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**Tracing monsters: the textual constitution of woman-mother-
childkiller**

or

**A reading of the non-origin of the monstrous feminine in the
specific instance of a case of child murder.**

A thesis presented in partial fulfilment of the
requirements for the degree of

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Errata

- p. 47 footnote 7: should read 'death of the author'
- p. 55 line 14: response
- p. 66 line 1: multiplicity
- p. 78 line 3: intelligibility
- p. 83 line 10: of an
- p.106 line 5: device *it*
- p.123 line 16: the
- p.148 line 5: tripartite
- p.177 line 20: delimitations
- p.191 line 18: to *describe*
- p.195 footnote 38: 1985b
- p.197 line 2: Narcissistic
- p.199 line 19: disorder *without*
- p.201 line 15: from a
- p.209 line 25: privileged
- p.236 order should read: Silverman, Slovenko, Smart, Smith

Abstract

This project begins with a story of my encounter with a sense of the similarities and differences between my own experience of motherhood and that of another woman charged, convicted and sentenced to life imprisonment for child murder, and a question about how it is possible for our experience to be so similar and different. My understanding of this encounter is informed by theories of 'écriture féminine' and the assumption that the diversity of women's lived experiences is delimited by discourses through which 'woman' is constituted culturally and historically.

In relation to poststructuralist assumptions about the constitution of subjectivity, my initial question is transformed into a problematic. This transformation is performed through a theoretical engagement with work by Foucault, Lyotard, White and Lacan. In reading these theories the problematic of woman-mother-childkiller becomes a question of how specific women are positioned within a phallogocentric system of signification through narratives legitimated by a phallogocentric moral order and told through discourses of legitimated knowledge of subjectivity: the 'psy' discourses. The complicity of women's positioning within moral order and social power relations demands attention to the ethics of the problematic and its mode of address. To address the possibility of an ethical response, I make use of Derrida's work on deconstruction as ethics. After reading Derrida the general question of women's positioning becomes a specific deconstructive reading of a narrative told at the site of coarticulation of legal practice and psychological discourse: a reading of the judge's summation in the trial of R v Lisé Turner.

The deconstruction is practised through reading for the traces of sexual difference in the constitution of the subject in Law and psychological

discourse, the legitimation of knowledge practised as a delimitation of psychological discourse in relation to Law, the constitution of crime, disease, mental disorder, disease of the mind, insanity, defect of reason, criminal responsibility and diminished responsibility. Of particular concern are the traces of sexual difference in the iterations of psychological discourse incorporated into the body of the judge's summation. This reading is prefaced by an historical account of the relationship between psychological discourse and legal practice. This is followed by readings of the judge's summation for its instruction on legal doctrine, practices of exclusion and inclusion, constitution of legal subjects, and its narrative endpoint. Since the trial was defended through a plea of insanity, expert testimony on the accused's 'mental condition' was iterated in the judge's summation. Readings of the judge's summation on the plea of insanity are prefaced by a reading of relevant definitions and caveats from The Diagnostic and Statistical Manual of Mental Disorders (DSM-IV): the legitimate text of psychological knowledge privileged by Law here. The testimony of psychological expert witnesses is also read as prefacing the particular iterations of psychological discourse in the judge's summation. From these readings I then return to the problematic constitution of woman-mother-childkiller as a problematic of justice.

Acknowledgements

This is a story that begins a long time ago...

This is a story that never stops beginning, and in its infinitude it subverts any notion of completeness for it is built on differences and therefore, in its circularity, its multiplicity, its history, I acknowledge all the women that 'appear' here, who have allowed the story to be told, and circulate.

For Lisé, I admire your courage for wanting to make a difference. Thank you.

For the endless discussion, criticism, theoretical challenges and arguments I am grateful to Mandy Morgan, without whom this project would not be what it is. Thanks Mandy, for the support, encouragement, patience and care, while I struggled to find a voice. As friend and colleague your voice is very much heard and responded to in the process of my writing.

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Preface

Research on the theme of child-murder is not for the faint-hearted, and I must confess that there have been times since I embarked on this project when I thought that if I kept on looking at my chosen topic, I would surely turn to stone (Corti, 1998, p.vii).

In as much as this thesis is a narrative and has a beginning, it starts with this quote. I found this quote at the same time that I was reading psychological texts on maternal filicide.¹ I had already read and written about the Law and its relationship to psychology and to women. I had already begun to address the questions which inform this thesis. Like Corti, I felt that I would imminently turn to stone. I already felt the horror of engaging with a project on child murder, and along with the horror, an incredulity about a mother killing her child. I had become committed to reaching an understanding of my own ambivalence to motherhood in relation to this incredulity, and horror. While I was writing, I often wanted my children to go away, and I would think about what, and how, it would mean to me when they left home, and what and how it might mean to have taken that experience from myself - and other parents - through the act of killing a child. I had also already wondered how it would feel to lose the experience of my children through death otherwise; cot death, illness, accident or someone else's act of violence, deliberate or unfortunate. And I had cried and been angry.

I had felt as if the legal and psychological texts I was reading were speaking about me, especially as mother or mother at risk of damaging her child. Corti's writing seemed to speak to me rather than about me. And in some sense, for me, my thesis is about difference between being spoken about and being spoken to. In the thesis I write about psychology and the Law, with regard to

¹ Some of the texts which I mention in this preface are referenced within the substantive chapters of this thesis. They are not referenced here so as to mark the 'preface' as coming before (and after) the work written as the thesis.

the relationship that I have with psychology in particular. I also do this with regard for my relationships with other women who experience the ambivalence of motherhood through diverse lived experiences, including the death of a child. But, however I write, I assume I cannot control the signifying structure through which this text is read. I cannot tell you how to read.

Conventionally a preface introduces the work that follows or 'outlines' what is to come so as to 'ease interpretation' of what is yet to be read. Conventionally the preface is written after the text which it precedes. But the preface only feigns its ability to reduce the heterogeneity of the text to a 'comprehensible representation' of the 'range' of its possibilities (Derrida,1972). In view of the impossibility of the conventional 'function' of a preface, I will not attempt to provide a 'summary', or a 'map' of the text that follows. Rather, in a gesture towards 'easing' the work of reading, I attempt to explain some of the less conventional practices which I have already engaged in writing this thesis as a text of psychology.

Conventional psychological texts rarely attend, explicitly, to their own structuring devices. In writing this thesis I have attempted to attend to the form of the thesis as a narrative, broadly understood as a temporal organisation of 'content', with a beginning, middle and implicit or explicit ending. This attention is paid through marking the narrative form from time to time, as in the opening sentence of this preface. It is also paid through including autobiographical narratives of the processes and experiences of reading and writing from time to time. Including the autobiographical narratives attempts to disrupt the possibility of reading the narrative of the 'thesis proper' as if it were a seamless and solitary view of the events it tells. This disruption is performed through drawing attention to multiple experiences which would 'otherwise'

become excluded or marginalised. For example, the thesis engages with psychological discourse through a legal text - the judge's summation of a murder trial in which a woman is accused of child killing. Legal theory is not usually read in psychology, but I have needed to read across the boundary between psychological and legal disciplines to make sense of the trial transcript. Conventionally, I would have no need to tell you how I encountered the texts which informed the 'analysis' of my 'research': it would be assumed as part of a process of graduating in psychology. But here, my 'learning to read' legal theory has been practised differently, and so the story of my encounter with the legal texts which inform my reading of the judge's summation of a trial needs to be told, differently, or else excluded. It becomes an example of autobiographical writing which always looks back to some event that happened before this...

I had been searching through texts of legal discourse to find a site of co-articulation between legal theory and feminism to inform my reading of 'woman' in relation to the Law. I found the work of Alison Young (1996), more or less accidentally, on the counter of a bookstall in the foyer of a conference venue.² The 'work' was a text called *Imaging Crime* (Young, 1996). In reading this text, and others signed by Young (1993; 1994; 1997), I recognised theories of feminist poststructuralism writing into the field of legal discourse. Young's (1996) work "inspired me to think harder about things taken for granted" (p.vii) in relation to the Law. As I read, I read a pretext for engaging with legal discourse through theories which I was writing in relation to psychological discourse. I also recognised the

² of another matter of the 'more or less accidentally', Young writes: "thus it was that, while attempting to throw things away, to dispose of detritus, I came upon something which enabled me to make a beginning. Thus do the pleasures of the serendipitous enhance the demands of writing" (1996, p.1). I might add, that at the conference where I 'found' Young's work, I was attempting to 'throw away' an earlier feminist psychological project. To Alison Young I owe the possibility of another beginning.

work of others in relation to Young's work and I found 'other' texts (Cornell, 1991; 1995; Douzinas & Warrington, 1995; Douzinas & Warrington with McVeigh, 1991; Goodrich, 1990; 1993; McVeigh & Rush, 1997; Rush, 1997a; 1997b; Rush, McVeigh & Young, 1997; Young & Rush, 1994; Young & Sarat, 1994). In reading through these texts, I recognised a circularity of citation which I read as a network of dialogue in Critical Legal Studies. This dialogue enabled me to engage with legal studies, and the Law. Through these texts, their dialogue and citation practices, I found a way to respond, as a woman writing deconstructively, to the call of the Law. My response to the Law is conditioned, first by the work of Alison Young, and also by the work of others in the dialogue of Critical Legal Studies.

The autobiographical narratives, like this, often imply a 'moral order' which would also be excluded or marginalised if the 'thesis proper' appeared as seamless and solitary. In the narrative I have told here, the implied 'moral order' constitutes an obligation to tell of my debt to Alison Young through my regard for other women whose voices inform my work. Throughout the autobiographic narratives I have attempted to specify relationships among women so that, for example, when I say something about my 'aunt' I specify my mother's sister (and not my father's sister or my mother's brother's wife) so as to clearly differentiate the relationships of women. Sometimes, the voices of other women are not so explicitly identified. Through theories of the narrative and discursive constitution of subjectivity, I understand the multiple voices of 'other women' informing 'my own' voices as an ordinary process of my subjectivity. Of this, Trinh Min-ha (1989) says:

"I" is, therefore, not a unified subject, a fixed identity, or that solid mass covered with layers of superficialities one has gradually to peel off before one can see its true face. "I" is, itself, *infinite layers*... Whether I accept it or not, the natures

of *I, i, you, s/he, We, we, they*, and *wo/man* constantly overlap. They all display a necessary ambivalence, for the line dividing *I* and *Not-I, us* and *them*, or *him* and *her* is not (cannot) always (be) as clear as we would like it to be. Despite our desperate, eternal attempt to separate, contain, and mend, categories always leak (p.94).

Sometimes, in writing autobiographical narratives, I mark the ordinariness of a 'leaking' between the categories 'myself' and the 'other woman' by blurring the boundary between 'she' and 'me' in the writing. By writing narratives autobiographically from time to time I am also able to include more than an academic authorial voice, for myself. This inclusion is a gesture towards enabling multiple voices be heard through a text written as academic psychological discourse. The exclusion and marginalisation of women's voices is a particularly important thematic in this thesis. By engaging a device which enables the inclusion of more than one voice, more than an academic voice, this thematic inhabits my practice of writing.

The multiplicity of voices disrupting a reading of the 'thesis proper' as seamless and solitary is also practiced in footnotes. Conventionally footnotes are used to comment on, or cite a reference for, a designated part of the text. They might also be read as something said or done after the 'more important' work has been completed - added as an after thought, in the margins, though not irrelevant to the argument. Throughout the thesis I have written footnotes. I have written them as citation sometimes, or as commentary on a particular section of text. Sometimes, I have also written them to mark different voices, most especially voices that would be excluded in relation to the 'thesis proper' if they were not able to inhabit a space on the margins. For example, I have included text and commentary from the trial which would otherwise not have a 'proper place' within the reading of the trial transcript. I have also included some commentary which is marked on the margins by my use of a lower case

'i' to signify a voice disrupting the monologue of the authorial voice of the 'thesis proper': a voice which sometimes speaks irreverently, critically or irritatingly in marginal interruptions. These marginal voices intrude on the conventional use of footnotes as a gesture towards bringing exclusions and marginalisations into view. This gesture is not made so as to 'expose' an 'error' of 'conventional' writing practices. Rather, it is to draw attention to the ways in which conventions enable particular reading practices: in this case the reading of a thesis argument as the voice of a singular, unified and authorial writing subject.

Another writing device which risks being read as a gesture towards 'exposing error' is the use of strike out to mark a word or passage as *sous rature*, under erasure. The practice of writing *sous rature* is taken from Derrida's work in which particular words, especially ~~Being~~, are written under erasure to signify both their 'necessity' and their 'inadequacy'. In the sense that *sous rature* signifies necessity simultaneously with inadequacy it is not merely the 'exposure' of an 'error' in the use of the words. I have used *sous rature* for both particular words, such as ~~concept~~, and also for passages of the trial transcript which are necessary to my reading of the judge's summation of the trial as a process of judgement, but inadequate in relation to the endpoint of the summation as a narrative.

Of course a question arises out of the 'transgression' of conventions 'outlined' here: why refuse the conventions, why not write conventionally? For me, refusing the conventions enables attention to social power relations which are more usually excluded or marginalised in psychological discourse. Writing across the boundaries of legal and psychological disciplines, poststructuralist and feminist theories, academic and autobiographical voices, enables the

formation and maintenance of those boundaries to be seen as effects of social power, rather than, perhaps, the natural order of things. It also enables a circulation of knowledges inscribed differently, through different discourses and texts, to inform the relations between and among disciplines, theories and voices, and 'open' their boundaries to critique.

Throughout the thesis I also engage with various deconstructive reading and writing practices. I have theorised my reading of deconstruction in chapters three and four. However, here, I address the possibility of reading deconstruction as a practice of 'exposing error', and the possibility of deconstruction as error, so as to preface these possibilities before the event that enables them.

Deconstructive reading and writing attends to the limits of textuality. This is not to say that 'attending to the limits' is anything like 'showing the mistakes'.

On this Spivak (1989) writes:

Deconstruction is not an exposure of error, certainly not other people's errors. The critique in deconstruction, the most serious critique in deconstruction, is the critique of something that is extremely useful, something without which we cannot do anything (p.129).

So, here, I do not attempt to show where legal and psychological discourse makes errors. Rather, I am attempting to bring into view the limits of legal and psychological discourse at the site of a particular text, and in the matter of the constitution of a woman's subjectivity.

The limits of textuality with which I am concerned are particular. Wherever deconstructive reading and writing practices are engaged they are engaged specifically: not in the task of 'defining general limits', but of making specific

limits explicit. To read deconstruction as a 'general critique' may regard a specific deconstructive practice as an error. The scope of deconstruction *never* encompasses all sides of an argument over meaning, all points of view on a topic or event, all possible interpretations of a text. To read deconstruction as if it were able to practice 'balancing' that which is impossible to 'balance', which has no inherent equilibrium, and no natural or essential equality, is to begin with an assumption that limits deconstruction as mistaken, or at least, polemical. Deconstruction always appears, at least, partial, incomplete and limited by that which it reads.

My reading of the limits of textuality in the matter of the constitution of a woman's subjectivity attends to the operation of binaries, particularly the man/woman binary complicit with the inscription of sexual difference. Here, I draw attention to the limits of my own use of the term 'binary'. I understand binaries as organising structures within textual processes, though I also understand that the meanings of the term 'binary' are not fixed, and the use of the term, here, is contestable. I take binaries to be hierarchical systems of domination and subordination, in which the subordinate term is 'defined' through lack or absence of the 'character' of the other term. However, what may appear as an 'opposition' also occupies the place of 'interdependence'. This is not to say that I think the organisation of the hierarchy, or of the power relations between terms, occurs 'naturally'. Rather, I take it that they emerge historically and within specific struggles over meaning. As the relationship between binary terms is read, here, it does not preclude the possibility that complex, multiple systems of differences between terms are built up through specific uses of binaries within systems of signification (Morgan, 1998). So, for example, in a binary relationship with 'reason', 'emotion' is 'defined' in relation to the absence or lack of 'reason', while 'reason' depends on the

absence or lack of 'emotion'. Within psychological discourse, the use of these binary terms, within complex relationships among terms, may produce more complex and elaborated 'definitions' of both 'reason' and 'emotion', however, these 'definitions' also depend on the binary relationship between the terms. While I have read texts of psychological discourse, in Law and in psychology, through attention to the operation of binaries, I have also attempted to address the complexities of a specific text engaged in an act of judgement on a particular occasion.

In addressing psychology and the Law as they constitute the matter of child murder, and the subject accused of killing her own and other's children, I have often felt turned to stone. Questions of child murder demand attention to morality, ethics and justice. Questions of the textuality of psychological and legal discourse demand attention to politics. While writing this thesis I have been reminded, often, of the place of morality, ethics, justice and politics in the reading and writing I have been practising. I have also, often, been reminded of how easily these questions can be reduced to question of guilt and responsibility. Within the complexities I have been reading and writing, I have attempted to resist the simplicity of reducing morality, ethics, justice and politics to a matter of guilt or responsibility.

Chapter One

Enabling a problematic I: Woman-Mother-Childkiller

My children cause me the most exquisite suffering of which I have any experience. It is the suffering of ambivalence: the murderous alternation between bitter resentment and raw-edged nerves, and blissful gratification and tenderness. Sometimes I seem to myself, in my feelings towards these tiny guiltless beings, a monster of selfishness and intolerance. Their voices wear away at my nerves, their constant needs, above all their need for simplicity and patience, fill me with despair at my own failures, despair too at my fate, which is to serve a function for which I was not fitted. And I am weak sometimes from held-in rage. There are times when I feel only death will free us from one another... (Rich, 1986, p.21).

...from when I was a little girl all I ever wanted was to be a good wife and mother (Lisé Turner, quoted in Bungay, 1998, p.111).

In as much as this thesis may be read as a narrative, it has a beginning...

Before that Min-ha (1989) wrote:

In writing close to the other of the other, I can only choose to maintain a self-reflexively critical relationship toward the material, a relationship that defines both the subject written and the writing subject, undoing the I while asking "what do I want wanting to know you or me?" (p.76).

So, I begin with my relationship with 'material events', birth, meetings, reading, conversations, at a critical 'distance' from the I of the writing subject, and the written subject, and I notice, self-reflexively, that I am writing.

There was a young woman (and me) who had just given birth to a much loved son. She was coming to terms with her new baby in the context of a relationship that was breaking down. Like many new mothers she was in love with her baby. She was very protective and afraid of her doing him harm through incompetence. He was often sick and she felt helpless. Sometimes she didn't want to be his mother, and she locked up the house and walked away for a while. She (and me) didn't want to be needed so

much, we didn't want to be confined so much, we didn't want to be afraid.
We wanted to be a good mother.

And before this, was my reading around motherhood, ambivalence, and childkilling.

The young woman had already read Adrienne Rich's (1976) *Of Woman Born: Motherhood as Experience and Institution*. The book questions the institution of motherhood as a 'natural state' for women. Rich tells of her own experience, and the experience of her friends, as they talked about a particularly horrifying and well publicised case of a woman who had killed two of her children in 1974.

Every woman in that room who had children, every poet, could identify with her. We spoke of the wells of anger that her story cleft open in us. We spoke of our own moments of murderous anger at our children, because there was no one and nothing else on which to discharge anger (Rich, 1976, p.24).

Between this reading and my own experience...

Another young woman (and she) had just been on trial for child killing. On the 21st November 1984 Lisé Turner was convicted of three counts of murder and three counts of attempted murder at Christchurch High Court. Her victims were babies. Two of her own children, and the infant son of her next door neighbours died. She was sentenced to life imprisonment.

Thirteen years later Lisé was released on parole. She had served more than ten years of her life sentence and was paroled on a very strict contract, including restrictions on her movement, compulsory psychological treatment and a prohibition on contact with children.

During the years of the other woman's sentence, the young woman was studying at university, completing a masterate in psychology. She had studied feminist theory as well as psychology and had become particularly interested in questions about the effects of women's exclusion from the making of legitimate, academic knowledges. Psychology's history was (and is) a history of male psychology where the masculine subject came to represent all that is valued as positive: conscious, rational, visible, unified. Women's contributions to the discipline had (often) gone unrecognised or undervalued, appropriated or left invisible (Parlee, 1979; Russo & Denmark, 1987; Squire, 1990; Unger, 1983). Women's lives, experiences and interests have not only been excluded, but the lives, experiences and interests of men have been built on the silence/invisibility of women (Smith, 1988).

Thirteen years later two middle aged women (and our kids) visited my mother's sister while she was working on a book about women who kill. One of the stories had been told to her by the woman convicted of killing children around the same time the young woman was struggling with the ambivalence of motherhood. And me, I wondered at the similarity and the difference of the experience of the ambivalence of motherhood. They talked to each other about how it might have been possible for the different experiences of ambivalence to have become such different forms of mothering.

And out of this story of conversations I write a number of questions about motherhood, me, and she.

And before them, is my reading around motherhood, ambivalence, child

killing, and the Childkilling-Woman-Mother.¹ From my earliest reading (and lifelong experience) I understand motherhood as a problematic, at least in as much as it constrains some women between 'love' and 'fear', 'patience' and 'anger', 'nurturance' and 'autonomy'. In wondering at the differences and similarities of the experience of this 'constraint between' I read feminist theory on Woman and Mother in the context of women's exclusion and silence from the making of knowledge. I read psychological texts about childkilling and the 'other woman', the childkiller.²

Within psychological discourse, the term for the killing of children by their mothers is maternal filicide. Through literature searches for psychological texts on filicide, women who kill their children, women who kill, and the legal category of infanticide, I located various texts which made mention of infanticide or filicide in passing but did not report studies of them. The issues that these texts were concerned with included: a debate on the moral difference between abortion and infanticide (Cannon, 1985; Hontela & Reddon, 1996); neonatal euthanasia (Hontela & Reddon, 1996; Post, 1988); infanticide and drug treatment of puerperal psychosis (Iffy, 1992); the psychohistory of schizophrenia (Kahr, 1993) and; cross-cultural comparisons of maternal ambivalence and infanticide (Amighi, 1990). Among these texts, which were few, disciplinary boundaries were blurred so that the terms, and the related issues, were considered within

¹ ...and before this is something of the process of 'reading' in relation to the 'formulation' of questions which was gifted to me by Meaghan Morris (1988) who wrote, in relation to the work of Foucault: "[i]t's worth insisting that in looking at these problems - obliquely - through Foucault's work, the point is to use it and not to 'apply' it" (p.55). When i read to 'formulate questions', or 'problems', and to address them, i read the theoretical work of 'others' for the resources they offer to theorise my own experience, which is *not* the same as 'applying theirs to mine'. So, to say theory is not method and reading is not analysis is to say that there is no 'fixed procedure' to apply, methodologically, to writing theory and no 'fixed structure of interpretation' to apply, methodologically, to reading practices.

² ...and as i read i also wondered at the plenitude of women's writing/feminist theory on the problematic of Woman and Mother and the scarcity of psychological writing/research on women who kill their children.

medicine, social policy, anthropology, sociology, psychology and legal studies.

I located four texts that 'studied' infanticide, filicide or women who kill their children: A study of women who kill their children, used, as it happens, in Lisé Turner's trial (d'Orbán, 1979); a review of the literature from medicine, law, psychiatry and psychology in which only two studies from psychiatry and psychology were cited, and one of these, as it happens, was the 1979 study already mentioned (Pitt & Bale, 1995); a text which incorporated statistics on patterns of infanticide in murder by women within a study of gender differences in the use of psychological discourse by the Law (Allen, 1987) and; a 'psychohistory' of child assault (DeMause, 1990). This latter text is not an empirical study and does not report any empirical studies related to women who kill their children. Kahr (1993) and Post (1988) both mention the DeMause text as influential in the debate on neonatal ethics. In the following section, psychology's empirical understanding of maternal filicide is discussed. DeMause's (1990) text is considered later.

Offences of violence in general, and murder in particular, are overwhelmingly more prevalent among men (Allen, 1987; d'Orbán, 1990). d'Orbán (1990) reports that 40-45% of cases where women kill are filicides. Of the women convicted of filicide, two thirds show evidence of mental disorder. In the United States, the outcomes of cases of women accused of murder have "been determined by psychiatric considerations" twice as often as for men (Allen, 1987, p.2). The only other empirical data gathered on filicide (Pitt & Bale, 1995) report that between 1970 and 1975, in England and Wales, 25% of all homicides were filicides. 81% of all

children killed were killed by one of their parents. Of the children under one year of age who were killed, 60% were killed by their mothers. That age group is the most vulnerable group of all the age groups of filicide. In 90% of maternal filicides the mothers who killed their children were convicted of infanticide (d'Orbán, 1979). Of the mothers who kill their children, most will probably have killed a child under the age of one, therefore, most of them, probably will have given birth within the previous two years. Therefore her act of filicide temporally coincides with a period of time within which the woman's body, as a matter of 'medical discourse' is 'suffering' the effects of childbirth and lactation. As a matter of psychological discourse she is 'suffering' a vulnerability to depression which is technically called 'postpartum depression'.³ As a matter of legal discourse she is not guilty of murder, nor is she insane, yet she must be 'suffering' an effect of childbirth and lactation and from which she has not recovered. This 'effect' might take the form of a 'mental disorder', such as depression, which features an impairment of reason to such an extent that she is not fully responsible for the criminal consequences of her act. In such a case, she would be guilty of infanticide. In section 178 of the Crimes Act, subsection (3) allows that where the extent of her 'impairment' is such that she can be judged insane then she would be not guilty on grounds of insanity caused by childbirth and lactation (Robertson, 1996). Therefore, 90% of women found guilty of infanticide are judged to be suffering the effects of bodily processes of reproduction which cause impairment of their reason and (therefore) their ability to control their

³The issues of probabilities, and the relationship between 'suffering a vulnerability' and 'mental disorder' are addressed in chapters 6 and 7 respectively.

actions.⁴ And the probable cause of infanticide is an effect of the maternal body. As a matter of legal, psychological and medical discourse then, the maternal body becomes a problematic 'special case' of causes of 'crime' and 'mental disorder'. In the texts of these discourses 'motherhood' becomes a 'special risk' for women's freedom and mental health. This cultural representation of 'woman's body' is also spoken as a particular problematic through feminist discourse.

I also read feminist texts on Woman and Mother,⁵ and the problematics of women's bodies and maternal bodies within the context of the historical, cultural, subordination of women and the exclusion and silence of women in the making of legitimate academic knowledges. In this reading I attempted to address the question of the relationship between women's lived experience and the cultural inscription of 'Woman' and 'Mother'. Of this relationship Braidotti (1989) writes:

'I, woman', am affected directly and in my everyday life by what has been made of the subject of woman; I have paid in my very body for all the metaphors and images that our

⁴ "Females are identified in an overwhelming number of cases as the principal perpetrators of filicide [60%]...9 of 12 men [convicted of killing their children] [75%] studied had psychotic or organic impairments". These men are historicised through their constitution as suffering from 'developmental stressors' such as "violence, parental abuse, separation from or death of parents... neurological or psychiatric disorders of childhood... physical or sexual abuse... placed in residential settings outside of the home or maternal incompetence". At the time of the crime the father saw "child behaviour... as threatening, rejecting or provocative" (Pitt & Bale, 1995, p. 379). So, these fathers who kill their children according psychological discourse, are suffering a 'disease of mind' in legal discourse, which is caused, according to psychological discourse, by developmental stressors in the social relations of their 'boyhood/childhood'. No such attribution of cause could be made in the case of 'women' because there is no historicisation of the women convicted of 'infanticide'. These constitutions of the sexual difference between paternal and maternal filicide make a problematic of 'woman's body' as a site of exclusion of women's histories. The issue of sexual difference in relation to legal and psychological constitutions of the body as 'organ' are addressed in more detail in Chapters 7 & 8.

⁵ Within the plenitude of these feminist texts, I tended to read mostly those feminist poststructuralist writings which were historically contextualised by their relationship with one or more of the 'psy' discourses. Issues of the relationship between poststructuralism and psychological discourse are addressed in chapter 2.

culture has deemed fit to produce of woman (p.101).⁶

As I read this, the relationship between women's lived experience and the cultural inscription of 'Woman' and 'Mother' becomes a matter of women embodying these inscriptions as (our) experience, while historically excluded and silenced in their production. The 'Woman' inscribed in cultural texts becomes incorporated into women's (and my) lived experience. The 'Mother' is also incorporated into mothers' (and my) lived experience. And both 'Woman' and 'Mother' are sexually specific. The relationship between cultural inscription and lived experience is sensible and intelligible to me through a recognition of the texts of 'Woman' and 'Mother' that I feel every day in my flesh, and blood, and organs, matter; in a sense of displacement; in a confusion between experience and articulation; in ambivalence.

This relationship is also sensible and intelligible to me through my lived experience as a woman writing in psychology, where I at least encounter cultural inscriptions of 'Woman' and 'Mother' which I recognise in my body and which simultaneously displace me from my experience.

Writing as a woman has been theorised through the notion of 'écriture féminine' in the work of Cixous, Kristeva, Irigaray and others. The texts of these women writers inform my own reading and writing practices at least to the extent that they enable me to account for my experience of displacement, confusion and ambivalence while I articulate questions

⁶ There is a feminist reading practice which might read a kind of 'universalising' or 'totalising' of 'women' as 'woman' in this text - and in the texts which inform it - however, I resist this feminist reading through evoking a poststructuralist notion of the 'diversity' and 'multiplicity' of possible relationships between 'what has been made of woman' and 'I' such that any woman, or women, may on any 'concrete occasion' of experiencing 'what has been made of woman', does not do so identically to any 'other woman' or 'women' even though our experience is lived through a sexually specific cultural body.

around the constitution of women's (and my) subjectivities through discourses which speak about 'Woman' and 'Mother'.

For Cixous (1980; 1988; Cixous & Clément, 1986), textuality and 'the psychic' are isomorphic. This is not to say they are 'identical', but rather, that they 'share' a kind of form through which both are made intelligible as systems of signification. The 'one' signifies the relationship between 'language' and 'the world', and the 'other' signifies the relationship between the 'subject' and 'the world'. In this form, textuality and 'the psychic' resist singularity of meaning or 'empirically correct' interpretation.

And so,

There is no such thing as 'destiny,' 'nature,' or essence, but living structures, caught up, sometimes frozen within historicocultural limits which intermingle with the historical scene to such a degree that it has long been impossible, and is still difficult to think or even to imagine something else (Cixous, 1988, p.291).

It is the sense of the 'historicocultural limits' of isomorphic textuality and 'the psychic' that I take from Cixous's theorising of 'écriture féminine' to inform my reading of the relationship between women's lived experience and cultural inscriptions of 'Woman' and 'Mother'.⁷

Kristeva (1986) practices a kind of 'slippage' between the use of the terms mother, hysteric, and women, woman (Braidotti, 1991). This practice of 'sliding between' the terms breaks apart what she writes as:

the apparent coherence which the term 'woman' assumes in contemporary ideology.... [which] has the negative effect of effacing the differences among the diverse functions or

⁷ There is, of course, more that i could 'take' from Cixous' work. But, no matter how much i took, i could not take the 'whole work', since there is no unity or singularity of text to constitute such a practice. There are also many debates over, and critiques of, Cixous writing on 'écriture féminine', however, this project is not directed towards the questions which inform these debates, and they are not addressed here.

structures which operate beneath this word. Indeed, the time has perhaps come to emphasise the multiplicity of female expressions and preoccupations so that from the intersection of these differences there might arise, more precisely, less commercially and more truthfully, the real *fundamental difference* between the two sexes: a difference that feminism has had the enormous merit of rendering painful, that is, productive of surprises and of symbolic life in a civilization which, outside the stock exchange and wars, is bored to death (Kristeva, 1986, p.193).

Although it may be read to reconstitute the 'apparent unity' of the term 'woman', the practice of slippage is a recognition of the possibility of 'unity' as a 'symbolic (ideological) function' and simultaneously an attempt to 'break apart' that 'symbolic function' which delimits the multiplicity and diversity of women's experiences to a singularity of the meaning of 'Woman'. This practice, practised explicitly, depends upon a binary relationship between unity and multiplicity such that a relationship between 'Woman' and 'women' is constituted. The relationship depends on presuming a need to break apart the apparent unity of woman because unity damages the lived experience of women. Simultaneously it depends on a binary opposition between ideology and reality. Since both multiplicity and the lived experience of women are both damaged by unity, women have a privileged relationship with multiplicity. The practice of slippage then, in 'breaking apart' an ideological unity through explicitly practising the privileging of women's experience, as multiplicity, is a practice of privileging women's experience as a signification of 'the real' and 'the true'. The practice enables the claims to "more precisely, less commercially and more truthfully", realise the *fundamental difference* as meaning something other than 'tell the truth, accurately, for values that eschew materialism, about reality'. In the context of *écriture féminine* the practice of explicit slippage to 'break apart' the 'unity of woman' constitutes a relationship between women's experience and the woman of the

symbolic order⁸ such that the 'speaking of the truth' about 'the real', means speaking of the multiplicity and diversity of lived experiences of those of us whose relationship to power, language and meaning constitutes us as 'woman'. It is the notion of the relationship between the lived experience of women (and me) and cultural inscriptions of woman as a relationship of social power, constituted through language and meaning, that I take from Kristeva's work.⁹ Kristeva (1986) names this 'relationship of social power', sexual difference.

For Irigaray (1985b) sexual difference is also a matter of power relations, discourses and discursive practices. Irigaray privileges embodiment as a site of the production of sexual difference through the cultural meanings ascribed to the body. This is not simply a matter of the 'culture' 'interpreting' the anatomy of differences between females and males as 'two sexes', but rather, the complex interplay of the 'internalisation' of cultural meanings, through systems of language and signification, which enable speech and language as possibilities of embodied experience: to speak is to already have internalised the inscriptions of sexual difference as a matter of embodied experience (Grosz, 1989). However, the body is not only culturally inscribed. The very possibility of cultural inscription (and therefore of speech and language) is enabled by the body as a system of energies available to be used as the 'material of inscription'. The complex interplay of internalisation of cultural meanings actively constitutes the lived experience of embodiment: the sensations, pleasures and pains,

⁸ The symbolic order does not correspond simply with cultural inscription. For the purposes of this project, the terms 'symbolic order' and 'cultural inscription' will be incorporated into the terms 'discourse' and 'discursive practice'. The difference between the terms arise from different theoretical re-writings of Lacian psychoanalysis in relation to Foucauldian theories of knowledge. The question of the dependency of notions of feminine écriture on psychoanalytic theory is addressed alongside the question of the dependency of this project's rewriting of other poststructuralist theory in chapters 2 and 3.

⁹ I could say much the same of 'Kristeva's work' as I said of Cixous'... but I am not engaging in the debates or addressing the questions which critiques of their work address.

coherence and temporal continuity of living as 'a body'. For Irigaray, embodied lived experience coincides with cultural inscription, not in processes of 'socialisation of meanings' or 'learning of gender roles' 'written over' a 'natural body', but rather in the processes and phenomenology of bodily experience itself (Grosz, 1989).

From this 'complex interplay' of cultural and biological processes, Irigaray (1985a) writes of the sexual difference in relation to the body as a matter of 'morphology' rather than anatomy or socialisation alone: the 'form' of the body as anatomical, biological, processes is always already coded through cultural inscriptions of sexual difference which are themselves processes of social power. The body is both social and biological, and becomes a 'libidinal surface' which is written with cultural inscriptions and simultaneously lived as embodied experience (Braidotti, 1991).

For Irigaray (1985a; 1985b) then, sexual difference is a difference constituted through power relations and a lived embodied experience. For women, it is an embodied experience of 'lack'. This 'lack' is produced through the specific power relations which constitute women only in relation to man, and which themselves produce relations of women's subordination. In addressing the question of woman Irigaray (1985b) writes:

... what I want, in fact, is not to create a theory of woman, but to secure a place for the feminine within sexual difference. That difference - masculine/feminine - has always operated "within" systems that are representative, self-representative of the (masculine) subject. Moreover these systems have produced many other differences that appear articulated to compensate for an operative sexual indifference. For one sex and its lack, its atrophy, its negative still does not add up to two. In other words the feminine has never been defined except as the inverse, the underside of the masculine (p.159).

The process of 'securing a place for the feminine' is a process of asserting the specificity of women's embodied experiences: the specificity of living the cultural inscriptions of woman as something other than 'a lack'. This 'something other' may be imagined as 'multiplicity', for where the 'lack' is a lack of 'unity' coded onto/into the masculine body, then that which is 'not One' (woman) is two or more, multiple. Writing as a woman, *écriture féminine*, is the name of the process of asserting the specificity of women's lived experience. In as much as writing as a woman transforms the inscription of 'woman' from lack to multiplicity, it challenges the social power relations through which cultural inscriptions of woman constitute sexual difference.

From Irigaray's work (1985a; 1985b), I take the notion of 'the body' as a 'libidinal surface' produced through social power relations which are themselves a matter of discourse and discursive practices: cultural inscriptions that constitute the lived experience of women down to the very phenomenology of the experience of a woman's body. I also take the possibility of challenging power relations through the practices of asserting women's specific lived experiences, as experiences of multiplicity.¹⁰

Challenging power relationships constituting woman through the writing of women's specific experience into the cultural inscriptions of woman implicates a complicity with the historicoculturally delimited processes of 'textuality' and the 'psychic' which have always already enabled the specific lived experience of a woman. As such, this 'writing' constitutes a special risk for women. The cultural inscriptions which 'write' the body as a libidinal surface are produced through discursive power relations that

¹⁰ I could say much the same of 'Irigaray's work' as I said of Cixous'... and again I am not engaging in the debates or addressing the questions which critiques of their work address.

constitute the body down to its phenomenological experience. To write from the specificity of women's experience is to write from the phenomenological experience of the body as it is written through the discourses which constitute that body: the discourses that write woman onto specifically sexed bodies. To speak of women's experience as a privileged relationship of multiplicity, through writing from the libidinal space which inscribes woman onto the body risks reproducing those inscriptions as the specificity of woman's experience, and simultaneously risks reducing the 'multiple' to a 'new unity': woman.¹¹

In addressing the question of similarities and difference between my own lived experience of motherhood and the experience of the 'other woman' convicted of childkilling, the question of the cultural inscription of 'motherhood' becomes a critical question: how is it possible that our similarities and differences are constituted through such inscriptions? The question of the relationship between woman and mother has been asked by Irigaray (1985b) in the context of the constitution of the 'libidinal surface', the body, through sexual difference:

[w]hy would the libidinal structuring of the woman be decided, for the most part, before puberty... unless it is because those feminine characteristics that are politically, economically, and culturally valorized are linked to maternity and mothering? Such a claim implies that everything, or almost everything, is settled as to woman's allotted sexual role... (p.64).

As I read this, even the body of the 'girl-child' is always already inscribed by maternity. The relationship between woman and mother preempts the woman. So, when Kristeva (1986) writes of the 'call' of a mother, for a

¹¹ So in writing as a woman here i risk not only reconstituting my own autobiography through the discourses of damage to women's lived experience, but i also risk damage to the lived experience of the 'other woman'. This is an ethical risk, which the politics of sexual difference makes personal...

woman, as a 'call' from "beyond time, or beyond the socio-political battle" (p.156) it might be read as (another) cultural inscription of the primacy of maternity in the constitution of the woman.

For Kristeva (1986), the body of the woman who answers the 'call' of mother, the pregnant body, should not be confused with either the maternal, which incorporates the body, or the subject. Maternity is process and the maternal is the production of the processes, and their effects. The process, maternity, is not a 'subject' in any sense of the 'subject' which implies agency. The 'subject' of the maternal body exercises no choice over the processes which constitute her as 'mother', they are processes of an organism, a matter of "fusion and movement" (Grosz, 1989, p.79). According to this account the 'subject' woman does not exercise control over her body as a 'subject' through maternity, which is not, merely a matter of 'becoming pregnant'.

Despite the lack of status as a subject,¹² maternity becomes a 'site' through which motherhood is inscribed with responsibility.¹³ This inscription of the pregnant body as responsible for its processes and their products,¹⁴ is enabled through cultural narratives which constitute 'the mother' as 'responsible' for the child, through her embodiment.

Of these cultural narratives Braidotti (1996) reads those of the 'origin of monsters' in an historicising account of inscriptions of the mother. These narratives tell of the effect of the mother's imagination of the birth of monstrous children. The mother becomes responsible through the

¹² even woman; or perhaps because of it...

¹³ 'criminal'? 'moral'? ... the questions of, will be addressed in chapters 6, 7, 8 & 9.

¹⁴ i apologise to my children for the economic metaphor, but in the days of economic rationalism, they will understand as the children of the days/daze.

process of producing the monstrous. For her to be able to produce it from her body, it is enough that she 'imagines' the monster.

A narrative, like this, appears in the DeMause (1990) article on the psychohistory of child assault. The narrative is told as 'anthropology' on the study of a "typical peasant community in rural Greece" (p.7). One of the participants tells a story reproduced in the article:

[t]here was a young woman who [was nursing an infant]. After the baby had all it wanted, it spoke out and said, "I ate, but I didn't bite you!" Well, the woman had a stroke right then and there. The other people opened the baby's clothing and found that the child was really a monster (p.7).

As I read it, this is a narrative of matricide: the 'child' whose 'shocking confession'¹⁵ brings about the mother's death, is recognised not as a 'child' but as a 'monster'. DeMause (1990) tells this story as anthropological evidence of 'child assault', in which the child is poisoned by the mother.

The infant had turned into the adults' own poisonous injections and had become a monster (p.8).

The 'poisoning adult' is the mother, and her death is simultaneous with the discovery that the 'child' (she produced) is a monster. DeMause (1990) does not mention her death as an event in the narrative. In the process of maternity, the woman-mother, becomes so capable of producing what is 'really a monster' and even her death is not notable in the inscription of the meaning of the processes. Her capacity to produce the monstrous both removes from any 'choice' over the matter, and also claims her body as the site of the production of both 'monster' and 'poison'. This is the constitution of maternal responsibility which shares a trajectory with narratives of the 'origin of monsters', narratives told in 18th Century

¹⁵ of gratitude: I ate, but I didn't bite you - for you, I would even defy my nature.

accounts of the 'bodies of mothers' and 'the birth of monstrous children' (Braidotti, 1996).

While the 'imagination hypothesis' was the 'longest lasting' scientific theory of the origin of monsters,¹⁶ it is not the only theory which constitutes the maternal body as the origin or cause of 'bad products' through 'dysfunctional processes'.

