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**Title: Crime, punishment, family violence and the cloak of legal invisibility**  
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As a unit of social organisation the family is constituted by and through law. Like the corporation, its precise legal form is a matter of civil rather than criminal law. The civil law constitutes the family through a variety of legal fields, ranging across constitutional law,<sup>1</sup> family law,<sup>2</sup> as well as taxation and welfare law.<sup>3</sup> The civil law constitutes the identity of the family primarily through regulating its membership. This has the effect of legitimising some forms of family, while rendering other forms “outlaw”.<sup>4</sup>

In this article, we redirect the focus away from issues that arise under the civil law to examine instead the concept of the family under the criminal law. This involves a critical (although selective) examination of the criminal law (including offence definitions, immunities and defences), as well as rules of evidence and procedure, including sentencing laws, policies and practice. We examine how Australian law, from its inherited roots in the common law of England through to its contemporary statutory and codified form, constructs and regulates crime within the family.

Before proceeding with our analysis of legal doctrine, we will examine the conceptual relationship between crime, law and the family within the discipline of the criminal law. Modern statutes, codes and legal treatises typically organise the criminal law into two parts: the first part deals with the ideas of criminal responsibility applicable to all offences (the general part) with the second part concerned with specific offence provisions (the special part).<sup>5</sup> The special part groups specific offences in discrete categories, ranging from the most serious such as crimes against the state like treason, to offences against the person, sexual offences, crimes against public order and morals, property crime, to less serious regulatory and welfare offences.<sup>6</sup> The shape of the criminal law has changed significantly over time. Reflecting contemporary concerns, the modern criminal law in Australia has been extended to include serious drug offences, terrorism and crimes against humanity such as genocide and war crimes. What is striking, however, in surveying the modern criminal law, is that there is no discrete conceptual legal category of “crimes against the family”.

What explains this longstanding conceptual invisibility? In the Australian context, the law governing domestic violence (which is increasingly termed as “family violence”) has not been addressed through the law reform processes normally applied to criminal law. Put another way, family violence has been segregated from the core of criminal law. This is most clearly evident in the approach to the development of Australian model laws in the field of domestic violence in the late

1990s. A national working group was established by the Standing Committee of Attorneys General (SCAG) to develop Model Domestic Violence Laws (MDVL) for adoption in all Australian jurisdictions. The MDVL working group operated entirely independently from the other national committee that had been tasked with drafting the Model Criminal Code (MCC), namely the Model Criminal Code Officers' Committee.<sup>7</sup> It could be argued that this separation from 'mainstream' criminal law reform simply reflected the fact that domestic violence law encompassed both civil and criminal law responses, and that from a policy standpoint reform had to be based on an holistic and inter-agency approach. On the other hand, it could be argued that this segregation epitomises the marginal relationship (and thus relative invisibility) of the family to the criminal law. It is particularly difficult to justify such segregation bearing in mind the MDVL working group's open acknowledgement in its preface that these crimes are serious and that "domestic homicide" (that is killings between spouses or intimates, or children who are killed by parents, or other family members) forms a significant proportion of homicides in Australia and that protection or restraining orders are one of the most common forms of legal action in Australia!<sup>8</sup>

Throughout the article, we confront the powerful claims of legal liberalism that the family is, or at least should be, legally segregated, constituted behind a veil of privacy, a protected zone into which neither the state, public officials nor the law should intrude.<sup>9</sup> This article challenges this position. It argues that the criminal law, like corporations law,<sup>10</sup> has always reserved the power to penetrate the family veil in defined circumstances. As this article reveals, "piercing the veil" on family violence is neither novel nor exceptional. As well as placing a spotlight on the relationship of crime and the family, a subsidiary purpose of this article is to argue that the "family" should not be presented merely as an adjunct or supplement to the critical lenses of gender, race and sexuality. Rather, the legal construction of the family in the criminal law and criminology demands further scholarly attention in its own right. Our contribution here is a preliminary step towards establishing this new scholarly agenda for research.

### Family violence and the cloak of legal invisibility: A case for historical revision

As noted above, modern criminal law failed to conceive the family as a legal interest worthy of protection in its own right, as distinct from the interests of its constituent individual members. But does this mean that there *really* exists a cloak of legal invisibility over family violence?<sup>11</sup> A recurrent claim, linked to ideals of legal liberalism, is that there is (or rather *should* be) a zone of legally protected family privacy immune from state intrusion. This is often invoked in academic and legal discourse as the historical and philosophical foundation for the law's failure to take family violence seriously. Feminist scholarship in particular has developed an extensive critique of privacy, exposing how its use condones and legitimates patriarchal violence against women and children.<sup>12</sup>

This portrait of a zone of legal impunity for patriarchal violence, however, is misleading. Our study reveals the criminal law has engaged with the family in a

more complex and contradictory way. Widening our historical lens reveals that, rather than immunising the family from legal scrutiny, the common law routinely intervened into family relations, albeit selectively, regulating and on occasion even disciplining patriarchal violence through arrest, prosecution and punishment.

