

FAMILY VIOLENCE: OPENING UP THE SILENCE

BY JOHN TOBIN*

[This article discusses and evaluates the main legal remedies available to victims of family violence in Victoria. Its objective is to locate the law within the context of this issue from a feminist perspective, and determine whether it acts to regulate and eliminate family violence and its underlying ideology, or to sustain it. Upon examining the Family Law Act 1975 (Cth) and the Crimes (Family Violence) Act 1987 (Vic.), the conclusion drawn is that despite advancements in the protection of women victims, the law remains an institution which legitimizes family violence.]

Last night I heard the screaming,
Loud voices behind the walls,
Another sleepless night for me,
It won't do no good to call,
The police,
Always come late,
If they come at all.¹

Tracy Chapman's voice in *Behind the Wall* exposes the silence that surrounds society's response to family violence. This song establishes a space in which to challenge such violence.² Within this space, I intend to open up a discussion and evaluation of the main legal remedies available to victims of family violence³ in Victoria, by locating this issue within its social context. That is, a context in which women are oppressed by and subordinate to men,⁴ where violence exists as the primary and legitimate means of maintaining the hegemonic hold of patriarchy⁵ and the family remains the basic unit of this regime.⁶

Traditionally the law was reluctant to intervene in the area of family violence because it occurred in the private sphere and was considered to be

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1 Chapman, T., 'Behind the Wall' on *Tracy Chapman*, Elektra/Asylum Records Inc. (1988).

2 Minow, M., 'Words and the Door to the Land of Change: Law, Language, and Family Violence' (1990) 43 *Vanderbilt Law Review* 1665, 1697-8.

3 I have chosen to use the term 'family violence' as opposed to 'domestic violence', 'wife battering' or 'criminal assault in the home' as it best represents this phenomenon. The alternative definitions tend to either trivialize, sensationalize or confine its incidence to solely criminal matters. The term 'family violence' identifies the location in which such violence occurs and recognizes the threat it represents to the idealized and *sacred* institution of the family in society.

4 This is my starting point and it is not within the scope of this project to argue in detail why or how this is the situation in contemporary society. This is not to suggest that women's oppression is universally homogeneous, because such an approach runs the risk of denying the cultural and historical specificities of women's struggles throughout the world.

5 This is to appropriate the idea of Susan Brownmiller in Brownmiller, S., *Against Our Will: Men, Women and Rape* (1975) 14.

6 The notion of the family as an institution of patriarchy has been explored in great detail within feminist discourse. E.g. Kate Millet identifies patriarchy's chief institution as being the family through its socialization and reproduction of the young with respect to its ideology of subordination: Millet, K., *Sexual Politics* (1971) 33-6.

beyond the realm of the law.⁷ However, in recent years the issue of family violence has become a priority on the political agenda,⁸ largely because of the women's movement, resulting in legislative intervention in an attempt to respond to the needs of victims. The focus of this analysis, is to locate the law within the context of this issue from a feminist perspective⁹ and determine whether the law acts to regulate and eliminate family violence and its underlying ideology, or to sustain it.¹⁰

After examining the legal remedies available to a victim of family violence under the Family Law Act 1975 (Cth) (hereafter 'Family Law Act') and the Crimes (Family Violence) Act 1987 (Vic.) (hereafter 'Crimes (Family Violence) Act'), the conclusion drawn is that despite advancements in the protection of women¹¹ subject to family violence, the law continues to serve as an institution which legitimizes the violence inflicted upon women.¹²

The reason for such a conclusion arises from a number of factors. First, the effectiveness of the law is dependent on those who are responsible for its implementation and enforcement.¹³ In this instance, the actions of the police and judiciary are influenced by the legacy of non-intervention in the

7 Katherine O'Donovan explores how the legal system has constructed the family as private and therefore as a zone of non intervention. She argues that the law has indirectly intervened to construct the family: O'Donovan, K., *Sexual Divisions in Law* (1985) 2-15. This approach suggests that the private sphere is actually a constructed space and not free from state intervention merely because it is characterized as private. See also Freeman, M. D. A. (ed.), *The State, the Law and the Family: Critical Perspectives* (1984) 1.

8 There have been inquiries at both the State and Federal levels: e.g. Victoria, Department of Premier and Cabinet, Women's Policy Co-ordination Unit, *Criminal Assault in the Home: Social and Legal Responses to Domestic Violence* (1985). See also the specific legislation dealing with family violence introduced in all states delineated *infra* n. 42.

9 Feminism does not exist as a homogeneous ideology and within its discourse there are several distinct perspectives such as liberal, radical and socialist positions, which suggest alternative explanations of women's status in society with corresponding prescriptions for change. See West, R., 'The Difference in Women's Hedonic Lives: a Phenomenological Critique of Feminist Legal Theory' (1987) 3 *Wisconsin Women's Law Journal* 81; Olsen, F., 'Feminism and Critical Legal Theory: An American Perspective' (1990) 18:2 *International Journal of the Sociology of Law* 199, 205-11. However, despite these differences, common themes exist within feminist discourse, such as women's subordination and gender inequality, and these form the basis of this analysis.

10 Such an approach has been identified by Katherine Bartlett as 'the woman question' which is designed to identify the gender implications of rules and practices which might otherwise appear to be neutral or objective. See Bartlett, K., *Feminist Legal Methods* (1990) 103 *Harvard Law Review* 829, 837. It reflects an adoption of the subordination principle which Elizabeth Sheehy describes as involving the assessment of laws to determine whether or not they operate to maintain women in a subordinate position. See Sheehy, E. A., 'Personal Autonomy and the Criminal Law: Emerging Issues for Women', *Background Paper for the Canadian Advisory Council on the Status of Women* (September 1987), in Graycar, R. and Morgan, J., *The Hidden Gender of Law* (1990) 42.

