpose of this paper. Information from one woman's file was not available.

## Overview: spouse homicides

### Prevalence

In the Western Australian study, twenty three women were charged with wilful murder, murder or attempted murder. Of these, ten killed their spouse or former spouse and three were charged with attempting to kill him. In the New South Wales Study of two hundred and fourteen female homicide offenders, seventy nine killed their spouse or former spouse. In the Victorian Study, of forty female homicide offenders, eleven killed their spouse or former spouse.

In the New South Wales Study of 1179 male offenders, two hundred and seventeen killed their spouse or former spouse. In the Victorian Study of two hundred and sixty two male offenders, thirty four killed their spouse or former spouse.<sup>37</sup>

### Domestic Violence

Prevalence, duration and seriousness of domestic violence as the background to spouse killings is impossible to ascertain. Evidence, especially that gained solely from the public record, will almost certainly be an under-estimate.<sup>38</sup> However, in the New South Wales Study:

A history of physical abuse was evident ... in almost half (48%) of the spouse homicides [male and female offenders]. In almost all these cases, this abuse was in one direction, ie by the husband against the wife.<sup>39</sup>

In the New South Wales Study, seventy percent of female offender killings occurred in a context of a history of violence by the husband on the wife. Of the thirteen women who killed or attempted to kill their spouse in the Western Australian Study, there was evidence that ten had been previously assaulted by their victim, at least six of them very seriously and over an extended period of time. Of the seventeen cases in the Bacon and Lansdowne Study, thirteen were women who had been

37. Supra n 33, 29, 85; supra n 34, 12, 17-18.

38. Supra, n 33, 96; supra n 34, 56.

39. Supra, n 33, 97.

physically abused in the past by the spouse they killed and in "most of these cases the women had been subjected to repeated and severe violence".<sup>40</sup>

In the New South Wales Study, Wallace writes:

Violence or fear of future violence was both the background and the cause of the use of force by women on their husbands ... Wife-killings, on the other hand, rarely, if ever, occurred in response to violence by the wife on the husband.<sup>41</sup>

In the Bacon and Lansdowne Study, in thirteen of the seventeen cases violence from her spouse or fear of an attack was, on the women's account, the reason why the woman killed.<sup>42</sup> In the Western Australian study it appeared unequivocal, in eight of the ten cases where violence formed the background, that the killing was in response to immediate and/or past violence perpetrated against the woman or her children by the victim.

In the Western Australian Study violence included: punching; kicking; being shot at; knocked down; bashed with heavy objects; pushed out of a moving car; being strangled; deliberate and punitive killings of favourite pets; being threatened with guns, knives and death; sexual assault; and physical and sexual abuse of the women's children. In some cases the abuse covered the entire length of the relationship, the period of abuse ranging from a few months to thirty years. Other studies reveal a similar range of abuse both in kind and durations.<sup>43</sup>

### Delayed retaliation

In the New South Wales Study, forty eight percent of the husband-killings occurred in a context other than that of an immediate threat or attack by the victim. Fifty two percent occurred in the context of an immediate threat or attack. In the Bacon and Lansdowne Study six of the seventeen women killed their spouse when he was asleep or she reasonably believed him to be asleep. In the Western Australian Study, four of

40. Ibid; supra n 35, 311. The information available to the writer from the Victorian Study did not delineate between spousal violence and other kinds of domestic violence.

41. Supra, n 33, 97.

42. Supra n 35, 311; see also C Ewing supra n 20.

43. See for example supra n 28, 97-98; supra n 35; Ewing supra n 20 passim.

the women killed or attempted to kill their spouse when there was no immediate threat of physical harm.<sup>44</sup>

### Utilization of the legal defences

#### *Provocation*

In the Bacon and Lansdowne Study, of the thirteen cases where domestic violence formed the background to the killing, provocation was raised four times by the woman's counsel and was raised by the court in one other case.<sup>45</sup> In the Western Australian Study, where domestic violence formed the background to the killing or the attempted killing (ten cases), provocation was raised in seven cases. In the three attempted murder charges provocation was not, legally, available.<sup>46</sup> In only one case, therefore, was provocation not raised where it could have been.

Of the sixteen male offender spouse killings in the Western Australian Study, provocation was raised three times. In none of these cases did the provocation consist of violence.

#### *Self-defence*

In the Bacon and Lansdowne Study, self-defence was raised by the woman's counsel in two cases and raised by the court on appeal in one other. It was mentioned tangentially in two other cases.<sup>47</sup> In the Western Australian Study, self-defence was relied on in two cases and was raised in two others. In only one of these cases was the woman acquitted - that is, the defence may have been successful in this one case. Self-defence was not raised in any of the male offender spouse killings in the Western Australian Study.

44. See for example *supra* n 33, 97; *supra* n 35, 315. In one survey in the United States, of 87 battered women who were tried for the homicide of their spouse, only 28 killings took place during the course of a battering incident. 18 of the remaining killings occurred when her spouse was asleep. Ewing *supra* n 20, Ch 5, n 27.

45. *Supra* n 35, 312. The NSW Study does not consider the criminal defences. This information was unavailable from the Victorian Study.

46. *Kapronovski v R* (1975) 133 CLR 209; *Roche* (unreported) May 1987 no 12 of 1987.

47. *Supra* n 35, 312.

## Summary

Women are roughly three times more likely to be killed by their spouse, than men. Where a woman kills her spouse, violence against the woman by her victim formed the background to the killing in the majority of cases and in many of those cases, the violence was prolonged and severe. By the women's account the killings were in response to the violence perpetrated against them by their partner in an on-going, intimate relationship. Except for, possibly, a small minority of male offender cases, *there is no equivalent social context from which wife killings emerge*. Yet the same legal defences apply to both groups of offenders. A considerable number of women killed outside of a battering incident.

There appears a marked increase in the use of provocation in the 1980's. Despite the fact that a majority of husband killings occurred in response to violence, self-defence was relied on in a small minority of cases and was very rarely successful.

## Conceptual analysis

A key conceptual distinction among defences is between justifications and excuses. Self-defence can be most easily characterised as a justification; provocation as an excuse.<sup>48</sup> Justifications (including also for example, necessity and public authority justifications) address - and negate - questions of the *wrongfulness* of the defendant's action. Excuses (including also for example, duress and automatism) address questions of the individual defendant's *capacity to act otherwise*. The action itself is presupposed to be wrongful.

So, where a homicide is justified on the basis of self-defence the killing is conceptualised as a necessary response to actual danger caused by an assailant's conduct. The defence addresses the corporeality of the *danger* in which a defendant finds herself when she kills. Ultimately no offence, nor any moral transgression has been committed. On the other hand, where a homicide is excused on the basis of provocation the killing is conceptualised as a morally and legal reprehensible act but the defendant's culpability is reduced because the act was committed during a fissure in rational consciousness. The defence addresses the *loss of*

48. Koh *Criminal Law in Singapore and Malaysia : Text and Materials* (Singapore/ Kuala Lumpur: Malaysian Law Journal, 1989) 103-104.

*emotional control* suffered by the defendant when she killed. Two related implications of this conceptual distinction between provocation and self-defence should be noted.

First, since provocation, conceptually, leaves undisturbed the wrongfulness of the killing and addresses only the 'frailty' of the particular defendant, the moral and ethical questions raised by this defence are of less import than those raised by self-defence. Consequently, a finding of provocation has fewer moral ramifications than a finding of self-defence. Secondly, domestic violence is conceptualised differently in a claim of provocation from its conceptualisation in a claim of self-defence. In a claim of self-defence the danger in which a woman finds herself as the result of violence by her spouse is addressed directly. The violence - and the danger - is the aberration in normal existence which invokes the application of the defence. In a claim of provocation the violence functions to enable a consideration of the woman's loss of control. The aberration conceived by the law of provocation is not danger but the woman's loss of control. The morally desirable state of things which would have prevailed had the aberration not occurred is, in the case of self-defence - no danger (and therefore no killing). In the case of provocation it is a retention of control in the face of domestic violence (and therefore no killing). No doubt in some spouse killings provocation is the appropriate defence. However, the point to be made here is that the very concept of provocation, however available the defence is to women, and whether it is successful in a particular case or not, fails to address directly the issue of marital violence. In particular, it fails to address the danger and violation which that abuse involves.

## Provocation

A killing is provoked in law if it is committed in response to a provocative incident which causes sudden and temporary loss of control in such circumstances where an ordinary person would have lost control and killed. If a killing is found to have been provoked a conviction of wilful murder or murder is reduced to a conviction of manslaughter.<sup>49</sup> The onus is on the Crown to disprove provocation beyond reasonable doubt. The defendant has an evidentiary onus only.<sup>50</sup>

49. The Code 1913 ss 245 and 281.

50. *Van Den Hoek v R* (1986) 161 CLR 158.

Two aspects of the law of provocation will be discussed: the provocative incident and the relationship between fear and anger.

(a) The provocative incident

According to section 245 of the Code any wrongful act or insult may form the basis of legal provocation. Traditionally, in deciding whether an accused was provoked and whether an ordinary person would have been provoked in the circumstances, a jury was permitted to consider the immediate provoking incident only, in isolation from previous events. The scope of provocation was extended however in the case of *R* in 1981.<sup>51</sup> As a result of that case a jury is now permitted to consider the immediate provocative incident in the light of previous conduct by the victim, including domestic violence. That is, the provocative incident may be the 'straw that breaks the camel's back'. In *R*, a woman had been the victim of serious domestic violence throughout a twenty-five year marriage. Several days before she killed her husband she discovered that he had been committing incest for many years with their daughters. On the night of the killing he had not been physically violent towards his wife but when in bed had put his arm across her telling her he loved her and that they would from now on be 'one big happy family'. It was this conduct and these words which constituted the provocative incident. *R* killed her husband about half an hour later. This decision has ameliorated considerably the difficulties faced by women offenders who respond to a history of domestic violence and undoubtedly accounts for the increased use of provocation by women noted earlier. However, the primary model for the defence has not changed. A provocative incident must induce an immediate response.<sup>52</sup> This means that where there is no perceivable provocative incident the defence will be precluded. Or where a woman has, in fact, been provoked by a history of violence, her defence counsel may select an incident strategically in order to rely on the defence. If the jury perceives her to be manipulating the facts (which,

51. (1981) 4 A Crim R 127.

52. Immediacy is indeed embedded in the language itself. The word provocation invokes the idea of suddenness. As Leslie Bender writes: "Naming controls how we group things together ... Our language is a male language that reinforces male perspectives ...." *supra* n 3, 16.

indeed she is) the defence may fail. The evidence of previous domestic violence will then merely function to confirm her intention to kill.<sup>53</sup>

The model of immediacy (albeit in a context where the court will allow reliance on innocuous words or conduct) directly contradicts the response patterns of women who are repeatedly beaten. Women who are the victims of repeated marital violence regularly respond at a time *other than* the time of an attack. Dobash found that:

The majority of the [109 seriously abused wives] ... responded to a violent attack by remaining physically passive. Women learn that it is futile to attempt to match the physical strength of their husbands and try primarily to protect themselves during attacks. Two women summed up the experience of most women: "Well, I didn't try to hit him back. It just got worse if I did". "I just tried to defend myself, got my arms up to save myself. ... if you can just think to yourself, I'm going to get two or three and then he'll stop ... but he wouldn't stop if you cried out or protested."<sup>54</sup>

This is consistent with the experience of the four women interviewed by the writer at Perth's Bandyup Prison. Three women said they only ever defended themselves, by putting their arms across themselves or attempting to push their husbands away. One said she always hit back, though she had never used anything but retaliatory force against her spouse. Further, Ewing analogises domestic violence to the psychological phases experienced by victims of violent crime in one off situations. Phase one is shock and disbelief; phase two is terror; phase three is circular bouts of apathy, anger, 'constipated rage', resignation, insomnia, and replay of the traumatic events through dreams and nightmares. Phase three is unlikely to be experienced while the victim is in contact with the criminal.<sup>55</sup>

53. *R v Bradshaw* (unreported) Supreme Court of Western Australia 16 April 1985 no 33/85 appears to be an illustration of this. In that case the assault and the argument relied on as the provocative incident had ended before the woman killed her de-facto husband. Evidence of previous violence against her was admitted including repeated beatings which resulted in permanent scarring and threats of death which she had reported to the police. Part of the prosecution case was that the woman was "merely angry", but not out of control and that she had seized upon an opportunity to vent the anger she felt as a result of treatment she had suffered at the hands of her spouse in the past. That is, she had not been provoked by the relevant assault, but was acting in "revenge". The woman was convicted of murder. Also, a credible reading of the *R* case supra n 46 is that the provocative incident relied on (the words and apparently benign conduct of the husband) was chosen strategically in order to rely on the defence.

54. Supra n 16, 108-109.

55. Ewing supra n 20, 70-73.

The changed response - that is the retaliation which results in the death where no, or no serious retaliation had occurred before - may be caused in various ways. However, Ewing refers to this change as resulting from a 'realization' or a 'turning point' at which many battered women begin to see themselves as victims and from which realisation killing sometimes results. The 'precipitating events' which lead to this realisation are varied but may be a serious escalation in her husband's violence (during which the woman would be even less able to respond) or when the abuse become visible to others outside the relationship.<sup>56</sup> In two of the Western Australian cases (as in the *R* case) the precipitating events appear to have included discovery that not only she but her children had been the victims of her husband's abuse.

So, women who are the victims of marital abuse regularly remain passive during an attack and 'precipitating events' which may lead to a loss of control and serious retaliatory force may well be incidences which are in an immediate physical sense unrelated to her abuser. A model of provocation which would accurately reflect a woman's experience would contemplate (as a central case) the killing being at a time *other than* during a violent incident.