While males exercised coercive power over their families in myriad ways, they did not have power to use violence with absolute impunity. This is revealed most clearly in Paul Halliday's landmark study of habeas corpus, the famous English common law writ that empowered individuals to contest the legality of any deprivation of liberty.<sup>13</sup> He reveals how the common law writ system was used creatively by victims' families, lawyers and judges to protect abused wives and dependants from patriarchal violence. The common law writ of habeas corpus created a protective jurisdiction for victims of family violence that on many occasions could provide quite an effective legal remedy. To illustrate this innovative use of habeas corpus, Halliday examined the first recorded use of this remedy in the *Case of Lady Elizabeth Howard* (1671), in which the Court of King's Bench in London granted a writ of habeas corpus to bring an abused wife to court so that she might swear "articles of peace" against her husband.<sup>14</sup> This practice of protecting wives from spousal violence, long used by justices of the peace, was akin to binding over orders to keep the peace or the modern protection order used to prevent family violence. That said, it is important to acknowledge the limited scope of this protective jurisdiction. Like access to royal courts of justice generally, these superior court remedies were not ordinarily accessible by the illiterate masses, and more readily used by the wealthier landed and middle classes. Nevertheless, this innovative "pro-female" use of habeas corpus demonstrated that the common law courts of England and senior judges, including the Chief Justice Sir Mathew Hale, were hardly indifferent to family violence.<sup>15</sup>

This assessment that the common law and legal system did not universally deny women access to justice against abusive husbands is also supported by a recent study by Carolyn Ramsey.<sup>16</sup> In her comparative legal historical study of family violence in the American west and Australia 1860-1930, Ramsey reveals a pattern of sustained efforts by state officials (police, prosecutors and judges) to combat patriarchal violence against women. Ramsey's detailed review of police, prosecution and court records reveals that legal action was routinely taken against abusive husbands in rates equal to violent assaults involving strangers. She concludes that the historical unwillingness of the police, prosecutors and courts to intervene has been significantly overstated:

[D]uring the late nineteenth century, and the first few decades of the twentieth, the public legal response to intimate-partner assault and homicides in both regions embodied the view that husbands ought to protect their wives and refrain from using violence against them. When men failed to live up to these prescriptive norms, state-imposed punishment and even self-defensive killings were considered justified.<sup>17</sup>

Ramsey's study also revealed that state action against abusers did not exempt members of the privileged classes, with assault prosecutions instituted against the wealthy and the clergy, as well as the working class and indigent. Countering modern narratives that the criminal law routinely denied legal remedies to family violence victims, Ramsey concludes that the home was significantly "less private" in the late-nineteenth century and early-twentieth century in the American west and Australia than modern scholars have previously supposed.

#### The story of marital rape immunity: a legal fiction endures

The immunity for rape within marriage is another common law doctrine whose rationale supposedly serves to protect the family from intrusive application of the criminal law to the marital relations. The offence of rape has always been recognised as a serious form of violence against women, which until the nineteenth century was a capital crime in most jurisdictions. The early common law of rape did not, however, extend the offence to sexual intercourse within marriage, thus carving out immunities for husbands who had sex with their wives without consent. The immunity's origins are usually attributed to the seventeenth-century writings of Sir Matthew Hale, an English judge and jurist, which rationalised the problem in terms of consent implied by marriage. As Hale's oft-cited passage from *The History of the Pleas of the Crown* explains:

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband which she cannot retract.<sup>18</sup>

To modern eyes, the idea of a marital rape immunity is archaic, offensive and discriminatory. The women's movement confronted and challenged traditional ideas about marriage and conjugal rights and "wifely" duties in the second half of the twentieth century. Pursuing claims to equality before the law, feminist lawyers exposed the highly offensive "legal fiction" that denied justice to women simply by virtue of their marital status. That said, some (male) scholars and judges continued to defend the immunity, albeit in qualified terms. For example, in 1983 David Lanham concluded his review of the common law marital immunity in England and Australia with a caution about the practical dangers of criminalising what he termed as "unwanted" marital sex, which he distinguished from the criminal act of marital sex involving violence.<sup>19</sup> Lanham's defence of the immunity was rooted in an appeal to traditional liberal ideas that the state should not intrude—arbitrarily or unnecessarily—into the affairs of married couples. Not surprisingly, ideas about the inviolate nature of sexual and family privacy, and his notions of what constituted "real rape", were challenged by feminist scholars who sought to expose the gendered nature of criminal law doctrine and practice, and the scale of hidden violence occurring within the family. The feminist law reform movement shifted community and political opinion,<sup>20</sup> and a wave of legislative reform swept slowly across Australia. Repeal of the immunity occurred first in South Australia (1976), followed by Western Australia (1976), Victoria and New South Wales (1981), Australian Capital