11 The association of the female gender with victims of family violence is not to deny that men and children are also victims of such violence. However, as this violence is largely directed towards women (which is a theme expanded upon at a later stage), I have chosen to identify such gender specificity immediately.

12 In adopting such an approach it is necessary to avoid any conspiracy theories as they represent a simplistic approach that polarizes the protagonists in the debate. This only serves to deepen the fissure between men and women and denies the possibility of any reconciliation. It also replicates the binary thought which feminism seeks to dismantle and denies both the possibility and actuality that men are not universally in support of the existing system even if it does confer greater benefits on their gender.

13 Ingleby, R., 'The Crimes (Family Violence) Act 1987 — a duck or an emu?' (1989) 3 *Australian Journal of Family Law* 49, 57.

private sphere, such that they continue to perceive family violence as an individual and private issue, rather than the gender specific and social phenomenon that it is.¹⁴

Secondly, at a federal level, the conciliatory nature of the Family Law Act assumes an equality between the protagonists which does not exist, whilst its ideology is committed to the maintenance of the family at the expense of the physical integrity of an individual. Such an approach explicitly supports the very structure that creates and reinforces the unequal power distribution between men and women and which facilitates the existence of family violence. Furthermore, its enforcement mechanisms, both in theory and practice, are inadequate to redress these imbalances and avail effective protection to women who are victims of family violence.

Finally, the introduction in 1987 of the Crimes (Family Violence) Act to overcome the inadequacies of both the criminal and family law, has offered more protection to victims of family violence. However, its civil nature has effectively decriminalized such violence. The result is that the present laws impliedly legitimize violence in the home and therefore operate to sustain the hegemonic hold of patriarchy which employs violence as a means to maintain the subordination of women.

This is not an inevitable result, and both the criminal and civil law could be used in conjunction to overcome each other's weaknesses and avail protection to victims, whilst maintaining the criminal nature of family violence as an abhorrent social act to be condemned by society. Yet the law itself will not put an end to such behaviour.¹⁵ Rather, society, with the legislatures at the helm, must redress the structural barriers and economic conditions¹⁶ which presently construct an environment which creates power differentials between men and women that are conducive to the existence of family violence.¹⁷

FAMILY VIOLENCE IN ITS SOCIAL CONTEXT

I told her I was going to give her the kicking of her life. But I had pre-planned that. At work I said to three or four blokes I'm going to go home and give it[sic] the biggest kicking of its [sic] life because I've had a gut's full. And I must have had a look of a crazy man because she was like . . . a rabbit ready to run. And I said "You move and I'll drive it right through your heart and you'll know every second you die".¹⁸

14 Scutt, J., *Women and the Law: Commentary and Materials* (2nd ed. 1990) 455-6. This is identified as a general theme permeating police and judicial action and it is not suggested that there are no police, or members of the judiciary, who are sensitive to, and aware of, the gendered harms experienced by women in our society.

15 It is essential to recognize the limits of the law as a mechanism for social change. It does not possess the ability to redress all social problems as it exists as merely a part of the society which creates the structures to facilitate these problems. As one of these structures, its power is contingent on society rather than independent.

16 Graycar and Morgan, *op. cit.* n. 10, 305.

17 According to Michele Bograd, feminists believe 'that the social institutions of marriage and the family are special contexts which . . . promote and even support and maintain men's use of physical force against women': see Bograd, M., 'Feminist Perspectives on Wife Abuse: An Introduction' in Bograd, M. and Yllo, K. (eds), *Feminist Perspectives on Wife Abuse* (1988) 12.

18 Anonymous male batterer interviewed on *Open File*, Australian Broadcasting Commission (1985) in Hatty, S. (ed.), *National Conference on Domestic Violence* (1986) Vol. I, 13.

Before commencing any discussion of the laws that attempt to regulate such violence, it is necessary to locate this issue within its social context. In doing so, I will identify some of the recurrent themes within a feminist perspective on this phenomenon which challenge interpretations accepted by the law.¹⁹

FAMILY VIOLENCE AND THE COMMUNITY RESPONSE

Alexander notes that '[i]t is now accepted that family violence is one of the most widespread and under reported crimes in Australia.'²⁰ 'Family Violence' includes assaults, threats of assault, damage to or threats of damage to property, harassment, molestation or behaving in an offensive manner. It can be psychological as well as physical in nature.²¹

In 1983 the Victorian police received 50,000 calls relating to family violence²² and it is estimated that approximately one third of all homicides in Victoria are spousal homicides.²³ It is therefore not surprising that a community survey in 1988 revealed that 85% of respondents considered it to be a serious issue.²⁴ However, that 20% considered the use of force to be legitimate in certain circumstances²⁵ and two thirds took the view that the woman beaten could always leave, is an indication of the extent of society's acceptance and misunderstanding of the material and psychological conditions facing women.²⁶

THEMES WITHIN A FEMINIST PERSPECTIVE ON FAMILY VIOLENCE

The discourse relating to family violence involves several themes set up as binary oppositions.²⁷ In each situation, the location of women within the opposition serves to maintain their disempowered status²⁸ in the eyes of the law, and it is within this framework that the operation of the law relating to family violence must be understood.

The masculine/feminine dichotomy is recognized within feminist dis-

19 Such an approach argues that the law does not exist as the rational and independent body of rules it is often depicted to be. Rather it suggests that it is imbued with a specific ideology which is both influenced by, and influences, the social environment in which it operates.

20 McCulloch, J., 'Police Response to Domestic Violence, Victoria' in Hatty, S. (ed.), *op. cit.* n. 18, Vol. II, 523, 526. Women are more likely to be hit, physically injured or killed in their own homes by another family member than anywhere else or by anybody else; Alexander, R., 'The Crimes (Family Violence) Act 1987' (1988) 62 *Law Institute Journal* 166, 166.