There is a further effect of the model of provocation remaining that of immediate response. Since the construct contradicts regular response patterns, even where the defence is raised successfully, a woman's experience may be misrepresented. The skewing of her experience so as to be represented in terms of immediacy may result in the enormity of the provocation in response to which she lost control, being obscured. The evidence of previous violence functions in law as background information, necessary to interpret a loss of control which may otherwise be unequivocally unreasonable (in the *R* case<sup>57</sup>: he told her he loved her so she killed him with an axe). To raise provocation, *R* was obliged to present herself as having 'snapped' because her husband spoke those words. Past history of victimisation had *no direct independent meaning*. The distinction to be made here is different from that made between justificatory and excusatory defences. Even assuming *R*'s action should be characterised as a loss of control not calculated to defend against danger, the story we are obliged to construct in order to excuse her is that she lost control over a trifling (albeit triggering) incident. *R* could not be

56. Ibid, 65-66.

57. Supra, n 51.

excused for having lost control *in direct response to his having abused her and their daughters over many years.*

Put very simply, the distinction is between, on the one hand, excusing a woman for reacting to being splashed by water because something in her past gave special significance to water and, on the other, excusing a woman for losing control in response to a series of tidal waves engulfing her home. That which is experienced as torture is understood to be chastisement. According epistemological primacy to an immediate incident even where it is not in fact what provoked a woman distorts the enormity of what many women are retaliating against when they kill. It relegates the enormity to incidental status, and protects us, finally, from the logical possibility that R's outrage (even where it is not conceived as rational defence) *matched* rather than exceeded the provocation. Acknowledging the enormity of the provocation in some women's cases introduces questions as to the possibility of a full acquittal even on an excusatory basis.<sup>58</sup>

#### (b) Fear/anger

In *Van Den Hoek v R* in 1986, the High Court considered the question whether a person could avail herself of the defence of provocation where what was claimed to be provocative were incidents which produced fear or panic rather than anger. Justice Mason said:

Whether one looks to s. 245 of the code or to the common law for elucidation, the defence of provocation for which s. 281 provides should be understood as embracing a sudden and temporary loss of self-control due to an emotion such as fear or panic as well as anger or resentment.<sup>59</sup>

The joint judgement made no such express statement, however their Honours' agreement may be inferred, given the fact that they held that the jury should have been given the opportunity to consider provocation

58. This may be one interpretation of the final decision in the *R*, *ibid*. On a re-trial *R* was acquitted which, legally, appears to have been an impossible result. There was no doubt as to *R*'s intent and self-defence was not in issue. It may be argued that the scope of a jury to acquit in this way is the adequate and appropriate legal mechanism. See C Harding "Not murder, she quoth" *The Bulletin* 29 August 1989, 40. However it would appear to be an extremely precarious mechanism and may depend on factors such as media coverage and the confidence of a particular jury. It also maintains the status of such decisions as exceptional with no real legal meaning.

59. *Supra* n 50, 168.

and that the accused had claimed that she experienced fear only and not anger.<sup>60</sup>

It is unclear precisely on what basis the High Court conceived fear founding a claim of provocation. If it is envisaged that the fear induces an unintentional killing then the appropriate defence would be one based on section 23 of the Code and, if successful, no criminal liability would attach. If, on the other hand, it is envisaged that the fear induces an intention to kill, then two possibilities follow. Where the fear is based on reasonable grounds the appropriate defence is self-defence and the result should therefore be a full acquittal. Where the fear is not based on reasonable grounds, it would appear that the High Court's extension of provocation amounts to a defence similar to excessive self-defence, not itself available in Western Australia.

This extension of the defence is strategically advantageous for women because it makes the defence more available. As provocation in the majority of female offender cases consists of violence, fear is likely to be induced and can, therefore, now be relied on to found the defence. For the conceptual reasons discussed above, provocation may be more easily established than self-defence. However, there may be detrimental effects for women in this extension. To import fear into provocation in this way may tend to appropriate, as it were, the evidence of fear which would otherwise found a claim of self-defence. By their own accounts most women who kill in fear, kill in defence of themselves, not because they lost control of their emotions.<sup>61</sup> To extend provocation in this way is to characterise women's response in fear as (merely) loss of control, the action of killing being tangential to the violence perpetrated against them. Such a characterisation may embed notions of women's fears being unreasonable, her action excusable because they caused her to lose control, but not justified on the basis of self-defence.

## Self-defence

When a person is unlawfully assaulted in such a way as to cause reasonable apprehension of death or grievous bodily harm and the person assaulted believes on reasonable grounds that they cannot otherwise save

60. Ibid, 162.

61. Supra n 33, 97; supra n 35, 311, 313; Ewing supra n 20.

themselves then the use of deadly force against the assailant is justified.<sup>62</sup> A successful claim of self-defence results in a full acquittal. As with provocation the onus is on the Crown to disprove self-defence beyond reasonable doubt.

Three aspects of the law of self-defence will be discussed. First, the nature of the assault; second, the requirements of reasonable apprehension of serious harm and belief as to alternative means of preservation. The psychological theory known as 'battered woman syndrome' will be discussed in this section. Third, the relationship between fear and anger will be discussed.

#### (a) Nature of the assault

An assault against which a person is justified in using lethal force must be of a kind which causes reasonable fear of imminent death or serious harm. The assault need not be ensuing but must be reasonably perceived to be imminent and the feared assault may be one of a series of assaults where a general attack is in progress.<sup>63</sup> The paradigmatic danger envisaged by the defence is that which emanates from an immediate single attack. Where there is no physical attack in progress and no reasonable perception that one is literally imminent the defence is precluded.<sup>64</sup> This represents the most profound instance of the exclusion of women's experience embodied in the defences under discussion. The model of self-defence which focuses on an isolated ensuing or imminent assault envisages a killing in response to an extraordinary eruption in normal existence. It is the interruption of normal existence which allows for the deviation from a simple application of the laws against killing.

62. Code s 248.

63. See for example the comments of Murphy J in *Lane v R* [1983] 2 VR 449, 456. He uses the example of an intruder shooting at a householder. The householder is not obliged to wait to be shot at again before using force.

64. In one Victorian case self-defence appears to have been successful where no immediate attack could have been expected. In that case the victim, a man who had perpetrated serious violence against his wife and children for many years, was shot by his son as he entered the house unarmed. The man's wife was acquitted of conspiracy to kill: *R v Kroepe* (unreported) Supreme Court of Victoria 15 August 1978. This is the only such Australian case known to the writer. In the only case in the WA Study where self-defence may have been successful, the woman's de-facto husband was strangling her at the time she stabbed him. Strong reliance was placed on evidence that bruising appeared on the woman's neck several days after the killing to show the immediacy of the attack. *R v Zuppec* (unreported) Supreme Court of Western Australia 21 May 1987 no 76/87.

Such a model may be appropriate in the context of an isolated contest between strangers. However, women who kill in retaliation to systematic abuse are killing in response to an aspect of their *ordinary* existence and the law at its most primary level does not contemplate the possibility of the need to defend oneself against normality. The danger faced by women in violent intimate relationships is embodied not in an isolated attack, nor even in a series of attacks, but in an on-going life of *being abused* and the fear which accompanies that life. The nature of these two kinds of 'assaults' are of a fundamentally different nature. The practical difficulties which flow from this are examined in the following discussions. The criticism of the law of provocation relating to delayed response patterns of women who are the victims of marital violence also applies to this aspect of self-defence.

- (b) Reasonable apprehension of death or grievous bodily harm and belief on reasonable grounds that she could not otherwise preserve herself

The test for whether the nature of the assault is such as to cause apprehension of serious harm is objective. The harm an accused in fact feared must be found to have been reasonable in the circumstances. The test for whether the required belief was present - that is the belief that the defendant could not otherwise save herself - is also objective. Although the accused's actual belief is the "definitive circumstance" this belief must have been based on reasonable grounds.<sup>65</sup>

Where, in the context of marital violence, a woman kills her spouse sometime well *after* an attack or well *before* an anticipated attack, or where the immediate assault is relatively minor, it is difficult to argue persuasively that her fear of death or her belief that she could not otherwise save herself was reasonable. Where some kind of attack has occurred, evidence of past abuse will be admitted to show the reasonableness of her perceptions and fears at the time of the killing.<sup>66</sup> As with

65. *Marwey v R* (1977) 138 CLR 630.

66. *R v Muratovic* [1967] Qd R 15; *R v Zupec* supra n 64.

provocation this evidence functions incidentally, and is admitted to elucidate the circumstances of the immediate event. Three effects of the introduction of such evidence in the context of self-defence are important. First, evidence of past abuse tends to be elicited in examination in chief by the accused's counsel as a 'list', little connection being made between it and the killing. Or one past event is emphasised where the abuser acted in precisely the same way and seriously harmed the accused. The experience and *effects* of living a life of *being abused* are not elicited.<sup>67</sup> Second, the defence is structured so that the weight of evidence of past abuse diminishes over time. Abuse which occurred several years before will be of less importance, whereas for an abused woman, its significance may increase if it indicates the fear with which she had lived.<sup>68</sup> Third, the introduction of evidence of past abuse may, in fact, work implicitly to undermine the reasonableness of a woman's perceptions. If she had survived all past abuse danger may be seen to be less than serious and if she had had 'warning' of the danger the belief as to alternative means of preservation may be seen to be unreasonable. If the relationship was seriously violent why didn't she leave?

In a social context where the extent and the effects of domestic violence are largely unknown or unacknowledged (and where common perceptions prevail about masochistic women, women who are emotionally disturbed or who themselves provoke and therefore deserve the violence they receive)<sup>69</sup> evidence which consists of the relating of particular instances of physical abuse may be insufficient to enable a jury to gain a proper understanding of the circumstances of a killing. To assist a jury make connections between past abuse and the killing, and to help to show the reasonableness of an abused woman's perceptions, expert psychological evidence of the effects of continued abuse is considered by some commentators to be necessary.

67. See for example *R v Zupc* supra n 64; *R v Bradshaw* supra n 53; *R v Goddard* (unreported) Supreme Court of Western Australia 21 June 1984 no 56/84.

68. Supra n 35, 315.

69. See Ewing supra n 20, 16-17; Western Australian Task Force on Domestic Violence, supra n 17, 48; *State of New Jersey v Kelly* 478 A 2d 364 377 (1984).

### Expert testimony: battered woman syndrome

Battered woman syndrome is a psychological theory that identifies the common characteristics of women in violent relationships and explains why women subjected to frequent abuse are less able to terminate these relationships. Expert testimony of this syndrome has been admitted in some North American jurisdictions.<sup>70</sup> In Australian jurisdictions the opinion of an expert witness may be admitted as evidence in support of a particular fact in issue where a field of knowledge is shown to be a sufficiently organised branch of science<sup>71</sup> and where the field of knowledge in which the witness professes expertise is outside the experience of the ordinary juror.<sup>72</sup> It is probably the case that evidence of battered woman syndrome is inadmissible in Western Australian courts.<sup>73</sup>

Testimony of battered woman syndrome comprises two aspects. First, evidence is given that many battering relationships involve a three-phase cycle of abuse. One phase is a tension building period during which the woman will often attempt to postpone the escalation of violence through exceptionally passive behaviour. The second phase is an acute battering period. The third phase involves contrition and loving behaviour from the abuser. Abuse often escalates as the cycle is repeated. The second aspect of the expert testimony refers to the psychological consequences for the woman: learned helplessness and depression produced by debilitating fear. These consequences, coupled with social factors such as economic dependance, concern for children, in some cases acute surveillance by the abusing spouse and realistic fear of serious reprisal from their spouse if they attempted to leave, make it increasingly difficult for women to leave the battering relationship.<sup>74</sup> Hilberman and Munson, in a report on the psychiatric evaluation of sixty battered women (one of whom eventually

70. J D'Emilio "Battered Woman's Syndrome and Premenstrual Syndrome : A Comparison of their Possible Use as Defenses to Criminal Liability" (1985) 59 St John's 558; E Hilberman et al "Sixty Battered Women" (1977-78) 2 Victimology 460.

71. *Fisher v Brown* [1968] SASR 65.

72. *Eagles v Orth* [1976] Qd R 313.

73. There is no evidence in the criminal records studied by the writer of any attempt to have such evidence admitted.

74. D'Emilio *supra* n 70, 563; Ewing *supra* n 20, 51-52.

shot and killed her abusing husband) sum up the psychological effects of regular and severe abuse.

The variety of initial complaints and diagnoses notwithstanding, there was a uniform psychological response to the violence which was identical for the entire sample. The women were a study in paralyzing terror ... the stress was unending and the threat of the next assault everpresent.... Events even remotely connected with violence, whether sirens, thunder, people arguing or a door slamming elicited intense fear ... In contrast to dreams in which they attempted to protect themselves or to fight back or to escape their waking lives were characterized by overwhelming passivity and inability to act on their own behalf ... There was a pervasive sense of hopelessness and despair about themselves and their lives. They saw themselves as incompetent, unworthy, unlovable and were ridden with guilt and shame. They felt they deserved the abuse, had no vision that there was any other way to live, and were powerless to make changes.<sup>75</sup>

In United States jurisdictions, testimony of battered woman syndrome has been admitted as evidence in support of the reasonableness of a woman's fear of serious harm, and to show that her belief that she could not otherwise save herself was reasonably based. The Court in *State of New Jersey v Kelly* said:

[T]he expert's testimony might also enable the jury to find that the battered wife, because of the prior beatings ... is particularly able to predict accurately the likely extent of violence in any attack on her.