Territory (1985), Tasmania (1987), Queensland (1989) and the Northern Territory (1994).<sup>21</sup>

Although there was a trend firmly against the immunity in the 1980s, it was not until the case of *R v L* in 1991 that High Court of Australia held that the immunity was no longer part of the common law of Australia.<sup>22</sup> In this case, the accused was charged and convicted of raping his wife. On appeal to the High Court, the accused argued that there was inconsistency between the South Australian law which had abolished the marital rape immunity by statute, and Commonwealth law,<sup>23</sup> which continued to recognise the common law right to marital intercourse without consent. In rejecting the appeal, the High Court clarified the status of the immunity under the common law of Australia. The majority of the High Court doubted whether the immunity had been part of the common law, and concluded that the court “would be justified in refusing to accept a notion that is so out of keeping with the view society now takes of the relationship between the parties to a marriage”.<sup>24</sup> The High Court was emboldened by an English House of Lords decision only a few months earlier that declared that immunity was not part of the common law of England, and that judicial references recognising the immunity, over the previous 250 years, had proceeded on a doctrinal error (or to use the Latin term, *per incuriam*).<sup>25</sup>

The 1991 High Court decision was not the final word on the legal status of the marital rape immunity in Australia. The courts still had to decide precisely *when* the marital rape immunity ceased to be good law in Australia. This question would be addressed almost two decades later in the case of *R v P, GA*.<sup>26</sup> In 2010, the Court of Criminal Appeal of South Australia examined whether a husband could be prosecuted in 2010 for the alleged rape in 1963 of his then wife. The court ruled that the way was open to bring such charges notwithstanding some judicial concerns over the potential retrospective operation of the criminal law.<sup>27</sup> On appeal to the High Court, the majority affirmed that the marital exemption was not part of the common law of Australia, and that even if it had been, it had ceased to be so at least by the time of its enactment as an offence in South Australia’s *Criminal Law Consolidation Act 1935*. Thus, since the immunity did not exist at the time of the alleged offence, the defence’s objection to the prosecution on the ground of retrospectivity did not succeed.

There is, however, a fictional and problematic aspect to the position adopted by the High Court majority in this case. While it manifestly delivers justice to women who otherwise would be denied legal protection if the immunity continued to apply, the ruling is not supported by the legal historical record. As the two dissenting judges (Heydon and Bell JJ) forcefully observed in separate but concurring judgments, the immunity was widely accepted as being settled law in Australia; Justice Heydon pointed out that Hale’s view of the law had never been rejected in Australia before 1991. He also pointed out that the immunity had been recognised through both Executive and legislature action in various official reports and through the statutory repeal of the immunity in Australian jurisdictions. The division of High Court opinion in *R v P, GA* then, represents “a clash” between two legal fictions: on the one hand, the fiction that underscores the implied irrevocable sexual consent between husband and wife,

and on the other hand, the fiction that judges merely apply rather than make the common law.<sup>28</sup>

There is a clear public interest in bringing prosecutions of sexual offences involving a serious violation of trust such as marital rape. However, such prosecutions do raise significant challenges for the principle of fairness relating to procedural and evidential challenges in defending charges brought many decades after the alleged event. The decision in *R v P, GA* leaves open the possibility of prosecuting old cases previously thought to be involving charges of spousal rape that were “not known at law”. Nonetheless, it is unlikely that the High Court’s ruling will open the prosecution floodgates – most “old cases” will be defeated simply by lack of corroboration or difficulties in ensuring that the accused would receive a fair trial.

Punishing crimes within the family: Matters of leniency or severity?

Sentencing and punishment is another field where the law takes cognisance of the family in contradictory ways: on some occasions the law imposes harsh punishment, while at other times it appears to exercise leniency (mitigating the penalty). Until the nineteenth century, for example, the murder of the head of the family by another family member was regarded as the most serious and aggravated form of homicide, on par with treason. The law regarded the wife who killed her husband as committing an act of “petty treason”, since the wife stood in relation to her husband as does a subject in relation to the sovereign. The law regarded “petty treason” as such an atrocious crime that it was punishable by burning at the stake.<sup>29</sup> Conversely, and with gross unfairness, husbands who caught and killed wives and their lovers in the act of adultery—*in flagrante delicto*—were excused the gallows by pleading provocation that reduced murder to manslaughter.