21 *Victoria Police force Circular Memo*, Policy Division, no. 915, 26 April 1991, 1.

22 Alexander, *op. cit.* n. 20, 166.

23 *Ibid.* 166.

24 Graycar and Morgan, *op. cit.* n. 10, 279.

25 *Ibid.* 280.

26 Such conditions are a result of the oppression experienced by women because of the social structures and underlying ideology of our society which do not allow the same access for women to the preconditions for material, social and mental independence as experienced by men.

27 For a discussion of dualisms and their relevance to the law, see Olsen, *op. cit.* n. 9, 199-201.

28 A status which may not necessarily be explicit yet nonetheless is reflected by the underlying ideology of the law: see Freeman, M. D. A., 'Legal Ideologies, Patriarchal Precedents, and Domestic Violence' in Freeman (ed.) *op. cit.* n. 7, 51, 5456.

course as being illustrative of the fundamental inequality of power between the sexes, a dichotomy which family violence laws do not accommodate and therefore reinforce.²⁹ The tendency of the law to locate such violence within the private sphere³⁰ as an individual issue, denies its social nature and gender specificity. Connected to this, is its identification primarily as an act within the realm of the civil law as opposed to the criminal law. This factor when combined with the priority accorded to the institution of the family, which is often valued at the expense of a woman's personal integrity, results in the law's implicit legitimization of the role of violence in sustaining this institution.

Despite gains made by women to redress the extent of their disempowered status in recent years, the National Committee on Violence concluded that:

attitudes of gender inequality are deeply embedded in Australian culture, and both rape and domestic violence can be viewed as expressions of this cultural form.³¹

The Committee also found that the legitimate use of violence to achieve a specific end is a principle firmly entrenched in Australian culture.³² Therefore, given that the institution of the family constitutes the basic unit upon which our society is structured, it is possible to conclude, as Freeman does, that family violence

should not be seen as a breakdown in the social order, as orthodox interpretations perceive it, but as an affirmation of a particular sort of social order.³³

From this perspective, family violence exists in a culture where violence, or the threat of violence,³⁴ is used to maintain gender inequality.³⁵ It is not

29 As noted by Thornton, 'feminist scholars have shown how the entire corpus of liberal thought is structured around a series of sexualised, hierarchised dualisms . . . men are identified with one side of the dualisms, namely thought, rationality, reason, culture, power, objectivity and abstract, principled activity . . . Predictably law is associated with the male side of the dualism, in that it is supposed to be rational, objective, abstract and principled': Thornton, M., 'Feminist Jurisprudence: illusions or reality?' (1986) 3 *Australian Journal of Law and Society* 5-29, in Smart, C., *Feminism and The Power of Law* (1989) 86. Examples of such dualisms include nature/culture, passive/aggressive, public/private. It has been argued that 'family violence is essentially a function of the excessive power which our history and our social structures grant to men, both in society at large and in the privacy of the home': *Family Violence: Everybody's Business/Somebody's Life* (1991) xiv-v.

30 It should also be recognized that the classic liberal philosophy underlying this approach operates to protect marital privacy rather than individual privacy. Traditionally, under the common law, by marriage a man and woman were one person, and that 'one person' was man. As a result, such an approach enabled a man to exercise exclusive jurisdiction over his wife and it is this legacy that continues in contemporary society when police do not intervene in family violence incidents because they are located in the private sphere.

31 Chappell, D. and Strang, H., 'Domestic Violence: Findings and Recommendations of the National Committee on Violence (1990) 4 *Australian Journal of Family Law* 211, 216.

32 *Ibid.*

33 Freeman, *op. cit.* n. 28, 52. Such an approach locates the cause of family violence not solely in individual failure but extends its origins to social structures which serve as the precondition to the incidence of such violence.

34 Regular violence is not required in order for a woman to live in fear. This was recognized by the Queensland Domestic Violence Task Force which stated that: '[s]ome victims wanted to make the point that you don't have to be assaulted regularly to live in fear. The occasional incident is enough to create a climate of fear and to frighten some women into compliance with a partner's wishes over a period of time.' *Family Violence: Everybody's Business/Somebody's Life*, *op. cit.* n. 29, 74.

35 Michele Bograd argues that violence exists as the most overt and effective means of social control in Bograd, *op. cit.* n. 17, 13.

merely an individual and private matter but a social phenomenon which reinforces women's subordination³⁶ and men's dominance.³⁷

Locating family violence within the context of an unequal power relationship reveals it to be a gender specific injury.³⁸ This is not to deny that men are also victims of family violence, but to recognize that 'men are nine times more likely to be perpetrators of family violence, whilst women are nine times more likely to be victims.'³⁹ Such a conclusion takes family violence beyond the confines of an individualist approach and identifies the connection between inequalities experienced by women, as women, which provide the potential for their abuse within the family by men.

Having established this social framework within which family violence occurs, it is now possible to locate the position and role of the law in relation to this issue.

THE LAW AND FAMILY VIOLENCE

[T]he husband hath by law power and dominion over his wife and may keep her by force within the bounds of duty, and may beat her but not in a violent or cruel manner.⁴⁰

Traditionally the law actually endorsed family violence⁴¹ reflecting the patriarchal ideology underlying women's subordination and disempowered status. Such an explicit legal mandate for men to beat their wives no longer exists today due to various legislative enactments⁴² seeking to extend the hand of the law into the private sphere of the family and protect victims.

Despite these changes, it should not be assumed that the law is necessarily

36 The gender construction of women as passive not only serves to increase their vulnerability to men's violence, but also makes it difficult for them to identify when in fact they are victims of such violence. Such a problem is illustrated by the following comment: 'I wouldn't call it physical violence. He hit me once or twice. He used to give me a bash. Nothing serious. Just temper', cited in Ingleby, *op. cit.* n. 13, 55.