Among the cultural narratives of the origin of monsters which Braidotti (1996) reads are those which tell of the mother's body as monstrous itself. The 'monster' is a product of a "deep contradiction that splits it within itself" (p.149). The pregnant body is also 'split within itself' is as much as it both protects the child and also conducts the 'shocks' of the mother's 'impressions' and 'emotions': "[i]t is both a 'neutral' and a somewhat 'electrical' body" (p.149).

A narrative, like this, appears in DeMause's (1990) article told as a theory of 'good' and 'bad' parenting in which 'bad parenting' involves the use of the child as a 'poison container' for the mother's 'injection'¹⁷ of her own poisonous emotions (depression, anger, fear...). Of 'good parenting' DeMause (1990) writes:

In *good* parenting, the child uses the caretaker as a poison container, much as it once used the mother's placenta as a poison container for cleansing its blood (p. 5).

In 'good parenting' the maternal body becomes a poison container, and a model for psychic mother-child relations. The maternal body 'protects', but it protects by being a 'container' of 'poison'. Although the maternal body

¹⁶ it does seem to have lasted somewhat longer than theories about the effects of radiation...

¹⁷ defined as 'projective identification' (DeMause, 1990)

does not 'split within itself' explicitly through the notion of its 'electrical' aspect, it is split, here, as 'protective' and 'poisonous'. In relation to the maternal body, by analogy, 'bad parenting' comes from 'conducting' poison from the 'poison container' (placenta) to the child in a process of 'injection'. This is a constitution of the maternal body which shares a trajectory with narratives of the 'origin of monsters', which inscribed woman's body with the monstrous capacity to 'split within itself' and produce the contradiction between 'protection' and 'contamination': narratives told in 18th Century accounts of the 'bodies of mothers' and 'monsters' (Braidotti, 1996).

According to DeMause (1990) 'bad parenting', metaphorised through the maternal body, produces a form a 'child assault': the poisoning of the child. But it is not only through the metaphor of the body that the maternal causes 'bad products'.

In a reading of psychological literature in relation to the 'cultural inscription' of maternity, Ussher (1992) writes:

[o]ne of the most common findings within psychological literature is the blaming of the mother for the ills or sins of the child. The mother has been a convenient scapegoat throughout the centuries, but psychology and psychiatry have elevated mother-hating and mother-baiting to the status of scientific fact... The mother has been blamed for the gamut of childhood illnesses, disturbances and delinquencies; for schizophrenia, depression, psychopathy and personality disorder; for homosexuality; for autism, anorexia and anxiety; for child sexual abuse (the mother's rejection of the father causing him to abuse the child). You name it, the mother has caused it (pp.184-185).

The trajectory of this discursive practice of 'mother blame' as a cultural inscription of 'scientific psychological knowledge' of maternity and the

responsibility of the mother for the producing 'bad products', is shared in DeMause's (1990) theories of the 'origin' of maternal filicide. He writes:

mothers... both in the past and in the present strangle, drown, suffocate and stab their infants to death because at that moment they *hate* them, their presence is intolerable to them, they represent a threat to their mental balance, to their very being... [they] want to do away with the child because they "are trying desperately to undo motherhood in order to divert a dire threat against them"¹⁸ from their own mothers who will hate them if they become women... "having is the most forbidden act of self-realization, the ultimate and least pardonable offence... punishment means annihilation" (p.4).

According to this theory, the childkilling mother kills because she hates. She hates because she is threatened by her own mother who will punish her for becoming a mother by annihilating her for the offence of an act of self-realization. The childkilling mother kills to avoid motherhood, an act of self-realization which will also be an act of 'becoming woman'. In 'becoming woman' the woman betrays the mother. Therefore, the woman is split between 'becoming woman' and betraying her mother, or killing the child through whom she becomes mother. This is another split analogous to the monster who is split within itself: woman-mother.

In another reading of cultural inscriptions of the maternal body as 'monstrous', Creed (1993) reads contemporary 'horror films' for their narratives of the monstrous feminine. Creed claims that "all cultures have stories of the monstrous feminine, of what it is about woman that is shocking, terrifying, horrific, abject" (p.1). This monstrous-feminine is inscribed on maternity.

¹⁸ Here DeMause (1990) cites the work of Reingold (1964) and, even though I've 'searched', I still wonder if the twenty six years between speaks only silence on the matter of maternal filicide...

Within the 'culture' of 'psychological knowledge' the trajectory of this narrative of the 'monstrous-feminine' is shared by DeMause's (1990) account of the origin of 'universal' filicide:

from the inception of pregnancy the woman feels threatened by a malevolent force bent on defeating her aspiration to motherhood or injuring or destroying her or the baby... always the source of the threat is the woman's mother (p.4).

This account is contextualised by the claim that, "[a]ll families once practised infanticide" (DeMause, 1990, p.1). Despite the 'gender neutral' notion of 'family' (and later, 'parenting'), the pregnant body is inscribed as the site of a 'malevolent force' which originates in the 'woman's mother'. The 'shocking', 'terrifying', 'horrific' prospect of a 'universal' practice of childkilling is inscribed as 'feminine', as enabled by the mother's body, and the mother's threat: a threat of annihilation.

In Creed's (1993) reading of the 'monstrous feminine' she mobilises Kristeva's theory of the abject to account for the inscription of the 'monstrous-feminine'. The 'abject' designates a threat to life which comes from the body itself. The abject is a 'border' between the processes of the body and the subject, a 'border' that is transgressed in the products of bodily processes: "shit, blood, urine and pus" (p.9). The corpse becomes the final signifier of the threat of the abject: of the body transgressing the boundaries of the subject.

The abject and the maternal body are analogous. Both implicate the "splitting, fusing, merging, fragmenting of a series of bodily processes outside the will or the control of the subject" (Grosz, 1989, p.79). In as much as the cultural inscription of the 'abject' designates a 'space between' the body and the subject, so the inscription of the maternal body

designates the woman as corporeal, a 'space between' nature and culture (Grosz, 1989).

According to Creed's (1993) reading of the monstrous-feminine, the association of the maternal body and the abject is isomorphic with the association of maternity and death. This association is manifest through the inscription of the mother as an "omnipresent archaic force linked to death" (p.23). The archaic mother produces a 'figure' of all powerful command over life and death, a mother who both gives and takes life on impulse: a figure of mythological proportions. Of the archaic mother, Creed (1993) writes:

[Her] central characteristic... is her total dedication to the generative, procreative principle. She is the mother who conceives all by herself, the original parent, the godhead of all fertility and the origin of procreation. She is outside morality and the law (p.27).

In particular she is outside the morality and the law of the patriarchal order. The archaic mother, as a 'universal' inscription of the monstrous-feminine, is not a subject: she is not subject to morality and law.

My reading of these texts of feminist theory addresses the question of the inscription of maternity on the body of woman. Through reading this theory, I am able to understand my own experience as constituted through cultural inscription, down to the very phenomenology of my body. As a matter of textuality (and isomorphically, the psychic) with historicocultural limits, my lived experience (and me) are always already placed within a specific historical and cultural context. At the moment, in the West, woman is inscribed within relationships of social power. 'Sexual difference' designates the lived embodied experience of these social power relations

in which woman is inscribed through a binary relationship to man.

To challenge these social power relations involves (in part) reinscribing woman through the specificity of women's lived experience. The processes of this 'reinscription' constitutes a 'special risk' for women which is structurally analogous to the 'special risk' of crime and mental disorder of women's bodies after childbirth.

Cultural inscriptions of woman as mother constitute the maternal body as responsible for its processes and products, as 'it' is simultaneously constituted as 'not a subject'. The maternal body is multiply inscribed with the monstrous, and the 'universal figure' of the archaic mother is not a subject of patriarchal law and morality. Maternity, as the cultural inscriptions of the lived embodied experience of woman as mother, is multiply inscribed as a 'special risk' for women: a risk of crime and mental disorder, a risk of failing to be a subject.

In the context of this risk my experience of ambivalence is both sensible and intelligible.

What remains is the question of how it is possible for these cultural inscriptions of 'special risk' to constitute the similarities and differences between my lived experience of ambivalence and the lived experience of the other young woman: the woman guilty of childkilling.

Before addressing this question, before even articulating its specificities, I want to acknowledge a dependence on poststructuralist theory: a dependence of mine in particular, and a dependence of the feminist theory

read in this chapter. Poststructuralist theory enables me to articulate the question of relationship between lived experience and cultural inscription, social power relations and embodied subjectivity, textuality and 'the psychic': the problematic of woman, mother, childkiller. So, in the following chapter, my reading of the poststructuralist theories which enable the articulation of the specific questions addressed in this thesis will be elaborated.

Chapter Two

Enabling a problematic II: A matter of dependence.

... postmodernism as a publishing phenomenon has pulled off the peculiar feat of re-constituting an overwhelmingly male pantheon of proper names to function as ritual objects of exegesis and commentary (Morris, 1988, p.12).¹

In as much as this thesis may be read as a narrative, it has a beginning...

To write an academic performance of scholarship I need a language of abstraction. This language is not a language which enables 'écriture féminine': it is not 'feminine', a woman's language (Irigaray, 1985a). A woman, writing academically, can mimic patriarchal discourse, but there is no place from which she can speak her difference 'within' it (Whitford, 1991). Even to say this relies on such a language. So, as I write, enabled by a language of abstraction which has historically excluded and marginalised the possibility of articulating my specific lived experience as a woman, I am also living the problematic about which I am writing: I am 'out of place' as I am 'in the place from which I write'.

To say this is not to say that as a woman I cannot speak, or write. However, in speaking (and writing) the problematics of woman-mother-childkiller, and questions which emerge from this writing (and speaking),² I am dependent on the theories of others, written in a 'language of abstraction'.

¹ In this chapter i engage the practice of 're-constituting an overwhelmingly male pantheon of proper names' as 'objects of ritual exchange'. That i am 'self-aware' as i do so, does not make it any less necessary to do (or apologise for)... to speak of poststructuralism is to evoke the already re-constituted pantheon. In participating in the 'economy of knowledge production' in which 'male proper names' are 'objects of exchange' it is virtually impossible not to use them. For this, I am sorry....

² Issues which arise from the relationship between speech and writing are addressed in chapter three.

In particular, it is poststructuralist theory which enables me to articulate the problematics of woman-mother-childkiller. So, in this chapter, the poststructuralist theories which enable the articulation of the specific questions addressed in this thesis will be elaborated.

Language occupies a position of critical importance in poststructuralist theory. In psychology, critical and discursive psychologists have drawn attention to language as a problematic (Gergen, 1985, 1991; Parker, 1992; Potter & Wetherell, 1987). They have critiqued traditional psychological theories, arguing that the 'infinite play' of language is neither separate from psychology's 'object of study', nor merely a 'capacity' of it. The theories of language used by critical and discursive psychologists question the boundaries between the 'individual' and the 'social'.

Traditionally, psychology has separated the individual and the social. The social is included in some psychological theories as an entity (some thing) with which the individual interacts, but the notion of an 'interaction' is predicated on their ontological status as distinct entities. In this context language has been regarded as a 'neutral tool' for communicating and/or reflecting the individual's reality. For critical and discursive psychologists, language is theorised as forming reality: what is 'real' is given by our socially shared means of making 'reality' intelligible. These 'means' are themselves historically developed in specific cultural contexts (Gergen, 1985). The traditional separation of the individual, the social and language ignores the constitutive force of language and strips individuals from their cultural and historical context. By emphasising language as an historically developed, culturally specific means of constituting reality, critical and discursive psychology redresses the absence of 'social context' in traditional psychological theory and practice.

Some feminists have also critiqued psychology for ignoring social context: specifically the social context of women's experiences in studies of sex and gender (Riger, 1992). Focusing on 'individual behaviour' at a particular moment ignores the individual's personal history and the effects of broader socio-cultural histories. In the study of sex and gender this 'focus' has led to assuming biological causes for observed sex differences and, therefore to a "deficit model of female psychology" (Nicolson, 1992, p.59). Through their attention to the importance of social context critical, discursive and feminist psychological texts enable me to contextualise the problematic of woman-mother-childkiller. Critical and discursive psychologists make connections between social context and language, and feminists make connections between social context and women's experience. By putting them into play together it is possible to create a space in which to speak about women's experience and language within psychological discourse.

Just as critical, discursive and feminist psychologies 'have a history' of relationship to traditional psychology, so too, poststructuralism has a history. It is possible to trace that history through hermeneutics and structuralism (Parker, 1989a), phenomenology and marxism, existentialism and psychoanalysis, and various other 'historical points of reference'. In the various forms which emerge from these various histories, poststructuralism provides theoretical accounts of the relationships between systems of signs, meaning, and human subjectivity. Poststructuralism therefore provides theories which may be particularly useful to psychology as a discipline concerned with human subjectivity, language and social context. Poststructuralist theories of language also provide a space in which it is possible to speak of the effects of masculinist

language and women's historical exclusion from academic knowledges on women's experience. Within poststructuralist theories there are diverse divisions and categorisations of 'language'.

In its broadest sense poststructuralist theories of 'language' trace a movement from theories of language as 'mimesis' to theories of language as 'representation' (deSaussure, 1983) to theories of language as systems of signifying practices (Derrida, 1976). Among the 'diverse divisions and categorisations of language' which are used in relation to systems of signifying practices, the terms 'discourse' and 'narrative' are used frequently. While these terms are also diversely used within poststructuralist theory, they generally signify specific *forms* of signifying practices.

The various forms in which poststructuralist theories emerge from various histories suggests that the contexts in which 'poststructuralist' theorists write; the questions they address (or even question), their audiences, cultural and sub-cultural, political and social places of enunciation, their textual histories, lives and styles are diverse. So too are the texts which they sign and are coded 'poststructuralist' (Gill, 1995). For this reason there are no one or two key principles, concepts or propositions which operate as poststructuralism in some unified or global sense. Shared academic histories and various interests in language and subjectivity produce conflict and disagreement as well as coherence and intelligibility: a vast discursive space in which 'locations' are specific rather than general. In specifying the use of 'poststructuralist' theory to enable speaking about the problematic of woman-mother-childkiller, it is therefore necessary to specify which writers, and texts, to bring into dialogue so as

to produce a 'location' that is both within the 'general field of poststructuralism' and enables the specific articulation of the problematic.

In the following sections of this chapter I bring together various poststructuralist theories to produce a theoretical 'frame' which enables me to ask and address specific research questions. Since these questions concern the relationship between language, legitimate knowledges and gendered power relations, the work of Foucault (1970, 1972, 1977, 1980, 1982, 1983, 1984, 1987) on discourse, knowledge and power provides a beginning...

Sampson (1989) historicises psychology as having reached substantial consensus that its proper 'object of study' is the individual and that this 'object' is a "natural entity with attributes that psychology can empirically study" (p.1). Foucault (1972, 1980, 1987) critiques and historicises both the 'nature' of this 'object of study' and also the 'nature' of psychological enquiry. His archaeology of the human sciences challenges psychology's foundations as a 'discipline' which appeared when it was decided to include 'man'³ as an object of scientific enquiry (Foucault, 1970). He writes psychology as an historical development made possible by certain social conditions and transformations in the conceptualisation of knowledge at the end of what he terms the 'classical period'. From this historical perspective, psychology is not a scientific discipline which uses empirical methods to objectively establish the 'reality' of individual human subjectivity. Rather it is a 'body of discourse' which is enabled by social

³ I am grateful to Foucault for constituting the subject explicitly as 'man'. This gendering of the subject is rarely reiterated in Foucauldian work in psychology, where often the anglo-american practice of 'gender-fair' writing produces the 'subject' as human (him or her) and even occasionally, and with an eye to feminist discourse, the subject becomes 'her' (see also Parker, 1989b). This 'gender-fair' practice, obscures the sexed specificity of the subject of enlightenment discourse: the 'subject' 'man' (Morgan, 1993).

and historical conditions to produce 'truth statements' about the nature of human beings. His archaeology describes the historical conditions that make possible particular 'representations' of 'reality' which prescribe the kinds of statements that can be legitimately regarded as 'true' or 'false'. What counts as 'truth' is not a matter of correspondence between a statement and a reality but instead it is a product of a particular mode of knowledge which is legitimated as 'proper knowledge'. The historical period in which psychology 'appears' as a discipline is one in which 'science' and 'objectivity' are legitimated as proper standards of knowledge production. Foucault disrupts the notion of objectivity in the human sciences by proposing that 'scientific knowledge' is a 'body of discourse' (Foucault, 1970, 1972, 1980), a collection of 'statements' which can be studied in their own right. Such statements are not only governed by rules of logic and grammar but also by rules which specify what is 'admissible' as a 'statement' in a particular body of knowledge and which specify the relationships between admissible statements. Psychological discourse is currently governed by rules which admit statements constituting women as 'histrionic' but prohibit statements constituting them as 'mad', or 'possessed'. Foucault named the rules of governing admissible statements as 'discursive formations'. The groups of statements which conform to the rules of their formation are called 'discourses' (Morgan, 1998). According to this reformulation 'scientific' knowledge no longer 'represents reality' but rather concerns the power of discursive formations to produce statements about realities and to affect 'real' social relationships.

For Foucault (1980,1983) power and knowledge are intimately connected and discourse is the form through which the power/knowledge relationship

operates. Power infiltrates the very modes of our 'being' and is not simply localised in the state apparatus and in institutions. Knowledge operates as a tracing of power exercised by institutions and practices which are themselves formed by and forming knowledges about human subjectivity. Each of us has been constituted by relations of power down to our gestures, talk and action (our libidinal bodies and language). What we 'know' of ourselves and our worlds is made available to us through discourse. What we 'know' enables us to 'be' certain kinds of persons, to take up particular identities and to understand our experience in particular ways (Davies & Harré, 1990). So, our identities, our sense of ourselves and our place in the world, are given in discourse rather than 'emerging' through a natural process of 'personal development'. In this formulation, power does not only "weigh on us as a force that says no... [but] traverses and produces things... induces pleasure, forms knowledge, produces discourse" (Foucault, 1980, p.119). From a Foucauldian perspective the embodied subject is a material effect of the nexus of knowledge/power relations, a complex and interrelated network of truth, power, and desire centred on the subject as a bodily entity. What constitutes the body and its experience is already implicated in language through discourse.

Foucault's writing of the power/knowledge/discourse relationship redefines human subjectivity. Psychology's 'object of study', the individual, is no longer regarded as a 'naturally occurring entity' but as a product of discourse/knowledge/power that is specific to particular historical and social conditions. Psychology itself is no longer simply a 'scientific discipline' but a 'body of discourse' that produces the object/subject of which it speaks and is itself produced by the discourses it uses.

In addressing the question of the relationship between lived embodied experience and cultural inscription in the previous chapter, I wrote of cultural inscriptions 'constituting' women's bodies: down to their very phenomenological experience. I also wrote, that the terms 'symbolic order' and 'cultural inscription' would be incorporated into the terms 'discourse' and 'discursive practice'. For this 'incorporation' I take Foucault's theorisation of the relationship between 'discourse, 'power/knowledge' and subjectivity.⁴

So, in as much as this thesis is a narrative, then from this point on in the story, I will no longer use the terms 'symbolic order' or 'cultural inscription'. In the context of writing about, and in relation to, the practices of psychology I will use the terms 'discourse', 'discursive practice' and 'discursive formation'. The theorising of the discipline as a power/knowledge system which constitutes subjectivity governed by rules of admissibility as to which statements are 'truth statements', is a means of writing 'intelligibly' about the constitution of the subject of psychology, and psychology's constitution of woman-mother-childkiller.

Foucault's notion of discursive formations as rules governing the

admissibility of statements co-articulates⁵ with Lyotard's (1984) notion of

⁴ ...and i wonder why, writing in psychology, i do not make use of 'Lacan's notion' of the 'symbolic' in the same place? and how much has this to do with psychology's history of relationship with psychoanalysis?

⁵ The term 'co-articulation' is taken from Parker's (1992) account of Foucault's work in relation to a form of 'discourse analysis' as a practice of psychology. Here, the term relies on the notion that discourses, 'constitute the subject of which they speak', and in this position, the 'subject' may also be an 'object': that is, (some) thing which 'appears' to those who speak the discourse as 'experts'. Discourses 'co-articulate' to the extent that they constitute an object which 'appears' (more-or-less) identical from positions 'within' the different discourses. Where objects are constituted so differently (as in the 'natural, biological body' and the 'libidinal social body') that they do not 'appear' identical then the rules of formation of statements of the discourses do not admit similar statements. It is entirely possible for discourses (say, psychological and legal) to co-articulate in the constitution of some objects and not others: the 'degree of fit' is diverse. It is also entirely possible for the same discourse to 'break' with each other: to be unable to 'speak' the same object.

narratives as defining “what has the right to be said and done” (p.23) within a particular cultural context. Lyotard also calls into question the status of scientific knowledge as ‘representing reality’. Foucault’s formulation of ‘knowledge’ as a ‘body of discourse’ and as producing ‘regimes of truth’ which are productive of objects/subjects is resonant with Lyotard’s formulation of knowledge as language games.⁶ This notion suggests that utterances are governed by rules that determine their properties and functions. Every utterance performs a move in a game. Lyotard (1984) uses this notion to distinguish between scientific and narrative knowledges.

Traditional distinctions between narrative and scientific knowledges are made on the grounds of the ontological status of their subject matter: science concerns the factual and the real while narrative concerns the fictional and the imaginary. This distinction creates a hierarchy in which scientific knowledge occupies a superior position as ‘knowledge’ and narrative is reduced to ‘literature’.

Rather than using this traditional distinction, Lyotard (1984) distinguishes between narrative and science on the grounds of language games. Narrative involves a variety of language games but scientific knowledge only involves one: denotation, the depiction of reality through a true statement about a object. This distinction also produces a hierarchy, but in this case it is narrative which occupies the dominant position. Narrative specifies the competencies necessary to perform moves in language games. Narratives determine what criteria of competence operate in particular language games, including the game of denotation which is the criteria by which science is understood as ‘speaking reality’. In this

⁶ A notion Lyotard takes from Wittgenstein.

formulation, science depends on narrative for its legitimation: for the authority to make a particular move in the game of denotation. Lyotard (1984) identifies two grand narratives of legitimation for scientific knowledges: the narrative of the emancipation of the people, and the narrative of knowledge for its own sake. Whether psychology is justified as a means of 'helping people' or for 'knowing about' people for the sake of knowing their nature, it is not simply a scientific discipline. Rather, it is a body of knowledge made up of utterances that have the status of facts because they meet the criteria of denotative language games. It is narrative which legitimates this status.

Narrative as knowledge is intimately connected with social power. As the determinant of criteria of competence in language games, narratives legitimate a speaker's position within a particular language game. Language games themselves are the "minimum relation required for society to exist" (Lyotard, 1984, p.15) and the form through which social relations are organised. By legitimating particular utterances as moves in games, narrative organises hierarchies of power in social relations. To challenge social power relations and the rules by which hierarchies are established and maintained it is necessary to attend to the narratives which authorise speaking positions.

From Lyotard (1984) I take the notion of narrative as the form through which moves in language games are authorised and social power relations are organised. Narrative is a particular form of discourse: of organising statements such that some are legitimated as 'proper' knowledge, and power relations among the subject and objects of the discourse are authorised.

Lyotard's (1984) formulation of the relationship between language games, narrative and social power resonates with White's (1987) discussion of narrative in the context of historical method. He argues that the use of narrative in the process of depicting a real historical event provides a content that is not given by the subject matter. Narratives endow real events with meanings that they do not have as mere facts. A 'fact' becomes meaningful in relation to other facts through their ordering as meaningful temporal sequences in narrative form (White, 1987). These temporal sequences are always ordered so as to 'move' towards an implied or explicit 'ending' (Gergen & Gergen, 1986). They constitute a trajectory.

According to White (1987) the closure or resolution of a narrative implicates sequences of events in a moral order. Any 'ending' to a sequence of events can only be a moral ending because real events do not come to an end. Narrative 'resolution' specifies the moral principle through which the speaking subject may judge the 'outcome' of events as 'just' or 'unjust'. In this way the 'endings' of narratives are not ascribed to real events themselves, but to the sequence of events as they are embedded in a moral order. Because, through narrative, real events are embedded in a moral order they are also constituted as sociopolitical events. Narrativity, the practice of narrative, constitutes a desire to moralise, an impulse to authorise or legitimate certain events or outcomes through reference to a moral order and a temporal rule of law (Morgan 1993). For White (1987),

narrativity... presupposes the existence of a legal system against which or on behalf of which the typical agents of a narrative account militate.... narrative in general... has to do with the topics of law, legality, legitimacy, or more generally, authority (p.14).

Subjects who occupy a 'position' as agents within a narrative account evidence against or on behalf of a legal system. This system includes the stipulation of what counts as evidence and will only admit within the system that which conforms to the criteria of admissibility which is given by the system. This is the sense in which the narrative constructs the agent: the narrative stipulates which criteria the subject must satisfy to have the authority to occupy a position within the narrative as an 'agent'. Narrative necessarily requires the moral order implicated by this system of rules and simultaneously reproduces that order as it is produced.

The social system of rules which construct the subject as agent also constitutes the agent's relationship with other subjects, events and objects which are 'admissible' according to the authority of the moral order. Therefore what the moral order admits as 'real' is taken to be reality: narrative constructs reality and that reality is isomorphic with a moral order.

The telling of a narrative is predicated on the speaking subject's competence in meeting the criteria of admissibility to a position within the narrative. In speaking from that position the subject is subjected to rights, duties and obligations implicated in the moral order on which the narrative is predicated (Davies & Harré, 1990).

So, from White (1987) I take the notion of narrativity positioning subjects within a moral order as it simultaneously organises 'events' in a temporal sequence authorised by that moral order. As subjects are positioned in the moral order, so they are constituted by the narrative. The content of the narrative form is the production of subject positions.

The work of Foucault (1970, 1972, 1977, 1980, 1982, 1983, 1984, 1987), Lyotard (1984) and White (1987) constitute, somewhat differently, relationships between language, subjectivity and rules of law, especially laws of admissibility or inclusion. Foucault names the rules that govern admissible statements 'discursive formations' and the statements that conform to these laws 'discourses'. Lyotard suggests that narratives provide the competencies to make moves in language games which are governed by rules given in narrative. White argues that narratives are predicated on rules of law through which real events are made meaningful. Together they provide the resources to specify relationships between power, knowledge, narrative and subjectivity so as to address questions of the positioning of women within narratives as forms of discourse which are organised to authorise particular moral orders and simultaneously legitimate power relations between subjects, events, and objects.

Whether as a language game or a 'body of discourse', scientific knowledge is governed by a system of rules of admissibility. What counts as 'real' within these systems of rules is not given by 'reality' but by the criteria established in the system. Therefore, scientific knowledge depends on narrative to be legitimated as 'knowledge' and also depends on narrative to make its 'statements of fact' meaningful within the realm of social relations. Through their dependence on narratives, scientific knowledges constitute both knowing subjects and the subjects, objects and events of which they speak. They also legitimate the knowing subject with the authority to make statements of fact about the reality of their subject matter. For psychology as a scientific knowledge, narratives produce speaking subjects who 'know' the facts about the lives and

experiences of other subjects, and hold these facts as 'commonly intelligible' among themselves. The narratives which psychologists 'tell' as those authorised to speak the 'facts' of others lives and experience also authorise particular statements as those which 'speak the truth'. These narratives occupy a privileged position in contemporary culture, with the consequence that the moral order they authorise is simultaneously a system of legitimated power relations.⁷

The subject positions constituted through narratives, and the moral order on which they depend, enable and constrain the subjects who occupy those positions according to the rights, duties and obligations which are given by the moral order. This is the sense in which Foucault's notion of power may be brought into play in relation to narrative: the enabling and constraining effects of subject positions positively construct the subject, locating 'him' within an already available moral order and within the social relationships constituted by that order. This formulation makes it possible to ask these questions: what positions are available to women through the narratives that are legitimated as the 'reality' of women's lives and experience?; what is enabled and constrained, for women, by these positions and what moral order and social power relations are implicated in the construction of these subject positions?

To challenge the social power relations between subjects constituted through these narratives it is necessary to attend to the moral orders and the subject positions they constitute by making the narratives, and the moral orders, explicit: to tell stories differently. So far, this reading of poststructuralist theories about narrative, knowledge, power and

⁷ In short, psychologists, speaking psychological discourse, through narratives of lived experience, are enabled to constitute 'other people's lives', and i can't help but wonder of the risk...

subjectivity, has enabled a reformulation of these relationships to ask questions of the subject positions available for women in psychological narratives. Mostly missing from these readings so far, is the specificity of sexed subjectivity and the visibility of the moral order which positions sexed subjects in relation to each other.

Lacanian psychoanalysis provides an account of the constitution of sexed subjectivity in relation to language and the rule of law. It “reads like a classic narrative” (Silverman, 1983, p.150) beginning with the child’s birth and ending with its constitution as subject through access to language and the Oedipus complex. In this narrative the Oedipus complex is construed as a specific social intervention through which the subject becomes both ‘social’ and ‘speaking’, separated from others, and identified as a sexually specific being. It is only by taking up a feminine or masculine position in language that a child becomes a symbolic or social subject (Rowley & Grosz, 1990). Sexuality and sexual identity are not constituted as ‘natural’ or ‘biological’ but as effects of the subject’s constitution in what Lacan calls the symbolic order.

For Lacan the symbolic order and the social order coincide. The child enters the social through the acquisition of language. Language is of the symbolic order which also includes law and exchange. With the child’s entry into language mother-child identification is broken and ‘separate’ social relationships are established. Simultaneously the child enters the symbolic order as a subject with access to speaking positions regulated by the ‘Law of the Father’. The key term of this law which regulates the symbolic order is the phallus (Rowley & Grosz, 1990; Grosz, 1989). This ‘key term’ does not represent an anatomical organ, nor is it a symbol. It is

a signifier, which not only circulates and has value within a system of signifiers, but also signifies that system itself. "As a signifier, the phallus cannot be owned or possessed by anyone. No-one can appropriate a linguistic term which functions only by virtue of the entire structure of language" (Grosz, 1989, p.20). So, no-one 'has' the phallus, but the phallus marks the difference between male and female. The capacity of language to inscribe bodies as sexually specific, to mark 'male' and 'female' according to the law governing the symbolic order, values the phallus as *the* signifier which divides subjects into two sexes and orders the relationships between them. Lacan designates the symbolic order organised around the phallus as 'phallogentric' and specifies that the Law of the Father which regulates the symbolic order is the law of patriarchy (Grosz, 1989). So Lacanian psychoanalysis provides a narrative of the constitution of sexed subjectivity in and through language and at the same time this narrative makes 'visible' the rule of patriarchal law over the constitution of the subject in the symbolic order.

Unlike other theories of the relationship between language, subjectivity and social power, Lacanian psychoanalysis privileges sex and gender and enables attention to the relationship between sexed subjects constituted through phallogentric language. The centrality of issues of sex and gender make psychoanalysis particularly relevant to feminisms. The sexually specific ways in which the phallus marks male and female bodies according to the Lacanian narrative position men and women asymmetrically. While 'no-one has the phallus', the phallus signifies a male sexual organ which is characterised by unity, solidity and visibility. Such signification does not translate to female sexual 'organs' and so women are positioned as 'lack' of that which the phallus signifies (Irigaray,

1985b). This asymmetry is predicated on a binary logic in which “two sexual symmetries (each representing the point of view of one sex regarding itself and the other) are reduced to one (the male), which takes it upon itself to adequately represent the other” (Grosz, 1989, p.xx). Phallogentric positioning then takes three forms: where women’s positions are constituted as the opposites or negatives to men’s, as identical to men’s or as complementary to men’s.

While feminist theorists have critiqued the Lacanian narrative for reproducing the very phallogentric order that it makes visible (Flax, 1983; Gallop, 1982, 1988; Irigaray, 1985a, 1985b), Lacan’s formulation has had a profound influence on many poststructuralist feminist theorists. The ‘visibility’ of phallogentrism enables feminist theorists to ask questions about the positioning of women and the constitution of women’s subjectivity through phallogentric discourse. Feminist theorists also argue that the psychoanalytic narrative is culturally and historically specific (Spivak, 1990). It is also very general in its scope (Henriques, Hollway, Urwin, Venn & Walkerdine, 1984; Hollway 1989) and while it provides a general answer to the question: what moral order authorises the positioning of women in phallogentric discourse?, it does not specify the effects of that positioning or the particular rights, duties and obligations that adhere to the positions constituted through specific narratives. This project is concerned with the operation of specific narratives in relation to the positioning of women within particular moral orders. It is also concerned with transforming phallogentric positioning at specific sites. While Lacanian psychoanalysis makes phallogentrism visible, it does not necessarily challenge the social power relations constituted through phallogentrism.

From the work of Lacan, I take the notion of phallogentrism as a signifying system in which women are positioned, only, in particular binary relationships with men.⁸

The problematic of woman-mother-childkiller as a problematic of similarities and differences in the lived experience of specific women (she and me) depends for its articulation as a question of the discourses of woman and mother inscribing the libidinal surface of the woman's body. It depends for its articulation, not only on feminist theories, but also on poststructuralist theories. In reading these theories the problematic of woman-mother-childkiller becomes a question of how specific women are positioned within a phallogentric system of signification through narratives legitimated by a patriarchal moral order and told through discourses of legitimated knowledge of subjectivity: the 'psy' discourses. These discourses constitute the subject of which they speak down to the very phenomenology of the body. Before elaborating that question any further, I address the question of the system of signification through which 'discourse' constitutes the position of woman, and its relation to ethics, morality and law.

⁸ i can't help but wonder if this is another way of saying 'a heterosexual system'? (though saying it differently)...

Chapter Three

Enabling a problematic III:

Depending on deconstruction and ethics

If we take the discourse of the “patriarchy” as a straw monster and pursue it mightily, our role as Furies will lead to little more than self-congratulation and euphoria. We must use and attend to “the patriarchy’s” own self-critique even as we recognize that it is irreducibly determined to disable us (Spivak, 1997, p.68).

In as much as this thesis is a narrative...

Before that, was my reading of the work of Jacques Derrida, and other’s readings of that work.¹

The Lacanian theorising of ‘phallogentrism’ brings into ‘view’ the binary relationship of woman and man through which sexual difference is ‘seen’ as a signifying system producing the social relations of power which position women, in the place of woman, through narrative and discourse.

Phallogentrism operates through binary logic. In reading Western texts of metaphysics,² Derrida (1978, 1989) locates binary logic and the power relations between binary terms at the foundations of Western systems of ‘conceptualisation’ of subjectivity, language, and social relations. Binary

¹ i can’t help but notice that the designation of a ‘space’ in which i read only Derrida, and others reading Derrida, is a space which positions me as dutiful daughter following ‘one’ of the ‘pantheon’ in which the patronym signs ‘theoretical legitimacy’. For this, i apologise, for the reproduction of the pantheon, and the patronym (even within a ‘space’ which demands them both), but not for Derrida. i apologise to Derrida for the violence... “Forgive me father, for i have sinned...”

² It is beyond the scope of this project to elaborate the relationship between western metaphysics and psychology. For the moment, perhaps it would suffice to say, after Heidegger, that “since Aristotle it has become the task of philosophy as metaphysics to think beings as such ontotheologically” (Heidegger, 1993, p. 431, cited in Patrick, 1997) and psychology necessarily depends on an ‘ontotheology’ of ‘human’ subjects as ‘lived beings’, there is an ‘ontotheological’ commonality.

logic operates as a privileging of one term over the other in as much as 'the one' is 'conceptualised' on its own terms while 'the other' is conceptualised as lack or negation. Thus absence is 'conceptualised' as lack of presence, dark as lack of light, death as negation of life, and emotion as negation of rationality. The two terms designate a mutually exclusive relationship. Derrida (1978) argues that this either/or dualism has no inherent logic. The privileged term (presence, light, life, rationality), 'the one' conceptualised on its own terms also depends on the other for its meaning. Neither side of a binary can be 'conceptualised' without the other, they are interdependent. Their 'relationship' is constituted through practices of privileging and subordination. To give anything an identity - to say what it is - necessarily also says what it is not.

In the process of 'saying what it is' Western metaphysics has privileged 'presence' to such an extent that it has become 'the value' through which 'ontologies' of human subjectivity, consciousness, and meaning are legitimated. 'Presence' enables closure to the question of 'what we are'. In the end, 'we are' the self-conscious origin of meaning, or perhaps, said as an 'ontology' of psychology's 'sub(object)'; an intentional, rational, autonomous 'individual'.

Privileging of 'presence' involves privileging 'existence', 'sight', 'temporal stability and continuity', 'consciousness' and the "co-presence of the self and other" (Patrick, 1997, p.13). In constituting an 'answer' to the question of 'what we are', privileging 'presence' demands that 'we are' visible, temporal, conscious, beings whose relationship with 'each other' is a matter of our mutual presence (our 'being together' 'visibly', 'temporally' or 'consciously') at least. 'Absence' is subordinated in constituting Western

'ontologies' of 'human subjectivity'. It lacks or negates 'presence': an 'invisibility', a 'myth, fantasy or fiction',³ a 'forgotten dreaming sleep', an 'unthought missing (of you)'.

Of 'disrupting', 'destabilising, and 'questioning', the pervasive privileging of 'presence',⁴ Derrida (1982) writes:

One can delimit such a closure today only by soliciting the value of presence... and in thus soliciting the value of presence, by means of an interrogation whose status must be completely exceptional, we are also examining the absolute privilege of this form or epoch of presence in general that is consciousness as meaning in self-presence (p.16).

'Soliciting the value of presence' may be practised through questioning the 'essentials' of 'presence' within the system(s) which produce the value. Simultaneously, and somewhat paradoxically, this questioning makes the 'value' of presence visible, conscious, meaningful - an 'examination' of the absolute privilege of this 'form'. It is also a practice of 'displacement', of locating the 'presence' somewhere other than 'essential form'. Presence, then, rather than being taken as the 'value' of the 'essential form' of human subjectivity, consciousness and meaning is relocated "as a determination or an effect within a system no longer governed by presence" (Patrick, 1997, p.13).

I read Lacanian psychoanalysis as theorising a 'view' of the binary relationship between woman and man through which sexual difference is 'seen' as a signifying system. I take this theorising as soliciting the value of 'presence' to enable sexual difference to appear, not as an 'essential' of the 'sexed body', nor as 'essentially' a (superficial) social 'command' to learn or conform to an 'appropriate role', but as 'displaced' onto/into the

³ an event 'of time' not 'in time'.

⁴ which might be a 'desirable outcome' if 'one' is not 'the one' privileged.

signifying system of phallogentric language.

Like other signifying systems the system of sexual difference is "traversed by *différance*" (Patrick, 1997, p.13). *Différance* signifies a break between theories of language as systems of representations and the ~~concept~~⁵ of the process of signification. As 'representation' the sign operates to re-present the presence of the 'absent thing' to which it refers. The 'sign' substitutes for the 'thing'. But the process of 'substitution' is not so simple if the system of 'signs' is taken into account as a 'system' where 'substitution' operates through deferral. The deferred 'presence' is a 'temporal absence' that becomes sensible in relation to other 'temporal absent presences'. As 'representation' the sign operates to re-present the presence of the 'absent thing' through recognisable differences between signs. But the process of 'recognising differences' is not so simple if the system of 'signs' is taken into account as a 'system' where 'recognition' operates through differences.⁶ '*Différance*' can only be 'recognised' "without positive terms" (Derrida, 1982, p.11): difference signifies what the 'sign' is not (Derrida, 1976, 1982).

By this account '*différance*' is an indefinable, undecidable, movement, or play, of (among) the 'spaces', of (between) the times: "the code of repeatability... within which our beliefs and practices are "inscribed"

(Caputo, 1997, p.100). There are those who write *différance* as something

⁵ The practice of striking out a word is called 'sous rature' (under erasure). "This is to write a word, cross it out, and then print both word and deletion. (Since the word is inaccurate, it is crossed out. Since it is necessary, it remains legible.)" (Spivak, 1976, p. xiv). Perhaps the term inadequate is more ~~accurate~~ (Sarup, 1988). From time to time the practice will be engaged as + write. Here, the term ~~concept~~ designates an 'idea', an abstraction (of language) which is inadequate to signify the material relations of discourse, language, or theory. It is necessary so as to distinguish a practice of theorising from a statement of 'truth'.

⁶ "Thus it makes no difference whether you say "rex," "roi," or "king" so long as "we" - those who share these conventions - can tell the difference between rex and lex, roi and loi, and kind and sing. The meaning - and reference - is a function of the difference, of the distance or the 'spacing'..." (Caputo, 1997, p. 100).

more towards a definition, something more like, the 'fusing' of difference and deferral, caught between the 'active' and 'passive' 'voice', producing 'significances' without 'reference' to an 'outside' (Abrams, 1988; Kamuf, 1991; Patrick, 1997).

Derrida (1982) says:

What is written as *différance*, then, will be the playing of movement that "produces" - by means of something that is not simply an activity - these differences, these effects of difference. This does not mean that the *différance* that produces difference is somehow before them, in a simple and unmodified - in-different - present. *Différance* is the non-full, non-simple, structured and differentiating origin of differences. Thus, the name *origin* no longer suits it (p.11).

Unlike the difference that might originate, say, in the anatomical structure of a biological body, the differences which *différance* produces, do not 'originate' in a material 'presence'. *Différance* questions the privileging of 'presence' and the 'origin' of difference.

In reading Derrida's (1976) writing on writing, the archetype of nonorigin appears as writing. The ~~concept~~ of writing as an "auxiliary form of language" is historicised. Where writing appears as the representation of speech, which is itself the representation of self-conscious presence and intention, it is seen as the 'signifier of signifiers'. As the 'signifier of signifiers', the 'origin' of writing becomes suspect, at least 'circular'. Simultaneously the ~~concept~~ of language has gone beyond its limits, being produced as a process which exceeds the ~~concept~~ of speech. If a 'signifier' is 'arbitrary' in relation to 'what' it represents then the signifier does not 'originate' in the 'what' but in another signifier. If 'writing' does not 'originate' in 'speech', then neither does 'speech' originate in 'self-

conscious presence' or 'intention, control over meaning'.⁷ Writing is no longer a 'supplement' to speech. Of this Derrida (1976) says:

Either writing was never a simple "supplement," or it is urgently necessary to construct a new logic of the "supplement" (p.7).

Derrida writes the constitution of such a 'new logic' as an excess and a lack, a movement which transgresses the ~~concept~~ of the subject as self-conscious presence and intention. This 'excess' 'of the subject' produces, a nonorigin, a 'supplement,' and its logic is the logic of a 'trace' (Grosz, 1989).