This leniency toward “crimes of passion” was mediated in the criminal law through the defence of provocation. Provocation is a partial defence in the sense that it does not result in an acquittal if successful, but rather operates to reduce liability from murder to manslaughter. The defence of provocation was refined over many centuries of judicial development of the common law, though the defence is now set out in statute in most jurisdictions across Australia.<sup>30</sup> Provocation is a controversial defence and is often raised in homicide cases where there was a history of family violence.<sup>31</sup> As a result of the extensive critique of the provocation defence from feminist and critical perspectives in the 1990s, and the highlighting of the injustices to battered women who killed abusive partners, it has been abolished in three states: Victoria, Tasmania and Western Australia.<sup>32</sup> Provocation continues, however, to operate as a partial defence in the other jurisdictions, although there are growing calls for its abolition. The emerging consensus in legal policy circles favours the repeal of the defence without replacement, arguing that “a person’s culpability for an intentional killing should be taken into account at sentencing rather than form the basis of a separate partial defence”.<sup>33</sup>

To raise provocation as a defence to murder the family member who committed the offence must establish before the court that he or she had lost self-control and that this loss of control was induced by the conduct of the victim. The very nature of this test directs the court's attention to the conduct of the victim, and the extent to which the victims have, in effect, contributed to their own fate. The origins of the defence under the common law mean that it has historically influenced by patriarchal conceptions of sexual jealousy, infidelity, revenge, scolding and ungrateful wives.<sup>34</sup> In the modern law, the test has been relaxed, with the effect that the conduct of the victim that caused the accused to lose self-control need not have occurred immediately prior to the conduct causing death to be relevant to the defence. In cases of family violence, this is a significant consideration given the dynamics of the family violence that occur over many years. Conduct that might otherwise be deemed innocuous can be seen to be highly provocative when examined in the context of intra-familial relationships.

The legal test for provocation does have limits. In the nineteenth century, the hypothetical "reasonable man" was adopted as the objective threshold for determining whether the defence operated. In the twentieth century, this test was reframed in gender neutral terms, directing juries to consider whether an "ordinary person" might naturally respond to that level of provocation in a similar way to the accused.<sup>35</sup> In practice a jury will be asked to look at the conduct of the victim and ask whether an ordinary person faced with this gravity of provocation could be induced to lose self-control to the extent of forming an intention to kill or inflict grievous bodily harm and act upon that intention.<sup>36</sup> In this light, the law recognises and reduces culpability for lethal acts of violence that arise in the heat of passion (such as, jealousy, rage, anger, fear, panic) within the family unit.

In Victoria in 2005 the defence of provocation was abolished.<sup>37</sup> The Victorian reforms in this area led to the inclusion of a new offence called defensive homicide.<sup>38</sup> This new offence covers circumstances where a person kills another believing the conduct is necessary to defend themselves or another person (from death or grievous bodily harm) but where that belief is unreasonable. The new statutory provisions specifically recognise the dynamics and history of family relationships and highlight the relevance of human behaviour within family units. For example, the cumulative effect and psychological effect of the family violence upon the accused or another family member can be taken into account by the court in assessing whether there were reasonable grounds for those beliefs.<sup>39</sup> So too can social, cultural or economic factors that impact upon the person or family member and the general nature and dynamics of the relationships affected by family violence.<sup>40</sup> The law is therefore acutely aware of intra-familial dynamics and the criminal law in this context constructs crime within the family as a specific category of crime.

The jurisdictions that have abolished provocation as a defence to murder have all adopted the practice of permitting provocation to be taken into account at sentencing. In the context of family violence cases, the nature of the family relationship would be a relevant in consideration of this factor. Thus, if the offence occurred within a broader history of family violence the sentencing could

take this factor into account. The consideration of provocative conduct on the part of the victim can also impact upon the “offender’s culpability as a sentencing factor”.<sup>41</sup> Again, if the offence occurred within the context of a broader pattern of family violence then this would be taken into account by the sentencing judge in a determination of the offender’s culpability. This could be regarded as an aggravating or mitigating factor depending upon the circumstances of each individual case and also dependent upon the statutory sentencing provisions of a particular state or territory. The shift to taking provocation into account at sentencing rather than as a defence in the criminal trial gives much greater discretion to the court. It remains to be seen, however, how sentencing practice will develop in respect of pleas in mitigation based on provocation in the context of family violence and whether the sexist patterns which we have seen in the past in the context of the defence of provocation continue to be perpetuated at sentencing.