[E]xperts point out that one of the common myths, apparently believed by most people, is that battered wives are free to leave. To some, this misconception is followed by the observation that the battered wife is masochistic, proven by her refusal to leave despite the severe beatings; to others, however, the fact that the battered wife stays on unquestionably suggests that the "beatings" could not have been too bad for if they had been, she certainly would have left. The expert could clear up these myths, by explaining that one of the common characteristics of a battered wife is her *inability* to leave despite such constant beatings....<sup>76</sup>

75. Hilberman et al supra n 70, 464-465.

76. *State of New Jersey v Kelly*, supra n 69, 378, 377. An example of the admission of the testimony on the former ground is *State of Washington v Allery* 682 P2d 312 (1984). There Allery's husband had returned to the house where she was living while he was under a restraining order. He was lying on a couch and had abused her verbally but had made no move towards her. She went into another room, heard a noise which she thought was her husband getting a kitchen knife with which to kill her. She loaded a gun, went back into the room and shot her husband who was still lying on the couch. Allery had been abused seriously and over a prolonged period by her husband.

Given the characterisation of the assault in self-defence the introduction of expert testimony of the battered woman syndrome may be advantageous for women in these ways. It may also be generally educative for the jury, judges and lawyers. There are, however, major problems with reliance on battered woman syndrome testimony. These difficulties are discussed below in the context of proposals for reform.

### Fear/anger

Whereas fear may now form the basis of a defence of provocation anger is considered to be inconsistent with self-defence. A strategy of prosecution cases appears to be to show that anger motivated an act to disprove self-defence.<sup>77</sup> Given a fuller picture of what is at stake for some women, the continuous nature of the assault to which they are subjected and the debilitating effect of constant fear in a context where there is a strategic necessity *not* to feel anger generally, it may well be that, far from being inconsistent, resort to anger is itself an act of defence. Access to the ability to assert oneself from a position of powerlessness may be facilitated by anger.<sup>78</sup>

This suggests a far more profound (though related) problem. If the fundamental distinction between provocation and self-defence concerns the distinction between an act of rational preservation and an irrational act committed as the result of a loss of emotional control, then the very distinction between the defences may exclude the real experience of women who are regularly abused. Hilberman and Munson write:

It is likely ... that the constellation of passivity, panic, guilt, intense fear of the unexpected, and violent nightmares reflect not only fear of another assault, but also a constant struggle with the self to contain and control aggressive impulses. The violent encounter with another person's loss of control over aggression precipitates great anxiety about one's own control.<sup>79</sup>

That is, it may be not simply a resort to anger but, precisely, a loss of control which facilitates the act of ('rational') preservation.

77. For example, *R v Bradshaw* supra n 64; *R v Zupce* supra n 64.

78. Ewing supra n 20, 72.

79. Supra n 70, 465.

## Proposals for reform

In the light of the above analysis three directions for reform are considered:

### 1. Provocation

The law of provocation should be amended so that provocation need not be constituted by an immediate incident and so that a pattern of past conduct may be relied upon directly.

### 2. Expert testimony

Admission of expert testimony of battered woman syndrome in the context of self-defence may, as noted, help to show the reasonableness of a woman's conduct which would otherwise appear unreasonable, and may be generally educative for jury, judges and lawyers. There may however also be disadvantages in the introduction of such evidence. In emphasising the passivity and helplessness of a battered woman, particularly within a psychological model, the evidence may have the effect of presenting a defence related to mental incapacity rather than self-defence, for example diminished responsibility (not available in Western Australia) or even insanity. The testimony may therefore *undermine* a woman's claim to have acted reasonably.

[T]he testimony seems to be inconsistent with the notion of reasonableness ... Regardless of its more complex meaning the term "battered woman syndrome" has been heard to communicate an implicit but powerful view that battered women ... are suffering from a ... disability [which] prevents them from acting 'normally'.<sup>80</sup>

Further, if battered woman syndrome is established in such a way as to appear to be a strictly defined condition, women may be excluded from benefiting from it where their circumstances do not precisely conform.

Some courts seem to treat battered women syndrome as a standard to which all battered women must conform rather than as evidence that illuminates the defendant's behaviour and perceptions. As a result, a defendant may be considered a battered woman only if she never left her husband, never sought assistance, never fought back.<sup>81</sup>

80. E Schneider "Describing and Changing : Women's Self-Defence work and the Problems of Expert Testimony on Battering" (Unpublished paper) (1986) 36, 16, cited in Ewing *supra* n 20, 56.

81. O Crocker "The Meaning of Equality for Battered Women Who Kill Men in Self-Defence" (1985) 8 Harv Women's L J 121, 144.

The most serious limitation of reform which provided for the introduction of battered woman syndrome testimony without further accompanying reform lies in the fact that such reform would leave unaltered, and perhaps embed, the current structure of the law. Given the nature of the assault conceived by the defence, the object of the evidence is, as has been discussed, to show the reasonableness of the perception and beliefs of a woman at the time of the killing. However, it is the structure of the law itself which, in part, constructs the *un*reasonableness of her perceptions. That is, the central requirement that a physical attack be ensuing or literally imminent fails in the first place to contemplate a killing at a time other than that as reasonable self-defence. The introduction of the testimony leaves unaltered the nature of the attack which constitutes the threat to life. For these reasons the introduction of domestic violence defence discussed next is to be preferred to reform which would provide only for the introduction of battered woman syndrome testimony.<sup>82</sup>

### 3. Domestic violence self-defence

The South Australian Domestic Violence Council in 1987 recommended that “a new complete defence be created which can be acted upon by a defendant charged with murder where the elements of such defence are a proven history of personal violence by the deceased against the accused or against any child or children of the accused’s household”.<sup>83</sup> The proposal is recommended here also. The South Australian Council did not formulate the proposal in detail, and it is beyond the scope of this article to do so. However, there are identifiable features which it would be necessary to include in such a defence so as to accurately reflect women’s experience:

- (i) The defence would be justificatory and provide a full acquittal.

82. It appears that on the basis of submissions presented to the Law Reform Commission of Victoria the Commission will not recommend the introduction of this type of evidence, though for very different reasons. Some of the submissions expressed doubt that battered woman syndrome is sufficiently established as a field of scientific expertise. Discussion with David Neal, Commissioner, Law Reform Commission of Victoria, 25 September 1989.

83. Women’s Adviser’s office Department of the Premier and Cabinet Report of the South Australian Domestic Violence Council Adelaide 1987.

- (ii) Evidence of abuse would include evidence of physical, sexual and psychological abuse including deprivation of financial resources and social isolation. Evidence of the psychological effects of such abuse would also constitute the history of violence.
- (iii) Evidence of anger and evidence of loss of control at the time of the killing would not preclude the defence.
- (iv) Provision for the defence should be worded so that it is clear that the defence is constructed primarily for women<sup>84</sup> in spousal relationships but that it is also available to men. This would be so that formal gender neutrality does not itself obscure the reality of who are the victims of domestic violence and as a disincentive for specifically male norms to be adopted as interpretive guides.

## CONCLUSION

The defences of provocation and self defence embody instances of the silencing of women. Women are excluded by and from these laws. It does not need to be shown that women are discriminated against in particular application of these laws (that question has not been addressed) for it to be seen that the objective structure of the defences, the elements of the laws themselves, functions to exclude the relevance of women's experience. When these laws are closely scrutinised it can be seen that women, in vital ways, are *not there*.

Social meaning, including legal relevance, is assessed by reference to a standard which is male. Or, from a woman's point of view, social meaning, including legal relevance, is assessed by reference to a standard which is not female. Woman comes to mean lack, absence. Self protection is understood to be premeditation. Violence in the home (in our ideology our safest place) experienced as torture, is understood to be chastisement - and right. The term "domestic violence" is itself a feminist event, that is, simply, the re-interpretation of social reality, the creation of meaning from a woman's point of view. Instead of lack, presence; instead of exclusion; inclusion.

84. Ibid. The defence could also be directed at children as it is clear that they are especially vulnerable to domestic violence also.

Utilising firstly the feminist concept of silence, absence, and secondly the idea that what is understood to be true emerges from and is inseparable from practical human relations, law can be re-interpreted. The laws of provocation and self-defence, understood to emerge from the centre of everyone's universe so to speak - to be everyone's "objectivity" - in fact reflect male experience. A woman's experience of her marital relationship and the killing itself and is likely to be systematically skewed by these defences. This skewing may preclude access by the woman to the defence, however, even where the defence is available (and even where it is successful) her experience may be presented and understood in a distorted way.

The structure of provocation and self defence represents the experience of those who are *not* abused within an *intimate* relationship. The laws emerge from the scenario of two roughly equal contestants in a single, purely physical battle. There is no suggestion here that these laws are not good laws; that these defences are not needed or should not be available. It is what they fail to address which is of interest to women.

Of the women who have killed, spouse killing is a central case, and of the women who have killed their spouse most have been consistently disempowered within that intimate relationship. Recognition of the specific experience of domestic violence and disempowerment, specifically *relevant* to women who kill, is absent in the structure of these laws. Most crucially, the requirement of immediacy of response in both provocation (in its primary model) and self defence, and the nature of the danger conceived by the law of self defence, is evidence of the absence.

Criminal defences constructed from the standpoint of women would take account of the nature of the danger they face and their necessary response patterns to such danger. That these defences fail to recognise crucial elements of a situation in which women find themselves and from which killing sometimes results, is an instance of the general strategy of the silencing of women. It can be seen therefore, that law and laws participate in the devaluing of women not necessarily by express discrimination against them, but by constructing a sphere from whose standards women's social reality is excluded.

## *BREAVINGTON V GODLEMAN:* WHERE NOW?

M GETTING\*

The decision of the High Court in *Breavington v Godleman*<sup>1</sup> (“*Breavington*”) may mark the beginning of a new era in Australian federal conflict of laws based on the operation of section 118 of the Australian Constitution,<sup>2</sup> specifically the interpretations given to that section by Justices Wilson, Deane and Gaudron. Section 118 provides that:

Full faith and credit shall be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State.<sup>3</sup>

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1. (1988) 169 CLR 41. See generally M Pryles “The Law Applicable to Interstate Torts: Farewell to Phillips v. Eyre” (1989) 63 ALJ 158; A Apps “*Breavington v. Godleman* (1988) ALJR 447: A New Choice of Law Rule for Torts” (1990) 12 Syd L Rev 625. It should be noted that both of these notes focus on the question of the choice of law rule for torts. An entirely new interpretation of s 118 was advanced in P Ziegler “A Proposed Reinterpretation of Section 118 of the Constitution” (1989) 63 ALJ 814. However, as Ziegler does not refer to *Breavington* and as Ziegler’s interpretation was not considered in *Breavington*, it is beyond the scope of this note.

The High Court applied the choice of law principles stated in *Breavington* in *Perrett v Robinson* (1988) 167 CLR 172, which was argued in conjunction with *Breavington*. However, the judgments in *Perrett v Robinson* do not add to the principles stated in *Breavington* and will not be considered further in this note.

2. The Australian Constitution forms s 9 of the (UK) Commonwealth of Australia Constitution Act 1900.

3. S 118 is complimented by s 18 of the (Cth) State and Territorial Laws and Records Recognition Act 1901 (“Recognition Act”) which provides that:

All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

This note examines the decision in *Breavington* as it relates to section 118 and considers some of its implications for Australian federal conflict of laws. In doing so, the focus of this note is on the application of section 118 to “laws” and not to “public Acts and records” nor “judicial proceedings”.<sup>4</sup>

## I. THE CASE

In *Breavington*, the action arose out of a collision between the motor vehicle in which the appellant was travelling as a passenger, and one driven by the first respondent. The second respondent was the driver of the motor vehicle in which the appellant was travelling. At all material times the appellant and the second respondent were employees of the third respondent, Telecom. The collision occurred in the Northern Territory. At the time of the collision the appellant and both respondent drivers were residents of the Northern Territory. The appellant sued the respondents in the Supreme Court of Victoria for damages for personal injury, specifically claiming damages for pain and suffering, loss of amenities of life and for economic loss. At the time the writ was served the first respondent was a resident of Victoria. All respondents entered unconditional appearances. By their defences, each of the respondents alleged that the appellant was a resident of the Northern Territory within the meaning of section 4 of the Northern Territory Motor Accidents (Compensation) Act 1979 (“(NT) Motor Accidents Act”). Section 5 of the (NT) Motor Accidents Act limits a person to whom the Act applies to bringing an action for damages for pain and suffering and loss of

4. For a discussion of the operation of s 118 of the Constitution and s 18 of the Recognition Act with respect to “judicial proceedings” see E I Sykes and M C Pryles *Australian Private International Law* 2nd edn (Sydney: Law Book Co, 1987) 300-303. See also *Posner v Collector for Inter-State Destitute Persons (Victoria)* (1946) 74 CLR 461 Dixon J, 479; *Harris v Harris* [1947] VLR 44 Fullagar J, 50-59; *G v G* (1986) 64 ALR 273 McLelland J, 276; *Bond Brewing Holdings Ltd v Crawford* (1990) 8 ACLC 198 Ipp J, 208. For a discussion of the operation of s 118 with respect to “public Acts” and s 18 of the Recognition Act with respect to “public acts” see *Breavington* supra n 1 Wilson and Gaudron JJ, 94-95; Brennan J, 114-115; Dawson J, 148; Toohey J, 164-165 (though the comments of their Honours focussed primarily on s 18 of the Recognition Act).

amenities of life only.<sup>5</sup> The issue before the High Court was whether the Supreme Court of Victoria should determine the appellant's claim for damages by reference to the common law principles governing the assessment of damages ordinarily applied in Victoria or by reference to the statutory provisions in force in the Northern Territory governing the recovery of damages.