What can be written of 'trace' is that its logic is not that of an 'origin' or an 'essence' even though "the signified is originally and essentially... trace" (Derrida, 1976, p.73). Derrida uses a number of other 'signifiers of the logic of trace': hymen, (Spivak, 1976; Derrida, 1976), pharmakon (Grosz, 1989; Brogan, 1989), imprint (Derrida, 1976), in each case marking a movement rather than a 'thing'. In 'general usage' (in a system of 'representation'), the 'trace' merely signifies " a present mark of an absent (presence)" (Gasché, 1995, p.45). In signifying 'a little differently', the movement between signifiers of the 'logic of trace' (hymen, pharmakon...) signifies not even a mark of an 'absent presence' but a movement between absence and presence, a movement which produces the 'general usage' of trace (and other 'general usage').

What can also be written of 'trace' is that its logic is not temporally or spatially similar to the logic of the 'origin'. The 'origin' is displaced spatially and temporally through a linear 'movement' towards 'the past'

⁷ i can't help but notice the similarities between this 'transformation of writing' and Foucault's ~~concept~~ of the 'death of the subject' and i wonder...

(the absent was present, somewhere else). The 'trace' is not displaced as much as it is displacement. It is not a 'movement back' as much as it is a 'movement between'. The 'signification' of the movement of 'signification' does not trace a 'line' between 'cause' and 'effect'. The movement is sometimes called 'circularity' (Derrida, 1976; 1987), or sometimes 'spiralling' (Patrick, 1997), or sometimes 'repeatability' (Derrida, 1987). In each case of 'différance within a system' signifying 'a nonoriginary, nonessential movement between deferral and difference' there is no 'origin' in the sense of a time of 'return' to the 'same place' in its absence: the 'different' names are irreducible, they do not mean the 'same' (Derrida, 1988).

In as much as there is a logic of the trace, through which *différance* questions the privileging of 'presence' and the 'origin' of difference, the questioning inevitably questions 'intention' within a system where signification 'defers and differs' rather than 'returns to the subject of meaning'. Where the 'signifier' no longer originates in 'self-conscious presence' or 'intention', there is no absolute origin of meaning in general. Where the the origin was never constituted "except reciprocally by a non-origin, the trace" (Derrida, 1976, p.62) *différance* does not *depend* on plentitude (multiplicity, excess), it is the condition of such plentitude.

The possibility of *différance* as conditioning a plentitude (of meanings) without reference to their 'origin' in the 'intention' of the subject, has led some to suggest that Derrida proposes a system of 'free play' in which there are none of the 'traditional' borderlines (between disciplines, truth/fiction) and meaning becomes an 'infinite regress' (Norris, 1992). But the 'play' is not entirely 'free'. "Meaning and reference are always built up

slowly and tentatively... from within the networks of codes and assumptions within which we all always and already operate" (Caputo, 1997, p.101).

The play of 'meaning' is always already delimited by the specific context of relations between and among signifiers which *différance* conditions. It is no more possible to 'mean anything' than it is to speak 'nowhere' or 'notime'.

In the sense that 'I take' Lacanian psychoanalysis as theorising which brings into 'view' the binary relationship of woman and man through which sexual difference is 'seen' as a signifying system, I read this 'system' as '*différance*'. The question of 'sexual difference' is not a question of the 'origin of the meaning of (or in) lived sexed experience', an ontological question, but a question of the relationships, deferrals and differences, of signification which condition the 'plentitude' of meanings of sexual difference within the context of a system delimited by the operations of the woman/man binary.

So, the question of 'sexual difference' itself conditions the question of the similarities and differences through which 'my lived experience as woman-mother' and the 'lived experience of the other woman-mother' are constituted: the question which this thesis addresses.

For Derrida (1990), questioning is itself questioned, and specifically as a question of authority. It may be said that the traditional 'form' of questioning in the social sciences, at least, is a form of questioning authorised by the 'what is' of ontology. The scientific, ontological question asks, from an 'objective' distance, the 'nature' of what appears to the 'objective gaze': it does not ask the object to answer. In psychological

discursive practice, the question is authorised through the values of presence, objectivity (distance), singularity (of reality, of meaning), unity and identity (of 'sign' and 'object', of the object- in-itself); obeying the laws of science. The form of the ontological question is a form of relationship in which the authority of the question stands "*before* the world: naming it, legislating it, reducing it to axioms" (Irigaray, 1985c, p. 83). It is a form which pretends to initiate itself, in its 'standing before', as if nothing stood before 'it'.

For Derrida (1984), the question of the question, is a question of response. In this form 'questioning' becomes a 'response' to what 'comes before', and recognises that the authority of the question cannot 'initiate itself'. As a response, the question is conditioned by an affirmation of the other, a consent to engage, an acquiescence to a call (Derrida, 1991, Gasché, 1994). The archetype of affirmative response is 'yes'. 'Yes' is always a reply. As an engagement, or a promise, a 'yes' must always be repeated: "a *yes* demands *a priori* its own repetition...[w]e cannot say *yes* without promising to confirm it and remember it, to keep it safe, countersigned in another *yes*" (Derrida, 1991, p.596). As a consent to engage, 'yes, yes' promises a relationship in which the form of questioning recognises a responsibility, in the asking, to 'regard' the relationship with the other who 'calls': the other of language and the Other of the self. This responsibility is a matter of effecting an ethical relationship within the 'circle' of the response and the other (Derrida, 1991).

Within the 'circle' of the response and the other of language, the ethical response is a multiplicity. Since unity and singularity stand in a binary relationship to multiplicity, the value of 'multiplicity' becomes the value of

the authority of the question (Gasché, 1994). If the question is no longer authorised by unity and singularity, then the ontological question is no longer authorised. To ask 'what is' is not an affirmation, a consent or a response: it does not regard an ethical relationship within the circle of the response and the other. The ontological question is irresponsible.

Within the circle of the response and the Other of the self, the ethical response is an 'openness' to the multiplicity of the Other, the Other's undecidability, irreducibility, incalculability (Derrida, 1988; Gasché, 1994). To ask 'what is' of the Other, 'stands before' the other and answers only to itself. It is not an affirmation, a consent or a regard. To authorise the question of 'what is' through the legitimation of scientific practices, is to privilege the values of presence, objectivity (distance), singularity (of reality, of meaning), unity and identity (of 'sign' and 'object', of the object-in-itself). This authority does not constitute an ethical relationship within the circle of the response and the other. The ontological question is irresponsible.

Derrida (1988) writes a transformation of the question through the value of multiplicity, authorised by a 'regard' for the ethical relationship within the circle of a response and the other/Other. This transformation may be written through deconstruction.

Deconstruction has been variously called " 'différance', 'supplement', 'trace', 'pharmakon', 'parergon', 'dissemination', 'grammatology', 'the science of writing', and, more problematically, Woman" (Grosz, 1989, p.29). Some of these terms have been put into circulation already in this chapter. Deconstruction becomes the ethical question as a practice of

affirmation, consent and regard, within the circle of the response and the other/Other.

The ethical question as a response is a reading practice, and explicitly responds to the call of the other through a practice of writing. Reading and writing are isomorphic in as much as both 'respond': to the 'other, text'; to the 'other, speech'. As a reading practice, deconstruction is a signifying structure that "critical reading should produce" (Derrida, 1976, p.58). This 'critical reading' does not proceed from a position 'before' or 'outside' the (other) signifying structures it reads. Deconstructive reading writes "necessarily from the inside, borrowing all the strategic and economic resources of subversion from the old structure, borrowing them structurally" (Derrida, 1976, p.24). Among the 'resources' of the 'old structure' which are particularly useful to deconstruction are questions.

Deconstructive questioning addresses itself to the authority of the question; to the relationship within the circle of the response and the other implied in that authority. Deconstruction might question scientific practice as a practice authorising 'distance' and 'objectivity', 'singularity', 'unity' and 'identity'. It might produce a signifying structure authorised by values of multiplicity. It might sometimes be called woman.

If woman were to respond with such a deconstructive question, to the call of 'scientific practice' as an 'other' form of questioning, her writing might produce a signifying structure which called into question the 'regard' of the ethical relationship, the value of multiplicity, the absolute undecidability, irreducibility and incalculability of the 'Other'. She would call into question the 'object' of the scientific gaze: in psychology, the human subject.

To be 'called woman'⁸ evokes a response to a question of sexual difference; a question of the ethics of the relationship constituted through the domination and submission of a binary opposition.

Deconstructive questioning addresses the processes which form and maintain binary oppositions. However, "beyond the analysis of conceptual oppositions, a deconstructive line of questioning produces always more and something other than an analysis. It transforms; it translates a transformation already in progress" (Patrick, 1997, p.18). The transformation already in progress may be understood as something like the transformation of 'thoughts' into 'reality': a transformation that depends on presuming that the 'real' relationship between the 'referents' of binary terms is inherent rather than historical. The deconstructive 'translation' of this 'transformation' concerns the implications of this presumption (Derrida, 1989).

Since deconstructive questioning of binaries concerns relations of domination and submission and the systems and processes through which one term attains and maintains the privileged position, it is questioning that concerns law, morality, justice and politics.

A deconstructive line of questioning is through and through a problematization of law and justice. A problematization of the foundations of law, morality and politics (Derrida, 1990, p.931).

Questioning the authority of the values of presence, distance, singularity, unity and identity; and of the morality of 'standing before', to ask, without affirmation, with no consent to engage, a question of some 'thing' that is not 'regarded' as (able to reply/'response'able) becomes a question of politics.

⁸ to be 'seen as' woman might also be read as a 'call' ...and i might be responding, responsible, but not responsive...

As such, with regard to the law of scientific practice, deconstruction might question methodology.

A deconstructive reading practice questions methodology through writing within double bind logic, and following protocols of reading.

As a 'response' deconstructive writing within double bind logic has already said 'yes' to the other/Other, and given 'consent' to engage. It always, already concedes to complicity with the signifying systems and the forms of discourse and narrative to which it is 'responding'. A deconstructive questioning, as response, cannot 'undo' that which it questions without also 'doing' that which it questions: a double bind (Derrida, 1976; 1982; 1992). This double bind logic, delimits the possibility of deconstruction as 'methodology'. The impossibility of 'standing before' or 'at a distance' in the practices of 'engaging' and 'complicity' constitute the impossibility of an ethical relationship as a product of 'objective knowledge'.

"[R]esponsibility is something of which one cannot have an objective knowledge" (Patrick, 1997, p. xi). 'Engagement' and 'complicity' authorise a prohibition on "destroy[ing] structures from outside" (Derrida, 1976, p.24.). And most especially in relation to systems of signification (language, science, philosophy, psychology, law), the impossibility of the 'outside' becomes the impossibility of signifying a signifier from 'outside' a system of signification.

Of double bind logic as authorising a prohibition on "destroy[ing] structures from outside" Derrida (1976) writes:

The movements of deconstruction... are not possible and effective, nor can they take accurate aim, except by inhabiting those structures. Inhabiting them *in a certain way*, because one always inhabits, and all the more when one does not

suspect it...the enterprise of deconstruction always in a certain way falls prey to its own work (p.24).

As a response to methodology an effect of double bind logic is the appearance of a 'strength' and a 'weakness'. The 'strength' appears as a violence done to the presuppositions (the assumptions, the 'foundations') of the 'inside' by a movement of inhabiting which displaces binary logic, through double bind logic, and simultaneously 'moves' binary oppositions out of their 'usual context' (Derrida, 1992). This 'movement' is necessarily seen as violence: a 'cutting' of the binary relationship 'in question' from its 'context'.

It is possible to see the 'weakness' of double bind logic in a form of 'paralysis', produced through equivocating as a condition of responsibility (Derrida, 1988; Patrick, 1997). As an effect of consenting to the other/Other is the impossibility of a 'certain, definitive, consistent answer' in response to the undecidability, irreducibility, and incalculability of the other/Other. The 'weakness' of 'paralysis' becomes a movement which 'doesn't go anywhere' - no certainty of place, no definition of the other/Other, no closure of the ontological question, no closure to the trajectory of the movement, no consistency in answering is possible.

So, as a condition of 'responsibility', it is not so certain that the 'strength' of double bind logic is a violence and its 'weakness' a paralysis. To cut as a response to the other/Other, might be construed as a weakness, as a 'failure' to seek consent for a specific practice of engagement. To equivocate in the dialogue with the other/Other, might be construed as a strength, as an 'affirmation' of openness to the other/Other's multiplicity. As displacement of the binary relationship between strength and

weakness, revaluing 'cutting' and 'equivocating', might be read as a responsible response to the call of methodology.

The responsible response takes the form of inhabiting a certain structure, the 'structure' of the binary relationship between 'strength and weakness', and borrowing, not the 'elements and atoms' of 'the structure', but the structure itself, the binary, so as to transform the strengths and weakness of responding to methodology. The transformation 'falls prey' to the structure and produces a binary itself, 'violence' and 'paralysis', but the movement between 'strength' and 'weakness', 'violence' and 'paralysis', displaces 'ethics' from methodology and produces a signifying structure through which 'ethics' becomes a condition of 'responsibility'. The 'displacement' and 're-conditioning of 'ethics' through a gesture which 'cuts' it from the context of methodology, and simultaneously re-institutes an(other) binary structure is a process enabled through 'protocols' of reading.

In as much as any reading has a 'beginning',⁹ deconstructive reading 'begins'

wherever we are and the thought of the trace... has already taught us that it was impossible to justify a point of departure absolutely. *Wherever we are*: in a text where we already believe ourselves to be (Derrida, 1976, p.162).

Wherever we are in a text is a beginning...

To refuse to locate an origin for the deconstructive question within the self-present meaning of the reader's intention, opens the possibility of a nonoriginal questioning in a textual relationship between the question and

⁹ which is not its origin

other/Other.

The gesture of refusal performs a 'response' by 'searching' for intelligibility through the text. 'Searching for intelligibility' refuses to search for the 'self present' meaning of the other/Other text. Rather, it inhabits the text so as to search, wandering through the 'inside' of the structure of the relationship with the other. It solicits the value of presence by attempting "to reveal the unseen without leaving the text" (Derrida, 1976, p.164). The searching becomes a wandering which 'reveals' the apparent 'presence' as never having fully presented itself. In this reading the figures of 'presence' are rendered supplementary and unable to re'present' any preexistent origin or centre in say, the intention of the other/Other. The reading of the supplementary might also become a writing of the trace.

Deconstruction has been variously called 'différance', 'supplement', 'trace'...

Trace becomes a nonoriginal absent 'present', figured as the supplementary; not only unable to 'reveal' the 'centre' of the 'other/Other', but also unable to reveal a centre, beginning, continuity or unity of the Self/self. In writing through excess, circularity, undecidability, the supplement is repeatable in and through the trace.

In answering psychology's call of woman the logic of the supplement may read the structuring binaries of sexual difference (woman/man) through displacing them as signifying essential biological/social differences onto a system traversed by différance. So, the question of 'sexual difference' translates the ontological question into a question of différance conditioning the 'plentitude' of meanings of sexual difference within a

system delimited by the operations of the woman/man binary.

A responsible response asks a question of *différance* in place of an ontological question at the same time as saying *yes, yes* to a call (Gasché, 1994). *Yes* is always doubled: affirmation, acquiescence, consent, all presuppose *yes* (Derrida, 1991). *Yes* is always said and done: an utterance, and event, simultaneously.

...*yes* is *par excellence* and through and through a performative...it opens up the position of the I, which is itself the condition of all performativity. Austin reminds us that the performative grammar *par excellence* is that of a sentence in the first person of the present indicative: *yes, I promise, I accept, I refuse, I order, I do, I will, and so on*". (Derrida, 1991, pp.592, 594).

The position of the 'I', opened up, becomes a position in relation, so that 'I promise', 'I accept' and so on, always depend upon a movement between the self and the Other/other. The *yes, yes* opens a circle between the self and the Other/other which does not close (Derrida, 1991).

The repetition of affirmation, consent, acquiescence, '*the yes, yes*', breaks apart the 'relative purity' of a performative. In speech act theory a performative is theorised as an event utterance: a 'unique' and 'concrete' occasion of language in use (Derrida, 1988). Since a speech act always occurs in a particular context and is always specific, it is never identical from one occasion to another, even where the words are the same; a performative is a singular event (Derrida, 1991). As an act, an event utterance is singular in as much as the temporal 'location' of the act can never be repeated (Adams, 1996). But Derrida questions the 'singularity' of a 'event utterance' through asking whether a performative utterance could succeed without repeating 'codes' that enable intelligibility (Derrida, 1988). The 'repeated codes' displace the singularity of the act and evoke

a value of multiplicity and undecideability in the theorising of iteration.

Iteration is not merely the repetition of something 'said before' so that the performance and its meaning, the act and its context, the saying and the doing are 'reproduced' or even 're-presented'. Iteration becomes a transformation which cuts meaning from context and equivocates. It becomes circularity through a process of 'repeatability' in which any repetition never repeats its point of departure: nonorigin. Iteration is not a form of 'parasitism', though it is sometimes takes the form of borrowing from a structure from within. Iteration is not a form of citation, though it sometimes takes the form of quotation as legitimation (Derrida, 1988).

Iteration breaks apart the relative purity of a performance as a singular event, through the dependence of an event utterance on repeatable codes which enable intelligibility. A search for intelligibility becomes a search for instances of iteration, for the repetition (out of context) of 'codes' which are recognised through displacement and from another location. These 'codes', perhaps called discourses, are displaced through a signifying structure in which they are iterated differently. And simultaneously their iteration opens the signifying structure to equivocation and undecidability.

As examples of iteration, Derrida (1988) cites the event utterances which "open a meeting, launch a ship or a marriage" (p.18). These 'events' may each be understood as discursive practices institutionalised almost to the moment of ritual. Another example of discursive practices so institutionalised are the legal practices of court processes: ritualised argument, citation and judgement (Goodrich, 1990).

Examples may also be understood as iterations which break apart the

singularity of an event utterance. As an occasion of language in use, an example poses as an instance of the general: a particular 'case' which illustrates the typical or the common, perhaps as the 'concrete' practice of an 'abstract' theory (Harvey, 1989). As a 'singularity', an example signifies multiple possibilities of similarities, each different, each unified through commonality, and yet none identical to the abstract theory. An example breaks apart the singularity of an event utterance through signifying a signifier.

As an illustration, an example is supplementary to the general or abstract. Another example might do as well, the example ornaments the general (or, in parentheses, it is set aside). This ~~concept~~ of the example assumes a traditional logic of supplementarity. Where the signifier (as example) signifies another signifier¹⁰ the logic of the supplement may become displaced.

This displacement moves the example from the usual place of the illustration, parentheses or ornament. As such, examples are within, though not the centre, operating as "clandestine and disguised processes organising the [object] itself" (Harvey, 1989, p.63).

And before this...

is a question, and response. Having heard Lisé's story, having read the trial, how are our similarities and differences constituted, most especially through the psychological and legal discourses of our subjection? This question also becomes my reponse to psychology's call of woman. And, perhaps, an example of reading legal and psychological texts deconstructively which

¹⁰ perhaps another matter...

'begins' 'somewhere in a text'¹¹ with a response...

The following chapter addresses the question of how Lisé's trial may be written deconstructively.¹²

¹¹ signed by a father/with a patronym.

¹² oh...i can't help but notice that a 'writing' chapter follows a 'reading' chapter, opening themselves to readings as methodology, perhaps following a literature review (or two). Displacement is not, after all (?), isomorphic with destruction. Empirical practices continue to be read and written through psychological practices.

Chapter Four

The question: The force of law

For the question is that of the response, and of a call promising or responding before the question (Derrida, 1984, p.22).

In as much as this thesis is a narrative, it has a beginning, a question...

How is it possible that the similarities and differences between my lived experience and that of the other woman are constituted through discourse?

As a deconstructive writing practice, responding to this question involves specifying other responses, relationships, texts, reading practices, questions. This chapter explicates particular ways in which these specificities are written into the practices of this thesis, with regard for ethics.

As an example of deconstructive questioning, the thesis 'question', begins somewhere in a text, with a response.

Before the response, are texts of psychological and feminist discourse, texts of *écriture féminine*, texts of poststructuralist writing, a 'network' of texts within which I read/write, as a woman within the practices of academic knowledges.

Before the response, are texts of lived experience, texts of girlhood, womanhood and motherhood.

Somewhere in these texts,

two middle aged women (and me and she, and our kids) visited my mother's sister while she was working on a book about women who kill. One of the stories had been told to her by the woman convicted of killing children around the same time the young woman was struggling with the ambivalence of motherhood. And me, I wondered at the similarity and the difference of the experience of the ambivalence of motherhood. She talked to the other middle aged woman about how it might have been possible for the different experiences of ambivalence to have become such different forms of mothering.

And out of this story of conversations I write a number of questions about motherhood, me, and she (see chapter 1).

Within the texts of conversations, wondering, reading and writing, there are multiple responses. *There are responses* to the constitution of the 'other woman', the woman-mother-childkiller, as monstrous, *and a response* to the constitution of the monstrous feminine.

I remember a response to the constitution of the 'other woman' as monstrous while I was talking to my mother's sister about Lisé Turner's case. During our conversation I also read a newspaper article written at the time of Lisé's sentencing. Later I read another woman's response to the same article.

Heading, *The Star*, Saturday 15 June 1985:

THE VERDICT WAS GUILTY AND LISE... LET OUT A
DEMENTED HOWL.

Alongside the headline, a horrifying drawing: a caricature of a woman who looks like a werewolf with huge teeth protruding from a grotesque mouth. Ratty hair, bottlestop glasses, hawkish nose. I have read the article and am about to meet the 'monster' depicted in it (Bungay, 1998, p.110).

There are responses to the constitution of the 'other woman', the woman-mother-childkiller as a woman-without-history, and a response to the

constitution of maternal filicide as 'ahistorical'.

I remember this response to reading about maternal filicide, finding the histories of fathers who kill, and questioning the absence of histories of women convicted of killing their children.

...fathers who kill their children... are suffering a 'disease of mind'... caused, according to psychological discourse, by developmental stressors in the social relations of their 'boyhood/childhood'. No such attribution of cause could be made in the case of 'women' because there is no historicisation of the women convicted of 'infanticide' (see chapter 1).

I also remember a response to reading the transcript of Lisé Turner's trial, alongside Bungay's (1998) account of Lisé's experience. I remember responses to absences in the history told of Lisé's life in the trial, especially in the judge's summation.

As another text, the judge's summation in the trial of 'other woman' does not mention her history-as-a-woman. No history of "sexual abuse, physical abuse, countless miscarriages, and [violent] relationships, crises and traumas" (Bungay, 1998, p.130) appears.

There are responses to the constitution of the 'other woman' as another woman telling her story to my mother's sister (another woman). *There are responses* to a woman writing of women's specific experiences of 'killing' and *responses* to the 'shared' experience of maternal ambivalence. Within texts-among-women, conversations, reading/writing, lived experiences, are *responses* to becoming woman in and through texts.

Within these texts, after reading Derrida, *there is another response* : how

might these responses become responsible responses? How might deconstruction write the texts constituting the 'other woman'?

As a deconstructive question the 'responsible response' is a form of relationship in which the question is conditioned by an affirmation of the other, a 'yes, yes', a responsibility to regard the relationship, a consent to engage, a dependence on a call. For me, here, in this thesis, this dependence is specified as dependence on psychology's call of woman.

This is how I read my relationship with psychology, as an affirmation through my undergraduate and graduate study of psychology in particular. In this affirmation I have consented to learn the values of objectivity, unity, singularity, identity. I have consented to speak, haltingly sometimes, the discourse of the psychologist. I have seen myself as an 'insider' to practices of scientific methodology. I have consented to engage with the 'science' of subjectivity. I have read the exclusion and marginalisation, silencing, pathologising and victimising of women (Hollway, 1989; Parlee, 1979; Riger, 1992; Russo & Denmark, 1987; Squire, 1989). I have been called, as woman, and said "yes, yes".

As a deconstructive question, responding recognises a responsibility to 'regard' the relationship with the other who 'calls': the other of language and the Other of the self. This responsibility is a matter of effecting an ethical relationship within the 'circle' of the response and the other.

With 'regard' to my relationship with psychology as the 'other who calls' (me), this 'recognition of responsibility' is practised through attending to the tension between my affirmation of psychology and my experience of

psychology as a woman. Attending to this 'tension' attends to a multiplicity of responses, of positions, of differences. Valuing this multiplicity recognises multiple points of view in and through the stories telling 'woman'. Writing with regard to these points of view responds by retelling psychological stories of woman-mother-childkiller from another point of view. This retelling is practised at a site where legal and psychological discourses coarticulate. At this site texts of psychology (on woman) are told in the form of narratives which constitute woman-mother-childkiller so as to position subjects, and authorise particular moral orders, an imperative of judgement¹ and the value of 'speaking the truth'. The retelling at a site of coarticulation of the Law² and psychological discourse is practised through 'deconstructive questioning' of psychological discourse narrativised as a legal delimitation of judgement.

As response, the deconstructive question is an ethical question. In the practice of this response, I will read a particular moment of the narrativising of psychological discourse as a legal delimitation of judgement: the judge's summation in Lisé Turner's trial. This summation will explicitly be read as a legal delimitation which constrains 'what can be said' of psychological discourse, and so 'what can be said' of subjectivity, knowledge, reality, normality, the body, and woman.

The responsible response 'regards' the relationship between the other who 'calls': the other of language and the Other of the self. It does not ask 'what is'. To ask 'what is' is to ask an ontological question, and an ontological question is irresponsible. In as much as ontology is addressed here, it is addressed as an assumption, not a question, an assumption that

¹ A cut: psychological discourse, out of context, suffering a rule of Law.

² Writing 'Law' rather than 'law' signifies the specificity of the institutional practices of legal discourse as structures of state power. The use of the 'lower case' signifies law more generally.

textuality, as a social process, *is*. So, the reading/questioning 'borrows' from the fields of its own textuality the structuring form of 'grounding' in a 'presence': the presence of 'text'. The deconstructive response assumes that textuality is isomorphic with 'the psychic', 'subjectivity', 'language', 'process', 'embodiment', 'inscription', 'system', 'signification'. Textuality is not singular. The 'what is' of texts assumes multiplicity in its response to the call of presence, unity, distance, singularity and identity.³

Regard for the relationship between the other who calls and the other of the self is practised through a double refusal to ask the question 'what is' of the woman-mother-childkiller. This refusal is practiced through asking 'what can be said', and also how do I read as a woman, responding to psychology, writing woman. The other who calls, psychology, and the other of the self, woman, suffer a radical 'break' of co-articulation at the moment psychological discourse speaks of woman-mother as 'object' of the psychological gaze. At that moment, the other who calls does not enable me to speak back. As 'woman' I am constituted through the 'gaze' as the 'presence' of an absence, a lack, a problem, a pathology, a victim (Hollway, 1989; Parlee, 1979; Riger, 1992; Russo & Denmark, 1987; Squire, 1989). As 'woman' I am constituted in the 'gaze' through the ontology of sexual difference and the operations of the man/woman binary.

Answering the call of woman, as an 'object' of the psychological 'gaze', through responding to 'woman' as she is constituted at a particular moment of narrativised psychological discourse delimited in the Law, answers to psychology, not to the 'call' of the 'other woman'. To that call I

³ i can't help but notice that in responding to unity with multiplicity a hierarchical binary is reversed. The term 'textuality' conflates the 'singularity' and 'unity' implied in 'one name' with the multiplicity of names of isomorphisms, each 'only' isomorphic, producing diverse effects. It becomes a 'third term'.

respond differently, elsewhere.⁴

Psychology and woman suffer a radical 'break' of co-articulation at the moment when I am positioned as woman and psychologist. These positions 'break' across the boundary between object/subject and between woman/man. This boundary may be figured as a 'cut' constituting a binary relationship where psychology defines woman through lack, absence. This binary relationship becomes a relationship of power, of domination and subordination.

Deconstructive questioning addresses itself to the processes through which binaries are formed and maintained. In relation to the 'responses' of this thesis, the binaries which appear in critical relationships to the call of woman are those which appear in relation to the woman/man binary. So, the scope of response is a 'territory' written by Cixious (1988) as:

Man
 Woman
 Always the same metaphor: we follow it, it transports, us in all of its forms, wherever a discourse is organised (p.287).

In the practice of response, the possibilities of addressing the processes of formation and maintenance of binaries become delimited by the question which I write: the question of psychological discourse as the science of subjectivity.

Addressing the formation and maintenance of the woman/man binary, and its associates, 'produces' more than analysis. As deconstruction, this practice produces a translation of "a transformation already in progress" (Patrick, 1997, p.18). In the practice of this thesis, then, the 'transformation

⁴ for an account of my regard for my relationship with Lisé, see Appendix A. Appendix B 'reproduces' Lisé's consent to my engagement with the texts of her trial.

already in progress' is a transformation of the meaning of sexual difference into embodied subjectivity. The deconstructive translation attends to the 'meaning' of sexual difference as 'essentially' a 'matter of bodies', as in the constitution of postpartum depression (Littlewood & McHugh, 1997; Nicolson, 1992; Ussher, 1992) or as 'essentially' not a 'matter of bodies', as in the constitution of 'mothering' as a 'social role' (Eagly, 1987). As a transformation of the meaning of sexual difference, this thesis depends upon the texts of women writing 'écriture féminine' for a reinscription of the 'essential' as a libidinal body which refuses the boundary between the social and the natural.

Deconstruction of binaries produces a question of power relations, relations of domination and submission, positive and negative value, between the binary terms. It also concerns transformations of the systems and processes through which one term attains and maintains the privileged position. As such it is questioning that is concerned with law, morality, justice and politics. In relation to the problematic woman-mother-childkiller, territories of law, justice, morality and politics which delimit the practice of deconstructive questioning in this thesis are marked as 'the Law' and 'the science of subjectivity'.

'The Law' is read here as an historicised practice of legal discourse⁵ governed and governing both the admissibility of statements concerning 'reality' and 'subjectivity', and the constitution of 'reality' and 'subjectivity' through those statements. This reading of 'the Law' as a 'structure of state power' performed through discursive practices governed by discursive formations which include rules of narrativising as the authorisation of

⁵ issues of the historicisation of legal discourse in relation to psychological discourse are addressed in chapter 5.

moral order and legitimation of specific rules of Law, depends upon the texts of poststructuralist writing signed by Foucault, Lyotard and White (see chapter 2).

'The science of subjectivity' is read here as an historicised practice of psychological discourse governed by and governing both the admissibility of statements concerning 'the reality of subjectivity', and the constitution of that 'subjectivity' through those statements. This transformation of the science of subjectivity from an essentially objective, unified and coherent practice of scientific methodology, to discursive practices governed by discursive formations which include rules of narrativising as the authorisation of moral order and legitimation of specific statements as 'knowledge', also depends upon the texts of poststructuralist writing signed by Foucault, Lyotard and White (see chapter 2). As deconstruction, this transformation responds to the call of scientific methodology by questioning the values of science; the morality of 'standing before' to ask, without affirmation, with no consent to engage, a question of some 'thing' that is not 'regarded' as able to reply; and questioning the rules of admissibility to 'psychological discourse' (see chapter 3).

In this thesis, psychological discourse as scientific methodology is transformed through reading the judge's summation of Lisé Turner's trial as a particular moment of narrativising psychological discourse. As psychological narratives, fragments from the judge's summation will be simultaneously read as tending towards an endpoint, (a 'verdict'), and authorising and authorised by a particular moral order through which another woman is constituted as subject to the co-articulations of legal and (delimited) psychological discourse.

Deconstructive reading writes “necessarily from the inside, borrowing all the strategic and economic resources of subversion from the old structure, borrowing them structurally” (Derrida, 1976, p.24). In the practice of reading the judge’s summation of Lisé Turner’s trial, forms of ‘borrowing from the old structure’, structurally, include explicitly borrowing the ‘form of questioning’ and the ‘position’ of ‘psychologist’ performing a thesis within the ‘field’ of psychology. The practice of ‘logical argument’ is also borrowed,⁶ and so is the practice of using examples. These ‘borrowings’ are enabled by writing from the ‘inside’ as a subject constituted through the Law, through psychological discourse, through the ‘call of woman’. They are enabled by responding to the ‘call of woman’ with regard to the relationship within the circle of the response and the ‘other/Other’.

The signifying structures of deconstruction are delimited by these borrowings which necessarily constrain the ‘play of meaning’ produced through a responsible response. In the practice of this thesis the delimitation of the play of meaning conditions the responsible response as a response to the ‘force of Law’ and questions of politics, morality and justice. These questions inform the ‘selection’ of the trial transcript from all the possible texts of Law as an example of responding to the ‘force of Law’ in relation to the problematic of woman-mother-childkiller. They also condition the ‘selection’ of the judge’s summation from the trial transcript as an example of responding to the moral order authorised through the narrative form of the text.⁷ Deconstructive questions also condition attention to the politics of ‘presence’. They inform a writing of the

⁶ i can’t help but notice, that the borrowing of ‘logical argument’ privileges the law in relation to the co-articulation of legal and psychological discourse. This practice ‘cuts’ psychological discourse from its own rules of formation and simultaneously questions scientific methodology through a refusal to ‘borrow’ the ontological question: an irresponsible question.

⁷ As an example, the judge’s summation, is read through the texts of Law’s doctrines, as the organising structures of the force of Law in practice.

constitution of the 'other woman' as a legal and psychological subject.

'Selecting' the judge's summation from all the possible texts of Law, and questioning the constitution of the 'other woman' specify delimitations of the play of meaning of the deconstructive signifying structure. To 'select' becomes a practice of 'cutting' a text from the context in which it, momentarily, performed a specific social act: the 'direction' towards a 'verdict'. This 'cutting' displaces the judge's summation from legal discourse and relocates it within psychological discourse. So, this thesis also coarticulates psychological and legal discourse, though here psychological discourse is privileged. At this site, to answer the call of psychology as a woman constrains a responsible response as a questioning of scientific methodology. This questioning is practiced through refusing to ask the ontological question of the other woman, displacing presence from the object of the psychological gaze. Questions of the politics of presence are relocated in the texts and textuality of the coarticulation of legal and psychological discourse. Displacing presence onto psychological and legal texts does not bring the ontological status of the 'other woman' into question. Rather, as a response to scientific methodology, deconstructive questioning equivocates concerning the 'presence' of the 'other woman' before the Law and psychology.⁸

To 'cut' and 'equivocate' displace binary logic in a transformation which writes through double bind logic. Double bind logic concedes complicity with the signifying systems and forms of discourse and narrative to which it is responding. 'Complicity' authorises a prohibition on "destroy[ing]"

⁸ Were this 'equivocation' to be practiced in the witness box, it might be read as 'perjury'. It might be a 'responsible response' to the 'force of Law' in the matter of the phallogocentric positioning of 'woman'. Issues related to the Law and phallogocentric positioning of woman are addressed in chapters 6, 7, & 8.

structures from outside” (Derrida, 1976, p.24). And most especially in relation to systems of signification (science, philosophy, law, language), the impossibility of the ‘outside’ becomes the impossibility of signifying a signifier from ‘outside’ a system of signification: the impossibility of fully present, consciousness as meaning in self-presence.

In the deconstructive reading of the judge’s summation, double bind logic is practised through ‘soliciting the value of presence’, by ‘making present’ the system in and through which the woman is constituted. This ‘presence’ is not the ‘presence’ of a consciousness or intentionality in the constitution of the woman by those ‘speaking’ the discourses through which ‘she’ is constituted. It is not a matter of ‘pointing to’ the ‘woman’ constituted through the binary operations of the woman/man in phallogentric discourse and saying that those who have ‘constituted her’ this way are either ‘intentional’ or ‘mistaken’. The text of the summation is read, here, as a signifying structure which prohibits an ‘outside’ from which to question the ‘intention’ of the speaker. Writing deconstruction from within is practiced, here, as a refusal to address questions of the intention or control of meaning of any speaker. So, in reading the constitution of the woman through phallogentric discourses spoken as Law and psychology, it is not a matter of saying ‘what bastards’ (Irigaray, 1985b) they are to speak a woman this way. Neither is it a matter of bringing into question the ‘truth’ of the verdict. Rather, deconstructive questioning equivocates concerning the presence of speaking subjects, whether witness, judge or jury. Through this practice the value of presence is displaced from the ontology of human subjectivity.

According to Derrida (1982) displacement also locates presence

somewhere other than 'essential form'. Rather than being taken as the 'grounding value' of 'essential form', presence is relocated "as a determination or an effect within a system...traversed by *différance*" (Patrick, 1997, p.13). In relation to the problematic woman-mother-childkiller the particular 'essential form' of the ontology of human subjectivity which is displaced through the deconstructive reading, here, is the 'essential form' of sexual difference.

This 'displacement' is practised through the constitution of sexual difference as a signifying system producing the social relations of power which position women, in the place of woman, through narrative and discourse. Sexual difference is displaced from a system where it appears as 'essentially' a 'matter of bodies' to a system in which it is produced through social power relations legitimated by the symbolic order and the law of the father, patriarchy. In this sense 'sexual difference' becomes a signifying system which is not governed by the presence of essential sexual difference but, rather, is an effect of *différance*. Displacing sexual difference to a signifying system depends upon the texts of poststructuralist writing signed by Lacan (see chapter 2). The notion of *différance* depends on texts signed by Derrida (see chapter 3). In this thesis, sexual difference is written as a signifying system through reading the positioning of woman in and through the judge's summation. Where the signifying system positions the woman phallogcentrically, the possibility of sexual difference as a nonoriginal effect of *différance* may be brought into view.

In reading the position of the woman in and through the judge's summation, the Law is read as subjecting woman through sexual difference (Young, 1997). Feminist writers of legal studies provide a

pretext for this reading: their writing already brings the relationship of the Law and woman into view. The woman positioned through legal texts appears only as a woman in relation to man, and the feminine appears only in relation to the masculine. Legal discourse inscribes an asymmetry of sexual relations in which woman does not appear on her own terms (Cornell, 1997). Sexual difference becomes a problematic of legal discourse where woman is positioned as a 'reasonable man' (with her sex discounted) and simultaneously judged according to the propriety of her 'feminine behaviour' (Allen, 1987; Young; 1993; 1997). In constituting reality and subjectivity through legal discourse, the Law conceals sexual difference except to make a woman appear as a subject of judgement. So, through legal discourse a woman is subjected to Law as if she were a man, or as if she were an exception, a deviation (Young, 1993). Sexual difference already occupies a position as 'supplement' to the constitution of the legal subject.

In this thesis I am reading and writing to bring into view the possibility of sexual difference as a nonoriginal effect of *différance*. My reading of the woman's position in the text of the judge's summation does not address questions of the woman's subjectivity. I do not ask the text to answer on the matter of the facts or the truth of the accused's subjectivity, including her guilt or her mental health. Rather, I question the ethics of her constitution at a particular site where the Law constitutes her through psychological discourse which is also subjected to the Law.

To question ethics displaces psychology's ontological question about the 'reality' of the woman's subjectivity. The ontological question privileges the values of presence, unity, identity and singularity and pretends the

'origin' of the 'other woman' as some 'thing' 'seen' through the presence of an essence of her difference. Here, displacement is practiced as reading psychological discourse through the 'inside' of the Law. Specifically, I read through logical argument rather than searching for the origin of the woman's constitution in the representations of her guilt and mental health. Logical argument is a practice of legal discourse as methodology. Reading through logical argument within a text of psychology displaces practices of psychological discourse as methodology. This becomes a practice of writing psychological discourse differently and, at the same time, answers the call of woman through a question: how is psychological discourse read from the position of the supplementary?

As a woman reading and writing within psychology, answering the call of woman, refusing the ontological question, I write from the doubled position of psychologist and woman. From the inside of the Law, in this case, the position of psychologist is supplementary: the law both subjects psychological discourse to its own rules of formation and simultaneously depends on psychological discourse to enact itself as judgement. From within the Law, and within psychology, the position of woman is supplementary: the woman is subjected to psychological discourse and simultaneously psychological discourse depends on woman, as absence and lack, to specify the psychological subject. Doubly, I read from the position of the supplementary.

As a reading practice, reading from the supplementary attends to an excess of the subject: language, textuality and social power relations. The ethical question displacing the ontological question becomes a question of the morality and politics of psychological discourse, legal discourse and

their social relationships on a particular occasion of the subjection of a woman. In the sense that language, textuality and social power relations do not usually come under the 'psychological gaze', they are construed here as 'supplements' to the psychological constitution of the subject. The figuring of the supplementary as language, textuality and social power relations, rather than, say the 'voice of the psychologist', cannot represent the intention of psychological discourse, or those who speak as psychologists. As supplementary, language, textuality and social power relations are subject to the 'logic of the trace'.

The logic of the trace is a logic of displacement. Displacement does not trace a line between cause and effect. Reading the position of the woman in the judge's summation, through a question of the ethics of her constitution, does not address the question of her determination through discourse. The text is not read to analyse the traces of a cause for the woman's guilt and mental health. Neither is it read to explain the cause or origin of sexual difference in a signifying system traversed by *différance*. Rather, the reading addresses the supplement of 'psychology's subject' to write the trace of sexual difference through the discourses of psychology constituting a subject of the Law: a woman-mother-childkiller.

The practice of writing the trace of sexual difference through the discourses of psychology constituting a subject of Law is a practice of searching for intelligibility and attempting to 'reveal' the 'unseen' of the text. As a question of the ethics of the 'excess of the subject' this search focuses on social power relations among legal and psychological discourses as they constitute the guilt and mental health of a woman. Specifically, the text is read to reveal the legitimation of expert testimony

practised as a delimitation of psychological discourse in relation to Law, the processes of the subjection of psychological discourse to the Law. The reading also searches for the intelligibility of the constitution of guilt and mental health through attending to the constitution of crime, disease, mental disorder, disease of the mind, insanity, defect of reason, criminal responsibility, diminished responsibility. Of most particular concern are the traces of sexual difference in the iterations of psychological discourse incorporated into the body of the judge's summation.

So, this thesis reads the judge's summation of Lisé Turner's trial as an example of psychological discourse subjected to legal discourse and constituting the woman's subjectivity in relation to guilt and mental health. The text is read as iterating psychological discourse through a narrative which tends towards a verdict, as a matter of Law. The reading is constituted as a questioning response to the ethics of psychological discourse in the matter of the problematic of woman-mother-childkiller and the similarities and differences among the lived experiences of 'me and she'.

In writing, and searching, this deconstructive reading begins with an historicisation of the relationship between psychological and legal discourse, so as to preempt the possibility that the questioning is either 'out of time' or 'elsewhere'. Here, my reading of the Law depends on the work of critical legal theorists in much the same way that I depend on the work of feminists theorising 'écriture féminine', poststructuralists theorising subjectivity, knowledge, discourse, narrative and social power, and Derrida's theorising of ethics, responsibility and authority before this...