Punishment may also be mitigated because of potential family hardship, in particular the impact of a sentence upon an offender’s family including the offender’s children. The approach taken to family hardship has shifted over time. Settlement of Australia was shaped in part, by sentences that impacted upon children and families of offenders. From 1788 to 1868, 25,255 female convicts were sentenced to transportation to Australia.<sup>42</sup> Some of these women bought their children with them. Early on there was no official position on whether children could travel with their mothers. While many children were left behind with family or orphaned, it was not uncommon for children to accompany their mothers on the convict ships. Seventeen children of convict mothers were transported on the convict ship “Lady of the Lake” that arrived in Hobart Town in November 1829.<sup>43</sup> The ship’s surgeon’s records for this voyage note that a school mistress was appointed and paid to look after the children for the voyage.<sup>44</sup> Upon arrival in Hobart Town, children who were under three years of age stayed with their mothers in the female factory with the children over this age were placed in orphan schools.<sup>45</sup>

In the nineteenth and early twentieth century, “gender” was regularly relied upon as a way of avoiding capital punishment. For example, female criminals routinely made pleas for leniency on the basis of their sex and two common practices at this time were made specifically on the basis of motherhood. These were the practice of “pleading the belly” (in cases of pregnancy) and for mercy pleas and petitions on the basis of motherhood. Both of these pleas recognised the effect that execution would have upon the lives of innocent children. “Pleading the belly” was a practice that operated under the common law. When it was raised following the pronouncement of the sentence of death, a special jury of twelve matrons would be impaneled to determine whether or not the woman was actually pregnant with a child.<sup>46</sup> It was a concession made under the law in recognition of the innocent life of the child; where a plea was successful the death penalty would be delayed until after the birth although in practice it was often indefinitely delayed. These pleas could be made by the offender, by members of their family and also by members of the general public. The common law’s refusal to take the life of an innocent unborn child explains why so many infants were conceived in nineteenth and twentieth century prisons.



“Compassionate” turnkeys offered to impregnate female convicts to help them escape the hangman’s noose.<sup>47</sup> We now turn to examine two notorious cases from Australian colonial history, separated by a century, to illustrate of how “pleading the belly” and pleas of mercy were used by female convicts.<sup>48</sup>

The first woman executed in Australia was Ann Davis (also known as Judith Jones) in 1789.<sup>49</sup> Ann had been found guilty and sentenced to death for breaking and entering a dwelling house in Sydney Cove and stealing a bundle of clothing. Upon being sentenced Ann stated that she was “quick with child”.<sup>50</sup> In Ann Davis’s case, reports noted the use of a jury of matrons by the Court of Criminal Jurisdiction. The report records the forthright verdict of the jury of matrons—incidentally the first of any type of jury convened in Australia—in the following terms:

On her condemnation she pleaded pregnancy, and a jury of venerable matrons was empanelled on the spot, to examine and pronounce her state, which the forewoman, a grave personage between sixty and seventy years old, did, by this short address to the court: 'Gentlemen! she is as much with child as I am.' Sentence was accordingly passed, and she was executed.<sup>51</sup>

A century later, in 1888, the case of Louisa Collins captured the public’s attention throughout NSW. Louisa had been convicted for the murder of her second husband Michael Peter Collins.<sup>52</sup> The governor of NSW had received thousands of petitions from men and women of the colony asking him to extend the prerogative of mercy to Louisa Collins. On the eve of her execution Governor Carrington received a plea for mercy from Louisa herself. Her plea for mercy was on the grounds of her innocent children:

Oh my Lord. Pray have mercy and pity on me and spare my life. I beg and implore you have mercy on me for my child’s sake. I have seven children. The two youngest only seven and five years old. Spare me Oh my Lord for their sake ... Oh my Lord my life is in your hands. I once again implore and humbly beg you to spare me my life ...<sup>53</sup>

Newspaper reports also alleged that Louisa was pregnant and she was examined by the gaol surgeon to determine whether this was the case.<sup>54</sup> Unfortunately, neither Louisa’s pleas, nor the pleas made on Louisa’s behalf, were successful and Louisa became the last woman executed in NSW.

Fast-forward to the modern day courtroom, and vestiges of these common law concessions to motherhood and family are still evident. A convicted person may enter a plea in mitigation of sentence on the basis of dependant children, and the probable effect of the conviction or sentence upon these dependants may be taken into account by a judge when determining the appropriate sentence to impose upon an offender. Between 1962 and 1970, pioneering sentencing scholar D. A. Thomas undertook a study of sentencing practices of the English Court of Appeal. He noted that the Court was frequently asked to consider at sentencing “the unhappiness and distress” that will fall upon dependants of an

offender.<sup>55</sup> He found that the usual practice of the Court was to acknowledge that this was an inevitable consequence of crime and therefore should not normally be taken into account in sentencing.<sup>56</sup> However, Thomas identified three “exceptions” recognised by the courts to this general position: where the degree of hardship suffered by the family is exceptional; where the offender is the mother of young children; and, where the child will be deprived of parental care because both parents are to be imprisoned or where the offender is a sole parent.<sup>57</sup>