All members of the Court held that the claim for damages should be limited to that allowed under the statutory provisions in force in the Northern Territory. Justice Toohey applied the common law choice of law rule in *Phillips v Eyre*,<sup>6</sup> as formulated by Lord Wilberforce in *Chaplin v Boys*,<sup>7</sup> applying the law of the forum, but only to the extent that civil liability in respect of the relevant claim existed as between the

5. S 5 of the (NT) Motor Accidents Act provides:

- (1) Subject to sub-section (2), no action for damages shall lie in the Territory in respect of the death of or injury to a resident of the Territory in or as a result of an accident that occurred in the Territory.
- (2) Subject to sub-section (3), nothing in sub-section (1) deprives a person of the right to bring an action for damages for pain and suffering or loss of amenities of life.
- (3) A person who has received or has elected to receive a benefit under section 17 shall not commence or continue an action referred to in sub-section (2).

6. (1870) LR 6 QB 1 Willes J, 28-29. The rule in *Phillips v Eyre* as stated in *Koop v Bebb* (1951) 84 CLR 629 Dixon, Williams, Fullagar and Kitto JJ, 642 ("*Koop*") is that:

[A]n action of tort will lie in one State for a wrong alleged to have been committed in another State, if two conditions are fulfilled: first, the wrong must be of such a character that it would have been actionable if it had been committed in the State in which the action is brought; and secondly, it must not have been justifiable by the law of the State where it was done."

See also *Pozniak v Smith* (1982) 151 CLR 38 Mason J, 49.

7. [1971] AC 356 Lord Wilberforce, 389. See also *Koop* supra n 6 Dixon, Williams, Fullagar and Kitto JJ, 642-643. Toohey J in *Breavington* supra n 1, 160 referred to the following quote of their Honours in *Koop* supra, 643:

It seems clear that the last word has not been said on the subject, and it may be the true view that an act done in another country should be held to be an actionable wrong in Victoria if, first, it was of such a character that it would have been actionable if it had been committed in Victoria, and, secondly, it was such as to give rise to a civil liability by the law of the place where it was done. (Emphasis added by Toohey J)

actual parties under the law of the place where the act was done.<sup>8</sup> His Honour was of the view that the rule in *Phillips v Eyre* is now subject to an exception based on flexibility in the interests of individual justice, but found that the exception was not made out on the facts of the case.<sup>9</sup> Justices Brennan and Dawson both applied the rule in *Phillips v Eyre* and came to the same conclusion on the facts as Justice Toohey.<sup>10</sup> However, neither Justice Brennan nor Justice Dawson was prepared to admit a flexible policy exception to this rule.<sup>11</sup>

Chief Justice Mason held that the rule in *Phillips v Eyre* should not be followed. In its place, the Chief Justice held that the choice of law rule is the law of the place of the wrong. On the facts, this was law of the Northern Territory. His Honour did not finally determine whether this rule is subject to a flexible policy exception where the parties have no substantial connection with the law of the place of the wrong, but found that if there was such an exception, then it was not made out on the facts of the case.<sup>12</sup> Justices Wilson and Gaudron, who delivered a joint judgment, held that the choice of law rule was the law of the place where the events occurred, this rule being necessary to give effect to the requirement of section 118 of the Constitution.<sup>13</sup>

8. *Breavington* supra n 1, 160-161.

9. *Ibid*, 161-163. On the question of a flexible policy exception, Toohey J followed the decision of Lord Wilberforce in *Chaplin v Boys* supra note 7, 391 where his Lordship stated:

There must remain great virtue in a general well-understood rule [the rule in *Phillips v Eyre*] covering the majority of normal cases provided that it can be made flexible enough to take account of the varying interests and considerations of policy which may arise when one or more foreign elements are present.

Given the general rule, as stated above, as one which will normally apply to foreign torts, I think that the necessary flexibility can be obtained ... through segregation of the relevant issue and consideration whether, in relation to that issue, the relevant foreign rule ought, as a matter of policy ... to be applied. For this purpose it is necessary to identify the policy of the rule, to inquire to what situations, with what contacts, it was intended to apply; whether not to apply it, in the circumstances of the instant case, would serve any interest which the rule was devised to meet.

10. *Breavington* supra n 1 Brennan J, 110-111, 118-119 Dawson J, 142-146. Their Honours adopted the position of the High Court in *Koop* supra n 7.

11. *Ibid* Brennan J, 112-114; Dawson J, 146-147.

12. *Ibid*, 77-79.

13. *Ibid*, 98-99.

Justice Deane held that section 118 of the Constitution is part of a constitutional structure which establishes a national system of law. Under this national system of law, a conflict between the laws of any of the States or the Territories is resolved by the confinement of the operation of each of the laws by reference to its territorial (or predominant territorial) nexus. On the facts, his Honour held that the Supreme Court of Victoria was bound to apply the (NT) Motor Accidents Act as this Act, territorially confined, was the relevant part of the national law that governed the rights and liabilities arising from the accident.<sup>14</sup>

## II. FULL FAITH AND CREDIT IN *BREAVINGTON*

### A. Overview

Notwithstanding the wide divergence of approaches by the Justices constituting the High Court in *Breavington*, there was a large measure of consensus as to the interpretation to be given to section 118. It is convenient to examine the extent of this consensus before embarking on an examination of the divergences.

The ratio of *Breavington* on the question of the interpretation of section 118 is that, in its direct operation, section 118 does not require full faith and credit to be given to the laws of a Territory.<sup>15</sup> One reason for the omission from section 118 of a reference to the laws of the

14. Ibid, 138-139. Wilson, Deane and Gaudron JJ all proceed on the basis of considerations peculiar to interstate conflicts of laws. Further, Mason CJ expressly notes the difference in the application of the choice of law rule for torts between interstate and international conflicts of laws. On this basis, the judgments of Mason CJ, Wilson, Deane and Gaudron JJ in *Breavington* will only be of limited relevance to an international conflict of laws. It should be noted that none of the Justices in *Breavington* considered the question of what principles a court should use to determine where a tort occurs for the purpose of ascertaining the law of the place of the tort. Deane J, 129 perhaps gets closest where his Honour states that in the case of multi-state circumstances the court must determine the State with which the events have the predominant territorial nexus. However, these comments must be limited to the context of the national system of law which forms the basis of the decision of his Honour.
15. Ibid Mason CJ, 80-81; Wilson and Gaudron JJ, 95; Brennan J, 114; Dawson J, 148-149; Toohey J, 163. This conclusion is not inconsistent with the judgment of Deane J, 137-138, as His Honour considered the position of the laws of the Territories separately from the direct operation of s 118. Kitto J adopted this interpretation in *Anderson v Eric Anderson Radio & T V Pty Limited* (1965) 114 CLR 20, 31 ("Anderson").

Territories is seen from the judgment of Justice Brennan, where his Honour stated:

The laws of a Territory are, or are necessarily supported by, laws enacted by the Parliament in the exercise of the powers conferred by the Constitution (whether s. 122 or some other provision). By covering cl. 5 in the *Commonwealth of Australia Constitution Act*, laws so enacted are binding on the courts, judges, and people of every State and of every part of the Commonwealth. Therefore the faith and credit which must be given to an ordinance or to a Territory Act is a function of the laws of the Commonwealth under which it was made.<sup>16</sup>

The second point on which there is a measure of consensus is that the laws of the States must be given full faith and credit “throughout the Commonwealth”, that is, geographically throughout the States and the Territories.<sup>17</sup>

The question on which their Honours had divergent views was the meaning and effect of the words “full faith and credit” as found in section 118. There is, however, dicta in *Breavington* and other cases which reject a number of suggested interpretations of these words. By examining these authorities it is possible to narrow the possible interpretations which may be placed on section 118.

In *Permanent Trustee Company (Canberra) Limited v Finlayson*<sup>18</sup> (“*Finlayson*”) the High Court held that section 118 of the Constitution and section 18 of the Recognition Act do not operate to give a statutory law an “extra-territorial result which on its true construction it does not purport to have”.<sup>19</sup> The essence of this proposition is that if, on normal principles of construction, the statute in question does not apply to

16. *Breavington* supra n 1, 115-116. See also Deane J, 137-138; Dawson J, 148-149. So far as is relevant, covering clause 5 of the (UK) Commonwealth of Australia Constitution Act 1900 provides:

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State....

17. *Ibid* Wilson and Gaudron JJ, 96; Deane J, 129; Toohey J, 163. See also *Lampshed v Lake* (1958) 99 CLR 132 Dixon CJ, 142 (with whom Webb and Taylor JJ agreed); *Spratt v Hermes* (1965) 114 CLR 226 Barwick CJ, 247; *Permanent Trustee Company (Canberra) Limited v Finlayson*; *Commissioner of Stamp Duties (NSW)* (1967) 9 FLR 424 Dunphy J, 440 (“*Finlayson CSD NSW*”).

18. (1968) 122 CLR 338.

19. *Ibid* Barwick CJ, McTiernan, Kitto, Menzies, Windeyer and Owen JJ, 343. See also *Anderson* supra n 15 Barwick CJ, 25; Kitto J, 33; *In re Commonwealth Agricultural Service Engineers Limited* [1928] SASR 342 Napier J, 346.

govern the matter before the court, then the giving of “full faith and credit” to that statute will not give it an extended application so as to enable it to govern the matter in question. In *Breavington*, Justices Wilson, Brennan and Gaudron expressly adopted the decision of the High Court in *Finlayson* on this point.<sup>20</sup>

There was no support in *Breavington* for the view that section 118 should take effect according to its literal terms, requiring that a State court apply the law of another State *whenever* the law of that other State has a claim to govern the matter before the court. This interpretation produces the result that a statute of a forum State has more force in the courts of another State than in its own courts, as in the event of a conflict of laws the statute of the forum State will be displaced in favour of the statute of the other State.<sup>21</sup> Further, this interpretation does not deal with the situation where the statutory laws of two States other than the forum State have a claim to govern the matter.<sup>22</sup>

At the other end of the scale of possible effect, section 118 cannot be confined so as to require merely the acknowledgement of the operative effect of a State law within the territory of that State. This much is achieved by the combined effect of covering clause 5 of the United Kingdom Commonwealth of Australia Constitution Act 1900 and sections 106 and 107 of the Constitution.<sup>23</sup> Further, this interpretation would render otiose the words “throughout the Commonwealth”.

20. *Breavington* supra n 1 Wilson and Gaudron JJ, 98; Brennan J, 116. The judgments of the other members of the Court are not inconsistent with this conclusion.

21. Ibid Mason CJ, 81-82. His Honour quoted part of the judgment of Stone J (who delivered the judgment of the Court) in *Alaska Packers Association v Industrial Accident Commission of the State of California* 294 US 532, 547 (1935) (“*Alaska Packers*”). Stone J made his comments in the context of considering the full faith and credit provision of the United States Constitution (Art IV, 1) which provides that:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

22. Sykes and Pryles supra n 4 290.

23. *Breavington* supra n 1 Wilson and Gaudron JJ, 96.

There is some authority to suggest that the effect of section 118 is evidentiary, only requiring that the laws of every State be *recognised* throughout the Commonwealth.<sup>24</sup> For a court to recognise a statute of another State it must take judicial notice of that statute. This interpretation would avoid the rule of conflict of laws that a party wishing to rely on “foreign” law must plead the foreign law as a fact and prove it by expert evidence.<sup>25</sup> However, it appears from the Constitution that recognition of the laws of the States was intended to be effected by exercise of the legislative power of the Commonwealth Parliament pursuant to section 51(xxv) of the Constitution.<sup>26</sup> Section 3 of the Recognition Act, enacted pursuant to section 51(xxv), provides that a court within the Commonwealth must take judicial notice of all State Acts. In *Breavington*, Chief Justice Mason and Justices Wilson and Gaudron specifically stated that, because of section 51(xxv), section 118 cannot be construed as merely requiring the laws of the States to be recognised.<sup>27</sup>

That section 118 was intended to have more than merely an evidentiary effect is confirmed by the fact that a majority of the High Court in *Breavington* were prepared to ascribe to section 118 some substantive effect. Chief Justice Mason, Justices Wilson, Brennan, Deane, Dawson and Gaudron were all of the view that section 118 prohibits a State or Territory court from refusing to recognise and give effect to the law of a State merely because that law conflicts with a public policy of the

24. *Anderson* supra n 15 Windeyer J, 46; *Varawa v Howard Smith Company Ltd* (1911) 13 CLR 35 O'Connor J, 69. It should be noted that in both of these cases the learned Justices were referring to s 18 of the Recognition Act and the reference to s 118 is only by way of inference.

25. See generally *Lazard Brothers and Company v Midland Bank Limited* [1933] AC 289 Lord Wright, 297-298.

26. S 51(xxv) provides that the Commonwealth Parliament has the power to make laws with respect to:

The recognition throughout the Commonwealth of the laws, the public Acts and records, and the judicial proceedings of the States.