After that, is a reading of the judge's summation for its 'instruction' on legal doctrine, its practices of exclusion and inclusion, its constitution of both the 'accused' and the 'jury' as legal subjects. This reading searches for the 'direction' of its narrative endpoint and draws attention to legal discourses iterated through the narrative performance. The delimitation of psychological discourse subject to legal discourse is also traced.

After that is a reading of the text privileged by legal discourse, in this case, as the legitimate text of psychological knowledge: the Diagnostic and Statistical Manual of Mental Disorders (DSM-III, DSM-III-R, DSM-IV; American Psychiatric Association (APA), 1980; 1987; 1994). This text is read for its constitution of mental disorder in general, so as to specify the possibilities of iterating psychological discourse in the judge's summation.

After that, is a reading of the judge's summation for its instruction on the plea of insanity, and iterations of psychological discourse in the direction towards an endpoint, a verdict. The testimony of psychological expert witnesses is also read so as to specify the particular iterations of psychological discourse in the judge's summation.

After that, is a writing of this deconstructive reading as a responsible response to the call of woman in psychological discourse: a question of ethics as morality and politics. Here, the constitution of an ethical relationship within the 'circle' of response and the other/Other and the possibility of justice are addressed.

Chapter Five

A history: Force of Law

To write history is to tell a story, to attribute temporal sequence and causal connections to a series of events. The phenomenal world, past or present, does not appear in the form of a closed segment, with beginning and end. On the contrary, we swim in incoherent streams of events and sequences that have no clear line of development or connection" (Douzanis & Warrington, with McVeigh, 1991 p.106).

In as much as this 'history' of relationship between psychology and the Law is a narrative, it appears as 'a closed segment, with beginning and end'. Like any other narrative it follows a moral trajectory, imposes a temporal order, and makes coherence out of the chaotic. As a starting point for this history, I take Foucault's theoretical writing of the relationship between power, knowledge, discourse and subjectivity (see chapter 2) *and* of the history of 'ideas' as a history of epistemic transformation (Parker, 1989b).

Foucault (1977) writes the history of knowledge, not as a seamless history of 'ideas' formulated out of their historical context and following a trajectory of progress, but rather, as history within which knowledge is read as more or less isomorphic with histories of culture, morality, politics and social being. In as much as the history is a story, it is also a movement in which knowledge emerges as an effect of the telling of culture, morality politics and social being. Simultaneously these histories are constituted through, and constitute social power relations. For Foucault (1977), power and knowledge "directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, or any knowledge that does not presuppose and constitute at the same time power relations" (pp.27-28). Knowledge and discourse are also intimately

connected. Discourse is constituted as knowledge when particular statements which conform already to rules of formation, are also subjected to disciplinary practises of legitimation.

I read Foucault's writing of the history of 'ideas' as a history of epistemic transformation and a re-writing of a narrative of progress towards the endpoints of 'pure knowledge' or 'emancipation' (Lyotard, 1984).

'Knowledge' does not 'move' smoothly along a moral trajectory in Foucault's re-writing of its history. For Foucault the history of knowledge is conditioned by transformations in the rules of formation of discourse and the disciplinary practices of legitimation. Simultaneously knowledge is located within cultural, moral and political histories so that there is a conditioned continuity between transformations in discursive formations, 'social change', and legitimate 'knowledge'. Foucault (1970) writes a tracking/tracing of transformations in discursive formations across 'periods' recognisable through the discontinuity between the rules of formation of discourse as legitimate knowledge, and corresponding discontinuities in the disciplinary practices of legitimation. These 'periods' are called the 'classic' and the 'modern' epistemes.¹ Their discontinuities are written in a history of the 'emergence' of the 'psy' disciplines² at an historical moment³ where 'classical rules' of discursive formation are transformed into modern rules. This transformation simultaneously brought 'man' into the gaze of science and produced the 'science of subjectivity' as disciplinary practices legitimating statements about the subject, 'Man'.

¹ The concept of 'periods' here is somewhat different to the usual 'historical' notion of temporal periods marked at the beginning and end by 'dates' in a calendar organised around 'linear time'. Here the 'historical' notion of the 'periods' is marked by 'transformations' not 'temporal order' and it is possible to read statements conforming to the formation of the rules of any episteme at a given point in a 'temporal line'.

² As well as medicine, in the 'Birth of the Clinic' (Foucault, 1982.)

³ The length of the moment is beyond measure.

'Man' as psychological subject, and 'Man' as subject of the modern state constituted through legal discourse, both 'emerged' within the historical, cultural, moral and political context of modernity.

In as much as the history of the relationship of psychology and the Law is a story, it begins in the modern episteme. It is also a history of knowledge in as much as it tells the story of discursive transformation through two epistemes: the modern and the postmodern. It is a story of two legitimated forms of disciplinary practices which constitute knowledge through the subjugation of discourse, and simultaneously constitute ~~conceptualisations~~ of subjectivity, specific 'objects' of inquiry and subject positions within the discourse and the discipline. Specifically, this is a history of the transformation of discourses operating through ~~conceptualisations~~ of disciplinary practices: through definitions, methodologies, and social processes of legitimation.

Reading the history of the relationship between psychology and the Law through psychological texts of that history, the 'beginning' of the relationship emerges simultaneously with the emergence of both psychology and the Law as academic disciplines.⁴ At this time the 'relationship' took the form of a "dramatic" brief engagement (Ogloff, Tomkins & Bersoff, 1996, p.200) in the courtroom, where psychologists became 'expert witnesses' on the 'nature of Man', and in the 'laboratories' where they became experts on witnessing.

The first psychologist to testify as an expert in court was German psychologist von Schrenk-Notzing in 1896 (Blackburn, 1996; Gudjonsson,

⁴ Psychology had not 'existed' before this moment, however, the Law had undergone a transformation in the 1870's from an 'apprenticeship model' to become an academic discipline (Stevens, 1983, Ogloff et al., 1996).

1996a). James Cattell is commonly cited (Bartol & Bartol, 1987; 1994; Blackburn, 1996; Gudjonsson, 1996a; Ogloff et al., 1996) as the first psychologist in the United States to use disciplinary practices to 'scientifically observe' the accuracy of recollection, so as to provide information on testimony to the court system. Bartol and Bartol (1999) locate Cattell's study, around 1895, as "the genesis of modern forensic psychology" (p. 4). The specific 'naming' of 'forensic psychology' is justified because Cattell's work "sparked the interest of other researchers in the psychology of testimony" (p.4.). At its 'genesis', forensic psychology was 'unnamed' and took the form an an 'informal' relationship with Law in which European psychological literature began to report empirical studies related to eyewitness testimony, retroactive memory falsification and suggestibility.

The Law, through the discipline of legal studies, resisted the formalisation of a relationship with psychology well into the twentieth century (Blackburn, 1996). With the support of 'other disciplines', legal studies did not regard psychologists as 'proper' expert witnesses, particularly on matters of criminal responsibility. As late as 1954 the Council of the American Psychiatric Association and the American Medical Association declared that only physicians were legitimate mental health experts (Bartol and Bartol, 1994; 1999). Simultaneously, legal studies, and legal practice, took so little regard of the 'findings' of psychological research on the question of 'accuracy' in the testimony of witnesses, that the practice of 'testimony' remained unaffected by psychological knowledge.⁵

⁵ i can't help but notice that psychological 'research' took 'accuracy of testimony' as its object of study, while legal practice regarded such 'accuracy' as an outcome of the legal process. Perhaps, psychological knowledge of testimony is too much 'out of context' for legal studies to pay it much regard.

So, at the moment of the formalisation of the relationship between psychology and the Law in the 'birth' of 'forensic psychology', psychology is already positioned by the Law as 'outside,' or perhaps a 'supplement' to the Law.⁶ According to Ogloff et al (1996) at that moment "psychology started to systematically permeate the legal system" (p.200). According to some psychological 'histories', the 'moment' is temporally located in the 1960's.⁷ Here the relationship between psychology and law was formalised as psycholegal studies: the practice of psychological disciplines focused on criminal justice issues (Blackburn, 1996; Kapardis, 1997; Loh, 1981; Ogloff et al, 1996).⁸ It was at this time that social psychology became 'interested' in the social processes of jury decision making. Cognitive psychology became 'interested' in the accuracy of eyewitness testimony. Clinical psychology became 'interested' in criminal culpability as pathology of mind (Kapardis,1997; Ogloff et al.,1996). Within psychology there continues to be a plethora of 'legal objects' subjected to the psychological gaze, made somewhat possible by social change: specifically the development of psychological associations to form divisions which have as their focus a relationship between psychology and the law.⁹ For example, the British Psychological Society formed the division of Criminological and Legal Psychology in 1977 and the American Psychological Association founded the division Psychology and Law in 1981 (Blackburn,1996; Kapardis,1997). In 1993, nearly two decades after

⁶ Since the Law relies on both its own constitution of subjectivity and processes of legitimation, and their 'difference' from the 'science of subjectivity' so as to practice both 'resistance' and 'exclusion' in relation to psychology.

⁷ ...and i wonder about that 'temporal location' as also a 'moment' of 'social change'... and the effects of that social change in relation to this 'birth'... perhaps 'justice' became a more 'common sense' possibility within a transforming episteme.

⁸ At the same time that various 'calls' for social justice were meeting the Law on the streets.

⁹ And at the same time various bodies responding to the 'call' for social justice were bleeding in the streets - and psychology responded to 'the call' by taking the 'criminal' as its object of study and formalising relationships within the discipline (between themselves?) so as to practice 'scientific method' on subjects of Law. A responsible response?

the establishment of the Division of Criminological and Legal Psychology, members of the association, that is, those subjects positioned as psychologists demonstrating experience in criminal justice settings' were able to call themselves Chartered Forensic Psychologists (Blackburn, 1996).

According to Blackburn (1996) and Hess (1996) the 'aims' of these associations are threefold: to scientifically advance psychological knowledge of the legal system; to provide empirical evidence of the assumed psychological functioning of law in practice; and provide legal institutions with technologies of psychology. These recent prolific formations and subsequent prolific textualisation of legitimated psychological knowledge of legal objects formalise an uneasy relationship between psychology and the Law. Despite this unease, both law and psychology share an interest in understanding and predicting human behaviour so any relationship between them requires (an understanding) of the theories and methodologies applied to issues arising in 'law' and 'legal processes' as well as in the 'practice' of psychology.

At the moment of this formalisation of the relationship between psychology and the Law in the 'birth' of 'forensic psychology' as a specific set of disciplinary practices focused on legal process and issues of concern to the Law, psychological knowledge was already positioned as 'outside', or perhaps a 'supplement' to the Law.¹⁰ In the position of 'supplement' to the Law, the 'formalisation' of the relationship argues for both psychology and the Law becoming seen as signifying structures. Both are systems of representation in which the 'presence' of the object of the gaze (legal

¹⁰ Since the Law relies on both its own constitution of subjectivity, and processes of legitimation, and their 'difference' from the 'science of subjectivity' so as to practice both 'resistance' and 'exclusion' in relation to psychology.

'objects') are constituted as an 'unseen presence' revealed in 'signs and symptoms' or in 'testimonial evidence'. As such both might be read as 'systems of mimesis' in which the facts or the truth of the object are revealed through the 'seen presence' of 'signs' which are legitimated through a judgement (diagnosis, verdict) as the 'presence' of the object. The processes of legitimation of judgement are social processes, specifically the practices of scientific methodology and the publication of scientific research, and the practices of logical reasoning and adversarial argument.

The formalisation of the relationship between psychology and the Law, in forensic psychology, read as a relationship of supplementarity among systems of signification, implies that the 'history' of the relationship is also a history of ~~conceptualisations~~, definitions and debate: a history of textual practices.

According to Ogloff et al (1996) forensic psychology 'developed' as a sub-discipline of clinical psychology and is concerned with the ~~concepts~~ of criminal behaviour and victimisation, competency to stand trial, sentencing, and more recently, psychological aspects of child custody and access. Hess (1996; 1999) argues that clinical psychology's 'interest in law' shows a shift from investigating ~~concepts~~ of 'mental disorder' in relation to objects of law to become 'interested' in ~~concepts~~ of criminal behaviour more specifically: criminal legal subjects as objects of the 'clinical gaze'.

The writer most often cited as the pioneering forensic psychologist (Blackburn, 1997; Gudjonsson, 1996a, 1996b; Kapardis, 1997) says that

forensic psychology is

[t]hat branch of applied psychology which is concerned with the collection, examination and presentation of evidence for judicial purposes (Harward, 1981).

According to the 'definition' psychology serves the purposes of the Law by constituting legitimate knowledge (collection, examination) of the subject of legal inquiry. Since 'that subject' is the criminal legal subject, not only is 'clinical psychology' perpetually reiterated as the privileged form of psychological practice legitimating knowledge of 'mental disorder', but psychology as 'serving the purposes of the Law' is perpetually reiterated in the position of the supplement.

The Association of forensic psychologists, in formulating 'ethical guidelines' for their practice, write that 'forensic psychology' is:

All forms of professional psychological conduct when acting, with definable foreknowledge, as a psychological expert on explicitly psycholegal issues in direct assistance to courts, parties to legal proceedings, correctional and forensic mental health facilities, and administrative judicial and legislative agencies acting in an adjudicative capacity (Committee on Ethical Guidelines for Forensic Psychologists, 1991, p.655).

According to this definition the objects of forensic psychological 'interest' are 'criminal legal subjects' disparately located within legal institutions (proceedings, facilities, processes). These 'subjects' are simultaneously subjected to the psychological gaze in 'assisting' the Law. And again, not only is 'clinical psychology' perpetually reiterated as 'serving the purposes of the Law' in the position of the supplement, but the 'objects' of their gaze are only 'locatable' within the territory of 'the Law'.

Within these definitions Haney (1980) writes distinctions into three 'forms' of relationship between psychology and the Law: an incorporation

(psychology in the law), a conjunction (psychology and the law), another incorporation (legal 'behaviour' as object of the psychological gaze).

These distinctions are articulated through definitions cited in the work of Blackburn (1996), Gudjonsson (1996b), Hess (1996; 1999) and Kapardis (1997).

Psychology in the Law becomes the direct 'contribution' of psychologists to the law where psychological knowledge 'aids' legal decision making. This 'aid' may take the form of reporting results of psycholegal studies (psychology of the Law), and psychological assessment of defendants through any version of the 'psychological gaze'.

Psychology and the Law becomes the practice of scientific methodology to produce empirical evidence explaining crime and also to produce treatment interventions for offenders, crime prevention and functioning of penal institutions. In as much as that 'behaviour of police' and 'attitudes of public' may also be of 'interest' here, psychology and the Law is somewhat similar to psychology of the Law (which itself appears 'in' the Law).

Psychology of the Law becomes an 'interest' in behaviour within the legal system as an 'arena' of human interaction. All legal subjects (not only 'offenders', but also 'victims', 'police', 'judges', 'juries' and 'penal administrators') become subjects of psychological knowledge in as much as they are 'all' constituted as decision making (cognitive) subjects. Thus 'psychology and the Law' becomes a specific 'interest' in eyewitness testimony reliability, how legal and extra-legal factors influence police/citizen interactions, child witness reliability and judges' decision making.

There are writers within the 'field' of forensic psychology who argue that these 'distinctions' are not clear, the divisions are not separate, and their 'separation' is problematic. Blackburn (1996) argues that the 'developments' which led to establishing divisions of legal psychology which enabled the position of 'forensic psychologist' also enabled a particular relationship between the 'criminal' and clinical psychology.

[Forensic psychology] has been applied most consistently to the direct provision of psychological information to the courts, that is, to psychology *in* the law...[forensic activities] are activities undertaken *for* the law, the purpose being to answer a legal question (pp. 6-7).

This may be read as another definition of forensic psychology in which clinical psychology is reproduced as the privileged form of psychological knowledge in relation to the Law, and also a contribution to a debate about the 'recognition' of the 'field' of forensic psychology.

If I take this as a definition of forensic psychology then the relationship between forensic psychology and the Law becomes only what others argue is psychology *in* the Law. So, forensic psychology can *not* be read as a specific branch of a more homogeneous field. For the law to ask a legal question of a psychological object (mental disorder, for example) which is answered by psychology on behalf of the law is not isomorphic with psychology asking a question (in a legal context) answered by psychology for psychology (*of* the law, *and* the law). Does it matter who asks? What about? Who for? Whose interests are served by the question?

The 'debate' over the constitution of the relationship between psychology and the Law becomes an argument in which there are (at least) two sides

articulating 'definitions' which locate the 'boundaries' around the relationship differently. Through argument, these 'differences' appear as differences in the 'territory' marked by the boundaries and simultaneously a perpetual 'blurring' of the demarcation of the territory.

In as much as the 'debate' primarily argues between the privileging of clinical psychology in relation to the Law, and the constitution of more heterogeneous psychological knowledge of 'legal things', it enables the reproduction of the clinical gaze as the 'centre' of the argument, and simultaneously enables the blurring of boundaries within the heterogeneity of possible relationships between psychology and the Law.

It is in the context of this 'historical moment' where the debate blurs boundaries and reproduces a privileging of clinical psychology in relation to the Law, that it becomes possible, writing psychology, to engage with the Law somewhat differently. At the same moment, within the territory of legal studies, theorists writing poststructuralist theory in the context of a critical engagement with legal studies are enabled to respond to the Law somewhat differently (Goodrich, 1990; 1993). Through readings of poststructuralist (and other) writing on the Law, the history of the relationship between psychology and the Law may be contextualised by a 'history' of the Law in the modern episteme.

Kerruish (1991) writes that

...given the diversity of legal practices and institutions, 'law' as a term denoting a unitary object can only refer to an idea. It is supported by the knowledge, technique and organisation of the legal profession, and the discipline within which the claim is made, explained and justified is jurisprudence (p.2).

In as much as the 'idea', the ~~concept~~, of Law works to 'unify' a heterogeneity of discursive practices conforming to the rules of formation governing 'Law', the Law as it has been written in relation to psychology is more general than specific and more totalising than diverse.

The privileging of 'clinical' psychological discourse as the 'legitimate' supplement to the Law in the 'definitions' and 'concepts' of forensic psychology suggests that among the 'diversity' of legal practices there are some which are more specific to the relationship between modern psychology and the Law. In particular, the 'clinical gaze' as a gaze directed towards the criminal legal subject implies that the site of the most privileged 'relationship' is criminology and criminal law. That these 'forms' of legal practice are also 'within' the territory of the more general concept of 'law' also implies that jurisprudence as the discipline within which the claim to a totalising 'Law' is 'made, explained and justified', also matters at the 'site' of the most privileged 'relationship'.

Criminology is the name for the set of legal discursive practices through which scientific methodology is used to 'establish the causes of crime'¹¹ through taking the 'criminal legal subject' as the 'object'¹² of the scientific gaze (Nelken, 1994; Pavarini, 1994; Smart, 1990). This set of legal discursive practices share with forensic psychology both an interest in the 'criminal legal subject' as an 'object', and the use of 'scientific methodology' to legitimate the statements of 'fact' which constitute that 'gaze' and the object that appears before it.

¹¹ A response with no regard for an ethical relationship with the 'other/Other' asks the 'Other' an ontological question... through which moral order, rule of law/Law?

¹² Which implies, at least, that the 'origin' of crime is 'located' in the 'individual' constituted through legal discourse as 'criminally responsible'.

According to Morrison (1994) the history of criminology appears as 'two traditions' of discursive practice. In the 'first' tradition, the notion of the 'social contract'

serves as a master narrative of history which enables classical criminology to define the criminal act, to locate the entity of the criminal, and to give meaning to events and acts which can now be labelled crimes and criminal (p.139).

The narrative of the 'social contract' thus legitimates particular constitutions of the objects of the scientific gaze. This narrative constitutes as 'legal knowledge' a 'code' valuing clarity and rationality and functioning to 'emancipate the people' through a 'strong social organisation' which is privileged over 'elite power' (Morrison, 1994). The 'social contract' as master narrative implicates a moral order in which the 'good' is marked as a trajectory towards emancipation (Lyotard, 1984). The social contract authorises the State, as a 'central authority', to 'create' the code which enables the narrative to be told. In the 'telling' particular 'definitions' of crime, the criminal legal subject and the 'location' of the 'origin' of crime are all legitimated as the 'proper' objects of the scientific gaze.¹³ That this 'location' and 'subject' and 'crime' are governed by a moral order in which the social contract 'splits' 'human subjectivity' into the 'social' and the 'individual', privileges the social over the individual, and subjects the individual to the social, also depends on the constitution of the individual as a 'reasoning subject'. To take the burden of the crime, subjection to the Law, and the origin of 'breaches' of the social contract, the 'individual' cannot find the "truth of the human self" (Morrison, 1994, p.138) in the social relations of 'customs or religion', the 'truth', according to this master narrative, is 'reason'. To be criminal is to be unreasonable.

¹³ ...and i can't help but notice that the 'objects' legitimated by a master narrative of emancipation valuing the strength of social organisation, constitutes the 'criminal' at the site of the 'individual', not the 'social'.

In the second tradition, 'nature' legitimates particular constitutions of the objects of the scientific gaze. This narrative constitutes 'legal knowledge' as a "reflection of underlying natural processes" (Morrison, 1994, p.142). Within this narrative the 'values' of 'social advancement', 'human happiness' and 'security' function to 'emancipate the people' through a recognition of 'nature' in the Law made possible by 'scientific enlightenment'. As a master narrative the concept of 'natural Law' (revealed by science) implicates a moral order in which the 'good' is marked as a trajectory towards 'enlightenment', 'knowledge of the truth for its own sake' (Lyotard, 1984). 'Natural Law' authorises a moral order in which 'the natural' coincides with an 'order' characterised by the 'absence' of 'culture and history', and the 'presence' of a 'reason' which is universal, practical, and a moral obligation (Kerruish, 1991). In the telling of the master narrative of 'nature', particular 'definitions' of crime, the criminal legal subject, and the location of the origin of crime are all legitimated as the 'proper objects' of the 'scientific gaze'. These objects are therefore governed by a moral order which 'splits' the natural and the social and privileges the 'natural' over the 'social'. The 'morality' of the social also depends on the constitution of the individual as a 'reasoning subject'. To take the burden of the crime, subjection to the Law, and the origin of 'unnatural behaviour', the 'individual' must 'guarantee' the moral sense of the community with reference to 'nature', to a 'natural order', 'revealed' by science, and takes the form of 'reason'. To be 'criminal' is to be 'unreasonable'.

Within 'criminology', as the discursive practices of the scientific gaze through which crime, the criminal legal subject, and the location of the 'origin' of crime 'appear', the two master narratives of legitimation

authorise the Law to subject the individual to a moral order in which the 'reason' of the 'individual' determines the 'good' of the social.

Criminal law is the name for the set of legal discursive practices through which crime, the criminal legal subject and the location of the origin of crime are constituted as a matter of the Law. The diversity of the 'legal gaze' on crime and the criminal subject may be 'categorised' according to "technocratic concepts, institutions and procedures" (Young, 1996, p.2). The 'procedures' become those discursive practices through which the Law administers penal sanctions on criminal acts. These implicate the 'institutional' doctrines and definitions of crime practised through the legitimate relation between the State and its 'citizens', the system of relations between and among legal subjects (officers of State government, including politicians and police; officers of the Court, including judges, barristers and lawyers; juries, offenders, victims, the public; teachers and students of 'the Law'), the legitimisation of the 'Crimes Act' as the text of the Law on crime and the 'logic of Law' (Rush, 1997a). These 'doctrines and definitions' implicate particular ~~concepts~~ concepts of crime, the criminal legal subject, and the location of the 'origin' of crime articulated through "principles and rules which reflect a philosophical understanding of the relationship between the individual, law and the state" (Norrie, 1997, p.1).

The 'principles and rules' of the concepts of criminal law constitute the legal subject as an individual who is fundamentally free to choose to act through the rational exercise of reason. The sanction of the law, "penal sanction should only follow a freely chosen act... affirming the need for intention, foresight, knowledge and beliefs concerning actions and their consequences" (Norrie, 1997, p.1) as 'characteristics' of the legal subject.

So, 'crime' is constituted as a choice to act in violation of the law as a normative order (McVeigh & Rush, 1997). The ~~concept~~ of the Law as 'normative order' constitutes a fundamental 'split' between the 'normative' and the 'moral'. However, the constitution of the legal subject as a 'reasonable individual' who becomes responsible for their actions through an 'abstract' ~~concept~~ of 'free choice' enables a form of 'morality' to be "built on the back of the law" (Norrie, 1997, p.3): a morality in which to be criminal is to be unreasonable. The 'reasonable individual' constituted through and governed by principles and rules as an 'abstract' or 'philosophical' practice of the 'logic of law' becomes a subject of 'properly legal' criminal law.

...[In] wanting to be properly legal , ...[c]riminal law wants to be: a moral philosophy and a government of action (McVeigh & Rush, 1997, p.197).

According to Rush (1997b), the discursive practice of the jurisdiction of criminal law is "the power and authority to speak in the name of law" (p.27). This 'power and authority' is legitimated through the moral order which authorises crime as 'unreasonable action in violation of a normative order'. The 'power and authority' spoken through this moral order is purposeful: to sanction the 'unreasonable action' (Rush, 1997b). The question of the 'purpose of penal sanction' is addressed in the 'field' of Law named 'jurisprudence'.

Jurisprudence names the set of discursive practices which make legal practices meaningful "from a legal point of view" (Kerruish, 1991, p.5). It asks the question 'what is law?' and two senses it attempts to answer: what is the history of the meaning of the word, 'law', and what is the 'truth' of Law? (Douzinas & Warrington with McVeigh, 1991). Jurisprudence 'reveals' those rules and principals which can be unified into a body of

knowledge about the Law in the history and meaning of 'law'. It authorises legitimate political power, through establishing what is 'proper' to Law. So, the 'term' jurisprudence refers both to a general theory of Law (philosophy or science of law) and to the expert knowledge of the legal profession. Methodologically, jurisprudence proceeds by applying legal procedures to law itself. It 'reveals' the universals of Law, its 'origins', its "correspondences with empirical realities" (Douzinas & Warrington with McVeigh, 1991, p.18) and the ~~concepts~~ on which it depends.

The orthodox jurisprudence of modernity constructs theories that portray the law as a coherent body of rules and principles, or of intentions and expressions of a sovereign will. Jurisprudence is obsessed with the self confessed and well-documented desire to dress the exercise of political power in legitimacy. Its predominant strategy is to try and weave the legal texts into a single, seamless veil in which authorised and symmetrical patterns are endlessly produced, circulated and repeated (Douzinas & Warrington with McVeigh, 1991, pp. ix-x).

Among these 'authorised and symmetrical patterns' is the repeated constitution of the legal subject as an 'individual' with 'freedom to choose to act through reasoned, rational control of their actions' and whose 'responsibility' to the 'social contract' or the 'natural order' as a 'normative order' is the responsibility to choose to act within the Law. The privileging of 'clinical' psychological discourse as the 'legitimate' supplement to the Law supplements the constitution of the legal subject with a psychological subject constituted as an 'individual' with 'cognitive' reasoning ability and volition: control over behaviour.

And as contemporary debate over the 'status' of the 'supplement' within the field of psychology effects a perpetual 'blurring' of the demarcation of the 'territory' of psychological discourse, so Young (1996) reads the debates attempting to distinguish criminology and criminal law, conducted

through the adversarial 'methods' of jurisprudence, as effecting a perpetual 'blurring' of the demarcation of the 'territory' of legal discourse.

And at the moment when both psychology and law may be read as engaged in a discursive practice (debate/argument) which effects a perpetual blurring of the particular 'boundaries' at stake in the debates, it becomes possible to imagine an epistemic transformation in the rules of the formation of discourses which speak the law and psychology, their subjects and objects. And this moment, both coming from and depending upon the modern episteme, becomes an 'historical' moment of the 'post'modern.

At this moment the 'relationship' between psychology and the law might take the form of a textual relationship: a relationship between and among texts through which discourses are realised, social power enables and delimits, knowledges are legitimated or subjugated, and human subjectivity is constituted.

In as much as any ontological question is addressed through the constitution of the 'relationship' as a textual relation, it is addressed as an assumption, not a question. This poststructuralist writing¹⁴ 'borrows' from the fields of its own textuality the structuring form of an ontological assumption: 'what is' 'is' 'textuality: an isomorphism with 'the psychic', 'subjectivity', 'language', 'process', 'embodiment', 'inscription', 'system', 'signification'.

Within the context of an 'epistemic transformation' the 'rules' of discursive

¹⁴ In the relationship between the 'post'modern episteme and poststructuralist theory i follow the writing of Huyssen (1984) who says that poststructuralism becomes 'post'modern as discourse writing/theorising the historical moment marked 'modernism'.

formation admit statements constituting textuality as the 'characteristic form' of both entities and relationships, processes and products, the social and the individual, nature and the social, knowledge and power. In this context 'clinical psychology' becomes those texts realising discourses which constitute 'human subjectivity', 'mental disorder', 'normality', 'pathology' in particular ways, as 'legitimate knowledge'.

Simultaneously, criminology and criminal law also become those texts realising discourses which constitute 'human subjectivity', 'crime', 'normative order', 'responsibility', 'intention', 'choice' in particular ways, as 'legitimate knowledge'. And jurisprudence becomes those texts constituting the 'meaning, truth, and origin' of Law, the 'authority' of 'political power' and legal 'knowledge' in particular ways as 'legitimate knowledge'.

These 'transformations' in 'fields' of legitimate knowledge, told as 'history' of the relationship between psychology and the Law through the modern episteme, implicate particular transformations in the practice of 'responsible response' to the call of woman at the site of a co-articulation of legal and psychological discourse.

In the first instance the boundary between law and the Law becomes a demarcation of a difference between the law and the Law. The law subjects texts to the history of phallogentrism and patriarchy: the history of the symbolic order, and its political co-respondent authorised by the 'Law of the Father'. The Law marks a space in which the crimino-legal complex (Young, 1996) subjects political subjects to the authority of political power and constitutes them as legal subjects: a space where subjects are

subjected to the laws of the State authorised by master narratives legitimating legal knowledge. In writing of the law, the 'responsible response' of this writing regards the relationship between the Law of the Father, phallogentrism and patriarchy and 'the woman writing' as an ethical relationship in which 'exclusion' and 'silence' constitute a form of violence. As such in the writing of this thesis there is an inevitable 'inclusion' and 'articulation' of the Law of the Father as an ethical practice of response: an inescapable¹⁵ complicity. In writing of the Law, this 'responsible response' regards the relationship between the authority of the State and the 'woman writing' as another ethical relationship in which 'exclusion' and 'silence' constitute a form of violence. In the readings which follow, the authority of the State is included and articulated as an engagement with the Law at the site of a particular legal text and a refusal to question the State's authority over penal sanction.¹⁶

In the second instance the boundary between psychology and the Law becomes a demarcation of a difference in discursive practices legitimating discourse as 'knowledge'. Psychological discourse is legitimated through privileging scientific methodology as a process through which 'objects' in 'reality' appear. Legal discourse is legitimated through privileging logical argument and reason as processes through which the 'truth' of 'empirical realities' appear. Within 'legal discourse', scientific methodology is legitimated in criminology. Within 'psychological discourse' logical argument and reason are legitimated in the practice of 'debate' over

¹⁵ oedipal?

¹⁶ The possibility of 'inclusion' and 'articulation' is delimited by the relationship between 'the woman writing' and the law/Law. The law/Law not only subjects the woman writing to the Law of the Father, but also to the laws of a State historicised by patriarchy. In this context, neither the law, nor the Law, could be included or articulated on their own terms. They are 'out of context' in as much as they are read from a position 'out of place/displaced'. To articulate or include 'out of context' necessarily involves a decision that cuts: violence. The forms of 'articulation' and 'inclusion' practised in this thesis are more like a gesture towards an ethical relationship than its realised possibility.

'definition', 'conceptualisation', 'methodological-practice', 'diagnosis' and 'measurement'. Within 'legal discourse' the legal subject is constituted through the privileging of 'reason'. Within psychological discourse the psychological subject is constituted through the privileging of 'reason'. So, the 'difference' is deferred by 'commonality'.

At this moment in the history of the relationship between 'psychology' and the 'Law', where both are textual and there is no 'pure difference' between them, 'the relationship' is an impossibility at the site of blurred boundary between them: the 'one' depends upon the 'other', the logic of the supplement is transformed. Where they co-articulate their 'difference', like 'sexual difference' is a matter of social power relations. As a matter of social power relations where the 'one' and the 'other' are constituted in relation, the 'other' is supplementary. It is in the sense that the history of psychology's relation with the law is a history of a supplement, that the social power relationship constituted between them is one in which the supplement is subjected to the laws of the 'one'. So 'psychology' as 'supplement', at the moment of transformation of the modern episteme, becomes subjected to the Law while simultaneously enabling the Law to legitimate the authority of political power, the State.¹⁷ In the following readings the relationship between the Law and psychology will be read as a social power relationship in which psychology is subject to the effects of the privileging of logical argument and reason over scientific methodology, the effects of 'speaking within' a text which does not realise the legitimacy of 'the speaker' yet depends on that 'spoken' to enable its function: judgement (justice?). In 'response' to the transformation of the logic of the supplement the following readings will 'regard' psychology in relation to

¹⁷ Such is the 'social power' of psychology: that it enables the Law/law to authorise political power.

the Law, as enabling the verdict through iterations from 'legitimated' psychological texts of 'knowledge', subject to the delimitations of 'what can be said'¹⁸ within the context of the social power relations that constitutes the difference between psychology and the Law.

At the moment in history where social power relations constitute the difference between psychology and the Law, their 'commonality' in privileging 'reason' becomes a site at which the possibility of 'unity, identity' through the 'blurring of boundaries' between 'territory' is displaced by questioning the 'common privilege': reason. In 'response' to the transformation of the binary relationship between 'unity' and 'multiplicity', 'identity' and 'difference' effected through this 'displacement' the following readings will question 'reason', in particular through articulating similarities and differences in the constitution of the 'legal' and 'psychological' subject, and most particularly through (foot)noting the implications of these constitutions for the social power relations which constitute 'sexual difference' through the phallogentric positioning of 'woman' in relation to 'man': as the 'same' as man, his 'other', or his 'complement'.

In as much as this 'history' of relationship between psychology and the Law is a narrative, it appears as 'a closed segment, with beginning and end'. Like any other narrative it follows a moral trajectory, imposes a temporal order, and makes coherence out of the chaotic. As an ending for this history, I write into readings of the judge's summation in the case of R v Lisé Turner.

¹⁸ Or 'not said', despite protest...(cf. Grisso, 1993; Gudjonsson, 1996a; Matarazzo, 1990).

Chapter Six

Reading judgement I: A matter of Law

To be just, the decision of a judge, for example, must not only follow a rule of law... but must also assume it, approve it, confirm its value by a reinstating act of interpretation, as if nothing previously existed of law... Justice, as law, is never exercised without a decision that *cuts*... (Derrida, 1990, p.961-2).

This chapter reads the summation by the judge in the case of *R v Lisé Jane Turner* for its constitution of subjectivity and its delimitations of psychological discourse. My reading of this text responds at a site where the 'other' woman is constituted through 'a body of legal narratives'. Such a reading might make visible 'the judgement' of Laws' processes as they constitute a verdict through a legal, but implied, doctrine of Woman in criminal Law. Laws' narrative processes reconstitute the social power relations of sexual difference through 'her' judgement enacted as an application and enforcement of legal rules, a response to a question addressed to a subject whose 'right to speak' is mediated by 'representation'. In this process of response *a woman* comes to embody the legal doctrine of Woman. In as much as 'she' embodies the doctrine Woman 'she' also is made a legal and pathological body: an embodied subject of both the Law and the laws of psychological discourse. This chapter then becomes a questioning of the ethics of judgement through an attempt to flesh the constitution of the psychological subject 'inside' the law of judgement.

The summation by the judge occupies a particular place in the conduct of the case and in the process of the Law: it is the judicial direction to the jury. In all criminal cases, the judge controls the conduct of the trial. The trial reaches its conclusion with the judge's direction to the jury in which the judge "instruct[s] the jury as to the legal rules which they should apply in

arriving at their decision” (Rush, 1997b, p.41).¹ In this ‘direction’ the judge will indicate the nature of the arguments presented by counsel for the defence and the prosecution and draw particular attention to what evidence will constitute ‘proof’ according to the legal definitions that apply to the crime. In effect, the judge’s direction to the jury is a reconstruction of the evidence and arguments presented to the court by the person who has the final authority to say what does or does not meet the requirements of legal process. This reconstruction is a narrative, a story of the trial evidence and arguments told from a particular point of view. It cannot be a ‘neutral’ retelling since it both frames all that proceeds it within the context of legal doctrine, and also functions to instruct with the force of legitimacy embodied in the judge’s voice. In each case a judge’s summation reinterprets both the texts of the trial and the texts of Law’s doctrine. The endpoint of this directional narrative is the verdict “or saying (*dict*) of the truth (*ver*)” (Rush, 1997b, p.41). This ‘endpoint’ as ‘goal’ is not achieved within the performance of the narrative: it is achieved by the jury under the ‘instruction’ of the narrative. As such the narrative implies its endpoint, tending towards its goal rather than reaching it. The judge’s direction to the jury is therefore crucial because it is *the* narrative which implies a particular and legitimate judgement as its endpoint.

The following text of the judge’s direction to the jury will read the text for its ‘instruction’ on legal doctrine, its practices of exclusion and inclusion, and its constitution of both the ‘accused’ and the ‘jury’ as legal subjects, so as to make the ‘direction’ of its narrative endpoint explicit and also to draw attention to the legal discourse through which the narrative is performed.

¹ The work of Rush (1997b) and Robertson (1996) are cited from time to time throughout the following chapters. These citations cannot acknowledge the extent to which I am indebted to their work for my reading of the Law. Their influence extends ‘beyond’ citation.

... this case is full of tragedy for practically everyone connected with it. It would be impossible for any human being to sit, and having heard all that has transpired in the last ten days, not be in some way emotionally involved in what has been described. It is important that you as a jury eliminate matters of emotion from your mental processes when you are considering your verdict. You must bring in your verdict dispassionately, according to law, without your being influenced by matters of prejudice, sympathy or other emotional matters which affect your reasoning process (p.210).

Reading this quote as the opening of the judge's narrative, it is noticeable that specific legal doctrines are not invoked. However, the passage constructs a particular version of personhood based on assumptions about 'persons' which inform legal doctrines.

The reference to tragedy identifies the events as having a particular narrative form (White, 1987). According to Mary Gergen (1988) tragedy takes the form of a "story of the rapid downfall...A positively evaluated stability narrative is followed by a rapidly descending regressive narrative" (p.100). This particular narrative form is commonly understood as evoking emotional response, in particular a 'sympathy', perhaps even 'pity' for the 'one' who is brought down. The judge explicitly constitutes the jury as having an emotional response as a result of the form of the narrated events. He then says that this emotional response must be excluded from the processes through which they reach their 'judgement'. Through this he constitutes a 'legal standard' as a framework for the process of judgement. This practice of exclusion produces a distinction between reason and emotion which is fundamental to the practice of 'Law': the truth is spoken 'dispassionately'. Matters of emotion must be eliminated because they can 'influence' the reasoning process. While emotion and reason are separated they are also in a relationship where emotion damages reason. In this relationship between reason and emotion, reason is the privileged term. This privileging reiterates an historical trajectory of a binary relationship

constituted so as to position 'emotion' as 'lack' of reason. In feminist texts, the history of this relationship has been written to reveal the association of reason and masculinity, emotion and femininity (Flax, 1983; Gallop, 1982; Harding, 1987; Keller, 1985). There may be ways of speaking, as in psychological discourse, where emotion appears as 'more than' a lack, as a content 'seen', though never simply 'in its own right'. Here, however, if the truth is to be spoken (a verdict is reached: a judgement made), it must be done through reason not emotion. So, even if 'emotion' is not simply 'a lack' elsewhere, it is excluded from reasonable 'truth' in the practice of the Law. If the endpoint of this 'tragedy' is judgement, then the judgement is made moral by the exclusion of the emotion which the 'tragic events' evoke. Judgement, in Law, is reasoned moral response. This construction of judgement, reason, emotion and morality also constitutes the jury as 'legal subjects'.

Initially the judge constitutes the jury as 'human beings' who are unable to listen to a tragic narrative without emotional response. The rest of this narrative fragment specifies that these 'human beings', as legal subjects charged with the responsibility to reach judgement, are obliged to eliminate a characteristically 'human' response. As a matter of Law, the judge constitutes the jury as subjects who can apply moral reason without reference to emotion.

It goes without saying that this, of course, is not only a tragic case but a very important case. It is important of course from the point of view of the accused. It is also important from the point of view of the public and the law, not to mention if one likes the parents of the children who have sadly been killed or died or nearly been killed (p.211).

This fragment relies on an assumption that narratives of the events have particular moral importance and they are told from particular points of view.

Point of view is linked to the moral endpoint of the narratives, which in this case is the judgement of a particular series of events. The judge specifies and separates different 'points of view'. The 'point of view' of the accused is mentioned first, and separated from other points of views through the rhetorical device *it goes without saying* and an association with emotional response of 'the tragic'. Three other points of view are specified: those of the public and the Law and the parents of the children. The 'point of view' of the parents is separated from the point of view of the public and the Law through the rhetorical device *not to mention if one likes* and an association with emotional response, 'sadly'. The rhetoric of the separations is inclusive, but the status of the inclusion is conditioned by the 'special case' of both the accused and the parents² and their association with emotional response. The status of 'special, emotional cases' works to privilege the points of view of the public and the Law, as the 'ordinary, reasonable cases'. The relationship between the public and the Law is one of both accountability and power; the Law is accountable to the public for the enforcement of moral codes.

In effect this fragment becomes a direction to the jury on the particular position from which they are to interpret the importance of the case: the point of view of the public embodied in the Law.

... questions of law are the responsibility of the Judge. I must therefore ask you to accept what I say as to the law... It equally applies that you are the sole judges of fact, and therefore you must not let me influence you over matters of fact if what I say does not accord with what you say, because just as the law is my responsibility, the facts are yours and yours alone (p.211).

In this fragment the judge's instruction directs the jury in matters of responsibility within the process of judgement: of deciding whether or not the accused is responsible for a criminal act. That is, the judge tells the jury

² Not to mention, if one likes, the accused as parent.

what it is that he is responsible for and what it is that they are responsible for in the process of attributing criminal responsibility. He constitutes three subject positions in this process: the subject responsible for addressing questions of Law, the subject responsible for matters of fact and, more implicitly, the subject subjected to their judgement of the facts.³ These subject positions are constituted through the separation of questions of Law and matters of fact in the context of the purpose of legal inquiry. His own position is that of the subject responsible for questions of Law.