Whether such circumstances are “exceptional” is a matter for the court to determine on the basis of the material before the court and the circumstances of the particular case. The principle has also now been recognised in statute in some Australian jurisdictions. The probable effect of any sentence or order under consideration upon an offender’s family or dependants is recognised as a sentencing factor in Sentencing Acts in the Australian Capital Territory, South Australian and in the Federal jurisdiction.<sup>58</sup> Although the language of these statutory provisions does not expressly state that exceptional circumstances are required the statutory provisions have been interpreted in light of the common law.<sup>59</sup> As we have seen the impact of a sentence upon children has been long recognised by the criminal justice system but dealt with in different ways and via different instruments of state power at various points in time.

## Conclusion

The issue of violence within the family was placed on the political and law reform agenda in the 1970s and 1980s by feminist scholars and activists. This political and social movement aimed to render transparent what many feminist scholars claimed the law had made invisible. As this article suggests, the “cloak of legal invisibility” is only partial, as revealed in our critical revision of law governing domestic violence, marital rape immunity and domestic homicide. The law regulates crime within the family in diverse and contradictory ways, sometimes hardening while at other times softening its responses.

It is our contention that the “family”, as a distinct site or focus of study, has been too long neglected by both mainstream criminal law and criminology. While gender, race and sexuality provide significant foci for contemporary studies of criminalisation, policing and punishment, there appears to be blind spot in relation to the family. This article has identified some of the relationships between crime and the family in the hope that the legal construction of the family in the criminal law and criminology will receive more serious scholarly attention in the future.

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<sup>1</sup> *The Commonwealth of Australia Constitution Act 1901* (Cth), (The Constitution) empowers the Federal Parliament to legislate on family and welfare related issues: see s51(xxi) (relating to marriage); s51(xxii) (relating to divorce and matrimonial causes regarding parental rights and the custody and guardianship of infants); s51(xxiiiA) (maternity allowances, child endowment and family allowances).

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<sup>2</sup> *The Family Law Act 1975* (Cth), (hereafter the *FLA*) also contains numerous provisions affecting family law matters. These are found in Parts VI to VIII B of the *FLA* ranging across validity, divorce and dispute resolution procedures; spousal maintenance and general maintenance agreements and the division of property in property settlement proceedings. The procedures outlining the dissolution of property and other financial matters in de-facto relationships is outlined in Part VIII AB of the Act, while Part VIII B contains provisions detailing how certain payments regarding superannuation interests are to be allocated between parties to a marriage or de-facto relationship.

<sup>3</sup> Taxation law provisions affecting the family are found in a number of taxation Acts including the *Income Tax Assessment Act, 1997* (Cth), the *Income Tax Assessment Act 1936* (Cth), particularly in relation to declaring capital gains tax when properties are sold and the *Child Support (Assessment) Act 1989* (Cth), and the obligation to pay child support.

<sup>4</sup> It has been noted that Australian child welfare policies operating between 1909 and 1969 enabled the widespread removal of Aboriginal children from their families, and was extremely destructive of Aboriginal families and their respective communities. See, Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Sydney: The Federation Press, 1990), 259.

<sup>5</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* 3rd ed. (Sydney: Thomson Reuters, 2010), 77-91.

<sup>6</sup> Bronitt and McSherry, *Principles of Criminal Law*, 85. The Australian Model Criminal Code drafted in the 1990s reflects this binary division. Chapters 1 and 2 address the principles of criminal responsibility and Chapters 3-9 address the specific offences.

<sup>7</sup> Model Criminal Code Officers Committee (MCCOC), *Model Domestic Violence Laws Report* (Canberra: Commonwealth of Australia, 1999).

<sup>8</sup> MCCOC, *Model Domestic Violence Laws Report*, 1-2. The topic of “family violence” was revisited in 2010 by the Australian Law Reform Commission. See, Australian Law Reform Commission, *Family Violence – A National Legal Response, Report no. 114*, (Sydney: Commonwealth of Australia 2010).

<sup>9</sup> A fundamental tenet of liberalism espoused by John Stuart Mill is that social life was to be divided into public and private spheres where the private/domestic sphere was an area that ordinarily was “none of the law’s business”. Stephen Bottomley and Simon Bronitt, *Law in Context* 4th ed. (Sydney: The Federation Press, 2012), 6-11,

<sup>10</sup> Ian Ramsay and David Noakes, “Piercing the Corporate Veil in Australia,” *The Company and Securities Law Journal* 19 (2001): 250.