27. *Breavington* supra n 1 Mason CJ, 79; Wilson and Gaudron JJ, 96.

forum.<sup>28</sup> Justices Rich, Dixon and Evatt expressed the same view in *Merwin Pastoral Company Proprietary Limited v Moolpa Pastoral Company Proprietary Limited*<sup>29</sup> (“*Merwin Pastoral*”). Further, there is authority to suggest that section 118 has the effect that a court within the Commonwealth cannot refuse to recognise and give effect to a law of a State on the basis that the law is a “revenue law”<sup>30</sup> or a “penal law”.<sup>31</sup> By logical extension, section 118 would also prohibit a court within the Commonwealth from refusing to give effect to a law that is a “public law” of a State.<sup>32</sup> One basis that is given for the rule that a court has no jurisdiction to entertain an action for the enforcement of a “foreign”

28. Ibid Mason CJ, 81; Wilson and Gaudron JJ, 96-97; Brennan J, 116; Deane J, 136-137; Dawson J, 150.
29. (1933) 48 CLR 565 Rich and Dixon JJ, 577; Evatt J, 587-588.
30. *Finlayson CSD NSW* supra n 17 Dunphy J, 439-440. An appeal to the High Court was upheld on the basis that, on a proper construction, the New South Wales statute in question did not extend in its operation to the Australian Capital Territory and that s 118 did not operate to give it that effect: *Finlayson* supra n 18. See generally Sykes and Pryles supra n 4, 286-289.
31. *Miller v Teale* (1954) 92 CLR 406 Dixon CJ, McTiernan, Fullagar and Taylor JJ, 415, although this proposition is only implicit in the judgment. It should be noted that in practice it is very unlikely that the courts of one State will be called upon to apply a penal law of another State as in almost all cases a provision in a statute which is penal in nature will be localised to apply only where the offence is committed within the territory of the State enacting the legislation: *Kays Leasing Corporation Proprietary Limited v Fletcher* (1964) 116 CLR 124 Barwick CJ, McTiernan and Taylor JJ, 134-135 (“*Kays Leasing*”); *Goodwin v Jorgensen* (1973) 1 ALR 94 Menzies J, 98 (with whom Barwick CJ agreed); Mason J, 101-102 (with whom Gibbs J agreed). Sykes and Pryles supra n 4, 288 adopt the view that it is difficult to see the penal law disqualification being displaced by s 118. It is submitted that the better view is that s 118 does apply to penal laws but, as noted above, these laws will rarely, if ever, purport to apply within the territory of another State.
32. On the power of an Australian court generally to refuse to entertain an action seeking to enforce a “foreign” public law, see *Her Majesty’s Attorney-General In and For the United Kingdom v Heinemann Publishers Australia Proprietary Limited* (1988) 165 CLR 30 Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ, 40-46 (“*Spycatcher*”); and see also M Howard “*Spycatcher Downunder: Attorney-General For The United Kingdom v Heinemann Publishers Australia*” (1989) UWAL Rev 158. It should be noted that the decision of their Honours was made in the context of an international conflict of laws.

revenue, penal or other public law is that the enforcement of these laws is contrary to the public policy of the forum.<sup>33</sup>

## B. The Judgments

Of the six Justices who considered section 118 in any depth, there is a basic divergence between the views of Chief Justice Mason, Justices Brennan and Dawson who adopted the view that section 118 does not otherwise inhibit the operation of the common law choice of law rules, and Justices Wilson, Deane and Gaudron who viewed section 118 and the Constitution in general as impacting upon the common law choice of law rules. From his Honour's comments, Justice Toohey could tentatively be placed in the latter category.

Justice Brennan placed weight on maintaining the legal independence of the individual States.<sup>34</sup> This position necessarily coloured his Honour's interpretation of section 118. His Honour held that, apart from the principle expressed in *Merwin Pastoral*, the giving of faith and credit to the laws of the States does not effect the substantive law which the forum applies in determining whether a plaintiff's claim succeeds.<sup>35</sup> The basis for this conclusion was that:

It would severely qualify the mutual legislative independence of the States to attribute to s. 118 the effect of compelling the courts of a State to give relief in circumstances which would give rise to no cause of action by the laws of that State or which may even amount to an offence against the laws of that State.

33. *Government of India Ministry of Finance (Revenue Division) v Taylor* [1955] AC 491 Lord Keith, 511. His Lordship also noted, 511-512 that "[i]t may be possible to find reasons for modifying the rule as between States of a federal union". In *Spycatcher* supra n 32, Mason CJ, Wilson, Deane, Dawson, Toohey and Gaudron JJ, 43-45 adopted the view that the rationale for an Australian court refusing to adjudicate on a public law of foreign State was that the universal rejection of these cases was the only way to avoid embarrassing the executive in its relations with that foreign State if the court declared that law contrary to the public policy of the forum. This rationale can hardly be said to exist within Australia as, on the authority of *Merwin Pastoral* supra n 29, a court within the Commonwealth has no power to decline to apply an otherwise applicable law of a State on the basis that that law is repugnant to the public policy of the forum.

34. *Breavington* supra n 1, 116-117.

35. *Ibid*, 116. His Honour cites *Finlayson* supra n 18 Barwick CJ, McTiernan, Kitto, Menzies, Windeyer and Owen JJ, 343 as authority for this proposition. See also *Pedersen v Young* (1964) 110 CLR 162 Kitto J, 165; *In the Will of Lambe* [1972] 2 NSWLR 273 Helsham J, 280; *Estate of Ellen Irene Hancock* (1962) NSWLR 1171 Myers J, 1174.

Equally it would severely qualify the mutual legislative independence of the States to attribute to s. 118 the effect of permitting relief to be given in another State in respect of circumstances occurring in a State the laws of which deny any cause of action arising from those circumstances or even create an offence constituted by those circumstances. If s. 118 were to have one or other of these effects, which effect should prevail? Should the *lex fori* defer to the *lex loci*, or vice versa? In truth, the words of s. 118 do not require either of these effects to be attributed to them. The attribution of either effect would be a source of tension as between the legislature of the forum State (whose authority over the law to be applied by its courts would be in question) and the legislature of the State in which the tort occurred (whose authority to prescribe the legal consequences of occurrences within its territory would be in question). The words of s. 118 should not be construed as giving rise to conflicts between the authority of the legislature of one State and the legislature of another - conflicts which are inimical to the high purpose of a national Constitution - unless the words of s. 118 compel a contrary interpretation. And they do not.<sup>36</sup>

It should be noted that, by virtue of sections 106, 107 and 108 of the Constitution, the constitutions of the States and the powers of the Parliaments of the States are made subject to the Constitution and thus to section 118. This means that section 118 is permitted to qualify the "mutual legislative independence" of the States. Consequently, the position of Justice Brennan is best formulated by stating that to give section 118 an interpretation whereby it alters the substantive law which the forum applies in determining the action would qualify the "mutual legislative independence" of the States to an extent not contemplated by the framers of the Constitution.<sup>37</sup> Further, his Honour does not allow for the possibility of an interpretation of section 118 which provides that, in some cases, the law of the forum ("*lex fori*") will defer to the law of the place where the cause of action arose ("*lex loci*") and in other cases the *lex loci* will defer to the *lex fori*, depending upon the application of a set formula derived from the Constitution.

36. *Breavington* supra n 34, 116-117.

37. Though it should be noted that, in interpreting the Constitution, the intentions of the framers are by no means determinative. Rather, the Constitution, as "*a mechanism under which laws are to be made, and not a mere Act which declares what the law is to be*" *Attorney-General for the State of New South Wales v The Brewery Employees Union of New South Wales* (1908) 6 CLR 469 Higgins J, 612 (emphasis in original)), may be interpreted in light of Australian society as it evolves and develops from time to time: *North Eastern Dairy Co Limited v Dairy Industry Authority of New South Wales* (1975) 134 CLR 559 Mason J, 615; Jacobs J, 621 ("*North Eastern Dairy Co*").

Justice Dawson held that the fact that a law is to receive full faith and credit, whether as a law of the Commonwealth or as a law of a State under section 118, does not mean that that law must determine the issues between the parties in the matter in question.<sup>38</sup> The application of a Northern Territory statute in Victoria can only be achieved by means of a rule of Victorian law, that is to say, by a choice of law rule of Victorian law indicating that the law of the Northern Territory is the applicable law in the circumstances. His Honour continued:

[T]he requirement that full faith and credit be given to the laws of a State, statutory or otherwise, throughout the Commonwealth, affords no assistance where there is a choice to be made between conflicting laws. Once the choice is made, then full faith and credit must be given to the law chosen but the requirement of full faith and credit does nothing to effect a choice. Nor is it to the point to say that the full faith and credit requirement assumes the applicability of a single law. No doubt that is so, but it is to say no more than that where there is a conflict of laws upon a given question a selection must be made before the question can be answered. The conflict rules are based upon the same assumption but they, unlike the full faith and credit requirement, provide a basis upon which the selection can be made. Section 118 of the Constitution is not directed to a conflict of laws; where there is a conflict it makes no choice or, to put in another way, [it] does not require the application of a law which is not otherwise applicable.<sup>39</sup>

Thus, his Honour rejected the interpretation of section 118 which displaced the rule in *Phillips v Eyre*.

Chief Justice Mason, like Justice Brennan, placed weight on the fact that within the federal union the States are to maintain their legal independence, referring to the following passage from *Pacific Employers Insurance Company v Industrial Accident Commission of the State of California*<sup>40</sup> ("*Pacific Insurance*"):

[T]he very nature of the federal union of states, to which are reserved some of the attributes of sovereignty, precludes resort to the full faith and credit clause as the means for compelling a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.<sup>41</sup>

38. *Breavington* supra n 1, 150.

39. *Ibid*, 150.

40. 306 US 493 (1939).

41. *Ibid* Stone J, 501. It is interesting to note that some 5 years earlier the same court in *Milwaukee County v M E White Company* 296 US 268 (1935) Stone J, (delivering the judgment of the Court) 276-277 had stated that:

The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties,

As is often the case with contemporary High Court judgments, his Honour referred to a number of United States cases, in this instance relating to section 1 of article IV of the United States Constitution from which section 118 of the Australian Constitution was derived. The Chief Justice noted that the presence of the full faith and credit clause had not hampered the elaboration and application of the principles of private international law and the disposition of interstate conflict problems in the United States.<sup>42</sup> His Honour concluded:

Why then should we give to the facsimile an interpretation denied to the original? I would give an affirmative answer if it clearly appeared that the full faith and credit clause had been understood at the close of the last century as the solvent of inter-State conflicts. But this was not the case. The same answer might be given if Australian history and understanding pointed in that direction. But the Convention Debates and the textbooks are silent upon the point.<sup>43</sup>

With respect, there are a number of grounds on which the High Court may depart from these United States authorities. First, the historical context in which the Constitution was drafted and the views of the framers are not determinative of the interpretation to be given to section 118.<sup>44</sup> Rather, the Court may interpret the Constitution in light of Australian society as it develops from time to time.<sup>45</sup> Secondly, as was stated by Justice Gibbs in *Australian Conservation Foundation Incorporated v The Commonwealth of Australia*:

each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation throughout which a remedy upon a just obligation might be demanded as of right, irrespective of the state of its origin.

(It should be noted that this action was an action to enforce a judgment of another State and not an action to enforce a law of another State).

42. *Breavington* supra n 1, 81-82. His Honour referred to the cases of *Bradford Electric Light Company v Jennie M Clapper* 286 US 145 (1932); *Pacific Insurance* supra n 40; *State of Nevada v John Michael Hall* 440 US 410 (1979); *Alaska Packers* supra n 21; *Allstate Insurance Company v Lavina Hague* 449 US 302 (1981) ("*Allstate Insurance*"). For Art IV 1 of the United States Constitution see supra n 21.

43. *Breavington* supra n 1, 83.

44. *Attorney-General of the Commonwealth (at the relation of McKinlay) v The Commonwealth of Australia* (1975) 135 CLR 1 Barwick CJ, 17 ("*McKinlay*").

45. *North Eastern Dairy Co* supra n 37; *Permewan Wright Consolidated Proprietary Limited v Trehwhitt* (1979) 145 CLR 1 Mason J, 35.

Although we naturally regard the decisions of the Supreme Court of the United States with the greatest respect, it must never be forgotten that they are often given against a different constitutional, legal and social background from that which exists in Australia.<sup>46</sup>

The position of the High Court of Australia as the ultimate court of appeal from all courts in Australia,<sup>47</sup> the existence of the cross-vesting legislation<sup>48</sup> and the provisions of the Commonwealth Service and Execution of Process Act 1901 providing for the direct enforcement of judgments,<sup>49</sup> are three examples of the differing legal background existing in Australia. Thirdly, the text of the Australian Constitution must always be controlling.<sup>50</sup> The word "laws" appears in section 118 but not

46. (1980) 146 CLR 493, 530. This passage was endorsed by Wilson J in *Attorney General for the State of Victoria (at the relation of Black) v The Commonwealth of Australia* (1981) 146 CLR 559, 652 ("Black"). See also *The Amalgamated Society of Engineers v The Adelaide Steamship Company Limited* (1920) 28 CLR 129 Knox CJ, Isaacs, Rich, Starke JJ, 147; *McKinlay* supra n 44 Barwick CJ, 22-25.
47. The United States Supreme Court will not review judgments of State courts that rest on adequate and independent State grounds: *Herb v Pitchairn* 324 US 117 (1945) Jackson J (delivering the judgment of the Court), 125-126. Rather, the United States Supreme Court's power to review State judgments is limited to correcting these judgments to the extent that they incorrectly adjudge federal rights. See *Herb v Pitchairn* *ibid*; *Huse Zacchini v Scripps-Howard Broadcasting Company* 433 US 562 (1978) ("Zacchini") White J (delivering the judgment of the Court), 566-567. Further, the United States Supreme Court has no jurisdiction to review a decision of a State court where the State court rests its decision on both State and Federal grounds, either of which would be dispositive: *Zacchini* *ibid*. By contrast, the High Court has full power of appeal from the State Supreme Courts: Australian Constitution s 73.
48. Each Act is titled Jurisdiction of Courts (Cross-vesting) Act 1987. The respective numbers are: (Cth) 24/1987; (WA) 68/1987; (NSW) 125/1987; (Qld) 88/1987; (Vic) 29/1987; (NT) 41/1987; (Tas) 78/1987; (SA) 67/1987.
49. Ss 20-26. For an analysis of the United States authorities on this question see M C Pryles and P Hanks *Federal Conflict of Laws* (Sydney: Butterworths, 1974) 68-84.
50. *Black* supra n 46 Barwick CJ, 578.

in its United States counterpart.<sup>51</sup> With respect to this argument, it should be noted that in *Breavington* Chief Justice Mason stated:

No doubt that word ["laws"] was inserted to guard against the possibility that the reference to "public Acts" might leave a category of laws in force in a State outside the reach of the section. The presence of the word does not justify giving the section the far-reaching interpretation proposed by the respondents.<sup>52</sup>

Lastly, the divergence in approaches between the Australian courts and the United States courts to the resolution of an inter-State conflict of laws may of itself be a sufficient justification for departing from the United States authorities. In the United States there are no general residual common law choice of law rules.<sup>53</sup> As a general rule, where statutes of different States each have a claim to govern a matter, the conflict is settled by a comparison of the competing policies of the two States and the extent to which their respective interests have been involved by reason of the fact situation.<sup>54</sup>

51. For example, in *Black* supra n 46, a majority of the High Court viewed the differences between the text of s 116 of the Constitution and its United States counterpart as being a reason for declining to accept the interpretation placed on the United States provision. See Barwick CJ, 578-579; Gibbs J, 603; Stephen J, 609-610; Mason J, 615-616; Wilson J, 652; contra Murphy J, 632. S 116 of the Constitution provides:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

The relevant part of the United States Constitution (in the First Amendment) provides that:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof....