The 'questions of Law' to which the judge refers are the principles which determine criminal responsibility and the knowledge of the practices through which those principles are applied to specific cases. In criminal Law, the principles which operate as criteria for determining criminal responsibility are known as *mens rea* and *actus reus*. *Mens rea* refers to the mental conditions of responsibility and *actus reus* refers to the behavioural conditions of responsibility (Rush, 1997b). These criteria constituted the subject of criminal responsibility as a subject which has both a mind in which the 'mental conditions of responsibility' are present and body which authors the 'behavioural conditions of responsibility'. In principle then, both mental and behavioural conditions of responsibility must be met for criminal responsibility to be attributed. How these conditions are met is stipulated by legal doctrines which specify the mental and behavioural conditions that must be present in the evidence of the events in question for the accused to be judged responsible for the consequences of the events. In relation to general principles, then, by claiming responsibility for the Law, the judge claims responsibility for determining which doctrines

³ 'The subject subjected to their judgement' is more like the object of legal inquiry than a 'subject' in the sense of one with 'rights to speak within a discourse'... this subject position is constituted as an effect of the positions of judgement. The practice of judgement requires a subject of judgement.

satisfy the criteria of *mens rea* and *actus reus* of murder in this case.

The judge also claims responsibility for knowledge of the practices through which the principles and their doctrines are applied to a specific case. This knowledge is the second 'dimension' of his responsibility for 'questions of Law'. It is knowledge of the legal standards by which evidence is judged as 'proof' of criminal responsibility. The judge, then, has responsibility for determining which standards the evidence must meet to be regarded as 'the facts' which meet the criteria established by the doctrines of *mens rea* and *actus reus* of murder in this case. By taking responsibility for questions of Law the judge takes responsibility for saying what mental and behavioural conditions are conditions of criminal responsibility according to legal rules, and also what standards of proof must be applied to evidence for it to be regarded as 'facts' which demonstrate the presence or absence of the mental and behavioural conditions of criminal responsibility.

The second subject position constituted through the separation of questions of Law and matters of fact is that of the subject(s) responsible for deciding which of the evidence presented to the court meets the standards of proof of a 'fact of the case' and whether or not that 'fact' meets the criteria set for criminal responsibility. This is the position which enables the jury to legitimately and collectively judge the evidence and make a judgement about criminal responsibility.

The judge constitutes the jury as 'sole judges of fact'. However, it is clear that his jurisdiction over the standards by which evidence is to be judged 'fact' directs the judgements of the jury. While the judge instructs that the jury "must not" let him "influence" them in "matters of fact", this instruction is

constrained only to the matter of judgement, not the process through which the judgement is made. The judgement is made through the process of applying the criteria and standards, over which the judge exercises responsibility, to the evidence. Therefore, subjects constituted as 'jurors' are constrained to make their judgements according to criteria set by the judge in his position of responsibility for questions of Law. In an arguably 'common sense' understanding of 'influence' the judge not only 'influences' but actually controls what may be regarded as a matter of 'fact'.

The third position implicitly constituted in this fragment is the position of the subject about whom judgement of criminal responsibility is made. Through directions of the judge in matters of Law, the question which is put to the jury is 'does the defendant, through the mental and behavioural conditions evident in the facts of the case, conform to the image of a murderer inscribed in the legal definition of murder?'. This question implies that the defendant's mental and behavioural 'conditions' at the time of the alleged offence become the object of legal inquiry. Legal inquiry proceeds through rules of Law over which the judge is arbitrator.

So, through the separation of question of Law and matters of fact the judge constitutes three subject positions. His own position as responsible for the Law is the position which enables him to legitimately control the process of 'legal' attribution of criminal responsibility. The jury's position enables them to make judgements of matters of fact within the constraints of questions of Law which are themselves not their responsibility. The defendant's position is more like the position of an object of inquiry than a 'subject position' in the sense that it does not involve any 'rights, duties or obligations' in relation to the process of judgement.

The separation performed in this fragment also works to privilege Law over fact. 'Facts' are determined by judging evidence according to standards and criteria set by the Law. That is, the Law provides the organising structure which allows the evidence to be judged by establishing the rules which the jury should apply. This structure organises knowledge of criminal Law into criteria and doctrines as well as organising the specific practice of 'legal judgement' into the application of particular standards. The particular standards and doctrines which apply in this case are specified by the judge in the fragments which follow.

[In deciding the facts, what evidence to accept wholly or in part] ...use your common sense, and in this regard I do not want you to think when I said take out of your mind anything you have heard about this case when you go into the jury-box that you cut out of your mind your whole experience as men and women of the world, because that is what I mean by applying your common sense (p.212).

In this fragment the judge instructs the jury that the standard by which evidence is judged to be 'fact' is 'common sense'. This standard is a matter of Law. In Law 'common sense' is not specifically defined, yet it is used consistently to evoke a 'sense', an understanding, of a kind of 'reason' which is held in common by humans. This 'commonly held' reason is an effect of the notion of subjectivity constituted through the criteria of *mens rea* and *actus reus* which determine criminal responsibility. This notion of subjectivity constructs the person as a being with both reasoning mind and acting body. Therefore not only do human beings, both jury and accused, share the faculty of 'reason', and therefore hold 'sense' in 'common', but they also subject the body to the governance of reason. This relationship between reason and action, mind and body, is clearly articulated in the doctrines derived from the criteria of *mens rea* and *actus reus*. The doctrines which the judge specifies as critical in the judgement of evidence

in this case also appear in fragments below.

So, when the judge instructs the jury on the standard of 'common sense' he is⁴ evoking the notion of 'reason' held in 'common' by those subjects positioned as jurors or accused, who are all 'human beings' with both mind and body, who both reason and act. This usage is evident in his elaboration of the 'sense' in which the jury is to understand the standard of 'common sense'. In this elaboration the judge refers to the possibility that jury members could (should?) manipulate their 'minds' in such a way as to 'cut out' anything they had heard about the case outside the context of the legal process. He also refers to the grounding of 'common sense' in the jurors 'whole experience as men and women of the world'. This direction may then be read as an instruction to control the mind, to 'cut out' of the mind, that part of their experience as men and women in the world which is concerned with hearing evidence (gossip? innuendo? opinion?)⁵ outside the context of the legal process. So, in specifying 'common sense' as the standard by which evidence is judged, the judge informs the jury of the means by which they should arrive at a judgement. Simultaneously the

4 he is *in fact*
 as he is telling them
 not to take into account that he was
in fact.
 and i would like to know
 whether
 (in fact)
 he meant for us
 in our common sense
 to ignore his standard
 of common sense
 as matter
 of fact
 over which he claims no jurisdiction.

5 hearing evidence (gossip? innuendo? opinion?) outside the context of the legal process.
 hearing evidence (character witnesses? police testimony? expert testimony?) inside the
 context of the legal process.

?

subjects of the Law are constituted as reasoning subjects, with control over their mind, 'commonality' of experience of the world, and therefore, capable of 'common sense'. The 'commonality' and 'reason' implied in the notion of 'common sense' are attributed to all legal subjects. The accused is also 'subject' to common sense. Thus the judges' direction positions both jurors and accused as 'human beings' with both mind and body, who both reason and act. In this position all legal subjects are judged 'responsible', and some are charged with responsible judgement, through the same criteria of *mens rea* and *actus reus*: subjects as a matter of Law. Thus the process of judgement consistently privileges the 'reason held in common by human beings' as both the standard by which judgement of evidence is performed and the criteria which establishes 'responsibility'. This process 'cuts out', by reason, any evidence which does not accord with the 'commonalities of experience' given by reason. So if this process of judgement is read as a process of exclusion, then the 'sense' common to both the standard and the criteria critical to the process of judgement must exclude any 'sense' which is not legal: which is not governed by rules of Law. This both privileges 'reason' and constitutes the legal subject, in mind and body, reason and action, as unified by reason. The specific constitution of the unity which produces a 'responsible legal subject' is articulated through the doctrines of Law which the judge later directs the jury to use to arrive at a judgement of criminal responsibility.

...one of the sad facts is that a great deal is not known about the processes of the mind, the brain and the mental processes and the makeup of individuals. You have to bring in your verdict on evidence. There is no certainty in the medical evidence but what you have heard is the opinions of well qualified, highly trained experts (p.213).

In the previous fragment the judge directed the jury to use the standard of

'common sense' in their judgement of the evidence as fact as a matter of Law. In this fragment he specifies that one 'fact' that is already established is that the 'processes of the mind' remain largely opaque to knowledge. He asks the jury to accept as a matter of Law⁶ that testimony about 'processes of the mind' is 'opinion' which cannot be judged as 'matter of fact' by any standard whether it is common sense, scientific practice, formal logic or anything else: there can be no certainty about processes of the mind. Expert testimony, as evidence, is therefore excluded from the body of evidence which is subjected to the standard of 'common sense' to be judged a 'matter of fact'. When the judge reminds the jury that they must 'bring in [their] verdict on evidence' he is evoking the previous instruction for them to judge the evidence, according to common sense, to decide which evidence is a 'matter of fact'. Knowledge of processes of the mind, appearing in the trial as competing expert opinions, cannot be subjected to such a judgement.

It may seem somewhat contradictory that the criteria of *mens rea* and *actus reus*, which enable 'common sense' as the standard by which evidence is judged, depend on 'knowledge' about processes of the mind (as reason governing action and reason held in common), while 'knowledge' about processes of the mind is simultaneously held to be opaque, lacking in certainty, and excluded from the realm of 'fact'. This apparent contradiction can be read as an effect the specific separation of matters of Law and matters of fact. The criteria, *mens rea* and *actus reus* are matters of Law, legal knowledge, not matters of fact. Therefore any other knowledge of the 'processes of the mind' are neither legal knowledge nor matters of fact. They

⁶ This request is by implication. The judge has jurisdiction over matters of Law, so that when he says 'this is a fact' he is evoking the notion of 'fact' as a matter of Law, and just as he has already requested that the jury accepts what he says about matters of Law, so here he requests that they accept this constitution of 'fact' as a matter of Law.

must be treated as no more than opinion, no matter what standards they meet as 'facts' outside the institution of the Law. It is possible to conclude then that the criteria legitimated by legal knowledge as the grounds for the judgement of both criminal responsibility and facts of the matter are the only criteria by which 'knowledge' is legitimated in the context of legal process.

Use your common sense by all means in determining what evidence you accept and what evidence you reject, but do not under the guise of common sense substitute your own evidence (p.214).

This direction to the jury to use common sense as a standard but not to substitute 'their own evidence' for 'common sense' performs a separation between 'common sense' and 'evidence' such that common sense determines what is fact, from evidence but does not, itself, include evidence. In as much as 'evidence' is understood as a version of an 'empirical event' (something that has happened in the world) then common sense does not include empirical content. So, if common sense excludes empirical content (that is, it does not include any 'evidence' which can appear as 'common sense') on what grounds does it determine what is an empirical event, a fact? In effect, the separation of common sense and evidence implies that the standard of common sense is constituted as 'pure reason': reason without experience of empirical events.

How then is it possible to read the judge's earlier admonishment to the jury to apply their 'whole experience as men and women' as an application of 'common sense' to the evidence? If 'common sense' excludes experience of empirical events then this admonition to include 'experience' cannot be interpreted/understood as an admonition to include 'experience of empirical events'. Rather, it can be understood as an admonition to regard common sense as the 'reason' which is 'common' to our experience as human

beings but is not derived from that experience. It therefore becomes necessary for the judge to direct the jury not to substitute evidence for common sense since as a 'matter of Law' they must not include their own experience of 'empirical events' within their understanding of their 'whole experience as men and women of the world'.

... the onus of proof... rests throughout on the Crown... It is a continuing burden so that at the end of the day you must say "Has the Crown proved that the crime has been committed by this accused?" (p.214).

In this fragment the judge instructs the jury on the matter of burden of proof. This instruction signals a shift from matters of Law concerned with the judgement of evidence as fact to matters of Law concerned with the judgement of facts as proof of criminal responsibility. That the 'burden of proof' rests with the crown is derived from a number of legal standards which are applied to the evidence to address the question of proof. What is to be proved is the question of criminal responsibility, in this case, is the accused responsible for actions which led to the death of another. So, the evidence must show that the death occurred and that it was a consequence of the actions of the accused. For the evidence to be proof of criminal responsibility it must first be judged 'fact' though the standard of common sense. Facts must then meet standards of legal and evidential proof. Legal and evidential proof are grounded in the assumption that the accused is innocent. The facts must then fit the definition of the crime as it is given by criminal Law and also be sufficient to either support or undermine the assumption of innocence. The 'fit' between 'facts' and 'definition' is referred to as legal proof and the sufficiency of evidence to support or undermine the assumption of innocence is referred to as evidential proof. To fulfil the burden of proof in the case of murder the Crown must present evidence

which in the first instance is judged as 'fact', and is then judged as proof that the accused did commit the acts which caused another's death.

The degree to which [the crown's case] must be proved is beyond reasonable doubt. Those words mean really no more and no less than what they say. They have been bandied about a bit in the last 10 or 20 years as a matter of discussion really, but if you simply analyse them they are words in common everyday use - beyond reasonable doubt, no more, no less. If at the conclusion of the case you are left in a state of doubt which you regard as being a reasonable matter the Crown has failed to prove its case. If, however, any such doubt is one which you say is fanciful and is so far fetched that reason rejects it then the Crown has proved its case. The obligation required by the law is not to prove to mathematical certainty because in almost all cases of crime obviously that just cannot be done. It is really to get you to a stage where you can say "I am satisfied beyond reasonable doubt that the crime was committed by this accused" (p. 214).

Having established that the burden of proof rest with the Crown, the judge proceeds to instruct the jury in the matter of the standard of proof. To make the judgement that the Crown's case shows that the crime was committed and that it was committed by the accused, the jury must use the standard of 'beyond reasonable doubt'. As a matter of Law this standard is undefined, as is the standard of 'common sense' (Rush, 1997b). 'Beyond reasonable doubt' requires that, on the basis of the facts established through judging evidence, the accused's criminal responsibility is more than just likely.

When the judge instructs the jury on the standard of 'beyond reasonable doubt' he is using the notion of 'reason' embedded in the constitution of legal subjects through the criteria of *mens rea* and *actus reus*. This usage is evident in his elaboration of the 'sense' in which the jury is to understand the standard of 'beyond reasonable doubt'. In this elaboration the judge refers to the words of the standard as having been subject to discussion but as having 'common everyday use' through which they are given meaning. This notion of 'commonality' in usage, and in meaning, has resonance with

the notion of 'common sense' used as the standard of judging evidence, at least to the extent that both rely on the assumption of 'sense' held in 'common'. In further elaboration the judge specifies a relationship between a 'state of doubt', a 'reasonable matter', and the 'fanciful' and 'far-fetched' which 'reason' rejects. This relationship relies on the separation of the 'reasonable' and the 'fanciful' without specifying the 'character' of either. The notion of mind embedded in *mens rea* and assumed in the standard of 'common sense' is again assumed in this relationship. 'Mind' has 'states' of doubt and certainty which are recognisably 'reasonable' or 'fanciful'. In accepting the 'reasonable' and rejecting the 'fanciful', subjects charged with the duty of judging criminal responsibility can determine 'proof' in evidence. The 'state of certainty' which is 'beyond reasonable doubt' is further elaborated in the comparison which the judge draws between legal and mathematical 'proof'. Mathematical proof requires a standard of certainty to which the Law does not aspire. This comparison may be read as a reiteration of the exclusion of other systems of knowledge, of fact and proof, from the legal process. Just as 'facts' established by scientific method do not have any privileged standing as anything more than 'opinion' in the Law, so standards of 'proof' that are required by other systems of knowledge have no standing in the Law.

In this case there is the defence of insanity and I have arranged to have made available to you a copy of subsections (1) and (2) of section 23 of the Crimes Act which sets out the definition of insanity. The first subsection says as a matter of law - "Everyone is presumed to be sane at the time of doing or omitting any act until the contrary is proved". Now in that respect what this means is this. The onus of proving insanity is on the accused... If you are not satisfied that these crimes were committed by the accused then the verdict is not guilty and that is the end of the matter. If you are satisfied beyond reasonable doubt that the crimes were committed by the accused or any of them, then you must consider the defence of insanity that has been raised by the accused. If you are then of the view that it is more probable than not that the accused was insane your verdict will be not guilty on the grounds of insanity. If, however, you are not brought to a stage where you

consider it more probable than not that she was insane at the time your verdict would have to be guilty. Now there is a different standard of proof required of the accused. I told you that the Crown must prove its case beyond reasonable doubt - so it does.⁷ The insanity issue on which the burden of proof is on the accused is one of a lesser standard. It simply must get you to a stage where you consider it more probable than not, in other words it is not beyond reasonable doubt at all (p.215).

In this fragment the judge instructs the jury on matters of Law related to the defence plea of insanity. He begins by reminding the jury that the defence case pleads that the accused was insane at the time of the murders and continues by directing them that as a matter of Law it is assumed that the accused was sane. Therefore, as the judge directs, the burden of proof of insanity rests with the defence. In his summation the judge does not, however, provide any definition of insanity⁸ other than that it is a possibility only after the accused has been judged to have committed the act.

Therefore, insanity is proved once the defence proves that the criminal responsibility of the accused for the deaths is somehow reduced. Given this reading of 'insanity' it follows, as the judge directs, that as a matter of Law the first judgement to be made is the judgement of responsibility for the act. If the accused is found guilty, then it must be proved that some mental condition existed which prevented the accused from being fully responsible. As each judgement is given, in the proper order of judgement, the consequences are also given. As a matter of Law, the accused is found to be either innocent or guilty of responsibility for the act. To judge, the jury must be satisfied that the proof is made on the basis of standards that the

⁷ In general, throughout this chapter, I have paid little attention to readings of rhetoric because of a focus on reading legal assumptions, criteria, standards and doctrines. However, the rhetoric used in this sentence has caught my attention. As I read this sentence I recognise two possible 'interpretations' of the phrase 'so it does' in relation to 'I told you that the Crown must prove its case beyond reasonable doubt'. In the first reading the phrase functions as an affirmation of the judge's control over matters of Law. In the second, the phrase functions as judgement of the crown's case: 'so it does' prove its case.

⁸ The judge does provide the jury with copies of subsections (1) and (2) of section 23 of the Crimes Act. Subsection (1) specifies the presumption of sanity, and subsection (2) provides a definition of insanity as "natural imbecility or disease of the mind" (Robertson, 1996, p.64).

facts must meet. The judge instructs the jury that in the case of proving insanity the standard of proof is a lesser standard than in the case of proving responsibility for the act. This lesser standard raises the question of how the notion of insanity inscribed through legal assumptions is related to the notion of criminal responsibility. It is apparent that the judgement of both as proven or not will result in a verdict of either guilty or not guilty. So the consequences of the judgement of criminal responsibility and insanity are articulated through an equal relationship, constituted in a sequential temporal order. The evidence on which the judgements are made, however, is articulated through an unequal relationship. In the case of insanity it is not possible for the jury to judge the evidence as 'fact', as the judge has already directed them that knowledge of the human mind is established through a different set of standards than that which apply to legal knowledge. Therefore, the requirement for a 'lesser standard' of proof is related to the exclusion of other knowledge systems. As a matter of Law, then, the judge later provides the jury with a set of conditions that must be met for the opinion of expert testimony on the accused's 'mental conditions' at the time of the murders to be judged as evidence proving insanity. These conditions are derived from legal doctrines based on the criteria of *mens rea* and *actus reus* and will be 'read' in relation to later fragments.

The particular 'lesser standard' of proof which the judge instructs the jury to use in the judgment of insanity is the standard of 'balance of probabilities'. As with the standard of common sense applied to judge evidence and the standard of reasonable doubt applied to judge criminal responsibility the standard of balance of probabilities is not specifically defined. However, in his direction on the matter of the previous standards, the judge elaborated a particular sense of their meaning through the use of other terms. In the

matter of the standard of probabilities, the judge's elaboration provides a reading of 'balance' through use of the terms 'more or less', but does not provide an elaboration of 'probability' through the use of any other term.

The standard of balance of probabilities is the last of the standards of judgment introduced by the judge. As a matter of Law these standards are applied to the evidence in a process of judgement which has as its goal, or end point, the verdict or 'speaking of the truth' where 'truth' itself is understood as a representation of the particular empirical events which show the accused to be either guilty or not guilty of criminal responsibility for the death of another. As such, these standards can be read as the 'tests' which evidence must pass to be judged 'knowledge of the crime' as a matter of Law, and the process of judgement can be read as a process of constituting legitimate 'legal knowledge'. This process of judgement has implications for the legitimacy of psychological knowledge of insanity presented as opinion through 'expert testimony'.

As opinion it is a matter of Law that psychological knowledge, as it is represented in expert testimony, cannot be legitimated as fact and is not put to any standard to be judged fact. Throughout the process of judgement psychological knowledge maintains its status as opinion. Other evidence may be subject to the standard of 'common sense' to be constituted as facts which represent empirical events and these then may be subject to the standard of 'reasonable doubt' to constitute a judgement of the accused's criminal responsibility for the death of another. However, psychological knowledge will only be presented as opinion where the defence presents a plea of insanity and the burden of proof is shifted from the Crown to the defence. In this case, a judgement of the accused's criminal responsibility

for the death of another is made by applying the lesser standard of balance of probabilities such that the opinion is judged to show that the accused was more or less likely to be sane at the time that the crime was committed. If, on the balance of probabilities, it is more likely⁹ than not that the accused was insane at the time of the crime then a judgement is made that the degree of criminal responsibility is reduced to such an extent that the accused is judged not guilty of the crime.

In as much as the standard of balance of probabilities applied to the opinion of insanity produces a degree of certainty in answer to the question of whether or not the accused was insane at the time of the crime, then the standard can be understood as a legal 'test' of knowledge legitimacy. Evidence leading to a judgement is therefore legitimated as meeting the legal standard of knowledge in and through the same process as other evidence is legitimated as knowledge. The question of what criteria are to be used to judge the opinion as showing insanity is constituted in legal doctrines derived from the criteria of *mens rea* and *actus reus*. Therefore, opinion of insanity needs to show that it is more likely than not that at the time of the crime the accused was suffering from a defect of reason such that the relationship between *mens rea* and *actus reus* is abnormal. In effect, the testimony of psychological experts is put to a test of whether or not it shows that the accused was more or less likely to be suffering a defect of reason at the time of the crime. Where the judgement is guilty then the Crown's expert testimony becomes the psychological knowledge which has passed the legal test and is judged as showing insanity: a legitimate

⁹ Rush (1997b) elaborates the relationship between the standard of 'reasonable doubt' and the standard of 'balance of probabilities' as a matter of greater and lesser standards respectively. However, the only occasion in which Rush elaborates a reading of 'probability' through use of other terms is in relation to the legal doctrine of recklessness where he uses the term "likelihood" (p.292) as synonymous with 'probability'. My own reading of 'probability' as a matter of legal standard is drawn from Rush's usage.

knowledge of insanity as a matter of Law. Simultaneously, as a matter of exclusion, the defence's expert testimony is judged to have failed to meet the legal standard of knowledge of insanity. Similarly, where the judgement is not guilty then the defence's expert testimony becomes the psychological knowledge which has passed the legal test and is judged as showing insanity: a legitimate knowledge of insanity as a matter of Law.

Simultaneously, as a matter of exclusion, the Crown's expert testimony is judged to have failed to meet the legal standard of knowledge of insanity. Therefore, the process of judgement acts to legitimate some psychological knowledge as legal knowledge while other psychological knowledge is judged as failing to pass the test as legal knowledge.

Since the doctrines which set the criteria for establishing insanity are derived from *mens rea* and *actus reus* it might be possible to expect that psychological knowledge constituting a similar notion of subjectivity would be more likely to be judged legitimate knowledge than psychological knowledge which constitutes the subject differently. This expectation is considered in the following sections which read the judges direction on the legal doctrines to be applied to the evidence in this case.

... the Crown must prove for the purposes¹⁰ of this trial that in relation to the murder charges the three children were killed by the unlawful act of the accused with the intent to cause death of the child or with the intention to cause bodily injury known likely to cause death and being reckless whether death ensues or not... Likewise, in relation to the two charges... of attempted murder, the Crown must prove that she first of all had the intention to kill and in those cases it must be an intention to kill and that she did some act so closely related to it as to have started on that purpose and to have started on that act (pp. 215-216).

In this fragment the judge directs the jury as to the specific criteria by which

¹⁰ From this fragment it is apparent that the 'trial' has a 'purpose' and as an act (of judgement) will cause consequences. I can't help but notice that this 'structure' of the trial as act, is similar to both the structure of the crime as act, and to the structure imposed by narrative on the chaotic events of lived experience.

the facts can be said to show that the accused was criminally responsible for murder and attempted murder. I have already argued that 'defect of reason' is proved when evidence is judged according to doctrines which constitute *mens rea* and *actus reus*. The following reading of the judge's direction to the jury on the specific criteria of judgement is focused on specifying the construction of 'defect of reason' which is constituted as legitimate knowledge of subjectivity, in the sense of a particular construction of the person, as an effect of the criteria of *mens rea* and *actus reus*.

As a matter of Law, these criteria are derived from four doctrines which constitute the criteria of *mens rea* and *actus reus* critical to the crime of murder. The first doctrines referred to in the judge's direction concern 'the act' and constitute *actus reus*. These are the criteria by which the 'act' itself is judged as criminal: that it is both voluntary and causes the prohibited consequences (death). Voluntariness and causality are the criteria of *actus reus* relevant to the charge of murder. Causality establishes a temporal relationship between the the act of the accused and the prohibited consequence such that the act occurred before the consequence and led to the consequence. Voluntariness establishes that the mental condition of the actor is such that the actor is conscious and, even if behaving in a manner which is habitual or unthinking, knows what he¹¹ is doing and chooses to do it. Whereas causality establishes a relationship between the act and the consequence, voluntariness establishes a relationship between the actor and the act such that the actor was aware of committing the act and the act itself is known to the actor. As a matter of Law, for the act to be judged a crime, it is not enough that the act caused the prohibited consequence but it must also be the case that the actor knew that he committed the act and

¹¹ The choice to use the masculine pronoun in this sentence is based on an argument about the sexed specificity of the subject of legal doctrine which will be made subsequently.

chose to do it.

The second doctrines referred to in the judge's direction concern 'the mental conditions of the actor' and constitute *mens rea*. These are the criteria by which the actor is judged as responsible: that he both intends the act and is reckless as to its prohibited consequences (death). Intention and recklessness are the criteria of *mens rea* relevant to the charge of murder. Intention establishes that the mental condition of the actor is such that he knew the consequences of the act and had those consequences as his purpose. Intention is related to causality in as much as the actor must know what the act might cause for him to have that consequence as his purpose. Intention is also related to voluntariness in as much as the actor must be aware of committing the act and choose to do so for him to have the consequence of the act as his purpose. Recklessness establishes that the mental condition of the actor is such that he knew the consequences of the act and chose to act in spite of knowing what the consequences might be. Recklessness is related to causality in a similar manner to that of intention: the actor must know what the act might cause for him to be reckless as to the consequences of the act. The relationship between recklessness and voluntariness is also similar to the relationship between intention and voluntariness: the actor must be aware of committing the act for him to be reckless as to its consequences. The foreknowledge of the consequences of the act which is necessary to either intention or recklessness establishes a relationship between the actor and the act such that foreknowledge is assumed to enable the actor to control the act. The decision to act in the knowledge of the consequences is a reasoned decision and where the facts show that the criteria established in the doctrines of intention or recklessness have been met then the actor may be judged to be

responsible for the act. Where the criteria of voluntariness and causality have been met in such a way that the act has been judged criminal, the responsibility of the actor for the act should be judged criminal responsibility.

In the case of murder, the doctrines constituting *mens rea* and *actus reus* are, therefore, used to judge the facts of the case as showing the presence of reasoned responsibility in the mental conditions of the accused at the time of committing acts which caused a prohibited consequence. The particular construction of mind which is produced by putting the facts to the criteria established in the doctrines of causality and voluntariness (*actus reus*), and intention and recklessness (*mens rea*) is one in which the processes of mind produce a consciousness of the relationship between act and consequence which enables the actor to be aware of what they are doing at the time of the act, to control what they are doing at the time of the act, and to make a decision based on common sense understandings of prohibited consequences to either commit the act or not. Therefore the accused should be judged guilty of murder if the evidence is judged, in common sense, to be facts which show, beyond reasonable doubt, that the accused knew what he was doing and choose to do it despite the prohibited consequence. The notion of mind here, is of mental processes which inform reasoned knowledge of the relationship between action and consequences and between actions and intention.

This particular construction of mind is the second such construction produced through the judge's summation. Earlier I read the direction on the standard of common sense as constituting legal knowledge of processes of the mind. The doctrines of *mens rea* and *actus reus* produce the specific

processes of which the Law claims to have knowledge. In short, the Law claims to know that mental processes include reason and common sense. According to this construction in the judge's summation the mind is an object that contains, and has conditions produced by, processes of which common sense and reason are privileged as producing reasoned responsibility. The 'object mind' has the same status as a physical object in the sense that it can be metaphorised as 'spatial' and 'material', as a thing from which matter can be 'cut out' by the processes which it contains.

A third construction of mind, as a matter of Law, is constituted through the legal definition of insanity as a disease of the mind. As a matter of Law this disease of the mind is a disease which causes a 'defect of reason' such that reasoned responsibility is not a 'condition of mind'. Therefore insanity is the absence of reasoned responsibility caused by a defect of reason such that the actor either did not have awareness of committing the act, common sense knowledge of the consequences of the act, or control over committing the act. This construction of mind privileges the process of reason over the committing of the act in the judgement of criminal responsibility for a prohibited consequence. This construction of mind, where reason is the privileged process of mind, is metaphorised in the definition of insanity as a physical object containing, and produced by, processes (reason, common sense) which are constituted as either healthy or diseased, normal or abnormal, functional or defective. The use of the term 'diseased', implies and draws on a notion of the 'object mind' as an object of biological physical being. This implication is read through medical discourse, in which the terms 'disease', 'pathology', 'health', 'illness', 'abnormality', 'function' are terms used to constitute the condition of biological processes.

These constructions of the mind have a number of implications for legal notions of subjectivity and knowledge. The construction of the mind as an object of biological, physical being bears strong resemblances to the construction of mind-brain identity within some psychological discourse. Historically, the psy discourses have made use of medical discourse, and its terms, to regard mental disorder as disease, and to constitute an identity of mind and biological processes, especially processes of the brain ~~conceptualised~~ as an 'organ'. For example, in the history of the Diagnostic and Statistical Manual of Mental Disorders (DSM) the ~~conceptualisation~~ of possible 'organic' etiology was included, explicitly, until the most recent revisions in DSM-IV (American Psychiatric Association, 1994), when the term 'organic' was 'eliminated' as a category of disorders. (Frances, First & Pincus, 1995). This 'elimination' was a practice of ~~conceptual~~ transformation through which the term 'organic' became more broadly 'accessible' as a code of etiology. DSM-IV (APA, 1994) says of this transformation that:

The term "organic mental disorders" has been eliminated from DSM-IV because it implies that the other disorders in the manual do not have an "organic" component (p.776).

Avoiding the implication that 'other disorders' may not have an 'organic' component relocates the 'organic' from a specific category of disorder to a generally available etiology. This 'elimination' does not 'break' with the use of medical discourse, and its terms, to constitute mental disorder. In specifying a relationship between mental disorders and "physical or biological factors or processes" (DSM-IV; APA, 1994, p.xxv) the transformation of the 'organic' maintains a trajectory within the history of the constitution of brain-mind identity. Where DSM-IV claims a goal of identifying 'disease entities' underlying symptoms and reconstitutes diagnosis as a privileged practice of 'psy' discourse (Follette & Houts,

1996), it reaffirms the value, and responds to the call, of medical discourse.

So, through medical discourse, the Law and psychology share a resemblance in their constitution of mind-brain identity.¹²

According to the Law, this biological object of 'mind' is understood as an object shared by all human subjects. Therefore all human subjects are capable of the processes of mind (common sense, reason). Simultaneously, mind-brain identity suggests that the mind and its processes are embodied as an object which is common to all human beings regardless of the sexed differentiation of the specific body in which it is 'contained'. This construction of mind produces a sexually undifferentiated mind, in which the process of reason and common sense are privileged. One of the implications of this construction is that it reproduces a phallogocentric¹³ subject position for woman in relation to man: they are the same. The privileging of 'reason' is a privileging of a 'mental process' which is culturally coded masculine. Therefore, where woman and man are constituted as 'the same', the mind is constituted as a biological object they have in common and reason is constituted as a privileged process of mind, she becomes a version of masculinity. Yet, simultaneously, through mind-brain identity the processes of the mind are embodied and common sense suggests that the 'bodies' of men and women are differentiated. Where it is the case that the woman is constituted as the same as the man, as it is as a

¹² With regard to the terms 'organic', 'biological', 'physical' (factors or processes) as terms from medical discourse, used with their associated implications by both psychology and the Law, I practice a form of 'slippage' between the terms in the following chapters. Sometimes the terms are used alone, and sometimes together, however, they always evoke medical discourse and risk mind-brain identity and 'ontological' reductionism.

¹³ According to Grosz (1989), systems of representation which are produced by and reproduce phallogocentrism take three forms.

...whenever women are represented as the opposites or negatives of men; whenever they are represented in terms the same as or similar to men; whenever they are represented as men's complements. In all three cases, women are seen as variations or versions of masculinity - either through negation, identity or unification into a greater whole (p.xx).

matter Law, *and* the only criteria legitimated to differentiate between processes of reason are criteria for judging 'defects', or 'disease', any differentiation of reason which may be an effect of the differentiation of embodiment, must be treated as a variation which constitutes defect or disease in the 'object' which 'varies': the woman's mind. Therefore, as a matter of Law in relation to 'insanity', the only subject position available to women as subjects of the Law are positions in which they are either the same as men or insane. Simultaneously, as a matter of Law, all legal subjects are coded masculine, because even those who are 'insane', are 'insane' because they suffer a defect of reason: the privileged, and masculine coded processes of the mind, which while embodied, control the actions of the body.

A second implication of the legal construction of mind is that 'common sense' enables legal subjects in the position of jurors to recognise, in evidence, the facts which represent a series of events as actions controlled by the reasoned choices of a subject who is both aware of committing the act and aware of its consequences. The subjects who are enabled with this recognition are simultaneously enabled to recognise the 'mental conditions' which control the act. They can, therefore, also recognise a 'defect of reason' as a 'defect' of the mental conditions of the actor controlling the act. So common sense enables a recognition of a 'defect of reason' through its ability to recognise the mental conditions which must be present in an actor whose act causes prohibited consequences. It also enables a recognition of evidence as fact. Both recognitions rely on knowledge of acts and consequences, actors and intentions, such that the relationships between them are consistent over time and across circumstances and therefore predicable, and also evidenced by facts. Common sense, then, is enabled

by 'foreknowledge' of the relationships between act and consequence, and act and intention. Since common sense, according to the judge's direction, is shared by all human subjects, foreknowledge of the relationships between act and consequence, and between act and intention enables both jurors and the accused to be attributed with the mental process of 'common sense'. Common sense, also according to the judge, is a product of our 'whole experience as men and women of the world'. Where men and women are constituted as the same, and the sense they have in 'common' is a product of their experience, the possibilities that variations in foreknowledge of the relationship between act and consequence, and act and intention, are a product of sexually differentiated experience 'of the world' is constrained. Therefore, as a matter of Law, 'common' 'sense' can only be 'common' to the extent that any variations in foreknowledge are not the product of sexually differentiated experiences of the world. Where common sense is also understood as a mental process then this mental process cannot be the product of sexually differentiated experiences. As a matter of Law, then, neither the embodied mind nor the processes of reason and common sense are sexually differentiated, even though, by common sense, and beyond reasonable doubt, both men's and women's bodies, and their experiences of the world, are (at least) sexually differentiated.

A third implication of the legal construction of mind concerns the privileging of psychological knowledges as more or less legitimate 'opinions'. The definition of insanity as 'disease of the mind' in relation to constructions of the mind as an 'object' implies that the 'object mind' is constituted as a 'biological object'. Disease of the mind is therefore treated in Law as meaning 'disease of the brain'. This then privileges the observable 'biological object', the brain, as isomorphic with the 'object mind'. Despite

this privileging it is still the case that expert testimony on the scientific knowledge of the processes of the observable brain is treated as a matter of opinion and not a matter of fact. Within the context of this exclusion of psychological knowledge from the realm of facts, the legal construction of mind still works to privilege some psychological knowledges over others. The privileging of the 'observable brain' as the site of 'disease of the mind' legitimates psychiatric over psychological knowledges where psychiatric knowledges conform to medical discourse, and neurological knowledges over social or behavioural knowledges where neurological knowledges conform to scientific discourse on the processes of the observable brain.

One effect of the legitimation of neurological over social or behavioural knowledges is the exclusion of psychological knowledges concerning social and behavioural sexual differentiation. As a matter of Law, in its particular constructions of the mind, knowledge of the different social contexts and behaviours of women and men has a lower status as 'opinion' than knowledge of the sexually undifferentiated processes of 'human brains'.

It is perfectly proper for you to make inferences and indeed juries are almost always invited to make inferences. An inference is something where as a matter of logical process you say that has been proved, therefore this must have occurred. That then is a logical inference and one which you are entitled to make... (p. 217).

In this fragment the judge instructs the jury on the use of 'inference'. In elaborating the notion of inference the judge constitutes it as a product of logical process. This logical process assumes a relationship between *actus reus* and *mens rea* in as much as the foreknowledge of relationships between acts and consequences and actors and intentions allows the conclusion that something happened if the evidence as fact, and the fact as proof show that something else happened. For example, if it is proved that

the act was committed by the actor then the intention to commit the act can be inferred even where there is no evidence of that intention. Inference then relies on foreknowledge of the relationships between acts and consequences, actors and intentions, as well as on the judgement of evidence as fact and the judgement of fact as proof. Since the judgement of fact and of proof are a product of common sense and reason then it can be inferred that the logical process which leads to an inference also depends on common sense and reason. As a matter of Law then, the processes of mind which are involved in reaching a verdict are common sense, reason and logic. Common sense enables facts to be determined from evidence while reason enables proof to be determined from facts. Logic enables the possibility of reaching conclusions about any relationship between act and consequence or actor and intention which is not proved through judgements of evidence. As a matter of Law then, common sense, reason and logic enable the jury to speak the truth about the accused's criminal responsibility for a prohibited consequence.

The privileging of common sense, reason and logic as the process which enable the jury to speak the truth construct jurors as legal subjects, like the accused, who control their actions (the verdict), through processes of the mind. Through my reading of the judge's summation these processes exclude emotion, are common to all humans, do not depend on experience of empirical events in the world, and assume foreknowledge of relationships between acts and consequences, actors and intentions which are consistent with the criteria of *mens rea* and *actus reus*. It is possible to infer then that the legal subject, whether juror or accused, is a unified rational subject whose processes of mind, while embodied in the organ of the brain, are sexually undifferentiated: as women and men legal subjects are the same.

The phallogocentric constitution of the woman legal subject as the same as man not only excludes the possibility of constituting women's subjectivity specifically (that is, not in relation to man) but also excludes the phallogocentric positioning of women as men's 'other' or 'complement'. These exclusions are a matter of Law and may be read as constituting a silent doctrine of Woman within the Law.

Alongside this positioning, as a matter of Law, expert testimonies drawn from psychological knowledges are excluded from matters of fact. Through the privileging of the mind/body relationship in *mens rea* and *actus reus* and the privileging of the brain in legal constructions of mind, psychological knowledges of the effects of social context and sexually differentiated behaviour are excluded as matters of evidence.

These multiple exclusions effectively exclude the possibility of sexually differentiated relationships between act and consequence and actor and intention. Where such relationships might be considered as a matter of Law they become an exception to the criteria for establishing criminal responsibility for prohibited consequences: an exception embodied in the crime of infanticide.

Infanticide constitutes an offence "where a woman causes the death of a child of hers under the age of 10, in what would amount to culpable homicide but for the effect of having a disturbed mind from an incomplete recovery from birth, or from lactation, or a disorder resulting from childbirth" (Robertson, 1996, p.353). Infanticide is constituted as 'disturbing the mind' to the extent that criminal responsibility is diminished even to the point of insanity. Both insanity and infanticide become exceptions to the 'normal'

relationship between *mens rea* and *actus reus*. So, the only exception to the criteria for criminal responsibility which recognises sexual differentiation is attributed a status similar to the exception which is not sexually differentiated: insanity. The implications of the positioning of sexual difference in relation to insanity will be elaborated in chapter eight which reads those fragments of the judge's summation concerned with insanity. Before this, is a reading of the relationship between psychological and legal discursive constitutions of terms critical to a plea of insanity.

Chapter Seven

Reading judgement II: A matter of authority

The law espouses the concept of free will circumscribed by the insanity defence and the concept of diminished capacity. By the way that people adapt to life events, they are called "normal," "neurotic," or "psychotic." A popular maxim states that the normal person is boring, the neurotic is foolish, and the psychotic is troubled or troublesome. (In another phrasing: "the psychotic doesn't know what reality is; the neurotic knows what reality is, but can't stand it.") (Slovenko, 1995, p.4).

This chapter reads the relationship between psychological constitutions of mental disorder and legal constitutions of insanity to provide a specific theoretical framework and set of questions for reading the evidence of insanity provided by experts for the defence and prosecution.¹

The plea of insanity is made by the defence on whom the burden of proof rests. The insanity plea assumes that criteria for criminal responsibility cannot be met because of a defect of reason. In effect, the insanity plea (re)presents a test of criminal responsibility. Arguments over insanity become arguments over whether or not an essential element of criminal responsibility was 'missing' at the time of the crime. Since this 'missing element' concerns reason, it is constituted through *mens rea* and *actus reus*. In particular, an insanity defence argues that the criteria of intent and voluntariness have not been met because of defects in cognition and control caused by a disease of the mind (Freckelton, 1987; Slovenko, 1995; Taylor, 1994). To prove a defence of insanity it is necessary to show that the mind of the accused was pathological to the extent that the accused did not intend a criminal act, or was not aware of acting criminally, or was not aware that the criminal act was

¹ Throughout this chapter the terms legal and psychological discourses are used. I would like to re-iterate that the notion of discourse engaged here is that of a heuristic which enables 'manners of speaking' to be spoken about. Discourses are 'realised' in texts, and when I use the terms legal and psychological discourses I do not mean to imply ALL legal and psychological discourses, but rather those which are realised in the texts I am reading.

morally wrong. Arguments about insanity raise questions about the meanings of intention, awareness, and wrongfulness. While these questions are raised and addressed through evidence provided by experts on psychological and psychiatric disorders, they emerge from a notion of 'defect of mind', insanity, which is given through legal, not psychological, discourse.