<sup>11</sup> The term “domestic violence” was coined in the 1970s to galvanise political action and law reform in UK, USA and Australia. The women’s movement played a significant role in the modernisation of the criminal law and how it dealt with family violence as well as sexual violence.

<sup>12</sup> For a representative collection of essays see, Margaret Thornton ed., *Public and Private: Feminist Legal Debates* (Melbourne: Oxford University Press, 1995).

<sup>13</sup> Paul Halliday, *Habeas Corpus: From England to Empire* (Cambridge, MA: Belknap Press of Harvard University Press, 2012).

<sup>14</sup> Halliday, *Habeas Corpus*, 124.

<sup>15</sup> Hale is regularly represented as a misogynist for his statements on the marital rape immunity, although Hale never doubted that husbands could be prosecuted for an assault punishable by fine or binding-over. Glanville Williams, “The Problem of Domestic Rape,” *New Law Journal* 141 (1991): 205.

<sup>16</sup> Carolyn Ramsey, “Domestic Violence and State Intervention in the American West and Australia, 1860-1930,” *Indiana Law Journal* 86.1 (2011): 186.

<sup>17</sup> Ramsey, “Domestic Violence”: 198.

<sup>18</sup> Sir Matthew Hale, *Historia. Placitorum Coronae. The History of the Pleas of the Crown* (London: Sollm Emlyn, 1736), vol. 1, 629. It is commonly claimed that Hale’s support for

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the martial immunity, and his judicial role in trials for witchcraft, are evidence of his “systematic biases against women”: Gilbert Geis, “Lord Hale, Witches, and Rape,” *British Journal of Law and Society* 5.1 (1978): 43. David Lanham has disputed Geis’s assessment of Hale’s misogyny and argues that by founding the rationale for the immunity on the idea of marriage as a contract, and by denying husbands the right to use force to compel submission, Hale’s immunity was “the most pro-female one which could readily have been conceived”: David Lanham, “Hale, Misogyny and Rape,” *Criminal Law Journal* 7(1983): 160.

<sup>19</sup> Lanham, “Hale, Misogyny and Rape”: 166. In this article Lanham discusses the dangers of criminalising what he termed “unwanted” marital sex, concluding that in the absence of any use of force against the wife, “the criminal law should keep out of it”. Glanville Williams also discussed this topic in “The Problem of Domestic Rape,” *New Law Journal* 141(1991): 205. He concluded that the offence of domestic rape should be downgraded in seriousness to an offence in the nature of an assault punishable by fine or binding-over.

<sup>20</sup> Gail Mason, “Reforming the Law of Rape: Incursions into the Masculinist Sanctum,” in *Sex, Power and Justice*, ed. Diane Kirkby (Oxford University Press, 1995), 50-67.

<sup>21</sup> Simon Bronitt, “Editorial: Rape Within Marriage: A Privilege Past Its Use by Date?,” *Criminal Law Journal* 35 (2011): 67.

<sup>22</sup> *R v L* (1991) 174 CLR 379.

<sup>23</sup> The *Family Law Act 1975* (Cth).

<sup>24</sup> *R v L* (1991) 174 CLR 379 at 390 per Mason CJ, Deane and Toohey JJ.

<sup>25</sup> *R v R* [1992] 1 AC 599. In this case, the husband and wife had not yet legally separated. The legal issue was whether the behavior of the wife, who had contacted lawyers with a view to obtaining a divorce, was sufficient to revoke her implied marital consent to sexual intercourse. The House of Lords found it was.

<sup>26</sup> *R v P, GA* (2010) 109 SASR 1.

<sup>27</sup> *R v P, GA* (2010) 109 SASR 1 at paras [76]-[91] per Doyle CJ. See also, Kellie Toole, “Marital Rape in South Australia,” *Criminal Law Journal* 35 (2011): 245.

<sup>28</sup> Simon Bronitt, “Editorial: Rape Within Marriage: A Privilege Past Its Use by Date?,” *Criminal Law Journal* 35 (2011): 69.

<sup>29</sup> The last recorded sentence of death by burning at the stake following conviction for petty treason was in 1773 at the Old Bailey. See, trial of Elizabeth Herring, September 1773, <http://www.oldbaileyonline.org/browse.jsp?id=t17730908-6&div=t17730908-6>, accessed 24 July 2012. There were several cases of petty treason in NSW, although the punishment was restricted to death by hanging. See for example, *R v Bradney* [1824] NSWSupC 9 (7 August 1824).

<sup>30</sup> See s23 of the *Crimes Act 1900* (NSW).

<sup>31</sup> Although it is not limited to these cases.

<sup>32</sup> *Criminal Law Amendment (Homicide) Act* (Western Australia), 2008; *Criminal Code Amendment (Abolition of Defence of Provocation) Act* (Tasmania), 2003; *Crimes (Homicide) Act* (Victoria), 2005 inserting *Crimes Act* (Victoria), 1958, section 3B.