37 The gender construction of men as aggressive and dominant is translated into their traditional expectations within a relationship which encourages their use of violence to maintain such dominance. This understanding has been identified by male attackers themselves on occasions, *E.g.* 'I feel I'm a bastard, some of the things I've done to her ... I think it's a traditional Australian relationship, you'd have to be blind not to see it. It's part of the Ocker image, the male dominating relationship', in Scutt, *op. cit.* n. 14, 138.

38 That is, as Catharine MacKinnon explains, '[f]or something to be based on gender in the legal sense means that it happens to a woman as a woman, not as an individual' in MacKinnon, C., *Feminism Unmodified* (1987) 107.

39 Gilmore, K., 'Community Action on Family Violence' in *Occasional Papers on Family Violence* cited in *Family Violence: Everybody's Business/Somebody's Life*, *op. cit.* n. 29, 112.

40 Cited in *Re Cochrane* (1840) 8 Dowl. 630, 633 and quoted in Abrahams, P., 'Violence Against the Family Court: Its Roots in Domestic Violence' (1986) 1 *Australian Journal of Family Law* 67, 71.

41 Historically, the power granted by the common law to a man to beat his wife, so long as he did it with a stick no thicker than his thumb, is considered to be the origin of the phrase 'rule of thumb'; see Freeman, *op. cit.* n. 28, 70.

42 Recently all states have introduced legislation specifically designed to deal with the problem of family violence. Apprehended Violence Orders are available under the Crimes Act 1900 (N.S.W.); Part XVA; Intervention Orders are available under the Crimes (Family Violence) Act 1987 (Vic.); Protection Orders are available under the Peace and Good Behaviour Act 1982 (Qld); Restraining Orders are available under the Justices Act 1942 (S.A.) and also under the Justices Act 1902 (W.A.); Restraint Orders are available under the Justices Act 1959 (Tas.); and Protection Orders are available under the Domestic Violence Ordinance 1986 (A.C.T.). For a detailed examination of each of these schemes see Seddon, N., *Domestic Violence in Australia: The Legal Response* (1989) ch. 5, 59-106.

redressing the inferior status of women in our society. It should be recognized that the legal system is *prima facie* an institution in possession of a distinct ideology which both reflects and supports the dominant social order, that is, the subordination of women.⁴³

When examining the main civil law remedies⁴⁴ available to victims of family violence at both a federal and state level in Victoria it is presumed that the law will sustain this position. Using the themes already identified, I shall draw attention to the ways in which this occurs. The conclusion drawn is that more protection is now offered to women in violent family situations. However, this has come at the cost of the decriminalization of such violence. This effectively legitimizes its use to sustain the unequal power relationship between men and women upon which it is predicated.

THE FAMILY LAW ACT 1975 (CTH)

The Family Law Act contains provisions which enable civil remedies to be granted to victims of family violence in the form of an injunction. These injunctions can be granted as primary or ancillary relief and are available on an *ex parte*⁴⁵ basis. Such relief is equitable and may be issued when the grounds for equitable relief are shown.⁴⁶

Originally the Family Court only had power under s. 114 of the Family Law Act to make orders for the protection of parties to the marriage or their children. However, s. 70C has extended this power to include exnuptial children and persons entitled to guardianship or access. However, being confined to matrimonial causes,⁴⁷ the provisions under s. 114 do not extend to *de facto* relationships. In such cases relief must be sought under the Crimes (Family Violence) Act.⁴⁸

Under s. 114(1) of the Family Law Act three types of injunction are available for the protection of family violence victims.

(i) *Non Molestation Orders*

The Family Court has a discretionary power to issue an injunction for the personal protection of a party to a marriage under s. 114(1)(a). This provision has been widely interpreted as availing the potential for a wide range

43 Freeman argues that the legal system is the cultural underpinning of patriarchy and is permeated by ideological considerations that express the subordination of women to patriarchy, in Freeman, *op. cit.* n. 28, 51.

44 This analysis is confined to the protection orders available under the Crimes (Family Violence) Act and injunctions under the Family Law Act. It does not consider the other civil remedies of a peace complaint, action in tort or criminal injuries compensation. For a discussion of these remedies, see Seddon, *op. cit.* n. 42., ch. 4, 48-58.

45 However, it will not be legally binding unless the respondent has been informed of his obligations under the order and this has been cited as a weakness of the provisions. See Alexander, R., 'The Response of Commonwealth Law to Wife-Battering' (1987-8) 2 *Australian Journal of Family Law* 240, 255.

46 The grounds for equitable relief being 'imminent harm is threatened, other remedies are inadequate and the balance of hardship favours the party seeking the order': *ibid.* 240.

47 *In the Marriage of F* (1989) 13 Fam. L.R. 189.

48 The provisions of the Family Law Act are not intended to exclude or limit the operation of state family violence laws.

of protection. In *In the Marriage of Kemsley* it was held that such an order may extend to preventing a husband from interfering with his wife's employment, or to safeguard her mental and emotional well being.⁴⁹

(ii) Restraining Orders

Subsections 114(1)(b) and (c) empower a court to grant an injunction to restrain a party from entering the matrimonial home, place of residence of one party, or place of work.

(iii) Sole Use and Occupancy Orders

Under subs. 114(1)(f) the Family Court has power to grant an injunction relating to the use of the matrimonial home during marriage. Despite criticism, the Family Court has been prepared to consider the conduct⁵⁰ of the parties where the applicant is a woman. In *D'Agostino v. D'Agostino*, a woman and her children were held to be entitled to the sole occupancy of the matrimonial home because of the husband's violence.⁵¹ Renata Alexander also argues that the Family Court has recognized the inferior economic and social status of women when granting such orders, by considering it more reasonable for a man to leave the premises in such circumstances.⁵²

Therefore, it would appear that, in theory, the Family Court is vested with a wide range of powers for dealing with family violence. However, due to procedural inadequacies and its underlying ideology, the law has proved largely ineffective as a means of protecting women who are subject to family violence.