Expert testimony in an insanity plea provides arguments about the probability of a disease of the mind resulting in 'missing elements' of criminal responsibility. In providing these arguments expert testimony gives meaning to the legal terms 'insanity', 'intention', and 'voluntariness', through psychological knowledge² of mental disorders and psycho-pathologies. So it becomes the task of the expert witness to speak evidence of the presence or absence of criminal responsibility through psychological discourse. Expert witnesses bear the burden of producing psychological 'facts' about insanity from evidence of the existence of 'psy' disorders. Simultaneously, the knowledge which expert witnesses use does not have the status of 'fact' within the Law. The expert witness is therefore constrained to give evidence of 'psy' disorders which are relevant to legal constructions of *mens rea* and *actus reus*. Specifically, expert psychological testimony, under the test of criminal responsibility, needs to argue that the accused suffered from psychological disorders which were causally related to the criminal act. It is insufficient for the psychological evidence to show the presence of a pathology: the pathology must be shown to cause the criminal act. To prove an insanity plea, experts must provide evidence that the disease/pathology/disorder made the difference between doing and not doing the criminal act. So, the facts concerning the disease and the facts concerning the acts need to be such that they justify the verdict that 'but for'

² this use of the term 'psychological knowledge' draws on Foucault's theorising of the 'psy' discourses and includes the terms 'psychological, psychiatric and psychoanalytic'.

this disease the act would not have been committed.

Within the context of *mens rea* and *actus reus* as the criteria for criminal responsibility a disease which effects a criminal act is also a defect of reason. In as much as the Law assumes that reason controls behaviour and involves the knowledge of right and wrong (foreknowledge that the consequences of the act are prohibited), it is necessary that a disease which effects a criminal act either causes a lack of control of behaviour (violates voluntariness) or causes an inability to 'know' the consequences of the act or the wrongfulness of those consequences (violates intention).

How do psychologists and psychiatrists, positioned as 'knowers' of psychological disorders, provide evidence which meets the criteria of *mens rea* and *actus reus*, where the necessary evidence shows that if there is disease, then the disease has effected the causes and controls of behaviour such that the criteria for criminal responsibility has been not been met? How is this evidence constrained by the standard of balance of probabilities, where the facts of disease constituted through psychological discourse are constructed as opinions as a matter of Law?

If, as a matter of Law, disease causes behaviour because the disease causes a defect of reason such that the criteria of intention or voluntariness for the criminal act is not met, then a number of constitutions of relationships between 'elements' of disorder in psychological discourse are excluded.

The requirement that the disease causes the behaviour excludes any constitution of disorder in which the relationship between behaviour and disease is not causal. A disease may be present but unless there is evidence

(in opinion) that the specific disease caused the criminal act, then its presence is not sufficient to prove insanity.

The same requirement also excludes any relationship in which behaviour causes disease. Discourses which constitute alcoholism, gambling addictions, and other behavioural addictions, as diseases are excluded. For example, the effects of alcohol are admissible as evidence of diminished responsibility, but not evidence of a disease of the mind, insanity.

The requirement that the disease of the mind causes a defect of reason privileges cognition over other psychological constructs. It excludes disorders of cognition which do not cause the behaviour. Discourses which constitute the disorder as a disease which does not affect the subject's capacity to know the consequence of the act or to know that they were 'wrong' are excluded.

The privileging of reason over action, which is an effect of the construction of processes of reason as controlling behaviour, excludes any relationship involving other 'elements' of disorder. Discourses which constitute the subject as unifying cognitive, behavioural *and affective* 'elements' of human subjectivity, and attribute affect with influencing behaviour, are excluded. Therefore, mood disorders and 'personality disorders' which privilege affect, and are not attributed to organic disease, are excluded, except where the cognitive 'component' is seen to cause sufficient disturbance of reason to meet the criteria.

The privileging of *mens rea* and *actus reus* as the criteria of criminal responsibility, simultaneously privileges a particular construction of the mind and body which excludes other constitutions of human subjectivity.

Discourses which constitute subjectivity as multiple, constructed and socially embedded are excluded.³ In particular, discourses which construct disorder as a culturally and sexually specific experience at a particular time are excluded, except where the cultural and sexual specificity is coextensive with the legal constitution of insanity.

The consequence of these exclusions is that, to prove insanity, psychological and psychiatric evidence of disorder needs to constitute an organic disease causing a criminal act through a one way causal relationship between cognition and behaviour which privileges cognition and excludes affect, or any other 'element' of the constitution of the human subject through psychological discourse. It is only through such a constitution that it is possible to show that the accused was unable to either control her actions or rationally 'know' "the consequences of her action..., the difference between right and wrong" (Rush, 1997b, p.410) and therefore did not intend or was not in control of the act.

Where psychological experts testify within these constraints they are required to address questions of the nature of disease so that they produce an opinion on the criminal act as a product of a disease. This is simultaneously an opinion of the accused's ability to control her behaviour or to 'know' the difference between right and wrong. As an opinion, psychological testimony is required to make use of psychological knowledge to establish evidence of the probability that the accused was unable to judge right from wrong, or control her act. In relation to judgment of moral reasoning, the opinions of psychological experts become arguments about the nature of the difference

³ ... as I am writing I can't help but notice that *even i* have not mentioned gender for quite some time... and it seems that I still have work to do before I can even find the space to ask the questions.... and i wonder about the effects of the historical constitution of the human subject as a masculine subject...

between disease and criminality. These arguments constitute a moral tension between the judgement of the accused as a diseased subject or as a criminal subject. It is the burden of the defence experts to produce evidence of diseased subjectivity and the burden of the prosecution experts to challenge that evidence so as to produce evidence of criminal subjectivity.

The criteria of *mens rea* and *actus reus* are not the only constraints which operate on psychological expert testimony. Psychologists are also constrained by their position as experts⁴ to produce their opinions through legitimated psychological knowledge of 'disorders of mind'. The principal text of this legitimated psychological knowledge is the Diagnostic and Statistical Manual of Mental Disorders (DSM)⁵ (Solvenko, 1995) since this manual provides diagnostic categories of mental disorder in the form of "a compendium based on a review of the pertinent clinical and research literature" (DSM-IV; American Psychiatric Association, 1994, p. xxiv).⁶ Effectively, the constraint to produce opinion through legitimated psychological knowledge privileges DSM. This privileging raises a number of questions about the use of the diagnostic categories of DSM as evidence of insanity: What are the differences between legal and psychological constructions of 'mental disorder'; and what are the effects of the differences between legal and psychological constructions of knowledge about 'mental disorder'? More specifically, how do psychologists or psychiatrists provide

⁴ Also see discussion of the four rules governing expert testimony, chapter 4.

⁵ In the past 20 years three versions of DSM have been produced. At the time of Lisé Turner's trial, DSM-III (APA, 1980) was in use. Since that time, DSM-III-R (APA, 1987) and DSM-IV (APA, 1994) have been published and used. For the purpose of this general discussion of the relationship between DSM and expert testimony, I rely on the contemporary version of the manual. In reading the texts of evidence in Lisé's case I will rely on the version in use at the time of the case. Differences and similarities between and among the versions of DSM will be considered throughout. The International Classification of Diseases (ICD) is also admissible as a legitimate text of psychological knowledge. The ICD is not read here because none of the expert witnesses in this case used it as a taxonomic system.

⁶ which "enhances the value and reliability" (DSM-IV; APA, 1994 p.xxiv) of legal judgement.

evidence which meets the criteria of *mens rea* and *actus reus*, using DSM diagnostic categories, given that, as a matter of Law, the status of legitimated psychological knowledge is such that the diagnostic categories cannot be treated as the 'facts' of 'mental disorder', and as a matter of DSM's own constitution of the knowledge it provides, it is "not sufficient to establish the existence for legal purposes of a "mental disorder," "mental disability," "mental disease," or "mental defect"" (DSM-IV; APA, 1994, p.xxiii)?

Within the context of psychological knowledge DSM-IV (APA, 1994) serves a particular purpose: "to provide clear descriptions of diagnostic categories in order to enable clinicians and investigators to diagnose, communicate about, study, and treat people with various mental disorders" (p.xxvii). These descriptions are not stable across time. Different versions of DSM are produced to 'up date' the system of categorisation according to changes in "increased knowledge of mental disorders... and of different conditions causing different disorders" (Slovenko, 1995, p.54). Whereas the legal definition of insanity has remained stable since the introduction of the M'Naghten Rule in 1843 (Freckelton, 1987; Goldstein, 1989), the diagnostic categories used in evidence of insanity have evolved over time as new research and new understandings of what constitutes mental disorder in psychological discourse have been incorporated into the categorical system. The difference between a stable definition of insanity in the Law and evolving classifications of mental disorder in psychological knowledge produces a tension between legal and psychological knowledge systems which is resolved, for the Law, by treating psychological evidence as opinion.

Within the context of an evolving system, DSM-IV (APA, 1994) provides a number of 'caveats' on its classifications of mental disorders. The use of the

general term “mental disorder” is qualified with reference to the “reductionistic anachronism” (p. xxi) implied by the dualism of mental and physical disorders. This dualism operates to separate the mental and the physical in a manner which is not justified by current conceptualisation and research findings. The interdependence of the mental and the physical which is the contemporary construction of ‘disordered’ subjectivity is not represented in the use of the term “mental disorder”. DSM-IV (APA, 1994) justifies the continued use of the term because an “appropriate substitute” (p.xxi) has not been found.

The acknowledged interdependence of the ‘mental’ and ‘physical’ as a reconstitution of the mind/body dualism does not necessarily produce a conflict between the psychological constitution of ‘mental disorder’ and the legal constitution of the subject through *mens rea* and *actus reus*. The mind/body dualism in Law refers to a separation of reason and action in which reason (mind) controls action (body). The reconstitution of the mind/body dualism in DSM-IV (APA, 1994) does not reconstitute the isomorphic psychological terms ‘cognition’ and ‘behaviour’. It may also be the case that despite reference to ‘reductionistic anachronism’, the conceptualisation of the ‘mental’ and ‘physical’ as interdependent inscribes a relationship between the same two terms, now without clear boundaries. The ‘blurring’ of boundaries between the two terms risks legitimating mind/brain identity within the legal context, where the ‘blurring’ is more likely to be read as ‘identity’, because identity is assumed. Therefore, the qualification that DSM-IV (APA, 1994) makes about the term ‘mental disorder’ does not constitute a ‘new break’ in the co-articulation of psychological and legal discourse.

In response to DSM-III (APA, 1980) some attempts were made to update the

legal definition of mental illness in the United States. These attempts have not been able to move the definition away from a medical account of illness of the mind (Freckelton, 1987; Slovenko, 1995). Neither legal nor psychological discourse has been able to constitute a notion of 'mental illness' which does not still depend on the mind/body split. Within a history of reductionism, the continuing dependence on the mind/body duality risks reiterating reductionist assumptions concerning not only the 'origin' of mental disorder, but also the 'origin' of sexual difference.

Another 'caveat' concerns, not the term 'mental disorder', but the general definition of mental disorder. DSM-IV 'admits' that "no definition adequately specifies precise boundaries for the concept of "mental disorder" (APA, 1994, p.xxi). In psychological discourse this means that the definition of mental disorder produced in DSM-IV lacks an 'operational definition'. As a consequence of this 'lack' the classification system employed in DSM-IV can not provide precise definitions of any specific, bounded and temporally stable category of 'disorder' which would describe "a complete discrete entity" (Slovenko, 1995, p.63). The implication of this caveat in relation to the Law is that the use of unstable categories of disorder justifies the legal construction of psychological knowledge as a matter of opinion rather than a matter of fact, even where that opinion is based on the findings of scientific research and clinical observation of symptoms. Despite qualifying both the use of the term 'mental disorder' and its definition DSM-IV (APA, 1994) reiterates the definition provided in DSM-III (APA, 1980) and DSM-III-R (APA, 1987) on the grounds that this definition is "as useful as any other available definition and has helped to guide decisions regarding which conditions on the boundary between normality and pathology should be included" in the manual (DSM-IV; APA, 1994, p.xxi). Through the notion of this definition being 'as useful as

any other', DSM-IV (APA, 1994) constitutes an equivalence between the 'usefulness' of alternative definitions which implies a 'functional neutrality' in the specific definition it provides. This 'functionally neutral' definition constructs particular boundaries between normality and pathology. The specification of these boundaries provides a continuity with legal discourse in as much as legal discourse is concerned with questioning precisely that boundary between normality and pathology in the defence of insanity.

This reading addresses the difference between legal and psychological constructions of knowledge about 'mental disorder', as psychological discourse constitutes 'mental disorder' in DSM. DSM-IV's (APA, 1994) construction of 'purpose' constitutes psychological knowledge as an evolving system which functions to justify the lesser standard of judgement applied to psychological evidence which itself is an effect of the status of psychological knowledge as opinion. The caveat concerning the 'reductionistic anachronism' of the mind/body split constrains the meaning of the dualism to one other binary, 'mental/physical'. This constraint implies no 'new break' in the co-articulation of legal and psychological discourse. The caveat constructing DSM's definition of mental disorder as inadequate again justifies the legal status of psychological knowledge as opinion. The justification of the continuing use of an 'inadequate' definition constructs that definition as 'functionally neutral' and specifies boundaries of common interest with the Law.

The following reading of the definition of mental disorder in DSM addresses questions of the differences between legal and psychological constructions of 'mental disorder'. In DSM-III, DSM-III-R, and DSM-IV (APA, 1980, 1987, 1994) the definition of mental disorder is:

a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom. In addition, the syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one. Whatever its original cause, it must currently be considered a manifestation of a behavioural, psychological, or biological dysfunction in the individual. Neither deviant behaviour (e.g. political, religious or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless the deviance or conflict is a symptom of a dysfunction in the individual, as described above. (DSM-IV; APA, 1994, pp.xxi-xxii).

The first phrase of this definition:

'a clinically significant behavioural or psychological syndrome or pattern that occurs in an individual'

begins by locating 'disorder' within the context of institutionalised clinical practice. 'Clinic' is a term from medical discourse and constructs a set of practices which directly observe and treat 'patients' and simultaneously train practitioners, and develop analytic, objective and scientific knowledge of human subjectivity. Foucault's (1982) analysis of the 'birth' of the clinic suggests that these practices constitute the clinical 'subject' through clinical discourse as an object. Foucault refers to the set of clinical practices as the 'clinical gaze'. From this framework the location of 'disorder' within the context of institutionalised clinical practice constituted the subject of 'disorder' through the perspective of the clinical gaze.

The terms *'behavioural or psychological'* constitute a binary by separating the notion of 'disorder' into two mutually exclusive (*or not and*) 'elements'. These elements reiterate the 'reductionist anachronism' of the mental/physical dualism. If the behavioural/psychological binary is read

within the context of the tripartite constitution of the subject in psychological discourse, then the behavioural component is given the 'status' of a separate 'element' and the cognitive and affective components are conflated into the psychological 'element'. As a binary pair, 'behavioural and psychological' 'elements' of disorder resonate with the mind/body split implicated in the legal constitution of the subject through the relationship between reason and action in *mens rea* and *actus reus*.

The terms '*syndrome or pattern*' construct the 'disorder' as having sets of related, clinically observable indications of its existence. This implies that the components of the sets of symptoms or behaviours are signs of disorder that are isomorphic with the disorder.⁷ From this perspective the 'clinical gaze' has no direct access to a disorder but infers disorder on the basis of observable behaviour or symptoms. In this, the psychological discourse on disorder strongly resembles the legal discourse on the primacy of the judgement of the act as criminal in the judgement of criminal responsibility. Without the act (or behaviour or symptom) no crime (or disorder) can be constituted.

The first phrase of the definition ends with the qualification that the syndromes or patterns which constitute the disorder '*occurs in an individual*'. The 'individual' is the taken-for-granted subject of psychological discourse. The constitution of psychological discourse as a discipline which takes the individual as its object of study is founded on a radical separation of the individual and the social (Henriques et al, 1984). From the perspective of the constitution of the individual, the individual/social binary depends on an

⁷ The theories of signification on which this notion of 'syndrome or pattern' are based perform a fundamental split between the sign and its referent. These theories imply none of the assumptions about the processes of signification that my post-de Saussurian (c.f. de Saussure, 1983) theoretical frameworks imply.

opposition between 'inside' and 'outside' where the individual is isomorphic with the inside and the social is isomorphic with the outside. The location of the disorder 'within the individual' is simultaneously a location 'outside' the social, so that while a relationship between the individual and the social is enabled by their separation, the social is excluded from the territory of the disorder. The individual is also a taken-for-granted legal subject in as much as the question of criminal responsibility is always already addressed through the relationship between the individual's reason and the criminal consequences of the individual's act. The Law provides no space for a notion of social criminal responsibility.⁸

The second phrase of this definition:

'and that is associated with present distress (e.g., a painful symptom) or disability (i.e., impairment in one or more important areas of functioning) or with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom'

begins with a conjunction, 'and', which functions to qualify what precedes it with what follows it. What follows is a list of the conditions under which the preceding elements of the definition become elements of 'disorder'. The first of these conditions, with present distress, conditions the notion of disorder by specifying a 'dimension' of the 'individual' 'inside' through association. This dimension implies affect - the feeling of distress - but the example, pain, implies sensation - a physiological experience, which might also be accepted as an affective experience. Together the dimension and the example perform a conflation of affect and sensation which risks limiting the meanings of 'feeling' to sensory, primarily physiological, experiences.

⁸ ... again i notice the absence of questions of gender. i also notice the absence of psychoanalysis and narrative analysis in my reading practices (and i feel some stories gathering in my brain and spilling down my fingers onto the the keyboard, and they might be 'textualised'). For some time now, my reading practices have depended on something like a 'pure' form of deconstruction - reading for the logic of the logical and the reason of the reasonable, and Foucauldian theories of discourse, knowledge and subjectivity.

The second specified condition, '[with] disability', also conditions 'disorder' through a similar 'individual' 'inside' dimension. Through elaborating ('i.e.')

disability by reference to 'impairment of functioning, 'disability' and 'ability', are separated from 'feeling' and 'sensation'. Simultaneously, within the context of a tripartite constitution of subjectivity, and a privileging of medical discourse, the 'clinical gaze' sees 'function' as cognitive and/or organic function. The implications of these conditions for the constitution of the 'inside' of the 'individual' are that cognition and feeling are separated but both are related (differently) to the organic body.⁹

The final specified condition, 'with a significantly increased risk of suffering death, pain, disability, or an important loss of freedom', separates the dimensions of the 'individual' 'inside' from the effects of their 'dysfunction'.

The 'significantly increased risk of suffering', implies undesirable consequences of the conditions of the 'inside' dimensions. Pain (sensation) and disability (function) are reiterated, here, as consequences constituting disorder. Death, like pain and disability, though more strongly, implicates the organic body, and *is* the final consequence of organic dysfunction. Under the clinical gaze, the risk of suffering 'loss of freedom' most strongly implicates the possibility of 'institutionalisation', either in prison or psychiatric hospital. The lack of specificity of institutionalisation, as well as its effects, imply a loss of autonomy and self-determination. This 'loss' is also a loss of status as a unified, rational subject.

Although the first two of the conditions in this list, specify 'dimensions' of the 'individual' 'inside', while the third implies possible undesirable

⁹ ... so when sleeping beauty pricks her finger, her nerve endings send a sensory message to her brain in the processes of which she is made aware of an event and is provided with an interpretation of that event? If the same process happens when the prince kisses her, why does she wake up?

... one day my prince will come ...

consequences of the conditions of the 'inside' dimensions, these three conditions are presented as a list without distinction in their status. Therefore any of these conditions may be read as an association of disorder in *its own right*. This may mean that 'significant risk of suffering' could become the object of the 'clinical gaze' autonomously from any observed dysfunction, present distress (because a 'risk' of distress does not require 'present' distress), or disability (because a 'risk' of organic, cognitive or even affective, 'dysfunction' does not require 'observable dysfunction').

While 'distress', 'disability', and 'significant risk of suffering' may be read as distinct from each other, they do not appear, autonomously, under the clinical gaze because of their status as conditions of 'disorder'. To become an object of the clinical gaze, these conditions need to be seen with behavioural or psychological syndromes or patterns.

In the list of undesirable consequences of the conditions of the 'inside' dimensions none are social consequences. Neither are social relationships otherwise incorporated into the general conditions of mental disorder, although they may appear in relation to some specific disorders.

So, the first sentence of the definition of mental disorder constructs an object of the clinical gaze which is not directly accessible and is therefore inferred on the basis of observable behaviour or symptoms. It is also located 'outside' the social. This 'clinical object' is conditioned by its association with the dimensions of the 'inside' 'individual' or the consequences of their dysfunction. These conditions strongly resemble a split between affect and cognition, a conflation of affect and sensation, a privileging of the organic body in a 'reductionist' reading of the 'individual inside', and the constitution

of a unified, rational subject.

In defining insanity, as a matter of Law, legal discourse also constructs an object (the condition of the accused's reason) which is not directly observable and is therefore inferred from actions. The condition of the accused's reason is also a matter of the 'inside' 'individual' which privileges the organic body. As the clinical gaze conditions observable syndromes and patterns so legal discourse conditions observable actions with the doctrines of intention and voluntariness. While the clinical gaze conflates affect and sensation, legal discourse excludes both terms and privileges 'reason' (cognition) and 'choice' (control). Both discourses construct a unified, rational subject. And, as legal discourse produces no notion of social criminal responsibility, the clinical gaze does not 'see' social relationships in the conditions or consequences defining mental disorder in general.

The second sentence of the definition:

In addition, the syndrome or pattern must not be merely an expectable and culturally sanctioned response to a particular event, for example, the death of a loved one.

specifies another condition of the boundary between normality and pathology, under which patterns of behaviour or psychological syndromes become elements of disorder. The phrase 'must not be merely' both excludes culturally expected and sanctioned responses (must not) and minimises such responses (merely) in relation to disorder. In effect, where distress, disability or significant risk are expected or sanctioned, they are not 'elements' of disorder. This condition operates as a negation of the previous conditions which specify 'distress, disability or significant risk' as conditions of 'disorder'.

The example of the 'death of a loved one' explicates culturally expected and

sanctioned 'responses'. Grief, as affect and set of behaviours, is a culturally expected response to the death of a loved one. As such the distress, disability or significant risks enabled by grief do not condition a disorder. However, cultural expectations of grief are temporally bound and where grief exceeds its temporal constraint (e.g. continues beyond six months) it violates cultural expectations and may then be read as 'disordered'. Grief behaviours are subject to diverse cultural sanctions. The expression of grief is bounded by culturally different sanctions: whether to 'wail' or 'be composed' at a funeral, whether to seek vengeance or offer forgiveness. The violation of these sanctions may also be read as 'disordered'. Culturally expected and sanctioned 'responses' therefore delimit individual 'responses' and their inclusion as a 'condition' on 'disorder' specifies a particular set of boundaries between normality and pathology. By locating cultural expectations and sanctions as boundaries between normality and pathology for the individual, this condition excludes the possibility of cultural 'disorder' enabling 'mental disorder'. In effect the cultural is inscribed as 'outside' the individual since the individual must 'violate' the cultural to meet conditions of 'disorder'. This notion of the cultural as 'outside' positions the cultural as isomorphic with the social, though the lack of specificity of social relations in this condition effectively excludes the social by conflating it with the cultural.

So, the second sentence of the definition of mental disorder, re-inscribes a split between the 'inside' 'individual' and the 'outside' 'social/cultural' such that the clinical gaze is directed towards the 'inside' 'individual' and the 'outside' 'social/cultural' is normalised. The 'outside' social/cultural delimits the individual response. In legal 'common sense', the 'sense' shared by human subjects, occupies a similar position, delimiting the individual criminal act. Where 'common sense' sanctions the 'individual act' it is not judged

criminal, nor insane. Where cultural expectations sanction the 'individual response' it is not seen as 'disorder' in the clinical gaze.

The third sentence of the definition:

Whatever its original cause, it must currently be considered a manifestation of a behavioural, psychological, or biological dysfunction in the individual.

provides a further condition on 'mental disorder' through addressing the issue of 'original cause'. The first phrase of the sentence 'whatever its original cause', marginalises the issue of causality in relation to disorder. 'Whatever' suggests that the origin of the 'disorder' is irrelevant as a condition of its existence. What matters to the recognition of a 'disorder' under the clinical gaze is that it is 'currently' 'manifested' as 'behavioural, psychological or biological dysfunction'.

The phrase 'behavioural, psychological or biological dysfunction', reinscribes a tripartite constitution of subjectivity. This construction again gives the behavioural component of the more common 'tripartite' constitution of the subject in psychological discourse the status of a separate 'element', and the cognitive and affective components are again conflated into the 'psychological' 'element'. Here, the third element is specified as 'biological', introducing an 'organic' component to the constitution of subjectivity in the definition of mental disorder.¹⁰ The use of the term 'manifestation' resonates with the earlier construction of 'disorder' as inaccessible to the direct clinical gaze. It is 'patterns and syndromes' that are observable, not 'disorder' in itself. Therefore, the disorder must 'manifest' itself for its existence to be recognised. The clinical gaze recognises the manifestation of 'disorders'

¹⁰ i can't help but notice that the 'organic' component - biology - is missing in the initial sentence of the definition which constitutes a binary from behavioural and psychological 'components'. i wonder if it matters that the context in which the 'organic' is introduced is the context in which the issue of causation is addressed. And does it matter?

specifically as 'dysfunction' in the components of subjectivity.

That the consideration of the manifestation of 'disorder' 'must be' current imposes a temporal relationship between the cause of the disorder and its appearance. The inclusion of reference to 'original cause' constitutes 'mental disorder' within a temporal trajectory in which 'it' has a history and a specific place of origin. Simultaneously, the irrelevance of the 'original cause' to the 'manifestation' of the disorder implies that the history of the disorder is irrelevant to its contemporary (current) consideration. In effect, the clinical gaze does not need to 'see' the trajectory of the past to constitute a disorder in the present.

In the third sentence of the definition of 'mental disorder' DSM-IV (APA, 1994) produces a radical break in the co-articulation of psychological and legal discourse. Legal discourse constitutes the notion of 'causality' as far more critical in relation to both the criminal act and insanity. *Mens rea* and *actus reus* construct criminal responsibility through a relationship between the act and the actors 'state of mind' such that the actor causes the act, knowingly and willingly. The legal definition of insanity requires the presence of a 'cause', most obviously an organic cause, which constitutes a 'disease of mind' and effects a 'defect of reason'. Psychological discourse constitutes 'mental disorder' through the recognition of an irrelevant cause, an 'invisible history', and a privileged contemporary 'manifestation' which may simultaneously include an 'organic component', though not necessarily an organic cause.

The final sentence of the definition:

Neither deviant behaviour (e.g. political, religious or sexual) nor conflicts that are primarily between the individual and society are mental disorders unless

the deviance or conflict is a symptom of a dysfunction in the individual, as described above.

begins with a phrase that specifies conditions of exclusion from 'mental disorder'. The first condition is that of 'deviant behaviour'. Deviance is a sociological term constituting subjectivities which differ from social norms or proscribed behaviours or accepted social or moral standards. The specification of deviance as a matter of behaviour effectively excludes the possibility of deviant affect or cognition. This exclusion implies that the 'difference' which constitutes deviance is not a product of psychological dysfunction. The examples of deviant behaviour as difference from social norms are specific to the realms of politics, religion and sexuality. These realms mark a territory in which the unified rational subject has rights to individual choice within a democratic political system. The choice to exercise these rights through resistance to social norms within these realms is not a condition of mental disorder.¹¹

The second condition, that of 'conflicts that are primarily between the individual and society', reinscribes a split between the individual and the social. Here the split implies that 'conflicts' between the two are not a matter of concern in relation to mental disorder where that conflict does not arise because of mental disorder. Again, the possibility that 'the social' might effect 'mental disorder' or that 'mental disorder' might be isomorphic with 'social disorder' is excluded.

These two conditions of exclusion imply that an 'individual subject' who makes a reasoned choice, within the context of a system of rights guaranteed by democracy, to exercise those rights is not suffering from a 'mental disorder'

¹¹ any more... ? Historically, cases of women's resistance to social norms of femininity was treated as 'mental disorder'.

no matter how deviant from or conflictual with social norms.

The second phrase of the final sentence, 'unless the deviance or conflict is a symptom of dysfunction in the individual as described above', provides a caveat to the two exclusions. In effect this caveat suggests that where an individual subject deviates from social norms or conflicts with society in a pattern of behaviour or psychological syndrome which occurs with the presence of distress, disability or increased risk of suffering, and is neither culturally sanctioned nor expected, and manifests dysfunction, that subject is not making a reasoned choice to exercise democratic rights to resist social norms. It is reasonable to assume that a subject who consistently resists social norms will manifest that resistance in patterns of behaviour, affect and cognition which are accompanied by distress, disability or increased risk of suffering.¹² Resistance to social norms is clearly not culturally expected or sanctioned since social norms define the expected and sanctioned.

Deviance and conflict may easily be read as dysfunction, especially where the physical and psychological costs of sustained resistance prohibit the manifestations of 'normal functioning'. Therefore, this final sentence of the definition of 'mental disorder' constitutes the difference between an 'individual subject' who suffers the effects of deviance or social conflict and 'one' who is subject to/of 'mental disorder' as a matter of the difference between the presence or absence of reasoned choice.

Legal discourse constitutes the difference between insanity and sanity as a matter of the presence or absence of reasoned choice to act. Despite their differences legal discourse and psychological discourse similarly privilege

¹² Autobiographical accounts of those who have been involved in consistent resistance to political, religious or sexual norms support the assumption that their resistance involves both physical and psychological commitments and is accompanied by distress, disabilities of various kinds and increased risks of suffering including loss of freedom (cf. Mandela, 1994; Millett, 1991).

reason in the constitution of 'insanity' and 'mental disorder'.

This reading of the definition of mental disorder in DSM-III, DSM-III-R, and DSM-IV (APA, 1980, 1987, 1994) addresses the question of the differences between legal and psychological constructions of 'insanity' and 'mental disorder'.

From this reading, psychological discourse and legal discourse similarly constitute 'disorder' and 'insanity' through privileging observable acts (material and embodied) as their signifiers. They also similarly constitute their 'subjects' as individuals with an 'inside' which is separate from their 'social' 'outside'. Neither legal nor psychological discourse create a space for a notion of the 'social' in the constitution of criminal responsibility, or insanity, or disorder. The 'inside' 'individual' constituted in both discourses is constituted through privileging the body or embodiment as organic or biological.¹³ Both legal and psychological discourses condition the privileged embodied acts, behaviours and syndromes, though the forms of the conditions vary between them. Legal discourse constitutes conditions through notions of intention and voluntariness while psychological discourse constitutes conditions through notions of distress, disability and significant risk. These diverse forms of conditions all constitute a unified rational subject whose 'inside' 'individuality' is composed of discrete elements. In legal discourse the elements are 'reason' and 'choice' while in psychological discourse they are 'cognition', 'affect' and 'sensation'. Both legal discourse and psychological discourse delimit the individual 'act' or 'response' by constituting an 'other' in relation to the 'inside' 'individual'. In legal discourse the 'other' is the 'sense' held in common by all human subjects, while in psychological discourse the 'other' is

¹³ Not only do these discourses fail to create a space for the 'social', but gender is also excluded, as is obvious from my difficulty in getting to the question of gender throughout this reading.

the normalised social 'outside'.

Legal discourse constitutes the notion of causality as a necessary condition of both criminal responsibility and insanity. Psychological discourse constitutes a notion of causality as an historical fact which is irrelevant to the constitution of 'mental disorder'. Despite these different constitutions of causality, both rely on the binary of presence/absence and the temporal ordering of cause and effect.

Both legal discourse and psychological discourse constitute criminal responsibility, insanity and mental disorder within the context of a notion of individual rights and democratic freedom of choice. Through notions of rights and choice, both discourses privilege 'reason' on the boundaries between normality and disorder, and criminal responsibility and insanity.

From this reading there are few differences in the forms through which legal discourse constitutes insanity and psychological discourse constitutes mental disorder. Both produce a unified rational subject whose reason is embodied and impaired. Both produce an individual with an inside and exclude notions of the social. Neither discourse creates a space within which gender is inscribed.

In the context of the Law, expert testimony, which has the status of opinion and privileges DSM as the legitimate psychological text on mental disorder, is constrained to produce evidence on which the judgement of insanity is based. Given the continuities between psychological and legal constitutions of subjectivity, insanity and 'mental disorder', how does psychological discourse constitute the relationship between psychological knowledge and 'legal

purpose' such that psychological knowledge is 'not sufficient' to that purpose?

The following reading of DSM-IV's (APA, 1994) caveats on its use in forensic settings, is focused on elaborating DSM-IV's (APA, 1994) constitution of the relationship between psychological knowledge and 'legal purpose'. There are three fragments which constitute this relationship.

The first fragment

...dangers arise because of the imperfect fit between the questions of ultimate concern to the law and the information contained in a clinical diagnosis...

constitutes a break between the purpose of the Law (its ultimate concern) and the products of psychological knowledge: categories of classification of mental disorder (information). This break is elaborated as an 'imperfect fit', but the questions of 'ultimate concern to the law' are not specified, nor is the purpose of 'the information contained in a clinical diagnosis': the questions of 'ultimate concern' to psychology. What is specified are the 'places' of 'imperfect fit' between Law and psychology. These 'places' may be read to articulate the questions of 'ultimate concern' to both the Law and psychology.

The second fragment specifies a place of imperfect fit at the boundary of functioning and impairment, ability and disability:

It is precisely because impairments, abilities and disabilities vary widely within each diagnostic category that the assignment of a particular diagnosis does not imply a specific level of impairment or disability.

In an earlier reading of a caveat on the term 'mental order' the classification system of DSM-IV (APA, 1994) was constituted as incapable of providing precise definitions as if 'mental disorder' were bounded and temporally stable. Here, this incapacity to specify precise boundaries and temporal stability implies that the location of a subject within a particular territory is not

a matter of precise co-ordinates such that impairment or disability is rendered numerate: mapped. This constitution of imperfect fit implies (at least) that the purpose of the Law does require boundaries which are precise and a content which is temporally stable so that a subject may be located in a particular position (literally the position of criminal responsibility or insanity at the time of committing the act). Simultaneously the 'concern' of psychology is the location of a subject within a territory, rather than in a particular position.

The third fragment

... diagnosis does not carry any necessary implications regarding the causes of the individual's mental disorder or its associated impairments...

addresses the issue of differences between legal and psychological discourse as to the position of causality in the constitution of insanity and mental disorder. While legal discourse requires a 'cause' of insanity (and therefore a defect of reason), psychological discourse admits an etiology of mental disorder but this etiology is irrelevant to the classification of a mental disorder. In constituting an 'imperfect fit' this fragment suggests that psychological discourse cannot provide the necessary causality required to constitute insanity as a matter of Law. Within legal discourse the mere presence of a mental disorder (in psychological discourse) is inadequate to constitute a pathology causing an act with criminal consequences.

Through these fragments it is possible to read the 'imperfect fit' between the purpose of the Law and the products of psychological knowledge as differences between a requirement to reach of verdict on the matter of criminal responsibility according to the criteria of *mens rea* and *actus reus* and the evolving classifications of behavioural patterns and psychological symptoms required to "enable clinicians and investigators to diagnose, communicate about, study and treat the various mental disorders" (DSM-IV; APA, 1994,

p.xxix). The 'evolving system' is incapable of providing the precise boundaries and temporal stability required to locate a particular subject at a specific position within a 'disorder'.

If the constitution of insanity and of mental disorder are read as the resources engaged in the construction of narratives which position particular subjects, then the legal narrative of insanity includes 'cause' which effects the trajectory of its endpoint. The psychological narrative of mental disorder includes etiology but cause is not relevant to the trajectory of its endpoint.¹⁴

DSM-IV's (APA, 1994) caveats on its use in forensic settings address the relationship between psychological knowledge and the purpose of the Law, including the context in which psychological expert testimony is required as evidence of the probability that an accused was unable to judge right from wrong, or exercise control over an act with criminal consequences because of a disease of the mind constrains the use of psychological knowledges in several ways. This context privileges DSM as the legitimate text of psychological knowledge of mental disorder. As a matter of Law psychological knowledge is treated as opinion, not fact, and is subjected to a lesser standard of judgement than the facts of the act with criminal consequences. This positioning of psychological knowledge within legal discourse is legitimated through statements produced in psychological discourse. In this position the differences between legal and psychological constitutions of insanity, criminal responsibility and mental disorder provide a context of constraint on the use of psychological discourse.

Through enabling DSM, with its definitions of mental disorder and caveats on

¹⁴ I suspect that what is relevant to the trajectory of the endpoint in the psychological narrative is the effectiveness of treatment interventions.

both definitions and use in forensic settings, the legal context also privileges psychological constitutions of embodied (organic) unified rational subjectivity composed of 'behaviour' and 'cognition'. Simultaneously discourse on 'the social' and on 'gender' is constrained.

In the case of R v Lisé Turner, the accused woman is constituted through psychological evidence as an embodied subject of psychological discourse within the constraints of a plea of insanity. As a matter of Law, what resources from psychological discourse does expert testimony use to provide evidence of a 'disease of the mind'? The following chapter reads the judge's summation, the evidence of expert witnesses on which the summation is based, and the relevant texts of 'psychological knowledge' providing resources for the evidence, so as to address this question.

Chapter Eight

Reading judgement III: A matter of responsibility

You know of course.... [the debate on iterability, citationality, or parasitism] concerned above all our experience of violence and of our relation to the law - everywhere, to be sure, but most directly in the way we discuss "among ourselves", in the academic world. Of this violence, I tried at the time to say something. I also tried, at the same time, to do something (Derrida, 1988, p.111).

This chapter returns to reading fragments from the judge's summation in the case of *R v Lisé Jane Turner*, though here, I read the iterations of expert testimony which appear in the judge's narrative. My reading attempts to address questions of psychological discourse as 'resource' in the constitution of a woman accused of child murder and defended through a plea of insanity.

It is the judge's summation that constitutes matters of Law in this case. The judge speaks with legitimated authority on matters of Law, and directs the jury as to the nature of the arguments presented in evidence and what evidence will constitute 'proof' of the verdict (the speaking of the truth). I have already argued that the summation takes the form of a narrative which tells the story of the trial evidence and arguments and implies an endpoint in the verdict given by the jury. The 'form' of the narrative may also be read as constituting a content (White, 1987). This 'content' emerges from the temporal ordering of facts so as to move towards an implied or explicit ending. This ending (the verdict) is a moral ending in as much as the narrative 'resolution' enables the moral principles through which the 'facts' may be judged: in this case, firstly as facts from evidence, and then as facts of criminal responsibility. Through the judges' narrative, then, the trial evidence is embedded in a moral order which 'assumes', 'approves' and 'confirms the value' of the rule of Law as it is spoken.

As a spoken narrative the judge's summation may be theorised as a 'speech act': a telling of a story which also performs an act. In its simplest form the 'performance' is a 'direction' but it is also a performance of constitution through constructing and positioning the 'objects' and 'subjects' of the story (the accused, the jury, the events spoken about, the judgement at the narrative 'endpoint').

Narrative as 'speech act' occurs as a 'concrete occasion' (Davies & Harré, 1990) within an institutionalised set of structures which are repeated elsewhere and differently, daily. It is this institutionalisation which marks a certain confidence in the judge's claim to authority over matters of Law. On such 'concrete occasions', however, it is never only 'matters of law' which are repeated differently: iterated. On this 'occasion' the expert testimony of those speaking to constitute 'mental disorder' through psychological discourse as evidence of insanity is also iterated.

The notion of iteration is constituted in relation to a 'relative purity' of performance in a given 'speech act' (Derrida, 1988). Iteration is not merely the repetition of something 'said before' so that the performance and its meaning is reproduced, but also an 'alteration' which cuts meaning from context. What might be 'meant' and 'done' in expert testimony is severed from the context of 'giving evidence' and the context of the evidence given as it is reproduced (in part) as (a part) of a narrative of summation. Iteration and alteration are simultaneous as the identity of the iterated and the difference of the iteration: "repetition as *différance*" (Derrida, 1988, p.54). It is through this notion of 'iteration' that the judge's summation may be understood as a reinstating act of interpretation of the expert testimony on insanity.

The question which frames the following reading of fragments from the judge's summation: as a matter of law, what resources from psychological discourse does expert testimony use to provide evidence of a 'disease of the mind'? may now be re-constituted in relation to the notion of 'iteration' in the telling of a narrative which embeds the iterations in a particular moral order. The question is now more like: What of the expert testimony does the judge reiterate in his summation and how is that testimony 'altered' in the performance of an act of narration so as to provide evidence of a 'disease of the mind' and to resolve a moral tension between the constitution of the accused as a diseased or criminal subject?¹

The following fragments from the judge's summation which iterate the expert testimony on insanity are read to introduce and contextualise the fragments from expert testimony which are iterated. These fragments are then read for their constitution of subjectivity, insanity, mental disorder in general and/or specific mental disorders as they simultaneously constitute the moral tension between disease and crime.

The judges' initial direction on the insanity evidence follows his final comments on evidence "relevant" (p.227) to criminal responsibility for the first death.

If considering all that evidence you are left in a state where you have no reasonable doubt that the accused murdered the child your duty is to bring in a verdict of guilty because although it may be open to you there is in my view no evidence of legal insanity at the time of [...]'s] death (p.227).

In the first sentence the judge reiterates the legal requirement that the defence of insanity be considered only after criminal responsibility for the act has been 'proved'. In doing so he also reiterates the standard of 'reasonable

¹ The readings which address this question are not an attempt to 'get at' the differences and/or samenesses of the iteration of psychological discourse in the judge's narrative, but to articulate effects of psychological discourses through their iteration in the law.

doubt' for judgement of criminal responsibility in relation to the 'facts' of the act.

As a matter of Law, the first death is crucial in that if the accused is not criminally responsible as a judgement of the facts of the act then the prosecution's case is not proved and insanity is no longer an appropriate defence. Insanity is only a defence where the prosecution's case is proved in relation to all the deaths. Even where the prosecution's case is proved in relation to all deaths, insanity must be proved in relation to the first death. If the prosecution's case was not proved in relation to the first death, but was proved in relation to the second and third deaths, then the defence of insanity is not available but the defence of diminished responsibility would be possible at appeal.