52. *Breavington* supra n 1, 83.  
 53. Sykes and Pryles supra n 4, 290.  
 54. Ibid. See also *Alaska Packers* supra n 21 Stone J, 547; *Allstate Insurance* supra n 42 Brennan J (delivering the judgment of the Court), 312-313; *Phillips Petroleum Company v IRL Shotts* 472 US 797 (1985) Rehnquist J (delivering the judgment of the Court), 814-823.

In short, the Chief Justice and Justices Brennan and Dawson viewed section 118 as entrenching the common law choice of law rules, that is, allowing the common law choice of law rules to operate and prohibiting the courts of the States from displacing them. This accords with the view of Quick and Garran who, writing in 1901, adopted the view that the purpose of section 118 was to preserve the common law choice of law rules.<sup>55</sup> However, Quick and Garran went further and stated that section 118 prohibited one State from enacting legislation intended to defeat or delay the residents of another State in the prosecution of legal rights and remedies against residents in that State.<sup>56</sup>

Underlying the judgment of Justices Wilson and Gaudron is the policy consideration that the one set of facts occurring in a State should be adjudged by only one body of law, and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter falls for adjudication. Consequently, their Honours declined to follow the rule in *Phillips v Eyre*, viewing this rule as being unsatisfactory in principle as it is biased towards the law of the forum.<sup>57</sup> On the same basis, their Honours refused to adopt the re-formulation of the rule in *Phillips v Eyre* as set out by Lord Wilberforce in *Chaplin v Boys*.<sup>58</sup>

Their Honours acknowledged that section 118 of the Constitution has no direct operation with respect to the public Acts and the laws of a Territory, but went on to state that it was “not on that account rendered irrelevant to the question whether the one set of facts occurring in Australia may be governed by different substantive laws depending upon the location or venue of the court in which action is brought”.<sup>59</sup> In the context of Chapter IV of the Constitution, Justices Wilson and Gaudron were prepared to give section 118 a wider operation than that ascribed to it in *Merwin Pastoral*. Their Honours concluded that:

55. J Quick and R R Garran *The Annotated Constitution of the Australian Commonwealth* (Sydney: Angus & Robertson, 1901) 962. See also *E and B Chemicals and Wool Treatment Proprietary Limited [No 1]* [1939] SASR 441 Napier J, 443-444 (“*E & B Chemicals*”).

56. *Ibid.*

57. *Breavington* supra n 1, 89. See also *E & B Chemicals* supra n 55 Napier J, 443-444.

58. *Breavington* supra n 1, 93. For the relevant part of the judgment of Lord Wilberforce see supra n 9.

59. *Ibid.*, 95.

The problem of one set of facts giving rise to one legal consequence by operation of one State law and another legal consequence by operation of another State law was resolved by the requirement in s. 118, to which the Constitutions, the powers and laws of the States are by ss. 106, 107 and 108 made subject, that “[f]ull faith and credit ... be given, throughout the Commonwealth to the laws, the public Acts and records, and the judicial proceedings of every State”. By the constitutional subjection of the Constitutions, the powers and the laws of the States to s. 118, the consequence was effected that the one set of facts occurring in a State would be adjudged by only one body of law and thus give rise to only one legal consequence, regardless of where in the Commonwealth the matter fell for adjudication. ... [S]ection 118 dictates a consequence to which State choice of law rules must conform.<sup>60</sup>

Justices Wilson and Gaudron interpreted section 118 as having the effect of requiring the application of a single body of law to determine the legal consequences of a set of facts. However, as Justice Dawson noted, the common law conflicts rules are based upon the same assumption.<sup>61</sup> On the approach of Chief Justice Mason and Justices Brennan and Dawson, the common law choice of law rules are applied to a given matter to determine the single applicable law. “Full faith and credit” is then given to the body of law so chosen, but this means no more than that the applicable body of law may not be displaced by the public policy of the forum.<sup>62</sup> Specifically, there is no requirement that each court in the Commonwealth must come to the same conclusion as to which State’s law will be the one applicable body of law.

Like Chief Justice Mason and Justices Brennan and Dawson, Justices Wilson and Gaudron held that the common law choice of law rules determine the applicable body of law. However, their Honours went on to state that the requirement that “[f]ull faith and credit shall be given, throughout the Commonwealth to the laws ... of every State” means that the applicable body of law, if it is a law of a State, must be applied by the relevant court wherever in the Commonwealth the matter falls for adjudication.<sup>63</sup> It follows that it must not be possible for a court of one State

60. Ibid, 98-99.

61. Ibid, 150.

62. See text accompanying notes 28-33. It is submitted that this rule extends to prohibit a court from refusing to give effect to a law of another State where that law is a penal, revenue or other public law.

63. *Breavington* supra n 1, 98.

to come to a different conclusion from that of another court within the Commonwealth as to the applicable body of law. To the extent that a common law choice of law rule permits this result it must be modified or departed from.

Their Honours, like Chief Justice Mason and Justices Brennan and Dawson, did not view section 118 as abolishing the need for the common law choice of law rules. Rather, on the approach of Justices Wilson and Gaudron, the common law choice of law rules exist, but must conform to the requirement of section 118.

Justices Wilson and Gaudron expressly declined to postulate a general formula to determine how a court is to ascertain the one applicable body of law. However, on the facts of the case, their Honours held that the requirement of section 118 could only be satisfied by the adoption of an inflexible rule that questions of liability in tort be determined by the substantive law that would be applied if the matter were adjudicated in the court exercising the judicial power of the State in which the events occurred.<sup>64</sup> Although technically section 118 only required the adoption of this rule in relation to events occurring in a State, as a matter of uniformity their Honours held that the same rule would be adopted as the common law rule in relation to events occurring in the Territory.<sup>65</sup>

Justice Deane did not view the subject of the appeal as being solely a question of choice of law in tort. His Honour found it necessary to first determine a very wide threshold question:

That question, stated in deceptively simple terms which require definition, is whether the Commonwealth and State constitutions and laws compromise a unitary system of law. By "a unitary system of law", I mean a comprehensive legal system in which the substantive law applicable to govern particular facts or circumstances is objectively ascertainable or predictable and internally consistent or reconcilable.<sup>66</sup>

Like Justices Wilson and Gaudron, Justice Deane held that:

What is essential is that the substantive rule or rules applicable to determine the lawfulness and the legal consequences or attributes of conduct, property or status at a particular time in a particular part of the national territory will be the same regardless of whereabouts in that territory questions concerning those matters or their legal consequences may arise.<sup>67</sup>

64. Ibid.

65. Ibid.

66. Ibid, 121.

67. Ibid.

In a significantly different contribution, his Honour came to the conclusion that it is manifest that the comprehensive system of law which the Australian Constitution established was intended to be unitary in the above sense. This conclusion, that it was intended that competing State laws be subsumed and reconciled in a new system of national law, is apparent from:

- (a) the fact that the High Court is conferred with original jurisdiction by the Constitution and that this jurisdiction may be invested in other Federal courts and in State courts;<sup>68</sup>
- (b) the separation of judicial from executive and legislative powers, which assumes the existence of laws independently of the courts that administer those laws - the framers of the Constitution could not have meant that those laws should be indefinite unless and until the identity of the court is known;<sup>69</sup>
- (c) the fact that the common law of Australia is uniform;<sup>70</sup>
- (d) the fact that "there lies at the heart of the legal system embodied in the Constitution acceptance of the principle that an individual should not be exposed to the injustice of being subjected to the requirements of contemporaneously valid but inconsistent laws";<sup>71</sup>
- (e) the fact that the High Court is constituted as the ultimate court of appeal from all courts within the Commonwealth.<sup>72</sup>

Justice Deane summarised his views in the following paragraph:

The effect of the Constitution was to establish a comprehensive and truly unitary system of substantive law. That national law applies throughout the territory of the nation. It encompasses: the Constitution itself; the constitutions of the States to the extent to which they are continued under the Constitution; the laws made by, and under the authority of, the Parliament; the laws made by, and under the authority of, the Parliaments of the States; and the common law. Within that

68. Ibid, 122. Contra *Anderson* supra n 15 Kitto J, 30.

69. *Breavington* supra n 1, 122. His Honour cites H Kelsen *General Theory of Law and State* (Cambridge (Mass): Harvard University Press, 1946) 49 as authority for this.

70. *Breavington* supra n 1, 123; Toohey J, 166. The judgments of both of their Honours on this point were quoted with approval in *Anglo-Australian Foods v Von Planta* (1988) 20 FLR 34 Lee J, 39. See also "Sources of Legal Authority" in O Dixon *Jesting Pilate* (Melbourne: Law Book, 1965) 198-202.

71. *Breavington* supra n 1 Deane J, 123. See also *University of Wollongong v Metwally* (1984) 158 CLR 447 Murphy J, 467, 476-477.

72. *Breavington* supra n 1 Deane J, 124. See the Australian Constitution s 73.

unitary system of national law there is no room for the direct application of private international law principles to resolve competition or inconsistency between a law of the Commonwealth and a law of a State or between the laws of different States. The Constitution itself resolves such competition or inconsistency: by s. 109 (in a case of inconsistency between a law of the Commonwealth and a law of a State); by the confinement of the operation of State laws by reference to territorial (or predominant territorial) nexus under the constitutional structure and the mandatory directive of s. 118 (in the case of competition or conflict between the laws of different States). Under the constitutional structure, State laws are essentially territorial in the sense that they apply to regulate (or to define the consequences or attributes of) conduct, property or status within, or having a sufficient relevant nexus with, that part of the nation which constitutes the territory of the particular State. To the extent of that valid territorial application, however, State laws are themselves part of the national law and, as such, [are] directly binding upon all Australian courts, both Commonwealth and State.<sup>73</sup>

Two interrelated points arise out of this quote. First, section 118 serves a similar function in resolving inconsistencies between State laws as section 109 does between Commonwealth and State laws. Justices Wilson and Gaudron adopt the same view.<sup>74</sup> Justice Deane, however, went further than Justices Wilson and Gaudron and set out the basis on which this inconsistency is to be resolved, namely, by reference to the territorial or predominant territorial nexus. Secondly, in contrast to Justices Wilson and Gaudron, Justice Deane viewed the national law as being *directly* binding upon all courts within the Commonwealth, that is, as being the applicable body of law to govern a matter by virtue of the Constitution. Justices Wilson and Gaudron, like Chief Justice Mason, Justices Brennan, Dawson and Toohey, adopt the common law position that a forum court may only apply the law of another State by the operation of a choice of law rule forming part of the law of the forum.<sup>75</sup> These two points mean that, under the Constitutional system as viewed by Justice Deane, there is no need for the common law choice of law rules to resolve inter-State conflicts of laws; there will be no conflict of laws. On the interpretation of Justice Deane, a court will give “full faith and credit” to a law of a State if it applies that law directly when the law is the applicable part of the national law.

73. Ibid, 134-135.

74. Ibid, 97-98.

75. Ibid, 98-99; Dawson J, 149. This conclusion is implicit in the judgments of Mason CJ, Brennan and Toohey JJ.

Section 118, on its face, only applies to the laws of the States. With respect to the laws of the Territories, Justice Deane stated:

Commonwealth laws conferring legislative power upon the legislature of an internal Territory in the traditional words (“for the peace, order and good government”) used in the various State constitutions should, in the context that such laws will constitute part of the national law established by the Constitution, be construed as intended to confer a legislative power corresponding to the legislative power exercised by the States with respect to their various territories.... [V]alid laws made pursuant to a legislative power so conferred enjoy the authority of a law made by the Parliament and, as such, are binding throughout the Commonwealth pursuant to covering cl. 5. They operate as part of the national law in its application to the particular Territory in the same way as a State law operates as part of the same national law in its application to the territory of that State.<sup>76</sup>

On the facts, his Honour held that the “substantive law applicable to determine rights and liabilities arising from [the] accident is the national law as it applies in the place where the accident occurred, that is to say, the national law as it applies in the Northern Territory”.<sup>77</sup> As this law included section 5 of the (NT) Motor Accidents Act, the Supreme Court of Victoria was bound to apply the provisions of that Act as the relevant part of the national law. In essence, the Supreme Court of Victoria was required to give “full faith and credit” to section 5 of the (NT) Motor Accidents Act.