With respect to procedures, the onus is placed on the applicant, who will invariably be a woman, to apply for an injunction. The Australian Law Reform Commission found that such a requirement rendered the injunction provisions 'toothless'.⁵³ Furthermore, it assumes the existence of an equality between the protagonists which does not actually exist. It denies the reality of women's economic, social and psychological condition which may not allow them to initiate an action against their spouses. By placing this responsibility solely in the hands of the applicant, it also serves to sustain a perception that family violence is not a social issue generated by social structures.

Even if an injunction is granted, its lack of enforcement is another factor inhibiting its effectiveness. It is valid for only six months and the perpetrator can be detained for a maximum of 24 hours. The reality is that this period is not sufficient to allow the necessary documents to be prepared before

⁴⁹ *In the Marriage of J. C. and W. G. Kemsley* (1984) 10 Fam. L.R. 125, 130.

⁵⁰ This criticism has been aimed at the Family Court because of its underlying philosophy of no fault in determining disputes presented for its adjudication. See Alexander, *op. cit.* n. 45, 245.

⁵¹ *In the Marriage of D'Agostino* (1976) 2 Fam. L.R. 11, 322.

⁵² Alexander, *op. cit.* n. 45, 245.

⁵³ Australian Law Reform Commission, Domestic Violence, para. 82, referred to in Graycar and Morgan, *op. cit.* n. 10, 301.

going to court and in most instances the perpetrator will be released. Furthermore, as Renata Alexander argues, the police are generally reluctant to intervene in family violence because these situations continue to be misconceived as belonging outside the sphere of the criminal law.⁵⁴

Where a breach does occur, the onus is on the woman to prove beyond reasonable doubt that such a breach has occurred.⁵⁵ Yet, even if this is established, the Family Court is of the opinion that its punitive powers should be used sparingly and only in exceptional circumstances.⁵⁶ This approach displays a lack of commitment to the criminal nature of family violence and the need to combat it with appropriate punitive sanctions where necessary. Richard Ingleby has identified such ambivalence by the Family Court towards family violence in decisions such as that of Wood S. J. in *Gillie* where he stated that a woman 'has in her own hands the ability to terminate the conduct of which she complains by not offering her husband provocation'.⁵⁷

This position is exacerbated by the underlying conciliatory philosophy of the Family Law Act.⁵⁸ This approach assumes an equal bargaining power between the parties which does not exist. Therefore, conciliation must be rejected as a solution to family violence because it 'adopts a behaviourist view of the conduct of family members and their intra-relationships, perpetuates the victimization of the wife, and neutralizes domestic violence'.⁵⁹

The ideology of the Family Law Act is also committed to the preservation of the institution of marriage⁶⁰ and the need to give the greatest possible protection to the family as the purported natural and fundamental unit of society.⁶¹ As a result, as Richard Ingleby recognizes, there is a conflict between two competing principles: the preservation of the family and the protection of an individual's physical integrity.⁶² Therefore, the priority accorded to the preservation of the family unit limits the effectiveness of the Family Law Act in providing protection to women. The result is that in seeking to protect the ideal of the nuclear family, the Family Court often neglects the reality of a violent family structure at the expense of women's protection and, in doing so, sustains the subordinate position of women within this structure.⁶³

Such factors, when combined with cost and the relatively cumbersome procedural process lead to the conclusion that:

54 Alexander, *op. cit.* n. 45, 248.

55 Section 108 of the Family Law Act allows the Court to punish persons for contempt for the Family Court where they breach an injunction granted under s. 114(1); *In the Marriage of Sahari* (1976) 2 Fam. L.R. 11, 125, 138.

56 *Ibid.* 127.

57 *In the Marriage of Gillie* (1978) 4 Fam. L.R. 127, referred to by Ingleby, *op. cit.* n. 13, 66.

58 Seddon, *op. cit.* n. 42, 43.

59 Alexander, *op. cit.* n. 45, 258.

60 Family Law Act s. 43(a).

61 *Ibid.* s. 43(b).

62 Ingleby, *op. cit.* n. 13, 67.

63 It has been argued that if the first response to a family violence situation is to think of ways to maintain the family, then the subordinate position of women is being maintained. See Younger, B., 'Domestic Violence: Ideology and Practice' in Hatty (ed.), *op. cit.* n. 18, 259, 263.

The present personal protection provisions of the Family Law Act are manifestly ineffective in protecting wives from the violence and harassment of their husbands.⁶⁴

Such a conclusion is supported by the decision of women to proceed under the Crimes (Family Violence) Act in preference to the Family Law Act,⁶⁵ and it is to this that I now turn.

THE CRIMES FAMILY VIOLENCE ACT 1987 (VIC.)

When introducing the Crimes (Family Violence) Bill into the Legislative Assembly, the responsible Minister stated:

The major object of the Bill is to provide for intervention orders in cases of family violence. These orders are intended to complement rather than replace existing criminal law remedies. An intervention order is a *civil remedy* in the nature of an injunction, designed to provide ongoing protection to a victim of violence in the home.⁶⁶

The Crimes (Family Violence) Act empowers a Magistrate to grant intervention orders to protect aggrieved family members.⁶⁷ Such an order can be made under s. 4(1) if the magistrate is satisfied on the balance of probabilities that a family member has assaulted, threatened to assault or behaved in an offensive manner. If the order is served and breached, the defendant is guilty of an offence under s. 22 and police may arrest him without warrant if he is believed, on reasonable grounds, to have committed an offence. Such a situation differs from the Family Law Act provisions which require a woman to apply for a power of arrest to be attached where the injunction being sought is of a non-personal protection nature. Furthermore, under the Victorian scheme the onus of lodging a complaint is not confined to victims, as police can do so independently, or on behalf of victims under s. 7.