<sup>33</sup> Victorian Law Reform Commission (VLRC), *Defences to Homicide, Final Report* (Melbourne: Victorian Law Reform Commission, 2004), 55.

<sup>34</sup> Jenny Morgan, “Provocation Law and Facts: Dead Women Tell No Tales, Tales Are Told About Them,” *Melbourne University Law Review* 21 (1997): 237; Danielle Tyson, “Victoria’s New Homicide Laws: Provocative Reforms or More Stories of Women ‘Asking for It?’” *Current Issues in Criminal Justice* 23.2 (2011): 203.

<sup>35</sup> The test originally looked at the reaction of a “reasonable man”, see *R v Welsh* (1869) 11 Cox 336. In the twentieth century, the standard shifted to that of an “ordinary person” see, *Moffa v The Queen* (1977) 138 CLR 601 at 606.

<sup>36</sup> *Masciantontio v The Queen* (1995) 183 CLR 58, 59.

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- <sup>37</sup> *Crimes Act, 1958* (Vic), s3B. The reforms were the result of the work of the Victorian Law Reform Commission; VLRC, *Defences to Homicide*.
- <sup>38</sup> *Crimes Act 1958* (Vic), s 9AD.
- <sup>39</sup> See, *Crimes Act 1958* (Vic), ss 9AH (3)(b) and (e).
- <sup>40</sup> See, *Crimes Act 1958* (Vic), ss 9AH(3)(c), (d) and (f).
- <sup>41</sup> Felicity Stewart and Arie Freiberg, "Provocation in Sentencing: A Culpability-Based Framework," *Current Issues in Criminal Justice* 19.3 (2008): 284.
- <sup>42</sup> Phillip Tardif, *Notorious Strumpets and Dangerous Girls: Convict Women in Van Diemen's Land 1803-1829* (Sydney: Angus & Robertson, 1990), 1.
- <sup>43</sup> Tardif, *Notorious Strumpets*, 1615.
- <sup>44</sup> Tardif, *Notorious Strumpets*, 1681.
- <sup>45</sup> J. C. Brown, *Poverty is Not a Crime: The Development of Social Services in Tasmania 1803-1900* (Hobart, Tasmanian Historical Research Association, 1972), 23, 27.
- <sup>46</sup> Sandra Shulman and E. J. Burford, *Of Bridles and Burning: The Punishment of Women* (New York: St Martins Press, 1992), 108.
- <sup>47</sup> J. Pylant, "Pleading the Belly," *Genealogy Magazine*, (2005) <http://www.genealogymagazine.com/plbeanbaav18.html> (Accessed 12/3/2013).
- <sup>48</sup> Although it should be noted that both cases are not successful illustrations of the pleas as in both the prisoners' pleas for mercy on the basis of dependent children (made by Louisa) and the plea of pregnancy (made by Ann) were each rejected.
- <sup>49</sup> Ann Davis was executed on November 23, 1789.
- <sup>50</sup> *R v Davis* [1789] NSWKR 5.
- <sup>51</sup> Tench's record is cited in *R v Davis* [1789] NSWKR 5 at Note 1, [http://www.law.mq.edu.au/research/colonial\\_case\\_law/nsw/cases/case\\_index/1789/r\\_v\\_davis](http://www.law.mq.edu.au/research/colonial_case_law/nsw/cases/case_index/1789/r_v_davis) (Accessed 12/3/2013).
- <sup>52</sup> Wendy Kukulies-Smith and Susan Priest, "No Hope of Mercy for the Borgia of Botany Bay: Louisa May Collins, the Last Woman Executed in NSW, 1889," *Canberra Law Review* 10.2 (2011): 144.
- <sup>53</sup> The Colonial Secretary's Correspondence: Special Bundle, Prisoner's Application or Statement, vol 4/895.1, Archives of New South Wales (AONSW).
- <sup>54</sup> "The Botany Murderess, Visited by the Children," *Brisbane Courier*, December 25, 1888, 6.
- <sup>55</sup> David Arthur Thomas, *Principles of Sentencing* 2nd ed, (London: Heineman, 1979), 211.
- <sup>56</sup> Thomas, *Principles of Sentencing*, 211.
- <sup>57</sup> Thomas, *Principles of Sentencing*, 211-213.
- <sup>58</sup> *Crimes (Sentencing) Act 2005* (ACT), s 33(1)(o); *Criminal Law (Sentencing) Act 1988* (SA), s 10(1)(n); *Crimes Act 1914* (Cth), s 16A(2) (p).
- <sup>59</sup> *Markovic v The Queen* (2010) 200 A Crim R 510.