The doctrine of diminished responsibility includes a category of 'abnormality of mind' which "extends the type and quality of mental states beyond those recognised by the doctrine of insanity" (Rush, 1997b, p. 414). In both 'insanity' and 'diminished responsibility' the constitution of the subject is a matter of the boundary between normality and abnormality. In 'insanity' the subject is constituted as unable to know the difference between right and wrong because of a disease of the mind. In 'diminished responsibility' the subject is 'rational' in the sense of knowing the difference between right and wrong but is 'compelled' to do wrong (Rush, 1997b). The subject of diminished responsibility does not suffer from a 'defect of reason' but rather from 'moral deficiency'. The criteria of *mens rea* and *actus reus* in relation to reason and knowledge are met by the subject of diminished responsibility (Rush, 1997b). However, the subject's action is an effect of something other than reason or knowledge. In 'insanity' the subject suffers a 'lack' - a defect of

reason or an absence of knowledge. In diminished responsibility the subject is constituted through something more than - in excess of - reason and knowledge. This 'excess' co-exists with reason. As a matter of Law this 'excess' is elaborated through the question of whether or not the accused 'gave in' to emotion in the presence of 'rational knowledge'. The inclusion of 'emotion' as 'excess' is constituted as something 'other than' a disease of the mind. The defect that results from this inclusion is a defect of morality rather than a defect of reason (Rush, 1997b). Whereas a defect of reason is constituted through a disease of the mind caused organically, a defect of morality is constituted through an abnormality of mind caused by environmental and personal 'factors' (Rush, 1997b). In elaborating these 'factors', as a matter of Law, examples are drawn from: alcoholism, drug abuse, sexual perversion, conjugal violence, psychopathy and depression (Rush, 1997b).² Thus, emotion is constituted through constructions of addictions that have 'biological' implications, deviant sexual desire, a specific 'type of violence' - 'intimate' interpersonal violence ('private' violence), a general term for mental disorder and a category of a specific mental disorder. So, an excess of reason, emotion, leads to a defect of morality such that the subject is compelled to act immorally by virtue³ of the presence of: an organic 'defect' which does not cause a 'defect of reason', or prohibited sexual practices, or violations of the 'safety' of the home, or legitimated abnormalities of morality which have no known organic cause. As a matter of Law, then, the subject of the doctrine of diminished responsibility is not fully responsible for their actions because their actions were compelled by an excess, emotion,

² Despite the cultural 'gendering' of these categories they are not articulated here, as matter of Law, with reference to gender: not even gender as 'different' or as 'complementary'. The trace of gender in these constitution of examples of excess enables the 'feminist reader' (or me) to read the positioning of women as phallogocentric in the particular form of 'identity'.

³ Through excess arising as a matter of 'virtue' the Law constitutes as matter of Law a category of virtue which it proceeds to take up, as it is constituted, and produces Law as 'virtuous' through legal discourse's constitution of the doctrine of diminished responsibility and the question of virtue.

caused by personal and environmental factors (embodiment, enactment of socially prohibited practices, mental disorders of unknown cause)⁴ which, in turn, cause a defect of morality.

Since 'insanity' is constituted as a defect of reason, and 'diminished responsibility' is constituted as a defect of morality, the prosecution arguing against the defence plea of insanity could make a case constituting the accused as a subject of 'diminished responsibility' through the constitution of mental disorder. If the accused is suffering a defect of morality they cannot also be suffering a defect of reason. The prosecution and the defence, through expert testimony on mental disorder, enact the moral tension between 'crime' and 'disease' through an argument constituting the subject as either suffering an organic defect of 'reason': a disease, or a defect of 'morality': an excess, emotion, of unknown (but not organic) cause.⁵

To show that there is no evidence of insanity, as a matter of Law, it is at least necessary to show that in relation to the deaths the accused acted immorally, that is knowing the difference between right and wrong and doing the wrong anyway. The action might be caused by a 'defect of morality', but this is not insanity. As the judge says 'in my view there is no evidence of legal insanity' he says, as a matter of Law, that if the facts of the first death are such that the accused is criminally responsible for the act then she was suffering a defect of morality rather than a defect of reason at the time of the act. Although the

judge specifies that it is 'open' to the jury to decide on the question of insanity,

⁴ i can't help but notice that the inclusion of 'environmental' is not elaborated with reference to any social relations and that social relations are implied only in relation to what is prohibited. It is the individual subject who is embodied, enacts prohibitions or is mentally disordered. It is the individual subject, not the 'social' which is constituted as suffering a 'defect of morality': the individual, not the social, who is 'immoral'.

⁵ By this account morality may be read as the ability to control an excess, emotion. Emotion itself is an excess of reason (emotion exceeds what is sufficient to reason, it is superfluous: a leftover, but it might also be a glut, an oversupply: too much) (emotion limits reason: too much reason is immoral) [ahah i thought so...]

it is also their duty (an obligation of their position as legal subjects) to “bring in a verdict of guilty”. In this, the Judge conditionally⁶ directs towards an endpoint of the legal narrative, and simultaneously constitutes the accused as an ‘immoral’ subject.

Although the judge does not regard the evidence of expert testimony as meeting the legal requirements to prove insanity, he does iterate from the evidence. In the first iteration he evokes the evidence of the chief defence witness:

PM is the only medical witness who gives evidence of insanity. He specifically excluded from his opinion, his opinion (sic) that she was legally insane at the time of [...]'s] death (p.227).

Through this iteration of evidence on insanity the judge directs towards the fragments in which the expert witness for the defence both gives evidence of insanity and also excludes the probability of insanity at the time of the first death. In reading PM’s testimony for the ‘iterated’ the following fragments were selected as those of ‘best fit’⁷:

PM: Now its easy to understand insanity when it’s persistent such as in schizophrenic or severe disabilities. I hesitated calling her intervals brief psychotic but they are repeated against a background of abnormality. They are quite grossly brief periods of disturbed behaviour of an aggressive dangerous type. Lord Denning stated that any mental disturbance that repeats itself in repeated (sic) dangerous acts is a disease of the mind -

⁶ The ‘condition’ matters: that the accused be found guilty of criminal responsibility for the death before the question of insanity arises. The judge’s earlier direction on the matter of evidence relating to the first death included his view that evidence of subsequent acts, although not evidence of criminal responsibility for the first death, entitles the jury to infer that it provides ‘a good deal more’ knowledge about the accused than was available at the time of the first death. He also says, as a matter of Law, that the evidence of subsequent acts was not the only ‘knowledge’ presented in Crown evidence of criminal responsibility. Although the judge expresses no view, as a matter of law, as to the accused guilt of the criminal act, his direction does tend towards an endpoint.

⁷ The inclusion of ‘these fragments’ as those of ‘best fit’ is also an iteration. In as much as this reading is also a narrative tending towards a moral endpoint, the inclusion of these fragments, and the exclusion of others, is also a judgement (of fit) that cuts: iteration is never only repetition but always also alteration, and violence done through transformation into this narrative.

its a concept that's certainly come through into medicine. I consider that at the time of her acts that Lisé with her borderline intelligence and temporal lobe abnormality compensated into brief psychotic states during which she was quite unable to reason out her acts with a modicum of common sense... (p.177).

The first sentence of this fragment evokes a notion of insanity which is 'easily understood' because it is 'persistent'. This notion of insanity co-articulates with the legal constitution of insanity as a temporally stable 'disease'. It is elaborated through constructions of 'schizophrenia' and 'severe disabilities'. Schizophrenia is included within DSM-III (APA, 1980) as a "group of disorders" (p.181) constituted by 'psychotic features' ("gross impairments in reality testing" (p.367)), 'disturbances' in 'thought' (delusions), 'perception' (hallucinations), 'affect', 'sense of self' (loss of ego boundaries), 'volition', 'relation to the external world' (egocentrism, illogic, fantasy) and 'psychomotive behaviour', 'deterioration of functioning', onset before 45 years of age, and "duration of at least six months" (p.181).⁸ The stability of these features across time, as well as the 'characteristic' disturbances of thought and volition enable 'schizophrenia' to coarticulate with insanity despite the 'absence' of an organic 'cause'. While 'severe disability' is not a category of DSM, 'disability' is a condition of general mental disorder and the use of the term 'severe' constructs this condition within a range of 'levels of impairment' which is clearly within the definition of mental disorder. So, in this first sentence, the expert witness iterates the legitimate 'knowledge' constituted in DSM as a preface to specific evidence of insanity.

In the second and third sentence, 'I hesitated calling her intervals brief psychotic but they are repeated against a background of abnormality. They

⁸ There is much that could be read through this constitution: the notions of 'stable' and 'relative' realities, the importance and limits of temporal stability; the tripartite constitution of the subject through 'thought, affect, behaviour'; the operations of the mind/body duality; the exclusion of the social - the 'external world'; the question of gender... the possibilities of these readings are beyond the scope of this reading of iteration through a 'concrete occasion' of use.

are quite grossly brief periods of disturbed behaviour of an aggressive dangerous type', the witness qualifies the use of the term 'brief' in relation to 'psychotic intervals' through reference to the temporal stability (repeatability) of abnormality. This qualification functions as an argument that the psychotic episodes, while too brief to justify a 'diagnosis' of schizophrenia, still provide evidence of insanity because they share with insanity a specific kind of temporal stability - repeatability. In addition, they share with insanity 'disturbances' which are 'aggressive and dangerous'; disturbances which are beyond reason.

The fourth sentence of this fragment, 'Lord Denning stated that any mental disturbance that repeats itself in repeated (sic) dangerous acts is a disease of the mind - its a concept that's certainly come through into medicine', iterates a legal constitution of 'mental disturbance' which privileges 'repeated dangerous acts' as signifying a disease of the mind. This iteration functions as a justification of the witness's opinion as evidence of insanity through legal discourse.

In the final sentence of this fragment, 'I consider that at the time of her acts that Lisé with her borderline intelligence and temporal lobe abnormality compensated into brief psychotic states during which she was quite unable to reason out her acts with a modicum of common sense' provides a summary of the witness's evidence of insanity. Two 'types' of abnormality, borderline intelligence and temporal lobe abnormality,⁹ are brought into relation with 'psychosis' (which can be 'understood' through the category 'schizophrenia'), to constitute a defect of reason in relation to the accused's actions. The process through which this 'defect of reason' is evident is called 'compensation decompensation'. It is process and the resulting 'defect of

⁹ Each of these 'types' are discussed more fully in readings of subsequent fragments.

reason' that co-articulates with the legal definition of insanity.

According to the judge's summation, however, this evidence is 'specifically excluded' in relation to the first death. The only fragment of PM's testimony which 'fits' as 'iterated' evidence of this exclusion reads:

PM: The only two episodes I was able to investigate in depth... was really [the second and third deaths]... (p.179)

Prosecution: Was she suffering from [a disease of the mind] ... when [the first death occurred]?

PM: I don't think so, I don't know, I don't think so. I think it is likely that following [the first death] Lisé deteriorated. I don't think so (p. 180).

In this fragment of exchange the witness at first claims the exclusion of an opinion on insanity through the grounds of lack of investigation. The prosecution's question evokes the temporal stability of the legal constitution of insanity through specifying a particular time at which the accused might be constituted as insane because the witness has already constituted her as insane at other times. The witness responds by iterating his exclusion of opinion 'I don't think so, I don't know'. This 'exclusion' may also be read as an opinion: PM does not think she was insane. PM then evokes the notion of 'deterioration', a 'feature' of schizophrenia, perhaps as a qualification of the assumed temporal stability of insanity: the category may be stable but 'functioning deteriorates'. Although the judge iterates this testimony as a 'specific exclusion' it may also be read as an opinion that evidence of insanity at later times does not necessarily exclude the possibility of insanity at the time of the first death.

In these fragments of 'opinion' spoken through psychological discourse, the constitution of the legal category of 'insanity' as temporally stable delimits what might be said of 'mental disorder'. Temporal stability becomes a critical

question in the argument over the constitution of the accused subject as 'criminal' or 'diseased'.

By the time the judge performs the second iteration he has directed the jury that the opinion of the chief witness for the defence should not be regarded as evidence of legal insanity at the time of the first death. As a matter of Law, the jury are the 'sole judges of fact'. The opinion of an expert witness is not 'evidence' unless judged so by the standard of probabilities, and only evidence can be judged as 'fact'. As matter of Law, then, the judge directs the jury away from the opinion of that expert witness whose testimony, does not, in the judge's view, provide evidence of legal insanity. As a practice of iteration this expert testimony will not be included in the readings of 'iterated fragments' which follow. Just as the jury have been 'directed away' from the evidence, these readings will be 'directed away' from the iterations.¹⁰

The second iteration of expert testimony in the judge's summation reads:

you are then required to consider insanity. All human beings are different¹¹, it is good thing for us that we are. Our make-up is different, our reactions to certain events is different, our ability to control ourselves is different... It is not because a person is different that you are entitled to find that they are insane. It is necessary for it to be established that the person is suffering from a disease of the mind (p.228).

In this fragment the judge directs the jury, as a matter of Law, to disregard 'mere difference' as evidence of insanity. In elaborating the notion of difference the judge specifies differences in 'make-up' (either 'organic' or

¹⁰ **A decision that cuts...** The exclusion of PM's evidence effects the exclusion of possible readings on all those questions raised through the iteration of psychological discourse in his evidence. These include questions on disease of the mind, on brain damage, on episodic discontrol, borderline intelligence, hysterical personality disorder, temporal lobe abnormality, neurotic hysterical personality, dissociation, psychosis, gross mood abnormality, 17 abnormalities signifying temporal lobe abnormality, ego functioning, hallucinations, the legitimacy of the diagnosis of temporal lobe abnormality, paranoid psychosis, gross distortion of reality, psychotic affect, defect of morality, lying, defect of reason, **difficult 'woman'...**

¹¹ though 'pure difference' might mitigate against the 'sense' they have in common.

'psychological' constitutions of subjectivity, body and mind), 'reactions' (a range of normal and abnormal reactions), and 'control' (a range of abilities to control). So, an argument constituting the accused subject as 'different' in relation to her 'organic' or 'psychological' 'make-up', or different in that her 'reactions' are 'abnormal' or she has limited ability to 'control' does not constitute the accused subject as 'insane'. To make an argument of insanity, as a matter of Law, 'it is necessary' for the subject to be constituted as 'suffering from a disease of the mind'. In reiterating the notion of disease the judge directs the jury not to regard evidence of 'difference' as evidence of 'insanity'. Through this, the judge reinscribes the accused woman in the positions of either 'the same', where her 'difference' does not matter, as a matter of Law, to her criminal responsibility, or 'insane'. This positioning reiterates the moral tensions of the argument between the constitution of the subject as 'criminal' or 'diseased'.¹² In this second iteration the judge directs the jury towards expert testimony (excluding that of the chief defence witness) on 'disease of the mind'. The following readings are from fragments of this evidence.

Bench:... if there were damage to the brain affecting her ability to reason and function in given situation and I know you don't, but if it were so would that not be a disease of the mind in medical terms?

DB: Yes, organic brain damage would be disease of the mind., one would have to ask to what extent.

Bench: And your answer is there may be a minimal element of it there?

DB: Yes, not substantial and disorders would not be sufficient to make her not realise the situation, where she was, what she was doing, and that this is wrong (p.201).

This fragment begins with the judge's request of the opinion of a prosecution witness, for clarification on the question of whether or not brain damage resulting in a 'defect' of 'reason' is a constitution of a 'disease of the mind'

¹² i can't help but notice how, after a brief appearance, gender disappears back into the folds of the footnotes...

according to medical discourse. The expert witness responds that such 'damage' would constitute a 'disease'¹³ however, the effect of the 'disease' on 'reason' can vary according to the 'extent' of the damage. Simultaneously this testimony reiterates the mind/brain identity. The judge then requests the opinion of the expert on the 'extent' of 'damage' constituting the accused subject's ability to reason, through iterating the witness' previous testimony. In response, the expert witness affirms previous evidence of the 'extent' of the 'damage' as 'minimal', and also constitutes this 'minimal damage' as having no effect on the accused's ability to reason. She is constituted as having 'knowledge' of her actions, the consequences of her actions, and the 'wrongness' of the consequences of her actions. In effect, even if 'minimal brain damage' constitutes the subject as 'diseased', the 'disease' is not such as to cause a 'defect of reason', and is therefore not insanity.

The second fragment of evidence on 'disease of the mind' reads:

Prosecution: Do you agree with PM's opinion that she suffered from episodic discontrol?

DW: No I don't.

Prosecution: Is that a classification of a disease of the mind known to you?

DW: It isn't a classification of a disease of the mind to my knowledge it is a view which was, which has been put forward in a number of cases as a variant of epilepsy... (p.203).

Here the prosecution requests the opinion of a prosecution witness on the chief defence witness' opinion about 'episodic discontrol'. PM's opinion is that: ~~at the time of the deaths Lisé was suffering from temporal lobe abnormality, an organic malfunction of the brain, of which episodic discontrol is the 14th of 17 characteristics elaborated as evidence. PM argues that episodic discontrol is a disease of the mind because it is caused by a physical disorder, and causes brief psychotic states in which the subject's thought~~

¹³ in medical discourse?

~~processes are disordered and actions are unable to be controlled~~.¹⁴ DW's response signifies disagreement with PM's opinion. The prosecution then questions DW's knowledge of 'episodic discontrol' as a 'classification' of a disease of the mind. In effect, the prosecution raises the question of the legitimacy of the category, 'episodic discontrol'. DW responds by separating 'classifications' from 'views' and claiming that episodic discontrol is a 'view' not a 'classification'.¹⁵ In elaborating the 'view', DW specifies that it is a 'clinical gaze' upon variants of epilepsy, of which temporal lobe abnormality is (merely?) an example. In DW's opinion then, not only was the accused subject not suffering from a 'disease of the mind' called 'episodic discontrol', but the category itself is not a legitimate classification of 'disease of the mind', nor is it only a 'view' of temporal lobe abnormality.

In these fragments of 'opinion' spoken through psychological discourse, the constitution of the legal category of 'insanity' as 'disease of the mind' delimits what might be said of 'mental disorder'. Knowledge of 'disorder' as 'disease' in psychological discourse is delimited to specific 'classifications' and the 'clinical gaze' is re-constituted as a matter of 'opinion' where there is no 'consensus' on classification. The argument over the subject's constitution as a 'diseased' subject is critically concerned with the question of 'brain damage' as a cause of a 'defect of reason'. So, through brain/mind identity and the privileging of 'organic cause' in the legal constitution of 'insanity', the question of 'disease of the mind' delimits the constitution of moral tension between 'crime' and 'disease' to an argument about organic, specifically brain,

¹⁴ While PM's evidence has been excluded from the readings of the iterated fragments, it is necessary to iterate fragments of the evidence in relation to the arguments of other witnesses, from time to time... On these occasions the iteration will appear *sous rature* so as to signify, as usual, the necessity but 'inadequacy' of the 'words', though in this case it is the evidence itself which has been 'judged' inadequate. The evidence iterated here is given on pages 172 and 177 of the trial transcript.

¹⁵ The 'view' of episodic discontrol may be referenced to: Bach-Y-Rita, Lion, Climent & Ervin, 1971; Ervin, Epstein & King, 1974; Stone, 1980.

damage or disease.

The privileging of 'organic cause' is reconstituted in the iterations of expert testimony in the following fragment from the Judge's summation:

There is no doubt here that this unfortunate woman is of inferior intellect,¹⁶ some people say of borderline intelligence. There is no suggestion that it is anywhere near the level of what is described in the act as natural imbecility so there is really no evidence of that at all and no-one has attempted to suggest it...The three psychiatrists for the Crown say is there is no disease of the mind here. They actually discount brain damage at birth, but they then say even if there was brain damage at birth that had the unfortunate result of leaving her with a low intellect, that is not a disease of the mind. (p.228 - 229).

The first iteration of testimony in this fragment evokes the opinion of witnesses that Lisé is intellectually deficient, and of 'some people' who say that she is of 'borderline' intelligence. The judge directs the jury that this intellectual deficiency, including the category of 'borderline intelligence', is not 'so low' as a 'level' of intelligence as to constitute the legal category of 'natural imbecility' as in Section 23 (2) of the Act. So, as a matter of Law, the accused subject cannot be constituted as 'insane' as a consequence of her 'level' of 'intellectual functioning', no matter what it's cause. The second iteration of testimony in this fragment concerns the opinion of prosecution witnesses that 'brain damage' is not a 'disease of the mind' in this case. As a matter of Law, 'even if' brain damage was a cause of 'low intellect' then, because the intellectual deficiency is inadequate to constitute 'natural imbecility', it cannot constitute 'insanity'. In this fragment the Judge again directs towards the desired endpoint of the summation as narrative.

The following readings are from fragments of the iterated evidence. The first fragment is from the testimony of the second defence witness:

¹⁶ 'no doubt': does this constitute 'a fact' from the 'consensus' of expert opinion?

DZ: [a report made in 1969 reads] Although she is no longer markedly poorer in performance than in verbal skills her full scale IQ does reflect gradual deterioration in intellectual functioning over the years since 1963 and she is now functioning generally at a borderline defective level (p.159).

This fragment is taken from testimony on the accused subject's history of mental disorder from childhood. It constitutes the subject as (a child) suffering from a quantifiable intellectual deficiency.¹⁷ The category to which this 'quantity' of 'deficit' belongs is the classification termed 'borderline intellectual functioning'. According to DSM-III (APA, 1980) this classification is not a 'mental disorder' but rather is ascribed to a subject who is not 'functioning adaptively' and may have come to the attention of the mental health system without a diagnosis of the "presence or absence of a mental disorder" (p.331).¹⁸ Borderline intellectual functioning is of concern where it 'coexists' with a mental disorder because of the implications for treatment. In the case of the accused subject in this evidence 'intellectual functioning' is constituted as temporally stable: deteriorating slowly. While the constitution of 'intellectual deficit' is neither a construction of 'mental disorder', nor of 'insanity', in psychological discourse it constructs 'difficulties' with normal 'functioning'. Within the legal delimitations of psychological discourse, these 'functional difficulties' are open to readings as 'defects of reason' though not to the constitution of 'disease of the mind'.

A fragment of evidence from one of the three Crown witnesses reads:

DB: She is of limited intellect, she has what is also classified in the American DSM III manual as borderline personality disorder (p.194).

¹⁷ The 'facts' established by scientific method do not have any privileged standing as 'facts' within the law. Although a condition, such as 'intelligence', may be quantifiable, and therefore have a certain standing as 'fact' within psychological discourse, as a matter of law, the measured condition, and the measurement, remain matters of opinion.

¹⁸ The clinical discussion on intellectual functioning is not confined to the DSM system. The delimitation of this discussion to its appearance in the DSM system is a consequence of the legal privileging of DSM in this case.

DB: I don't altogether accept that she is of borderline intelligence basically speaking who has come down to that level as measured by the tests but I am of the view that she is more capable and will be more capable given care and attention than is shown in the more recent tests (p.197).

In the first instance, the Crown witness constitutes the subject as suffering from a 'personality disorder' of a specific 'type'. This 'mental disorder' coexists with 'limited intelligence'. Secondly, there is a question raised about the probability that this 'limited intelligence' is 'limited enough' to be classified as 'borderline'. The possibility of speaking an opinion that 'doesn't necessarily accept' measurements of a quantifiable condition in psychological discourse is enabled by the legitimacy of the 'clinical gaze'. Classification is an 'evolving system' and it is the clinician's right and obligation, within this discourse, to contribute to the evolution of the system, by disagreement with it as one legitimate practice of speaking (Follette & Houts, 1996). In psychological discourse, the legitimacy of the clinician's speaking position mitigates against the accused subject's 'intellectual deficit' being categorised discretely. Under the 'clinical gaze' its coexistence with a personality disorder may be seen as an effect of the personality disorder rather than a 'disorder' in its own right. As a matter of Law her constitution through this psychological discourse mitigates against the probability of a 'defect of reason'.

DW: During the course of the interviews she impressed me as being at the dull end of the intelligence scale, very near borderline intellectual handicap (p.202).

In this fragment another of the three Crown witnesses constitutes the accused subject as 'near' 'borderline intelligence'. In doing so the subject is located at a particular point on a quantifiable scale. However, as the witness constitutes this 'location' as an effect of an 'interview' rather than a 'measurement', the

legitimacy of the clinician's speaking position enables her constitution through a 'qualitative impression' rather than 'quantifiable measurement'. Simultaneously, as the subject is 'located', a 'borderline' is constituted between the boundaries of the classification 'borderline handicap' and the locations 'near' that borderline. By locating the subject 'near' the borderline, the witness calls into question the probability that the subject's 'intellectual condition' contributes to a 'defect of reason'.

Another fragment of evidence from the second defence witness reads:

DZ: It was suggested from these results and confirmed by further tests specifically designed to detect organic cerebral dysfunction that Lisé had a definite disturbance in visualmotor perceptual organisation which impairs her ability to learn. The most probable basis for this dysfunction is that of minimal brain damage (p.160).

DZ: ...there were no objective signs of any severe degree of brain damage such as might cause neurological symptoms on examination, she had an electro encephalogram which is a tracing of the brain waves in I think, in May 1970 and that showed a normal recording... (p.162).

In the first instance the witness constitutes the subject as suffering from an organic 'dysfunction' which causes a 'learning impairment' and is itself, probably, caused by minimal damage to the brain. In psychological discourse an 'impairment' is not isomorphic with a 'disorder'. Secondly, the witness locates the subject within the boundaries of the 'normal' according to a measurement of the function of an organ. 'Normal brain function' differs to the extent that 'minimal brain damage' need not constitute a 'disorder' nor cause 'neurological symptoms'. The subject constituted through 'minimal brain damage' is constituted as impaired, not disordered, and normal, not dysfunctional. Through this constitution the witness raises a question about the probability that minimal brain damage contributed to a 'defect of reason'.¹⁹

¹⁹ how much damage is enough??

Another fragment from one of the three Crown witnesses reads:

Defence: Do you accept that at an early stage she has shown signs of some general organic brain damage?

DB: No I don't. There is nothing to show that, there's something to suspect that but not to show it (p.197).

Bench: Do you reject brain damage as being a cause of this person's problems?

DB: I don't see any substantial clear sign of brain damage even with the tests that have been performed. I see her however as functioning at an ever diminishing level of efficiency, regressing really to a more childish state of behaviour because life's been progressively too much for her (p.200).

Bench: ... do you reject brain damage as being a contributing cause present in this person?

DB: I don't absolutely exclude it, I think it may have a small part to play but I would by far emphasise the emotional difficulties and the chaotic progressive problems that she's got into that accounts for her deterioration, not brain damage because she's rational (p. 200).

In the first instance the defence requests the opinion of the witness on the question of the evidence of organic brain damage. The witness responds that 'organic brain damage' cannot be 'seen' in this case, and therefore, under the clinical gaze, there is no evidence even though it might be 'suspected'.

Through this opinion, in psychological discourse, 'organic brain damage' is not constituted as a 'fact' in this case. From the clinician's position, it is legitimate to hypothesise, to 'suspect', but hypotheses and suspicions are not 'facts', even in psychological discourse. Therefore, as a matter of Law, where even psychological 'facts' have the status of 'opinion', the accused subject constituted through this evidence is 'not organically damaged'.

In the second instance the judge requests the witness's opinion on the probability of organic cause of the subject's 'problems'. In response, the witness's testimony produces a 'split' between 'organic damage' and 'function' such that 'function' can 'deteriorate' as an effect of 'life'²⁰ through

²⁰ is that too much damage, yet??

increasing inefficiency without either 'signs' of 'damage' or ever reaching a 'level' of 'defect'. Therefore the subject is constituted, through psychological discourse as 'regressing' without transgressing the boundary between 'normal' and 'abnormal'.

In the third instance, the judge requests the witness' opinion on the probability of organic damage as a contributing cause 'in' the subject. The witness' response constitutes 'organic damage' as a 'possibility' to a 'limited extent', and qualifies the possibility with reference to 'emotional difficulties' and 'chaotic problems'. 'Emotions' and 'problems' delimit the effects of 'organic damage', and neither 'emotions' nor 'problems' are mental disorders or defects of reason in and of themselves. They do not constitute 'insanity' or a 'disease of the mind'²¹ .

In these fragments of opinion the legal constitution of insanity 'caused' by a 'disease' delimits what might be said of 'causes' contributing to a 'defect of reason'. Since there is a consensus of opinion that there is no 'disorder' or 'damage' resulting in 'natural imbecility' then any 'intellectual' deficit, even if caused 'organically' could only contribute to a 'defect of reason', but then only if the damage were such that a 'threshold level' enabled the boundary between 'normal' and 'abnormal', 'function' and 'defect' to be crossed. Such 'deficit' would appear to the 'clinical gaze' through quantified organic functioning or intellectual functioning or clinical experience. So, through privileging 'organic cause' in the legal constitution of 'insanity', the question of the boundary between 'normal' and 'abnormal' delimits the constitution of moral tension between 'crime' and 'disease' to an argument about the 'level' and 'effect' of organic, specifically brain, damage.

²¹ enough damage now??

In the following fragment of the Judge's summation, expert testimony on 'personality disorders' and the relationship between 'personality disorders' and 'insanity' is iterated:

There is no evidence from PM or anyone else that a mere personality disorder is a disease of the mind... a person who is quick tempered, bad tempered, often for some stages irrational, may be in that way solely because they have a personality disorder... They are not legally insane... What the three psychiatrists for the Crown say is that she is a very, very troubled girl or woman. She has a lot wrong with her but none of it is a disease of the mind. It is a severe personality disorder which her limited intellect makes worse. [PM] alone says that in his view she suffers from a temporal lobe abnormality.... which he says is diseased to the extent that periodically she has these psychotic episodes. As I understand the evidence for the psychiatrists for the Crown they would not dispute if that was the case that was a disease of the mind, what they say is that this is not the case (pp.228-230).

The first iteration of testimony in this fragment evokes the opinion of the chief witness for the defence, and all other expert witness, that 'personality disorder' is not a 'disease of the mind'. PM's opinion is that: ~~Lisé was suffering a disease of the mind at the time of the events because she was suffering from temporal lobe abnormality. The classification of Lisé's symptoms into the category of 'personality disorder' is a superficial clinical diagnosis, one which PM might also have made if the other characteristics of temporal lobe abnormality had not also been present. 'Personality disorder' has many meanings, however, according to PM, in Lisé case behaviour of a 'hysterical nature' is superficial and the result of brain damage, not personality disorder.~~²² So, as matter of Law, while PM disagrees with the diagnosis of the accused subject as suffering a personality disorder, his evidence does not challenge the assertion that a personality disorder is not a disease of the mind. In effect, the judge again directs the jury away from the testimony of the chief defence witness by saying that he provides no evidence that challenges the prosecution assertion that personality disorder is not a

²² pages 171, 184, 187 of the trial transcript.

'disease of mind'.

The second iteration of testimony in this fragment concerns the opinion of prosecution witnesses that specific 'personality traits' are caused by 'mental disorders' rather than a 'disease of the mind causing a defect of reason'. As a matter of Law, then, even if the accused subject suffers from a mental disorder which causes 'irrationality' or 'emotional lability', that 'disorder' does not constitute 'insanity'. The third iteration of testimony in this fragment concerns the opinion of the three witness for the Crown that the accused subject suffered from a 'severe' personality disorder, 'made worse', by intellectual deficit. So, as a matter of Law, the accused subject is constituted as 'mentally disordered',²³ but the 'disorder' is such that it does not constitute 'insanity'.

Another iteration of testimony in this fragment concerns the argument between the chief defence witness and the witnesses for the Crown concerning the constitution of the accused subject as suffering from a 'disease'. From this argument the judge specifically directs towards the difference of 'opinion' over the presence of 'periodic psychosis'. As a matter of Law, the jury must decide between the arguments on the basis of the standard of probability. In directing the jury, the judge emphasises that it is 'PM alone' who holds the 'opinion' of 'presence of psychosis', while the three witnesses for the Crown, who would agree with PM if 'psychosis' was present, hold the opinion that it is 'not present'.

Through the iterations in this fragment, the judge again directs away from the evidence of the chief defence witness and towards the desired endpoint of the summation as narrative.

²³ disordered enough, but not enough damage???

The following readings are from fragments of the iterated evidence on personality disorder and its relationship to disease of the mind. The first fragment is from the testimony of the second defence witness:

DZ:...Her personality constellation is narcissistic obsessive compulsive with fixation points at all levels. It means that she was very self centred as a person, very preoccupied with her own feelings and her own views as well as having very obsessional traits in her personality (p.158).

DZ: Lisé is an extremely immature dependent and has a severely obsessive compulsive personality disorder which at times seems to decompensate to a psychotic level., that means breaks down (p.159).

In the first instance DZ testifies to the nature of the accused subject's personality in childhood. The testimony is elaborated through constructions of 'personality constellation', 'narcissistic' and 'obsessive compulsive' traits. Personality 'constellation' refers to an enduring set of personality 'traits'. DSM-II (APA, 1968) did not distinguish between personality 'constellations' and personality 'disorders'. The change to the use of the term 'disorder' was incorporated into DSM-III (APA, 1980). 'Personality disorders' are included within DSM-III (APA, 1980) as a "group of disorders" constituted by 'enduring patterns of traits' which are "inflexible and maladaptive and cause either significant impairment... or subjective distress"²⁴ In other words, 'inflexible and maladaptive' traits which meet the general definition of 'mental disorder'. Such disorders are "generally recognisable" (p.305) by adolescence, so that the witness' opinion of the accused subject as suffering from a 'personality disorder' in childhood is relevant to her diagnosis as an adult. According to DSM-III (APA, 1980) personality disorders of childhood and adolescence "should be changed to corresponding" personality

²⁴ this reads: "inflexible and maladaptive and cause either significant functional impairment or subjective distress" in DSM-III-R (APA, 1987, p.335). In DSM-IV (APA, 1994) the general definition of personality disorders is further elaborated: "an enduring pattern of inner experience and behaviour that deviates markedly from the expectations of the individual's culture, is pervasive and inflexible, has an onset in adolescence or early childhood, is stable over time, and leads to distress or impairment" (p.629).

disorders of adulthood, implying that the classification of the specific disorder may change, but the 'disorder' itself is continuous (p.305). This 'continuity' between childhood, adolescence and adulthood, marks a temporal stability in the constitution of disorders of personality.

In classifying the particular personality disorders constituting the accused subject, DZ's testimony iterates DSM categories. In DSM-III (APA, 1980) narcissistic personality disorder is constituted through the 'essential features' of: "grandiose sense of self importance or uniqueness; preoccupations with fantasies of unlimited success; exhibitionistic need for constant attention and admiration; characteristic responses to threats to self-esteem; and characteristic disturbances in interpersonal relationships..." (p.315).²⁵ Of these features, DZ's testimony specifies 'self-centredness' and adds 'obsessional traits'. DSM-II (APA, 1968) includes a category of 'obsessive-compulsive personality' which is transformed in DSM-III (APA, 1980) into compulsive personality disorder so as to distinguish it from obsessive compulsive disorder. The latter classification is an anxiety disorder, not a personality disorder. The characteristics mentioned in DZ's testimony are not specified in DSM III (APA, 1980) as the diagnostic criteria for compulsive personality disorder. The characteristics of the testimony more strongly resemble the features constituting obsessive compulsive disorder. The features of obsessive-compulsive disorder include: recurrent ideas, thoughts, images or impulses that 'invade consciousness', increasing tension produced from resisting the compulsions and relieved by giving in to them. One of "the most common obsessions are repetitive thoughts of violence (e.g. killing one's child)..." (DSM-III; APA, 1980, p.234). So through this iteration of DSM,

²⁵ a reading of these 'essential features' in terms of the particular constitution of subjectivity, the implications for 'the social' and 'gender' is beyond the scope of this project... another decision that 'cuts'. With a critical gaze 'glimpses' of the particular constitutions enabled through these 'essential features' may be caught in the reading of their iteration.

DZ's testimony constitutes the subject as suffering a disorder of "enduring patterns of perceiving, relating and thinking about the environment and oneself" such that she is self-centred and subjectively experiences involuntary, unintentioned, thoughts.²⁶

This constitution of 'disorder' strongly resembles the legal constitution of 'defect of reason' in as much as they share a privileging of 'reason' as a feature of their construction. It also shares with the legal constitution of 'insanity' a kind of temporal stability, and a 'violation' of intention and voluntariness in relation to 'mind', *'mens rea'*. This 'disorder' differs from 'insanity' as does 'mental disorder' more generally, in that it is not necessarily 'organically caused' and, more specifically, where the violation of intention and voluntariness is 'subjectively experienced' by the subject of psychological discourse, it is an 'objective fact' of the subject of legal discourse²⁷.

In constituting this 'disorder', DSM-III (and DSM-III-R; APA, 1980, 1987) exemplify 'repetitive thoughts of violence' with 'killing one's child'. Of the 'example' of 'examples', Derrida writes that what is in parentheses are not so much our 'common sense' of the ornament, the artifact selected from the 'outside' to "illustrate, allegorize, demonstrate, or concretize" (Harvey, 1989, p.62) but which "does not belong to the complete representation of the object

²⁶ In DSM-III-R this reads: "persistent ideas, thoughts, impulses, or images that are experienced, at least initially, as intrusive and senseless" (APA, 1987, p.245). And, "The person recognizes that the obsessions are the product of his or her own mind and are not imposed from without (as in the delusion of thought insertion)" (p.245). Delusion of thought insertion is constituted 'psychotic' when ('not initially'), the subject cannot "acknowledge the possibility that his or her belief might be unfounded" (p.246). Therefore, psychosis, like 'insanity', is constituted through a 'defect' which is a 'defect' of 'knowledge'.

In DSM-IV this reads: "persistent ideas, thoughts, impulses, or images that are experience as intrusive and inappropriate and that cause marked anxiety or distress" (APA, 1994, p.418). And, "The individual is able to recognize that the obsessions are the product of his or own mind and are not imposed from without (as in thought insertion)" (p.418).

²⁷ In and through what 'sense' that we share in 'common', is it likely that even in this defect of reason there is not yet 'enough damage' to constitute insanity?

internally as elements, but only externally as complements” (p59). Such ‘ornaments’ are within, but not the centre, operating as “clandestine and disguised processes organising the object itself” (p.63). Read this way, the example of ‘thoughts of killing one’s child’ becomes not an ‘ornament’ of disorder, but an organising process of it. By this reading, the ‘thoughts of killing one’s child’ organise the disorder as they exemplify it.

The ‘disorder’ exemplified and organised by ‘thoughts of killing ones’ child’ is constituted as ‘disordered thinking which invades consciousness’, without either ‘intention or control’ in psychological discourse, and strongly resembles the legal constitution of a ‘defect of reason’. To be constituted ‘insanity’ it is necessary for the ‘defect of reason’ to be caused by a ‘disease of the mind’. In and through what moral order does psychological discourse constitute ‘thoughts of killing one’s child’ as a ‘defect or reason’ differently from the moral order through which the law constitutes such thoughts as ‘immoral’?²⁸ What possible connection could constitute a relationship between the ‘organic’ as the cause of disease, and the ‘organic’ implied in the social relations of ‘one’s child’? Even in this case, where the accused subject is a woman standing trial for the murder of her children and is constituted through a disorder which may be read as organised by ‘thoughts of killing one’s child’, the questions of sexual difference, even as a matter of ‘organs’, are not raised through either psychological or legal discourse.

In the second instance DZ testifies to an ‘obsessive compulsive personality disorder which at times seems to decompensate to a psychotic level’.

According to DSM-III (APA, 1980) one of the ‘associated features’ of

²⁸ In what moral order is a defect of reason which enables thoughts of ‘killing one’s child’ constituted as (merely) ‘immoral’? How are the mothers of children constituted and positioned by this moral order? Is it possible to imagine a story which is not constituted in and through this moral order?

narcissistic personality disorder is that “during periods of severe stress transient psychotic symptoms of insufficient severity or duration to warrant an additional diagnosis are sometimes seen” (p.316). Obsessive thoughts produce tension, and in the case of thoughts such as ‘killing one’s own child’ this ‘tension’ could be read as ‘severe stress’. Together then, ‘narcissistic personality disorder’ and ‘obsessive compulsive disorder’ produce multiple ‘locations’ at which the subject could be constituted as ‘psychotic’.²⁹ Psychotic episodes, even those too mild or too brief to justify another ‘diagnosis’ (say, schizophrenia), share with insanity a specific kind of temporal stability and ‘disturbances’ which are ‘aggressive and dangerous’; disturbances which are beyond reason. They differ from ‘insanity’ in as much as their temporal stability and ‘disturbances’ are not necessarily constitutive of a ‘disease of mind’ nor even of a *defect* of reason’ in legal discourse.

In these fragments of opinion the legal constitution of insanity as ‘caused’ by a ‘disease’ delimits what might be said of ‘personality disorders’ constituting insanity. The specific personality disorders through which the testimony of the second witness for the defence constitutes the accused subject may constitute a ‘defect of reason’ to the extent that they ‘feature’ ‘disordered thought’, and they may share with the constitution of ‘insanity’ both temporal stability and disturbances beyond reason. However ‘personality disorders’ are constrained in the constitution of a ‘defect or reason’ because they are not necessarily caused by a ‘disease’ and they constitute ‘personality’ not ‘mind’. Even though addressing the question of temporal stability, the construction of ‘insanity’ as a ‘defect of reason’ caused by a disease of the mind delimits the constitution of moral tension between ‘crime’ and ‘disease’. Where legal discourse locates ‘disease’ in the mind then as a matter of Law ‘disturbances

²⁹ In relation to DZ’s evidence on ‘psychotic decompensation’, PM says: “~~it seems rather a tragedy she wasn’t gone into more fully at that time... if people’s lives can be saved by speaking this time I think it’s worthwhile~~” (trial transcript, p.186).

beyond reason' which are not 'disease', produce a 'defect of morality' rather than a 'defect of reason'. Where psychological discourse constitutes 'disorder' which is not 'disease' in the personality and that 'disorder' may appear as a 'defect of reason', then as a matter of Law, the nature of the 'defect of reason' in personality disorder is constituted as a 'defect of reasoned morality'.

The following fragments of the iterated evidence on personality disorder and its relationship to disease of the mind are taken from the testimony of prosecution witnesses on histrionic personality disorder.

Defence: Do I take it from what you've said that the view you formed in 1983 was that she had this hysterical personality disorder?