Justice Toohey made only limited comments about section 118 after having concluded that it was not directly relevant to the outcome of the appeal.<sup>78</sup> The essence of these comments is that it is not appropriate in every case to view the States as foreign countries for the purpose of the application of the common law choice of law rules.<sup>79</sup> It seems implicit in the comments of his Honour that if the common law choice of law rule in question (the rule in *Phillips v Eyre*) had not led to the conclusion that the law of the Northern Territory governed the action, then His Honour may have departed from that common law choice of law rule. In this regard, the judgment of Justice Toohey is closest to that of Justices Wilson and Gaudron. His Honour implicitly approved of the idea of the common law choice of law rules, but appeared to be willing to modify

76. Ibid, 138.

77. Ibid, 138-139.

78. Ibid, 163-164

79. Ibid 166-167.

these rules in an appropriate case based on the policy consideration that the States of Australia are States in a Federal Commonwealth.

### III. FULL FAITH AND CREDIT AND THE APPLICATION OF STATUTORY LAWS

#### A. A Unitary System of Law

In *Breavington*, Justices Wilson, Deane and Gaudron interpreted section 118 as having the effect that there must be only one applicable body of law to determine the legal consequences of a set of facts regardless of where in the Commonwealth the matter falls for adjudication.<sup>80</sup> This requirement can only be given effect to if the system of laws within the Commonwealth is unitary in the sense adopted by Justice Deane. That is, the substantive law applicable to govern particular facts or circumstances must be “objectively ascertainable or predictable and internally consistent or reconcilable” so that each court within the Commonwealth will apply the same principles to come to the same result as to the law to govern the matter in question.<sup>81</sup> Thus, by interpreting section 118 as they did, Justices Wilson and Gaudron give tacit support to the conclusion that the system of law within the Commonwealth is unitary. The fact that three judges, Justices Wilson, Deane and Gaudron can be said to support the conclusion that the system of laws within the Commonwealth is unitary is arguably the most significant point to come out of the decision of the High Court in *Breavington*. The remainder of this note will consider some of the ramifications of a unitary system of laws.

#### B. Limitation on the Legislative Powers of the States

If it is asserted that the system of laws within the Commonwealth is unitary, then the issue arises as to how this impacts on the legislative powers of the States. The position of the laws of the Territory will be considered in part III D below. In both *Merwin Pastoral* and *Breaving-*

80. Ibid Wilson and Gaudron JJ, 98; Deane J, 121, 134-135.

81. Ibid Deane J, 121.

ton it was accepted by a majority of the members of the High Court that section 118 may operate to displace a non-statutory law.<sup>82</sup> “[I]f s. 118 may displace non-statutory law, there is no reason why it might not displace statute law, or operate as a limitation upon the power of the States to legislate with respect to the law to be applied in the courts of that State in matters involving an interstate aspect.”<sup>83</sup> Support for this conclusion is seen from the fact that, by virtue of sections 106, 107 and 108 of the Constitution, the constitutions, powers and laws of the States are made subject to the Constitution and thus subject to 118. This means that section 118 may have the effect of operating as a limitation on the legislative powers of the States.<sup>84</sup>

The broad nature of this limitation is inherent in the idea of a unitary system of law. As defined above, a unitary system of law is one in which there is one body of law to govern the legal consequences of a particular set of facts. It follows that section 118 will displace a statute where the statute purports to determine the legal consequences of a set of facts in circumstances where that statute, according to the unitary system of laws, is not part of the one applicable body of law. The question then arises as to how a court determines whether a particular statute is part of the one applicable body of law. Unless there is going to be a radical overhaul of every law in Australia, it would seem that the starting point must be the fact that the laws of the States are essentially territorial.<sup>85</sup> As noted by Justices Wilson and Gaudron in *Breavington*:

The States, by force of s. 123 of the Constitution, continued with identifiable territorial limits, those limits in ordinary legal conception *constituting the law areas of the States*.<sup>86</sup>

If the law area of a State is the area in which a State may legislate, it would seem to follow that a State may only legislate to attach legal consequences to a set of facts, or that part of a set of facts, which occur within the “identifiable territorial limits” of that State.

82. Supra n 28 and n 29.

83. *Breavington* supra n 1 Wilson and Gaudron JJ, 97.

84. Ibid.

85. For example, s 2(1) of the (WA) Constitution Act 1889 grants to the legislature of the State of Western Australia the power “to make laws for the peace, order, and good Government of the Colony of Western Australia...”.

86. *Breavington* supra n 1, 97. (emphasis added)

In *Breavington*, Justice Deane adopted this view and held that where the laws of two or more States have a claim to be the one applicable body of law, the conflict of laws is to be resolved by confining each law to its territorial nexus, that is, territorially confining the application of the law.<sup>87</sup> It follows that a law of one State which purports to attach legal consequences to a set of facts, or that part of a set of facts, which occur within the territory of another State is invalid.<sup>88</sup> However, as Justice Deane recognised, there will be cases where, because of the connections that a set of facts has to more than one State, it is inappropriate to confine the law in question strictly territorially. In those cases, it will be sufficient if there is some “relevant overriding territorial nexus”.<sup>89</sup> Further, a legal system may operate by silence.<sup>90</sup> Consequently, the principles outlined above would apply equally where the law of one State purports to attach legal consequences to a set of facts, or that part of a set of facts, which occur within the territory of another State where there is nothing in either the statute law or common law of the second State which renders anything in the set of facts wrongful.

As noted, Justices Wilson and Gaudron expressly declined to postulate a general formula for ascertaining the one applicable body of law.<sup>91</sup> However, given the reference of their Honours to the territorial limits of the States constituting the law areas of the States,<sup>92</sup> an approach similar to that of Justice Deane is most consistent with the judgment of their Honours.

A statute may contain an express localising provision, that is, a provision expressly setting out the territorial or spatial reach of the

87. Ibid, 135.

88. Ibid, 136.

89. Ibid, 137.

90. Ibid, 136.

91. Ibid, 98.

92. See text accompanying n 86.

provisions of the statute.<sup>93</sup> Applying the principles set out above, if the effect of an express localising provision in a statute of a State is to purport to attach legal consequences to a set of facts, or part of a set of facts, which occur outside the territory of that State, then the express localising provision is invalid unless there is a “relevant overriding territorial nexus”. In essence, that part of the express localising provision which is invalid is so because there has been a failure to give “full faith and credit” to the laws of the State in whose territory the set of facts occurred. This is true even though the laws of the State in whose territory the set of facts occurred was silent on the particular matter in issue. It thus becomes crucial to determine when there is a “relevant overriding territorial nexus”.

The case of *Borg Warner (Australia) Ltd. v Zupan*<sup>94</sup> (“*Borg Warner*”) provides an illustration of how this principle would operate. In *Borg Warner*, an employee of the plaintiff was injured when the motor vehicle

93. An example of an express localising provision is found in sub-ss 4(1) and 4(2) of the (WA) Fair Trading Act 1987 which provide that:

4. (1) Except as otherwise expressly provided in or under this Act, this Act applies (notwithstanding anything to the contrary in any other Act or law) to and in respect of an acquisition or supply or the proposed acquisition or supply of goods or services, or the disposal or proposed disposal of an interest in land -
  - (a) if the person by or to whom the goods or services are or are proposed to be acquired or supplied signs in Western Australia a document relating to the acquisition or supply or the proposed acquisition or supply;
  - (b) if the person by or to whom the interest in land is or is proposed to be disposed of signs in Western Australia a document relating to the disposal or the proposed disposal of that interest; or
  - (c) if that person does not so sign such a document, if the goods or services are or are proposed to be delivered or supplied, or that land is situated, in Western Australia.
- (2) This Act extends to the engaging in conduct outside Western Australia by bodies corporate incorporated or carrying on business within Western Australia or by persons ordinarily resident within Western Australia.

94. [1982] VR 437.

in which he was travelling was struck in the rear by one driven by the defendant, Zupan. At the time of the accident the employee was on his way to work in New South Wales. In the circumstances, compensation was payable and was actually paid to the employee by the plaintiff under the New South Wales Workers' Compensation Act 1926 ("(NSW) Workers' Compensation Act").<sup>95</sup> The plaintiff then commenced an action in the County Court of Victoria claiming a right to be indemnified from Zupan under section 64 of the (NSW) Workers' Compensation Act.<sup>96</sup> The matter was reserved by way of case stated for the opinion of the Full Court on the question of whether the proceeding was justiciable before the County Court of Victoria. Justices Starke, Murphy and Marks held that the proceeding was so justiciable.<sup>97</sup>

As a preliminary matter, their Honours held that section 64 applied on its face to permit a claim for an indemnity where the place of employment was New South Wales and the place of the injury was Victoria.<sup>98</sup> To this extent, the (NSW) Workers' Compensation Act purported to attach legal consequences to Zupan's conduct in Victoria. The question arising out of *Breavington* is whether this is valid if the system of law created

95. This Act has been repealed and replaced by the (NSW) Workers' Compensation Acts 1987 ("1987 Act").

96. S 64 of the (NSW) Workers' Compensation Act provided:

- (1) Where the injury for which compensation is payable under this Act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof-
- (b) if the worker has recovered compensation under this Act, the person by whom the compensation was paid shall be entitled to be indemnified by the person so liable to pay damages as aforesaid...;

97. *Supra* n 94 Murphy J (with whom Starke J agreed), 445; Marks J, 463.

98. *Ibid* Murphy J, 439-440; Marks J, 447-448. In doing so, their Honours relied on s 7(1A) of the (NSW) Workers' Compensation Act to determine the operation of s 64. S 7(1A) so far as relevant, provided:

Where an employer has a place of employment in New South Wales ... and there employs a worker, and such worker whilst outside New South Wales receives an injury under circumstances which had the injury been received in New South Wales would entitle him to compensation in accordance with this Act, and the provisions of this Act shall apply mutatis mutandis to and in respect of such injury....

(See now s 13(1) of the 1987 Act).

by the Constitution is unitary. The answer depends upon the existence of a “relevant overriding territorial nexus”.

The essence of workers compensation legislation is the payment of compensation to workers who suffer as the result of certain injuries, essentially being injuries having a relevant connection with their employment.<sup>99</sup> To do this, the (NSW) Workers’ Compensation Act placed certain obligations on employers, primarily the obligation to insure and the obligation to pay compensation.<sup>100</sup> This suggests that the relevant overriding nexus is the fact that the employment took place in New South Wales. To be valid as an overriding territorial nexus, the nexus must not detract from the fact that the system of law within Australia is unitary.<sup>101</sup> This is saying no more than that the question of whether there is an overriding nexus must not be determined in isolation, but having regard to the Constitutional system and the law of each State and Territory in Australia as a whole.

In *Borg Warner*, Justice Marks viewed the (NSW) Workers’ Compensation Act as part of a “single interlocking structure for the nation”.<sup>102</sup> It is submitted that this fact would be sufficient for the territorial nexus of the place of employment to be valid. Thus, it would seem that the operations of section 64 of the (NSW) Workers’ Compensation Act as was considered in *Borg Warner* would be valid if the system of laws created by the Constitution is unitary.<sup>103</sup>

Although many statutes contain specific rules determining their territorial or spatial reach, some do not. It falls upon the judiciary to localise, that is, determine the territorial or spatial reach of, these statutes. Judicial localisation is essentially a process of statutory interpretation. There are

99. See generally *Mynott v Barnard* (1939) 62 CLR 68 Latham CJ, 86.

100. S 7 (obligation to pay compensation), s 18 (obligation to insure). These sections have been replaced by ss 9 and 155 of the 1987 Act respectively.

101. *Breavington* supra n 1 Deane J, 121.

102. Supra n 94 Marks J, 460; also Murphy J, 444.

103. Another specific example of an interlocking legislative scheme would be that of compulsory third party motor vehicle insurance schemes based on the territorial nexus of the State of registration. For example in *Hodge v Club Motor Insurance Agency Pty Ltd and Australian Motor Insurers Ltd* (1974) 7 SASR 86 (“*Hodge*”) the court considered the provisions of s 4A of the (Qld) Motor Vehicles Insurance Act 1936. Their Honours were of the view that the liability of the statutory insurer pursuant to s 4A could be invoked where the car was registered in Queensland and insured pursuant to the above Act but the accident occurred in South Australia. It is submitted that this interpretation would be valid under a unitary system of laws.

two approaches to this process of interpretation. One takes as its starting point the subject matter and character of the statutory provision.<sup>104</sup> The other takes as its starting point the relevant common law choice of law rule.<sup>105</sup> However, on either approach the courts are guided by a presumption of construction that a statute is not intended to attach legal consequences to events occurring outside the territory of the State.<sup>106</sup>

Under a unitary system of law the same principles would apply to the judicial localisation of statutes as apply to statutes with express localising provisions. Thus, in localising a statute, a judge must avoid an interpretation that would give rise to the possibility of different legal consequences depending upon where in the Commonwealth the matter falls for adjudication. In other words, a judge must not localise a statute so as to give a result contrary to the requirement of section 118 that the system of laws within the Commonwealth is unitary. In practical terms, a judge may not purport to localise a statute so as to attach legal consequences to a set of facts, or part of a set of facts, which occur within the territory of another State in the absence of some relevant overriding territorial nexus.