The discretionary power of a magistrate when granting an intervention order is broad, with s. 4(2) allowing any restriction or prohibition to be imposed on the respondent as appears necessary or desirable in the circumstances.⁶⁸ However, the paramount consideration when exercising this discretion is the need to ensure that the victim is protected from violence.⁶⁹

64 Waters, P., 'The Family Court and Domestic Violence: More of the Rack and Less of the Rubric' in *ibid.*, Vol. II, 547, 578.

65 This is not to suggest that the remedies under the Family Law Act should never be used as they may be more convenient when combined with other proceedings under the Act, such as a custody order. However, regardless of the circumstances in which they are used, their weaknesses persist.

66 Cited by Nathan J. in *Fisher v. Fisher* [1988] V.R. 1028, 1032.

67 The power to grant an intervention order exists under s. 4(1) which reads:

A court may make an intervention order in respect of a person if satisfied on the balance of probabilities that:

(a) the person has assaulted a family member or caused damage to property of a family member and is likely again to assault the family member or cause damage to property of the family member; or

(b) the person has threatened to assault a family member or cause damage to property of a family member and is likely to assault the family member or cause damage to property of the family member; or

(c) the person has harassed or molested a family member or has behaved in an offensive manner towards a family member and is likely to do so again.

68 See sub-ss 5(1)(a)-(h) of the Crimes (Family Violence) Act for a non-exhaustive list of such restrictions or prohibitions.

69 *Ibid.* s. 5(2).

Part of the rationale behind the Victorian legislation was to overcome the limitations of s. 114 of the Family Law Act, such as its non-applicability to *de facto* relationships. As a result, the legislation applies to such relationships. This is achieved by the definition of family member in s. 3 to include a spouse, child or any person who is ordinarily a member of the household in which the violence occurs.⁷⁰

The Crimes (Family Violence) Act appears in theory to provide an effective and flexible means of protection for women whilst overcoming several of the impediments of the Family Law Act. However, it must be asked whether such a vision has been translated into reality and if its implementation operates to sustain or eliminate the oppression of women by effectively controlling family violence.

The answer to these questions lies in the recognition of two factors. Firstly, that the effectiveness of this legislation is dependent on the reaction of those who are responsible for its implementation and enforcement. Secondly, that there are ideological implications involved in adopting a civil remedy as the more appropriate method of dealing with family violence. The legacy of traditional police reluctance to intervene in family violence situations and treat them as criminal matters persists to impede the effectiveness of the legislation at both a state and federal level. Additionally, the adoption of a specialized civil remedy has contributed to the decriminalization of family violence.

(i) *Police and Judicial Response*

I feel a lot of women could have avoided violence by being a bit more generous. By doing a better job of housework and better care of their appearance.⁷¹

The sentiments expressed by this young officer are an explicit illustration of the extent to which patriarchal ideology has legitimated the use of violence against women in our society. Such attitudes have prompted the Victorian Police to amend their Standing Orders to ensure police treat family violence as a serious matter.⁷² However, the prevalence of such attitudes will not be removed solely by such measures, as they reflect a deeply rooted ideological perception about family violence within our society. This is a perception that continues to locate the origins of this phenomenon within the private sphere as a 'domestic' issue of less seriousness than other more public forms of criminal assault. This perception is entrenched⁷³

70 Despite the apparent scope of this provision the judiciary has already confined its application. Gobbo J. held in *Kingsland v. McIndoe* [1989] V.R. 273 that: 'the definition of "family member" does not embrace persons whose sole relationship is that of sharing a house. Spouses and their children are the principal objects of the protective provisions of the Act.'

71 Harry, S., 'Policing and Male Violence in Australia', *Women, Policing and Male Violence*, in *Family Violence: Everybody's Business/Somebody's Life*, *op. cit.* n. 29, 191.

72 Victorian Police Standing Orders presently read that members receiving complaints of domestic violence shall give prompt attention to and thoroughly investigate the incident. See Ingleby, *op. cit.* n. 13, 59.

73 Police can not be held singularly responsible for their actions relating to family violence situations as the standard by which society judges their performance is a standard that prioritizes their ability to control the more public acts of violence. That is, they are constrained by the social attitudes towards family violence relative to public violence.

by the reluctance of police to intervene. As the Victorian Women's Legal Resources Group has stated:

despite the introduction of the Crimes Act to increase protection for victims of family violence and increase police involvement, police remain reluctant to involve themselves because it is not considered real police work.⁷⁴

This argument is borne out by the general failure of police to exercise their power under the Act to lodge complaints for intervention orders thereby leaving the burden of dealing with family violence upon the victim. In 1991, of the 5,343 complaints laid, only 183 were made by police.⁷⁵ This has occurred despite the legislative attempt to overcome such a problem under the Family Law Act, and it further serves to ignore the unequal status of women and the public interest in controlling family violence as a social phenomenon.

However, this statistic should not be considered in isolation from the interpretation of the Act's provisions by the judiciary. Nathan J. in *Fisher v. Fisher* held that police members should only make complaints in exceptional circumstances.⁷⁶ Therefore, whether or not police inactivity is a direct result of such a restrictive decision,⁷⁷ the fact remains that the police and judiciary are presently acting in a manner which reinforces the definition of family violence as an individual issue to be dealt with by women alone.

Recent amendments to the Crimes (Family Violence) Act have been passed due to pressure on the Victorian Government to clarify police powers, and ensure that their discretion is exercised in a way which provides the level of protection to victims of family violence that was originally envisaged by the Act.⁷⁸ These amendments followed police complaints that they were unsure of their powers under the Act, and several instances where police failure to exercise a discretionary power to seize firearms⁷⁹ led to fatalities.⁸⁰ It remains to be seen what the practical consequences of such

⁷⁴ In Scutt, *op. cit.* n. 37, 290.