The conclusion from the above analysis is that section 118, either as interpreted by Justices Wilson and Gaudron or by Justice Deane, imposes a limitation on the legislative powers of the States. A State legislature will only be able to legislate to attach legal consequences to a set of facts, or that part of a set of facts, which occur within its territory. Only in limited circumstances will a State legislature be able to attach legal consequences to a set of facts, or that part of a set of facts, which occur within the territory of another State.

104. *The Wanganui-Rangitikei Electric Power Board v The Australian Mutual Provident Society* (1934) 50 CLR 581 Gavan Duffy CJ and Starke J, 596 ("Wanganui-Rangitikei"); *Mynott v Barnard* supra n 99 Latham CJ, 86; *Kays Leasing* supra n 31 Barwick CJ, McTiernan and Taylor JJ, 133-135; *Goodwin v Jorgensen* supra n 31 Menzies J (with whom Barwick CJ agreed), 97; Mason J (with whom Gibbs J agreed), 101; *Freehold Land Investments Limited v Queensland Estates Pty Ltd* (1970) 123 CLR 418 Walsh J (with whom Barwick CJ agreed), 440; McTiernan J, 421; Menzies J (with whom Owen J agreed) 425 ("*Freehold Land Investments*").
105. *Barcelo v Electrolytic Zinc Company of Australasia Limited* (1932) 48 CLR 391 Dixon J, 423-428; McTiernan J, 445-448; *Wanganui-Rangitikei* supra n 104 Dixon J, 601; *Kays Leasing* supra n 31 Kitto J, 142-144.
106. *The Jumbunna Coal Mine No Liability v The Victorian Coal Miners' Association* (1908) 6 CLR 309 O'Connor J, 363; *Freehold Land Investments* supra n 104 McTiernan J, 421; Walsh J (with whom Barwick CJ agreed), 440.

If the system of laws within the Commonwealth is unitary, there follows a second limitation, a corollary to the first. The essence of a unitary system of laws is that there must only be one applicable body of law to determine the legal consequences flowing from the one set of facts, wherever in the Commonwealth the matter is adjudicated. If, on the above analysis, a statute of one State applies to determine the legal consequences of a set of facts occurring within the territory of another State, then that statute is the one applicable body of law. It follows from this conclusion that the legislature of the second State cannot purport to attach the same or an inconsistent legal liability to the same set of facts. To do so would deny "full faith and credit" to the law of the first State in breach of section 118 of the Constitution.<sup>107</sup> In these circumstances, a court of the second State, and indeed any court within the Commonwealth, must hold that the legislation of the second State is invalid, being in breach of the requirement of section 118, to the extent that it is inconsistent with that part of the law of the first State which forms part of the one applicable body of law. It is only with this limitation that the system of laws within the Commonwealth can be unitary in the above sense. Because of this second limitation the courts will be slow to allow a State to legislate so as to attach legal consequences to a set of facts, or that part of a set of facts, which occur within the territory of another State.

If section 118 is given a substantive effect, either as determined by Justices Wilson and Gaudron, or by Justice Deane, then the process of localisation - that is, the determination of the territorial or spatial reach of a statute - will no longer be unilateral, allowing the court to consider only the interpretation of the statute of its legislature before it. Rather, the court will have to consider how the operation of the particular statute fits in with the constitutional system of laws as a whole.

107. This interpretation is not totally original. See Sykes and Pryles *supra* n 4, 296-298. Sykes and Pryles adopt the view that once full faith and credit is given to a statute of a sister State, then this statute must be applied and will displace an inconsistent statute of the forum State. However, Sykes and Pryles differ from the present analysis as the learned authors adopt the view that the common law conflictual rules supply the mechanism to determine when a statutory law of a State should be given full faith and credit. See also *E & B Chemicals* *supra* n 55 Napier J, 444; *E & B Chemicals and Wool Treatment Proprietary Limited [No 2]* [1940] SASR 267 Richards J, 280; *Alaska Packers* *supra* n 21 Stone J, 548.

### C. Application of the Laws of other States

One area of Australian federal conflict of laws in which there has been a marked absence of clear principle is the question of when, if ever, the courts of one State can apply the statute laws of another State in the absence of an established choice of law rule. According to traditional conflict of laws, a court of one State can only apply the statute law of another State when it is directed to do so by a choice of law rule of the first State.<sup>108</sup> A problem which has arisen in a number of cases is that the particular statutory right in question does not fall neatly within one of the existing categories for which there are choice of law rules, but is best characterised as a statutory right of its own kind (“sui generis”).<sup>109</sup> If the system of laws within the Commonwealth is unitary then a solution will need to be provided to this problem.

The idea that section 118 of the Constitution, either alone or together with section 18 of the Recognition Act, is a constitutional or legal justification for a State court to apply the statutory laws of another State in the absence of an existing choice of law rule has been considered in a number of cases.<sup>110</sup> Equally, aside from *Breavington* there is authority that section 118, either with or without section 18 of the Recognition Act, cannot be construed as a constitutional or legal mandate to the States to apply each others laws.<sup>111</sup> A third possibility which has received some support is that public policy, in light of section 118, allows a court to create a new choice of law rule.<sup>112</sup>

108. *Breavington* supra n 1 Dawson J, 149. See also *The Nominal Defendant v Bagot's Executor and Trustee Company Limited* [1971] SASR 346 Bray CJ, 364-366 (“*Bagot's Executor*”) and *Hodge* supra n 103 Bray CJ, 89-91 for illustrations of this traditional approach.

109. *Plozza and Plozza v South Australian Insurance Company Limited* [1963] SASR 122 Hogarth J, 127 (“*Plozza*”); *Borg Warner* supra n 94 Murphy J (with whom Starke J agreed), 441-442; Marks J, 456. The judgments of Bray CJ in *Bagot's Executor* ibid, 365-366 and *Hodge* supra n 103, 89-91 bear out the difficulty of trying to place in an existing category a statutory right that is essentially a statutory right sui generis.

110. *Plozza* ibid Hogarth J, 128-129; *Hine v Fire and All Risks Insurance Co Ltd* [1972] 7 SASR 49 Zelling J, 56; *Hodge* supra n 103 Zelling J, 102.

111. *Borg Warner* supra n 94 Marks J, 461.

112. *Ibid* Murphy J, 444-445; Marks J, 461-462.

As noted, section 118 operates to give full faith and credit to the laws of the States as they stand, not as nationally altered.<sup>113</sup> In the present context, this means that the statute of the State in question must first be localised in accordance with the principles outlined above. Only if the statute in question so applies to the facts according to its own terms will the issue arise as to whether a court of another State must apply that statute.

On this question, the judgments of Justice Deane and of Justices Wilson and Gaudron diverge. Under the unitary system of law advocated by Justice Deane, the national law is “*directly binding*” upon all courts throughout the Commonwealth, both Commonwealth and State.<sup>114</sup> Thus, once a law has been localised and has been found to be the applicable part of the national law, each of the courts throughout the Commonwealth must apply, and thereby give “full faith and credit” to, that law to determine the legal consequences of the particular set of facts in question. The law of the other State applies directly, that is of its own force under the constitutional system, and not by virtue of a choice of law rule of the forum State. Thus, the problem of a statutory right *sui generis* will not arise. All statutory rights are considered on the same basis and are applied independently of the common law choice of law rules.

Justices Wilson and Gaudron do not go as far as Justice Deane. Specifically, the unitary system of laws as viewed by their Honours did not involve a departure from the basic rule of conflict of laws that, for a court to apply a statute of another State, it must be directed to do so by a choice of law rule that forms part of the law of the forum State.<sup>115</sup> However, the common law choice of law rules must conform to the consequence dictated by section 118. The consequence dictated by section 118 is that the system of laws within the Commonwealth is unitary, that is, that the one set of facts occurring in a State is to be adjudged by only one body of law, regardless of where in the Commonwealth the matter falls for adjudication. If a forum choice of law rule does not lead to the application of the one applicable body of law in every case, then

113. *Finlayson* supra n 18.

114. *Breavington* supra n 1, 135.

115. *Ibid*, 99.

the choice of law rule must be altered.<sup>116</sup> In *Breavington* this meant that a new choice of law rule had to be created to replace the common law rule in *Phillips v Eyre*.

However, the essence of the problem with a statutory right *sui generis* is that it does not fall neatly within an existing choice of law rule. The question arising from the judgment of Justices Wilson and Gaudron is whether it is legitimate to create a new choice of law rule to deal with a statutory right *sui generis*. There is nothing in the judgment of Justices Wilson and Gaudron that would prohibit this approach. Rather, in certain circumstances it will be necessary to create a new choice of law rule in order to satisfy the requirement of section 118. If a statutory right *sui generis* is part of the one applicable body of law, then in order for the system of laws to be unitary that law must be applied wherever in the Commonwealth the matter falls for adjudication. Further, on the approach of Justices Wilson and Gaudron, that law must be applied

not by reason of extended or extraterritorial operation of that State or Territory law, but by operation of the choice of law rule applicable in the State or Territory where the matter falls for adjudication.<sup>117</sup>

If a court purports to decline to apply the one applicable body of law, then it is acting in breach of section 118. In essence it would fail to give "full faith and credit" to the one applicable body of law. Thus, in this situation, the court must either develop a new choice of law rule or else breach the requirement of section 118, with the effect that the system of laws within the Commonwealth will not be unitary.

To summarize, in the process of localisation, as outlined above, the court will determine the one applicable body of law. The constitutional system of laws, either as interpreted by Justice Deane or by Justices Wilson and Gaudron, provides a court with the corresponding ability to apply that law, even if it is a statutory right *sui generis*.

116. Ibid, 93. Their Honours rejected the approach of Lord Wilberforce *supra* n 9, because that approach allowed the continued *possibility* that the one set of facts occurring in Australia may give rise to different legal consequences depending upon the location or venue of the court in which the action is brought.

117. Ibid, 99.

## D. Laws of the Territories

Justice Deane concluded that the laws of the Territories operate as part of the national law in their application to that particular Territory in the same way as a State law operates as part of the same national law in its application to the territory of that State.<sup>118</sup> Thus, the legislative powers of the Commonwealth with respect to the Territories and of the Territories themselves are to be limited in the same way as the legislative powers of the States. Further, as was the case in *Breavington*, a law of a Territory which is the applicable part of the national law is *directly binding* upon all the courts throughout the Commonwealth.

As a matter of uniformity, Justices Wilson and Gaudron held that the requirement of section 118 in relation to events occurring in a State should be adopted as the common law rule in relation to events occurring in a Territory.<sup>119</sup> Thus, the one set of facts occurring within a Territory must be adjudged by only one body of law and give rise to only one legal consequence regardless of where in the Commonwealth the matter falls for adjudication. The limitation on the legislative power of the States and the ability of the courts of the States to apply the laws of the other States which flow from this requirement will likewise apply to the Commonwealth legislature in relation to the Territories, the legislatures of the Territories and the courts of the Territories.

On the interpretation of either Justice Deane or Justices Wilson and Gaudron, the result is the same. The system of laws within the Commonwealth is unitary, that is, the one set of facts will give rise to only one conclusion of law wherever in the Commonwealth the facts occurred and the matter is adjudicated.

## IV. CONCLUSION

There is great sense in the statement of Justices Wilson and Gaudron that, in a united indissoluble Federal Commonwealth, “[i]t is not only undesirable, but manifestly absurd that the one set of facts occurring in the one country may give rise to different legal consequences depending upon the location or venue of the court in which action is brought”.<sup>120</sup>

118. *Ibid*, 138.

119. *Ibid*, 98.

120. *Ibid*, 88.

In *Breavington*, the judgments of Justices Wilson, Deane and Gaudron support the view that the effect of section 118 is that the system of laws within the Commonwealth is unitary. That is, there must only be one applicable body of law to determine the legal consequences of a set of facts wherever in the Commonwealth the matter falls for adjudication. Under a unitary system of laws, the legislative power of each State and Territory is essentially limited to defining the legal consequences where the particular set of facts, or part of the set of facts, occur within the territory of that State or Territory. Each State and Territory would only have a limited power to legislate to attach legal liability to a set of facts, or that part of a set of facts, which occur outside its territory. To the extent that a State or Territory may legislate to attach legal consequences to a set of facts, or that part of a set of facts, which occur outside its territory, the State or Territory within whose territory the relevant facts occur is prohibited from attaching the same or an inconsistent legal consequence to the same facts. In this way, “full faith and credit” is given to laws of each State throughout the Commonwealth by section 118 of the Constitution. Not only must the legislatures of the States and Territories give “full faith and credit” to the laws of the States, but so must the courts. Each court within the Commonwealth must apply the one applicable body of law, either directly, or by operation of the common law choice of law rules modified or replaced so as to conform to the consequence dictated by section 118.

In the present legal environment there is a need for there to be a single applicable body of law to determine the legal consequences of a set of facts wherever in the Commonwealth the matter falls for adjudication. The cross-vesting of jurisdiction pursuant to the respective cross-vesting legislation serves to highlight this need.<sup>121</sup> The freedom that the cross-vesting legislation gives to litigate has increased the possibility that the same facts will give rise to different legal consequences depending upon where the matter is litigated.<sup>122</sup> Indeed, the different legal consequences that flow from the choice of forum may be deliberately sought. The time is ripe for this united indissoluble Federal Commonwealth to have a unitary system of law.

121. *Supra* n 48.

122. Though, arguably, that freedom has always been there: D Kelly and J Crawford “Choice of Law Under the Cross-vesting Legislation” (1988) 62 ALJ 589, 591. It is because of this ability to “forum shop” that transfer provisions were included in the cross-vesting legislation (common s 5). See generally Australia, Senate 1987 *Debates* vol S120, 1566-1568.