⁷⁵ Attorney General's Department, *Crimes Family Violence Act, Monitoring Report* (1990/91) 8. This figure is in sharp contrast to that in South Australia where 97% of restraining orders are applied for by the police on behalf of the victim: South Australian Domestic Violence Council, *Domestic Violence* (1987) 96 in Seddon, *op. cit.* n. 42, 81.

⁷⁶ *Fisher v. Fisher* [1988] V.R. 1028, 1039.

⁷⁷ The argument could be made that police inactivity is not a result of an inherent reluctance on their part to intervene in family violence situations, but rather due to the inertia of the judiciary. That is, even if they do utilize their powers the courts will be less disposed to deal with such applications because they believe such action to run counter to their interpretation of the Act. However, ultimately both the police and judiciary are *prima facie* in possession of the values of the dominant ideology (being the subordination of women and the privatization of family violence) and their actions are a reflection of this.

⁷⁸ Under the new provisions police will be allowed to enter homes without a warrant where they have 'reasonable grounds' to believe an assault has taken place or is about to take place: Crimes (Family Violence) Act 1987 (Vic.) s. 18AB, inserted by the Crimes (Family Violence) (Further Amendment) Act 1992 (Vic.).

⁷⁹ Originally police could be granted a discretionary power to seize firearms when attached by a magistrate to an intervention order under sub-s. 5(1)(h). Under the new provisions this power has become mandatory and police must seize firearms: *ibid.* s. 10.

⁸⁰ In one such instance reported in the *Age* (Melbourne) 9 March 1992, 'a woman with two children sought refuge after suffering violence at the hands of her husband, who owned guns. Police did not confiscate the guns. After a long custody battle the husband shot and killed the children.' In another case, in response to a call from a woman alleging that her husband had threatened her, police attended the premises and left after deciding that no other offences had been committed. After the police had left the premises, the woman was shot dead by her husband. *Ibid.*

amendments will be. However, the Domestic Violence and Incest Resource Centre has stated that such changes 'are being used as a screen to cover the unnecessary extensions of police powers'.⁸¹

The implication to be drawn from the Government's approach is that the problems relating to the regulation of family violence are perceived as being merely a result of poorly drafted legislation, rather than a result of the entrenched community attitudes which underlying police behaviour.

(ii) *The Effect of a Special Civil Remedy for Family Violence*

These attitudes are also reinforced by the civil nature of the protection measures available under both the Crimes (Family Violence) Act and Family Law Act. Leading feminist lawyers, such as Scutt, have long opposed the introduction of new civil remedies to deal with violence in the home because of the fear that it would decriminalize such an activity.⁸² Criminal assault laws make no apparent distinction between a man who beats his wife as opposed to a stranger. However, as Scutt argues, the police and judicial response to criminal assault in the home is not comparable to their response to street activity.⁸³ Such a state of affairs, despite her arguments that the criminal law and police powers are sufficient to deal with family violence,⁸⁴ precipitated the recommendation by the Domestic Violence Committee in 1985 for the civil procedure now in place under the Crimes (Family Violence) Act.

This approach has several advantages over the criminal law because of the reduced burden of proof,⁸⁵ the anticipatory nature of intervention orders⁸⁶ and the flexibility of a jurisdiction extending to areas beyond the realm of the criminal law. A restraining order can extend to behaviour having emotional or psychological effects which would not be covered under the criminal law. The result, as stated by a senior Victorian magistrate, is that:

The civil remedies provided by the Crimes (Family Violence) Act have increased the protection for victims of family violence in comparison to existing criminal laws. However, this has had the effect of trivializing the criminal nature of such violence under the Crimes Act.⁸⁷

According to Scutt, this decriminalization of family violence occurs because of the civil nature of the remedy available under the Crimes (Family

⁸¹ *Ibid.*

⁸² *E.g.* Scutt argues that '[r]ather than have any new laws, it would be better for women to fight to have the laws which already exist put into effect by police and acted upon by the courts': see Victoria, Department of Premier and Cabinet, Women's Police Co-ordination Unit, *op. cit.* n. 8, 80. See also Scutt, *op. cit.* n. 14, 451, 459.

⁸³ Scutt, *op. cit.* n. 14, 447.

⁸⁴ *Ibid.* 447-9.

⁸⁵ As injunctions under the Crimes (Family Violence) Act are of a civil nature, the standard of proof is on the balance of probabilities as opposed to the higher standard of proof, beyond reasonable doubt, as required by the criminal law.

⁸⁶ Future behaviour is considered when granting intervention orders as opposed to the procedure under the criminal law where a Magistrate looks backward to determine whether past behaviour is criminal: Ray, A. and Cotta, J., 'Domestic Violence: Legal Remedies and the Police' (1987) 61 *Law Institute Journal* 1026, 1026.

⁸⁷ Interview with John Charles Tobin, Magistrate, conducted on July 5 1992.

Violence) Act.⁸⁸ This procedure involves a two step process whereby, following a family violence incident, initially only an injunction will be granted. If this is breached, then the perpetrator can be arrested and is liable to criminal prosecution. However, the effect of this procedure is to condone the initial act of aggression,⁸⁹ whilst the *raison d'être* of the arrest is the breach of an order of the court, rather than further violence inflicted upon a woman. Therefore, the criminal component of the Act operates to protect the status and authority of the judiciary as opposed to denouncing family violence as an abhorrent social act.

The consequence of such an approach is to identify family violence as something less than criminal activity in the public sphere, which should be regulated by the civil law. It also sanctions a 'kiss and make up' mentality denying the criminal nature of family violence, and confining its relevance to the private sphere. However, the intention of the legislation was not to replace the criminal law's role in prosecuting perpetrators of violence in the family. This is a goal that has been achieved according to Justice Nathan in *Fisher v. Fisher*, where he held that 'the operation of the criminal law is in no way impeded by the introduction of intervention orders.'⁹⁰

Such a conclusion fails to recognize several fundamental effects of the legislation. Firstly, the civil procedure under the legislation does not attempt to redress or acknowledge the underlying ideological reasons for the failure of the criminal law to deal with family violence prior to such enactments. Secondly, it provides a specialized legal option which will ensure such problems need not be directly confronted. This is because victims will be able to achieve protection via a civil procedure in preference to the criminal law. As a result, the problems that continue to exist within the criminal law will not be fully exposed. Finally, it effectively legitimizes the previous police and judicial inactivity under the criminal law, which has resulted in the failure of the law to accord family violence a criminal status.⁹¹ This has the effect of compounding the problem of the social relegation of this activity to the private sphere because of its apparent individual and less serious nature.

In order to overcome these problems, the Victorian Police Force has recently taken steps to encourage its officers to apply the criminal laws of arrest and prosecution in cases of family violence independently of any application for an intervention order.⁹² Therefore, such a conclusion may be preemptory. However, whilst the fundamental ideology underlying the social and police perception of family violence persists, its decriminalization will continue to exist.

This predicament is not a necessary result and the civil and criminal law could be used in conjunction to complement each other as intended. What

88 Scutt, *op. cit.* n. 14, 457-9.

89 *Ibid.* 458.

90 *Fisher v. Fisher* [1988] V.R. 1028, 1034.

91 Scutt, *op. cit.* n. 14, 458.

92 *Victoria Police Force Circular Memo, op. cit.* n. 21, 1.

is required is for the police and judiciary to recognize fully the criminal nature of family violence and eliminate the social conditioning that leads to its location by the law within the private sphere as an individual act. These bodies must then be prepared to treat it as a criminal act by fully enforcing their powers of arrest,⁹³ prosecution⁹⁴ and sentencing available under the law, to ensure two ends. Firstly, the protection of individuals subject to family violence and secondly, the affirmation that family violence is a criminal act to be condemned by the law. These objectives are not mutually exclusive as they appear to be under the present implementation of the law.

CONCLUSION

You see a lot of tramps in this business, women who'd screw anyone. They've just got that look about them. You can't really blame the men.⁹⁵

Whilst such attitudes prevail in contemporary society, the law will remain but a limited vehicle for change, even if it is to fully criminalize family violence. Until the structural barriers and social conditioning which act to subordinate women are eliminated, family violence will continue. The pre-conditions for women's financial and social independence lie not only in the language of the law, but also in resolving issues such as employment inequalities, accommodation shortages and social security constraints experienced by women.⁹⁶ However, in the interim, the law must no longer accentuate or sustain these inequalities. It must challenge, and be challenged to identify, the misconceptions regarding family violence in society, which operate to the detriment of women.

When a police officer decides not to intervene in a family violence incident because it is a private matter, he/she must ask, whose privacy is being protected? When a Magistrate imposes a non-custodial sentence so

93 The Government should give serious consideration as to the merits of a mandatory arrest scheme in cases of family violence. Such an approach has been used successfully in parts of the USA. In Minneapolis it was found that arrested offenders were about half as likely as non-arrested offenders to repeat their violence over a six month follow period. See Buel, S., 'Mandatory Arrest for Domestic Violence' (1988) 11 *Harvard Women's Law Journal* 213, 215.

94 In criminal cases the refusal of a woman to give evidence against her partner is often cited as a major reason for the failure to obtain a conviction. Whilst *de facto* spouses remain compellable witnesses, legal spouses are able to be exempted from giving evidence against their partner where such an exemption would be in the interests of the community: see s. 400(3) Crimes Act 1958 (Vic.). Magistrates invariably allow legal spouses to be excused from giving evidence against their partner spouse. This stance is presumably taken because magistrates assume women do not want their families to be destroyed.

Unfortunately, however, this situation poses two problems. Firstly, it effectively gives a woman a choice whether or not to give evidence. Therefore she may be forced into seeking an exemption because of the fear of a reprisal. See Victoria, Department of Premier and Cabinet, Women's Policy Co-ordination Unit, *op. cit.* n. 8, 141. Secondly, even if this is not the case, allowing an exemption for a woman on the basis that the defendant is her husband results in the legal protection of a violent marital relationship. Consequently, the family unit is protected at the expense of a woman's physical integrity.

95 Statement made by a NSW police officer, cited in Hatty, S., 'Policing and Male Violence in Australia', *Women Policing and Male Violence in Australia* 79, in *Family Violence: Everybody's Business/Somebody's Life*, *op. cit.* n. 29, 191.

96 See Graycar and Morgan, *op. cit.* n. 10, 305-7; Graycar, R. 'Violence in the Home: A Legal Response — A Limited Solution' (1988) 26 *Law Society Journal* 46-9; Scutt, *op. cit.* n. 14, 455; Ingleby, *op. cit.* n. 13, 61.

as not to disrupt a family, he/she must ask, what kind of family is being maintained? When a stranger remarks 'she could always have left him', he/she must ask, what forces have not enabled her to do so? When the Government resolves to regulate family violence with civil procedures, it must ask, what is the effect on the status of this activity? When anyone knows of the existence of family violence and says nothing because it is 'none of their business', he/she must ask, what is the effect of such silence?⁹⁷ Then he/she must listen to the silence that surrounds such inaction, because within it there may be heard the beseeching cries of so many women in our society that are trapped 'behind the walls'.

⁹⁷ Perhaps the advertising campaign recently introduced by the Victorian Government to encourage the community to respond to family violence situations may be of assistance in redressing the present reluctance to do so in our society.