DG: Yes. Simply means she's a person subject to hysteria. Its a description usually give to people emotionally labile, they rapidly change their emotional state depending on on what's happening at the time, they're often impulsive, they're often emotionally dependent on others, they are people very much influenced by surrounding events.

Defence: What is hysteria?

DG: Hysteria is a neurotic condition, its usually described as hysterical neurosis in which one can see various forms of dissociations (p.191).

DB: I would confirm what he [DG] has said about the changeable nature of the personality, the unstable moods, the demanding nature of the individual, the dramatisation... hysterical personalities do exaggerate or on the other hand they may be quite indifferent... (p. 194).

In the first instance the defence requests that DG affirms a diagnosis of hysterical personality disorder ascribed to the accused subject as an adult. The witness responds with both affirmation and elaboration of the 'meaning' of 'hysterical personality disorder'. In this elaboration DSM-II and DSM-III (APA, 1968, 1980) are iterated.

DSM-II (APA, 1968) includes a category of 'hysterical personality' which is

transformed in DSM-III (APA, 1980) into histrionic personality disorder, so as to distinguish clearly those features of personality disorder which do not have a relationship to conversion symptoms, perviously known as hysterical neurosis (DSM-III; APA, 1980). The former classification more strongly resembles the features constituting the accused subject in prosecution witnesses' testimonies than does conversion disorder. The 'essential' features of histrionic personality disorder³⁰ include: "overly dramatic, reactive, and intensely expressed behaviour and characteristic disturbances in interpersonal relationships" (DSMIII; APA, 1980, p.313). The testimony iterates elaboration of the 'overly dramatic, reactive behaviour' as 'emotional lability and impulsiveness'.³¹ A characteristic disturbance in interpersonal relationships is elaborated as 'emotional dependence'. The specification of 'influence of surrounding events', iterates an associated feature of histrionic personality disorder. In DSM-III (APA, 1980) this reads: "individuals with this disorder tend to be impressionable and easily influenced by others or by fads" (p.314).³²

³⁰ also included in DSM-III, but as neither an essential nor associated feature, is an elaboration of 'prevalence and sex ratio' which reads: "The disorder is apparently common, and diagnosed far more frequently in females than in males" (APA, 1980, p.314). As an associated feature DSM-III suggests that "[w]hen the disorder is present in men, it is sometimes associated with a homosexual arousal pattern" (p. 314). In DSM-IV this reads: "In clinical settings, this disorder has been diagnosed more frequently in females; however, the sex ratio is not significantly different from the sex ratio of females within the respective clinical setting" (APA, 1994, p. 656). One implication of this transformation in DSM-IV is that the differential 'sex ratio' should not be meant as 'women suffer these disorders more than men', without taking account of women's general over-representation "within the respective clinical setting". With a 'critical gaze' it might be possible to 'glimpse' something more of the gender relationships implied here, than is iterated in either the testimony of the witnesses or the readings of fragments of that testimony. In particular, the 'absence' of histories of women's relationships with psychology, from women's points of view, might inform the gendered implications of "the sex ratio of females within the respective clinical setting" (See, for example, Ussher 1991, Nicolson, 1990).

³¹ DSM-III specifies that the subjects suffering from this disorder behave "without being aware of it" (APA, 1980, p.314). The absence of this as 'iterated' in prosecution testimony is notable given the importance of 'knowledge' in relation to 'defects of reason'.

³² Another associated feature in DSM-III reads: "during periods of extreme stress there may be transient psychotic symptoms of insufficient severity or duration to warrant an additional diagnosis" (APA, 1980, p.314). This strongly resembles the 'associated feature' of narcissistic personality disorder iterated in defence testimony, but *not* iterated here, in prosecution testimony.

Through these iterations of DSM-III (APA, 1980), the accused subject is constituted as suffering from a disorder of “enduring patterns of perceiving, relating and thinking about the environment and oneself” (p.305) such that she is ‘emotional labile’, ‘impulsive’, ‘dependent’ and ‘impressionable’. These ‘characteristics’ constitute a ‘disorder of personality’ which is separate from a ‘disorder of mind’ and does not, in these instances, provide any construction of a ‘defect of reason’.

In the second instance the defence requests the witness for an opinion on the constitution of hysteria. The witness responds by elaborating hysteria as a ‘neurotic condition’ in which the ‘clinical gaze’ ‘sees’ ‘dissociations’. As this form of ‘neurosis’, hysteria more strongly resembles the DSM-III-R (APA, 1987) classification of ‘hysterical neurosis of a dissociative type’ than either ‘histrionic personality disorder’ or ‘hysterical neurosis of a conversion type’. In DSM-III (APA, 1980) hysterical neurosis of a dissociative type does not appear as a specific classification. Rather, DSM-III says of neurosis in general that “there is no consensus in our field” (p.9) as to its definition. DSM-III (APA, 1980) instructs that the term ‘neurotic disorder’ is to be used only to *describe* a ‘mental disorder’ of unspecified etiological process, in which reality testing is unimpaired and subjects are aware of their symptoms, as symptoms, although their behavioural functioning may be impaired. Five of the classifications of ‘affective disorders’ are included in ‘neurotic disorders’. The DSM-III (APA, 1980) category which most strongly resembles the testimony of this prosecution witness is the class of ‘dissociative disorders’. However, none of these ‘disorders’ have ‘features’ which are ascribed to the

accused subject in testimony on personality disorder.³³ In the third instance, DB's testimony elaborates agreement with the testimony of the previous witness for the prosecution and constitutes the accused subject as suffering from 'hysterical personality disorder'.

Through these iterations the accused subject is constituted as suffering from a disorder of personality which is of uncertain etiological process and does not 'impair' either her knowledge of reality or of herself. From these, and the previous iterations, this 'disorder' is multiply 'characterised' through 'emotion': preoccupation with feelings, emotional lability, emotional dependence, overly dramatic, reactive. The multiplicity of 'emotion' reconstitutes the tripartite construction of the subject of psychological discourse so that the 'affect' characterises 'disorder' alongside disordered thought. As such 'personality disorder' performs a break between psychological constructions of 'mental disorder' and legal constructions of 'defect of reason', 'disease of the mind' or 'insanity', where 'emotion' is excluded.

In these fragments of opinion the legal constitution of insanity as 'caused' by a 'disease' delimits what might be said of 'personality disorders' constituting insanity. The specific personality disorders through which the testimony of these witnesses for the Crown constitutes the accused subject do not constitute a 'defect of reason' in as much as 'emotion' becomes an organising feature of these 'mental disorders'.

³³ The testimony which most closely resembles an iteration of a 'dissociative disorder' is given by PM in relation to the '15th characteristic' of temporal lobe abnormality which reads: "~~15th, multiple personality, Lisó can be described you might say as a shuttle personality but her personality too changeable to be called a multiple or for her to have a clear cut multiple personality... Its very hard as I've said before to pinpoint Lisó's personality, it jumps all over the place but its not particularly multiple but of a rather similar type of phenomenon~~" (p. 173). And also, in relation to the '5th characteristic' which reads: "~~The fifth feature are sudden alterations in states of consciousness... part of the confused picture she gives is due to altered states of consciousness at the time of her disturbed episode...~~" (p. 169).

As a matter of Law, if the accused is suffering an 'excess of reason', emotion, of unknown cause they are suffering a 'defect of morality'. As a matter of both legal and psychological discourse, then, a 'defect of morality', a 'disorder of affect', 'a neurosis' and a 'personality disorder' are spoken through a separation of 'reason' and 'emotion'. In performing this separation psychological discourse constitutes the 'mentally disordered' subject in the same position as the legal subject constituted through a 'defect of morality'. The prosecution, through expert testimony on mental disorder, enacts the moral tension between 'crime' and 'disease' through an argument constituting the subject as suffering a defect of 'morality': an excess, emotion, of unknown cause. Simultaneously they iterate constitutions of 'hysteria' and 'neurosis' as categories of 'disordered emotion'. The constitution of mental disorder in general performs a conflation of affect and sensation which risks privileging the meanings of 'feeling' as sensory, primarily subjective experiences. Read in relation to the mind/body split constituting *mens rea* and *actus reus*, 'defect of reason' and 'disease of mind' are privileged as 'evidence' of 'insanity', while an inability to voluntarily control the behaving body in the presence of foreknowledge, constitutes a 'defect of morality' and is privileged as 'evidence' of 'diminished', but still criminal, responsibility. Thus the constitution of a 'disorder of emotion', which provides evidence of a 'defect of morality' is strongly associated with the body (the sensory, and the control of action) while a 'disorder of thought' is strongly associated with the mind (reason and foreknowledge). The association of 'emotion' with 'the body' might, otherwise, possibly, constitute a 'different body', at least in as much (and for as long) as the accused subject is constituted as "a very troubled girl or woman" (trial transcript, p.229). This 'different body' might be both emotional and physical as 'a girl or woman's' body.³⁴ And yet, even here, the question of sexual difference is not raised in either psychological or legal

³⁴ I wonder, how might the difference matters if 'this' were girl/woman, (and/or), girl and woman?

discourse.³⁵

The constitution of the woman's body through 'defect of morality', and 'disorder of affect' delimits what can be said of 'personality disorders' within the context of an argument about the constitution of the subject as either 'criminally responsible' or 'insane'. As a matter of Law, iterations of DSM-III (APA, 1980) on the relationship between personality disorders and 'psychosis' (disordered thinking) is constrained in an argument directed towards challenging the 'proof' of 'insanity'. Disordered thinking is privileged as sharing with the legal definition of 'insanity' a notion of 'defect of reason'. In effect, where psychological discourse constitutes a 'difference' from 'disease of mind' and 'defect of reason' through features of 'disordered emotion' it is constrained, as a matter of Law, to constitute 'mental disorder' as a 'defect of morality'. Simultaneously psychological discourse constitutes a 'different' 'woman's body' where an excess (emotion) multiply characterises 'disorder'. This constitution of the 'woman's body' as characterised by emotion, positions woman as the 'other' of man, as it positions 'emotion as the 'other' of 'reason'.³⁶ 'Woman' in the position of 'other' constitutes another form of phallogentrism, but the forms are not the same. Here the 'woman', the accused subject, is constituted through the position of 'other' as 'disordered'

³⁵ i wonder, through which moral order, and how, is such an exclusion 'righteous'?

³⁶ 'its excess'.

and 'criminally responsible',³⁷ an 'hysterical, neurotic, woman'.³⁸ Within the constraints of an argument enacting the moral tension between crime and disease, the phallogocentric positioning of 'woman' as 'other' through 'emotional disorder' and 'defect of morality' seems likely to produce a specific endpoint in and through the narrative form iterating this testimony.

The following fragments of the iterated evidence on personality disorder and its relationship to disease of the mind are taken from the testimony of one of the three Crown witnesses on borderline personality disorder.

DB: ... she has what is also classified in the American DSM-III manual as borderline personality disorder which includes... low self esteem, difficulties in interpersonal relationships (p.194).

DB: The mood changes occur in the borderline personality disorder this has been outlined in the various descriptions we've heard from depression, that may last a few hours or even a few minutes, to anger, to anxiety or even to laughter so that there are these unstable mood changes... So she has these labile moods. There's another feature about borderline personality disorder which is mentioned in the Coding and she exhibits these, that is self mutilation... She has low self esteem, recognises this but tends to compensate by the gay outward appearance and the claim to be competent (p.194).

In the first instance the witness's testimony constitutes the accused subject through explicit citation of the category of 'borderline personality disorder' in

³⁷ out-of-control, compelled, but 'knowing' and 'aware'.... enough damage now?

³⁸ "The supposed role of the 'wandering womb' in the etiology of madness has been well documented by feminists from different disciplines... Madness was seen to be closely associated with menarche, menstruation, pregnancy and the menopause. The womb itself was deemed to wander throughout the body, acting as an enormous sponge which sucked the life-energy or intellect from vulnerable women... Madness was almost inevitable, given the female constitution" (Ussher, 1991, p.74).

"In all events, the womb has been played with, made metaphor and mockery of by men. At least *three* men... But this three is only apparently a sum. And the one nearest the back of the cave, the one with the heaviest chains, the one bound with the strongest fascination to the depths of that crypt, will be so strongly persuaded that the shenanigans of the other are the truth that he will lose all the senses that the "others" pretend still to control. But at this point in the drama, as quite often in fact, it is hard to decide who is weaving the web of illusion and who is caught in it" (Irigaray, 1985, pp. 263-264).

DSM-III (APA, 1980).³⁹ In elaborating the disorder the testimony iterates the 'essential feature' of its constitution. In DSM-III (APA, 1980) this reads: "instability in a variety of areas, including interpersonal behaviour, mood and self-image. No single feature is invariably present" (p.321).⁴⁰ Each 'aspect' of this feature, 'interpersonal behaviour', 'mood'⁴¹ and 'self-image' is elaborated in turn and ascribed to the accused subject. Each elaboration iterates some part of DSM-III's (APA, 1980) elaboration of the 'essential features' of disorder.⁴² In relation to interpersonal relations DSM-III (APA, 1980) reads: "Interpersonal relations are often intense and unstable... frequently there is impulsive and unpredictable behaviour that is potentially physically self-damaging" (p.321). As it is iterated in the testimony this elaboration becomes 'exhibiting self-mutilation'.⁴³ In relation to 'low self esteem', an elaboration of the 'instability of self-image', the witness' testimony iterates the construction of 'self knowledge' as unimpaired through the notion of 'compensation' signifying an 'act' enabled by 'knowledge'. This is not an iteration of a 'feature' written into the category of 'borderline personality disorder' in DSM-III (APA, 1980), but rather an iteration from 'histrionic personality disorder'. This iteration 'across' personality disorders is legitimated through DSM-III's

(APA, 1980) writing of 'associated features' of 'borderline personality

³⁹ 'Citation' is not 'iteration'. 'Citation' evokes something of a context of meaning from the 'original', and in this instance the 'evocation of the original' is an iteration of the legitimacy of DSM as the 'text' of 'psychological knowledge' of 'mental disorder'.

⁴⁰ It seems to me rather odd that an 'essential feature' might be 'variably present'. It suggests at least a temporal instability in the 'presence' of the 'essence' of 'disorder' (sometimes disorder, perhaps? or maybe, in 'absence' also 'disordered'?). What of this 'unstable presence'? ...Another decision that 'cuts' possible readings....

In DSM-III-R this reads: "a pervasive pattern of instability of self-image, interpersonal relationships, and mood...A marked and persistent identity disturbance is almost invariably present" (APA, 1987, p.346). In DSM-IV this reads: "a pervasive pattern of instability of interpersonal relationships, self-image, and affects and marked impulsivity that...is present in a variety of contexts..." (APA, 1994, p.650).

⁴¹ "Mood is to affect as climate is to weather" (DSM-III; APA, 1980, p. 363).

⁴² Also included in DSM-III, but as neither an essential nor associated feature, is elaboration of 'prevalence and sex ratio' which reads: "The disorder is more commonly diagnosed in women" (APA, 1980, p. 322). In DSM-III-R (APA, 1987) it is unchanged. In DSM-IV it reads: "Borderline Personality Disorder is diagnosed predominantly (about 75%) in females" (APA, 1994, p.652).

⁴³ i wonder about the relationship between 'interpersonal relationships' and 'self mutilation'...

disorder' as: "Frequently this disorder is accompanied by many features of other Personality Disorders such as Schizotypal, Histrionic, Narcissistic and Antisocial Personality Disorders. In many cases more than one diagnosis is warranted" (p.322).⁴⁴ Two of the three Crown witness' constitute the subject through iterations of more than one⁴⁵ 'personality disorder'.

Through these iterations, the accused subject is constituted as suffering from a disorder of "enduring patterns of perceiving, relating and thinking about the environment and oneself" such that she has 'low self-esteem' and 'labile moods' and she 'exhibits self-mutilation'. These 'characteristics' constitute a 'disorder of personality' and does not, in these instances, provide any construction of a 'defect of reason'.⁴⁶

In effect, these iterations share a separation of the features which constitute a 'defect of reason' and the features which constitute a 'defect of morality' performed in the constitution of the accused subject as suffering from an 'hysterical personality disorder'. This separation of 'reason' from 'emotion', which in legal discourse is isomorphic with the separation of 'reason' from

⁴⁴ In the expert testimony the witnesses (excluding PM) constitute the accused subject as suffering from narcissistic personality disorder, histrionic personality disorder, borderline personality disorder, obsessive compulsive personality disorder, and antisocial personality disorder'. The only iteration of the latter is in the evidence of one of the three Crown witnesses who says: "I concluded that she had a personality disorder with features of hysterical personality and sociopathic personality" (trial transcript, p.203). There is no elaboration of the 'features' of sociopathic personality disorder. According to the indexing of DSM-III (APA, 1980) sociopathic personality disorder is synonymous with antisocial personality disorder.

⁴⁵ 'multiple'?... 'more than one', for some feminist readers (or me?), might be read to iterate Irigaray's writing on 'sexual morphology': "Her sexuality, always at least double, goes even further: it is *plural*... Woman always remains several..." (1985a, pp. 28, 31).

⁴⁶ Once again, an associated feature, but not iterated in this testimony, could mitigate against an 'unobscured' reading of the 'absence of defect of reason'. "During periods of extreme stress there may be transient psychotic symptoms of insufficient severity or duration to warrant an additional diagnosis" (DSM-III; APA, 1980, p.322). In relation to the question of 'defect of reason' it might also matter that from DSM-II (APA, 1968) to DSM-III (APA, 1980) the category 'schizophrenia - latent type' was changed to 'borderline personality disorder' and 'schizotypal personality disorder' to mark the differentiation between 'personality disorder' and 'psychosis'. Borderline personality disorder has something of a 'history' of schizophrenia (latent type) which is without iteration here.

'morality', constitutes the 'personality disorder' of the clinical gaze as a 'moral object' of the legal gaze. As a matter of Law, then, the legitimacy of multiple diagnosis of personality disorders in psychological discourse enables multiple testimony arguing the 'presence' of a 'defect of morality' in the accused subject. The enabling of this argument seems likely to produce a specific endpoint in and through the narrative form iterating this testimony.

The following fragments of iterated evidence concern the argument between the chief defence witness and the three witnesses for the Crown over the 'presence' of 'psychosis' in the condition of 'mental disorder' suffered by the accused subject. PM argues that ~~the accused subject suffers from temporal-lobe abnormality, of which one characteristic is "brief psychotic episodes". He says that the classification of 'psychosis' nearest to this 'characteristic' is paranoid psychosis, however, the 'mechanism' of the 'characteristic' is 'organic': an abnormality of the brain.~~⁴⁷ In this testimony PM asserts that ~~the accused subject was not suffering from a personality disorder.~~ In response to this argument the three witnesses for the Crown claim that there was no evidence of 'psychosis', whether as a characteristic of an organic abnormality, an 'associated feature' of 'personality disorder', or a distinct classification of 'disorder' in its own right.

DG: ... at the time [1983] we got no impression of any serious psychiatric disorder. There was no evidence for instance of any psychosis or any major mental disturbance and while she seemed rather immature in her behaviour and clearly of limited intelligence she fitted more into the scheme of hysterical personality disorder presenting with a minor stress reaction. (p. 188).

DG: At the time I saw her [in custody] there was no evidence of any gross psychosis again I felt that her intellectual level was probably at least dull if not on the borderline range... The history she gave me [later] in no way changed my opinion regarding the absence of psychosis (p. 189).

DB: As to [PM's] opinion that she was suffering from episodic

⁴⁷ iterated from trial transcript p. 182.

*discontrol or paranoid psychosis at the time of these deaths or near deaths. I didn't come to that conclusion at all, neither did any of our colleagues in the hospital... I recognise many of the elements which [PM] described but put a different construction on them... our diagnosis was a personality disorder which was a mixed one, with predominantly hysterical features...(p.193).
DW: My conclusion as to whether she suffers from a disease of the mind or psychosis such as paranoid states - I could find no evidence of that, I have given the matter rather anxious consideration today and I cannot agree with the theory (p.203).*

In the first instance, one of the three Crown witnesses claims an 'absence of psychosis' in both historical and contemporary 'examinations' of the accused subject. In making this claim the testimony elaborates the relationship between the 'presence' and 'absence' of psychosis in terms of the 'degree' of 'disturbance'. The matter of 'degree' is a matter of the 'location' of the subject of psychological discourse within the 'territories' of 'normality and abnormality'. The absence of psychosis is linked to the absence of 'serious' and 'major' illness or disturbance. By implication, the presence of a personality disorder *without psychosis* is a particular location within the territory of 'abnormality' which is closer to 'normality' than is a 'major', 'serious' or 'gross' 'disorder'. By linking 'personality disorder' to a 'minor' stress reaction, the testimony performs an exclusion of the possibility of 'brief psychotic episodes' as an associated feature of the 'personality disorder' in the case of the accused subject.

In the second instance, another witness for the Crown argues 'absence of psychosis' in the 'construction' of the subject as 'disordered'. Through this argument the witness evokes the 'clinical gaze' as a practice of classification as 'construction', in which 'what is seen', the observables, are 'symptoms' of 'disorder' not the 'disorder' itself. It is the clinician's right and obligation within the psychological discourse which speaks of 'patterns and symptoms' as a system of mimesis, where the 'thing itself' is represented by its 'sign', to 'see'

the patterns and symptoms as representing a particular disorder.⁴⁸ It is also the clinician's right and obligation to disagree with the 'seeing' of a 'disorder' by another clinician. Such disagreement is one legitimate practice of speaking which 'contributes' to the 'evolution' of the 'system of classification'. However, the disagreement is constrained by the requirement of psychological discourse that the 'clinical gaze' be practised through the observation of 'evidence' (patterns and symptoms) and spoken through legitimated texts of psychological discourse.⁴⁹ Therefore, disagreements about the 'interpretation' of 'patterns and symptoms' need to be grounded in the 'observable pattern or symptoms' being 'recognised' as 'representing' a particular 'classification' in DSM. The second instance of testimony argues the matter of the 'interpretation' of particular 'patterns and symptoms' evidenced by the accused subject, through the 'absence of psychosis' as an 'observed feature' of the accused subject's 'mental disorder'. In and through this practice of argument the testimony evokes DSM's constitution of the relationship between 'psychosis' and 'personality disorder' to warrant the constitution of the subject as suffering from 'personality disorder' not 'psychosis'.

As a matter of Law, the argument (disagreement) concerning the constitution of the subject as suffering from a 'personality disorder' or a 'temporal lobe abnormality' is constrained to an argument of opinion judged by the standard of probability. Within psychological discourse an argument of opinion is one practice in the constitution of legitimate knowledge through the 'consensus' of the 'clinical gaze' on 'interpretations' of 'patterns and symptoms' in a mimetic

⁴⁸ The reading of the term 'construction' as 'interpretation of signs' rather than 'constitution of meanings' or 'system of signification' is warranted by the practice of iterating DSM as the legitimate text of psychological knowledge. DSM provides the frame for this reading through constituting the relationship between 'patterns and symptoms' and 'mental disorders' as mimetic.

⁴⁹ A requirement to see and cite.

system of representation which is simultaneously an 'evolving system' of 'classification'. As a matter of Law this practice of argument of opinion is privileged to the exclusion of other practices of 'reaching consensus' (statistical probabilities, agreements on 'tests' of 'data' to produce 'fact', adherence to scientific methodologies and the 'model' of the 'scientist-practitioner, and use of DSM to diagnose, communicate about, study, and treat objects of the 'clinical gaze').⁵⁰ Simultaneously, the 'practice of argument' is delimited to agreements and disagreements about the observation of particular patterns or symptoms which represent disorders that co-articulate easily with, or perform a break with, the construction of 'insanity' as a disease of the mind caused by an organic abnormality, defect or dysfunction and causing a defect of reason.

In the third instance, the third witness for the Crown elaborates agreement with the testimony of the previous witnesses for the prosecution and constitutes the accused subject as suffering from a from a 'lack' of psychosis and therefore a 'lack' of evidence of 'disease of the mind'.

Subsequently, the judge's summation iterates expert testimony on evidence of 'hallucinations' as a particular instance of the question of the accused subject's constitution as suffering a 'lack' of 'defect of reason' through an 'absence of psychosis'. This fragment reads:

The other thing you must bear in mind is [that] her evidence of hallucinations... is only what she has said to other people and it is a matter of whether it is believed or whether it is not believed... The doctors for the Crown say this is just part of her make-up, it is part of her disorder, she fantasises... about these hallucinations... psychiatrists for the crown say there is no supporting evidence that this woman at the time [of the crimes] was in a state of psychotic whatever it might have been (pp.231-232).

⁵⁰ The 'starting point' of any revision of 'consensus' which produces a 'revision' of DSM is always the previous DSM classifications as systems of 'diagnosis, communication, study and treatment'. Therefore, the practice of 'reaching consensus' always, already involves whatever practices were engaged in producing the previous 'consensus'.

In the first instance the judge directs the jury, as a matter of Law, to take account of the 'testimony' on hallucination as a question of whether or not to believe the reports of the accused subject's 'hallucinations'. In iterating evidence on hallucinations he directs the jury towards the testimony of witnesses for the Crown who argue that evidence of hallucination is a 'manifestation' of 'personality disorder' in as much as it is a 'fantasy' told as an 'experience', and it should not be treated as 'legitimate' evidence of psychosis. The first testimony on hallucination is given by the chief witness for the defence in relation to the 7th of 17 characteristics of temporal lobe abnormality. This testimony argues that: ~~the seventh characteristic is hallucinations which are imaginary voices or visions that are usually seen as symptoms of schizophrenia. Hallucinations are mistaken perceptions.~~

The following fragment of iterated evidence is taken from the testimony of one of the three Crown witnesses on the question of hallucinations.

Defence: Auditory hallucinations might be one of the signs or symptoms of a psychosis of the mind?

DW: Yes... I couldn't elicit any alterations of consciousness, I couldn't elicit any clear visceral hallucinations... (pp. 205-206).

Bench: I take it that notwithstanding the evidence from some people of hallucinations of some kind you believe that its part of the falsehood that this girl from time to time sees?

DW: Not so much falsehood but a hysterical manifestation (p.208).

In response to the question of the relationship between psychosis and hallucination, the witness for the Crown agrees that hallucination is a 'sign or symptom' of psychosis, but argues that no hallucination or any other 'sign or symptom' of psychosis could be 'deduced' from clinical examination of the accused subject. When asked for an opinion on 'other opinions' about the 'presence' of 'hallucinations' the testimony of this Crown witness argues that the 'apparent' 'hallucinations' are a symptom of an 'histrionic personality disorder' and, by implication, not a 'sign or symptom' of psychosis. Through

this iteration the testimony constitutes the accused subject as suffering from an 'histrionic personality disorder' in which there is an 'absence of psychosis' and therefore a 'lack' of 'defect of reason'.

Through these fragments, within this 'delimited argument', the 'absence' of 'psychosis' constitutes 'a lack' of consensus⁵¹ on the classification of the accused subject as suffering from 'a lack' of 'defect of reason'. This 'lack' is 'recognised' as evidence of a 'personality disorder' in the presence of 'essential features' which constitute the accused subject with a 'mental disorder' isomorphic with the legal constitution of a 'defect of morality'. As the subject is constituted through a 'lack' of 'defect of reason' she is simultaneously constituted through an 'excess' of 'reason', emotion. As a matter of Law, a 'lack of defect of reason' locates the accused subject within the 'territory' of 'normality', positioning her in the same position as the 'normal' legal subject. At the same time, and still as a matter of Law, 'an excess, emotion' locates the subject within the 'territory' of 'abnormality', positioning her as 'different from' the 'normal' legal subject. And, as a matter of Law, 'mere difference', does not constitute 'insanity'.⁵² The constitution of the subject as suffering 'a personality disorder without psychosis' in psychological discourse, which positions the subject as 'criminally responsible' within an argument enacting the moral tension between crime and disease (in which only 'argument of opinion' may practice constitution) seems likely to produce a specific endpoint in and through the narrative form iterating this testimony.

The tendency towards this endpoint is reiterated, subsequently, as the judge's

⁵¹ 'sense' held in 'common'?

⁵² The movement between the constitution of the accused subject as the 'same' as a 'normal subject' (through 'lack') and 'different' from a 'normal subject' (through 'excess') is isomorphic with the 'movement' between the phallogocentric positioning of 'woman' as 'the same' as man, and as his 'other'.

summation iterates his direction on trial processes and the question of the accused subject's constitution as a 'knowing' subject. The fragment reads:

[the defence] have to establish that it was a disease of the mind to such an extent as to render her incapable of knowing that the act or action was morally wrong.... it is her view of what is right and wrong.... it is common ground that whether it is due to a personality disorder or whatever it is due to, this woman does not tell the truth (p.230).

In the first instance the summation iterates the previous direction on the matter of 'proof' of 'insanity': that evidence must show 'insanity' as a disease of mind causing a defect of reason such that the criteria of voluntariness and intention are violated. Specifically there must be evidence that the accused subject was incapable of acting immorally with intention and control. To provide this evidence it is necessary for expert witness to 'show' that the subject either did not know the difference between right and wrong (as a result of a defect of reason) or could not control their actions (as a result of a defect of reason).

In the second instance the judge iterates evidence from expert testimony 'held in common' on the question of the accused subject's ability to know the difference between right and wrong and to control her actions. Here, the 'sense' of 'held in common' implies an opinion of both the defence and the Crown expert witnesses. In relation to a statement from the prosecution which reads: "If people think its right then they don't tend to lie...." (p.178.), the chief witness for the defence says that: ~~Lisé might well have known the difference between right and wrong. She might well have known that the act was wrong. But she was incapable of reasoning about that knowledge.~~ Through this testimony PM constitutes a split between 'knowledge' and 'reason' such that the presence of 'knowledge' alone does not imply a capacity for 'reason'. It is notable that this 'split' is not compatible with the criteria of *mens rea* and *actus reus* as they are used to constitute 'criminal responsibility' and

'insanity'. Within legal discourse 'knowledge' and 'reason' are inseparable and interdependent: 'knowledge' implies the capacity to reason.

The following readings are from fragments of the iterated evidence on 'moral' knowledge and 'control'.

DB: I believe that she knows right from wrong and in many cases chooses to do the wrong thing... I think she would know her actions were morally wrong at the time (p.196).

DW: I think she was aware of what was going on and was able to understand the moral significance of her actions... I think she probably was able to control her actions (p.203).

Prosecution: In relation to the question of whether or not she was aware what she was doing was morally wrong as that term is used in the normal sense what is your opinion as to her ability to reason about those matters at the time these events occurred?

DW: I think I'd be forced to the conclusion she could reason because she lied (p.204).

In the first instance, one of the three Crown witnesses constitutes the accused subject explicitly as 'knowing' the 'difference between right and wrong'. She is then implicitly constituted as having control over her actions through the constitution of 'choice'. In the second instance, another of the three Crown witnesses constitutes the accused subject as 'knowing' the 'difference between right and wrong' through the constitution of 'awareness' and 'understanding' of her actions and their moral consequences. In the third instance, this Crown witness constitutes the subject as 'able to reason' on the grounds that she was 'able to lie'. In effect, she had 'knowledge of right and wrong' through an ability to reason such that she was able to choose to tell of an event that 'was not real'.

Through these iterations the accused subject is constituted as meeting the legal criteria of *mens rea* and *actus reus* in relation to intention and voluntariness. However 'mentally disordered', her 'knowledge of reality and

herself' is not impaired to such an extent that she does not 'know' the 'difference between right and wrong' and/or cannot 'control' her actions.

These readings of fragments of testimony iterated in and through the judge's summation on the question of insanity have attempted to address questions of psychological discourse as 'resource' in the constitution of a woman accused of child murder and defended through a plea of insanity.

In the first instance this question has been addressed through readings attending to the questions of the delimitations of psychological discourse 'as a matter of Law'. The legal constitution of insanity as a 'disease of mind' caused by an 'organic abnormality, defect or dysfunction' and causing a 'defect of reason' delimits psychological discourse to the constitution of 'mental disorder' through the specific classifications of DSM as a matter of the 'opinion' (spoken view) of the 'clinical gaze'. Simultaneously, as a matter of Law, the legitimation of psychological knowledge spoken through psychological discourse is delimited to the practice of an argument of opinion over specific classifications of mental disorder, and therefore to an argument over what is 'seen' as 'present' to the 'clinical gaze'.

At the same time, what can be said of 'mental disorder' is delimited by the temporal stability of the legal 'category' 'insanity' to privilege questions of 'duration' in the constitution of specific disorders. Simultaneously, what can be said of the 'cause' of mental disorder is delimited to matters of the abnormality, defect or dysfunction of the brain as the 'organ' of identity with the mind. Also, what can be said of the 'cause' of mental disorder is delimited to the 'causation' of 'defect of reason'. In as much as a 'cause' might contribute to a 'defect of reason', it is delimited by the extent of the defect. If

the 'defect' is not 'severe' enough, then even though the 'cause' is 'organic' (such as brain damage) it does not constitute insanity.⁵³ At the same time, if a 'cause' is not 'organic' then even though it causes a 'severe enough' defect of reason, it does not constitute insanity.

In and through the legal constitution of insanity as a 'defect of reason', 'reason' and 'emotion' are separated and while a 'defect of reason' is necessary to the constitution of insanity, disordered emotion as an excess constitutes a 'defect of morality'. Where psychological discourse constitutes a 'mental disorder' through characterising an 'abnormality, defect or dysfunction' through 'emotion' this constitution is delimited to evidence of a 'defect of morality' not a 'defect of reason'.

In the second instance the question has been addressed through readings attending to the judge's summation as a narrative tending towards a desired endpoint (the speaking of the truth - verdict). This narrative is constituted in part by iterations of parts of the testimony of expert witnesses speaking psychological discourses to constitute mental disorder. The form of this narrative is itself constituted in and through a moral order in which an argument about the difference between 'insanity' and 'criminal responsibility' produces a moral tension between the constitution of 'disease' and 'crime'. This argument is not only a 'matter of Law' which delimits psychological discourse in particular ways, but also a 'matter of Law' which constitutes the accused subject as either 'abnormal' or 'normal'. As an argument, the moral tension resolved through the endpoint of the narrative depends on (at least) two 'opinions' about the interpretation of signs of disorder being spoken through psychological discourse. According to the content of the narrative form, one of the (at least) two 'opinions' will 'win' the argument and, as a

⁵³ The question of 'severity' is simultaneously crucial to the constitution of 'natural imbecility'.

matter of Law, the 'opinion' that 'wins' becomes a speaking of the truth of the constitution of the accused subject. When, as a matter of Law, the judge initially directs the jury away from the evidence of the chief witness for the defence and subsequently reiterates this direction and directs towards the evidence of the three witnesses for the Crown, the summation as narrative performs a movement towards constituting the desired endpoint. One transformation enabled by the narrative's function as direction is a transformation of the question which framed these readings. Taking account, after reading, of the judge's directions towards the resolution of a moral tension between 'disease' and 'crime' through the iteration of psychological testimony which itself iterates DSM, the question becomes: As a matter of Law,⁵⁴ how does expert testimony use psychological discourse as resource to constitute evidence challenging opinions that the accused subject suffers from a mental disorder which co-articulates easily with the legal constitution of insanity?

The legal constitution of insanity as a 'disease of mind' caused by an 'organic abnormality, defect or dysfunction' and causing a 'defect of reason' enables a 'defect of morality', which would otherwise constitute evidence of 'diminished responsibility', to constitute a challenge to the defence of a plea of insanity.

Therefore to challenge opinions that the accused subject suffers from a mental disorder which co-articulates easily with the legal constitution of insanity, psychological evidence needs to constitute the subject as either suffering a 'defect of morality' or, at least, the 'lack' of a 'defect of reason'. As a matter of Law a 'defect of morality' is caused by an 'excess', 'emotion', which enables the subject to know and to reason her actions but not necessarily to be able to control her actions. The privileging of 'reason' in the criteria of *mens rea* and *actus reus* is iterated in the privileging of 'reason' in

⁵⁴ which stays the same...

the constitution of insanity. As a matter of Law, a subject constituted as unable to know or reason is constituted as 'insane', while a subject constituted as unable to control her actions in the presence of knowledge and reason, is constituted as criminally responsible to a diminished degree. This privileging of 'reason' itself privileges a violation of the criteria of intention over a violation of the criteria of voluntariness in the resolution of the moral tension between the constitution of 'insanity' and 'criminal responsibility'. Where a defect of reason violates the criteria of intention then the accused subject is constituted as legally 'insane'. Where a 'defect of morality' violates the criteria of voluntariness then the accused subject is constituted as 'criminally responsible'.⁵⁵ Therefore psychological evidence of a 'mental disorder' which constitutes the subject as suffering a 'defect of morality' constitutes the accused subject as criminally responsible since only the criteria of voluntariness is violated in such a constitution.

Another transformation of the question which frames these readings is enabled through taking account, after reading, of the resolution of the moral tension between 'insanity' and 'criminal responsibility' as a direction towards the expert testimony providing evidence of a 'defect of morality' in the constitution of the mental disorder suffered by the accused subject. The question becomes: As a matter of Law, how does expert testimony use psychology discourse as resource to perform clinical opinions constituting the accused subject as suffering from a 'mental disorder' which either constitutes a 'lack' of 'defect of reason' or co-articulates with the legal constitution of a 'defect of morality'?

As a matter of Law, the legitimacy of DSM as the privileged text of

⁵⁵ As a matter of law, in the case of a plea of insanity, the 'degree' of 'criminal responsibility' does not matter: it is enough to show 'some' 'criminal responsibility'.

psychological knowledge on mental disorders, here, delimits psychological discourse spoken through expert testimony to arguments over the constitution of the accused subject according to specific classifications of DSM. In reading the fragments of DSM iterated through the evidence iterated in the judge's summation, the performance of clinical opinions which challenge the constitution of the accused subject as 'insane' do so through challenging each of the 'aspects' of the legal definition of insanity as well as constituting the subject as suffering a 'defect of morality'.

Insanity as a 'disease of mind' 'caused' by an organic abnormality, defect or dysfunction was challenged through testimony constituting the subject as suffering only 'minimal brain damage', and also through testimony constituting the subject as suffering 'personality disorder' which is not organically caused. Insanity as a 'disease of mind' was challenged through testimony constituting the subject as suffering 'patterns and symptoms' of 'personality disorder' rather than 'temporal lobe abnormality'. Insanity as a 'disease of mind' causing a 'defect of reason' was challenged through testimony constituting the subject as suffering only from 'limited intelligence', not from 'natural imbecility', and also through testimony constituting the subject as suffering 'personality disorder' in which there is no 'disordered thought', no impairment of 'knowledge of reality and self', and no impairment or 'reason or choice'.

The constitution of the subject as suffering a 'personality disorder' also challenges the constitution of insanity through including emotion, which reconstitutes the tripartite construction of the subject of psychological discourse, so that 'affect' characterises 'disorder' alongside 'cognition'. This constitution of 'personality disorder' performs a separation of reason and

emotion, and a 'disordering' of emotion which reproduces the same separation and privileging which work to constitute a 'defect of morality' as a matter of Law. Through 'features' of 'emotional lability' or 'irrationality' iterated from DSM classifications of particular 'personality disorders', expert testimony enables the constitution of the subject as both 'criminally responsible' and 'mentally disordered'.

The particular classifications of personality disorders iterated through expert testimony iterated in the judge's summation are narcissistic, histrionic and borderline classifications. As the evolving system of classification enables changes over time, these classifications are historically constituted through relationships with hysteria, neurosis and psychosis. In speaking through these classifications and their historical relationships, expert testimony not only constitutes the accused subject as suffering a 'defect of morality' but also as a 'different body' where an 'excess, emotion' characterises the process of disorder. In constituting the particular accused subject, a woman, through this expert testimony, she is positioned as the 'other' of 'man', as 'emotion' is simultaneously positioned as the 'other' of 'reason'.⁵⁶ This simultaneous positioning of 'woman' and 'emotion' through expert testimony iterating DSM might be read as 'coincidental' but for the inscriptions of gender which, although not iterated in the testimony, are written into DSM as the text of legitimate psychological knowledge privileged here.

Of gender, in relation to the classifications of narcissistic, histrionic and borderline personality disorders, DSM writes that these are 'more frequently' or 'more commonly' 'seen' in women. As the consensus of the 'clinical gaze', the implication of this inscription of gender is that the 'woman' more probably

⁵⁶ i am suffering (an excess, emotion?) as i wonder whether this simultaneous constitution is merely 'co-incident', as an effect of 'happening at the same time'?

suffers from patterns or symptoms that the clinician sees as 'disorders of personality'.⁵⁷ As an inscription of gender into the body of the text of legitimate knowledge of mental disorder this implication may be read as a reinscription of the cultural positioning of woman as both 'same' and 'other' of 'man'. As such, as a matter of psychological discourse, this reinscription signifies the positioning of 'emotion' as the 'other' of reason and the positioning of woman as 'the same' as man in relation to 'reason' but the 'other' of 'man' in relation to 'emotion'. In as much as legal discourse also positions 'emotion' as the 'other' of 'reason' and 'woman' as both the 'same' as, and 'different' from 'man', the constitution of an accused woman through iterations of the inscription of 'woman' in the classifications of DSM becomes an 'easy co-articulation' of legal and psychological discourse.

After reading to address questions of how psychological discourse is used as resource constituting an accused subject as both 'criminally responsible' and 'mentally disordered', and taking into account the inscription of gender in the legitimate text of psychological discourse on mental disorder, another transformation of question is enabled. Rather than asking how a woman is positioned as a subject produced through a narrative directing towards the resolution of a moral tension between crime and disease where as a matter of Law she is already criminally responsible for killing babies (including her own) it becomes possible to ask: what may be said in and through feminist discourse of the ethics of iterating the positioning of woman as the same as, or different from, man in the constitution of a particular woman through a narrative resolution of a moral tension concerning the killing of babies? This question is addressed in the following chapter as a question of the (im)possibility of justice.

⁵⁷ A 'feminist gaze' might more probably 'see' her suffering the effects of phallogocentric positioning in patriarchal social relations.

Chapter Nine

The (im)possibility of justice: questions of ethics and the contributions of Law, authority and responsibility.

Deconstruction suspects that deep truths are purchased by deep violence, by excluding what contaminates the system of truth, by disturbing what disturbs its unity, by swatting away those who trouble the guardians of truth with bothersome questions (Douzinas & Warrington with McVeigh, 1991, p.51).

In as much as this thesis is a narrative, it has a conclusion, and tends towards an 'endpoint'...

The deep truth of Lisé Turner's guilt is not open to question in this thesis: no questions have been addressed to Lisé or asked about Lisé. Rather, questions have been asked about the 'exclusions' and 'disturbances' which 'purchase' the deep truth of her guilt: the exclusions and disturbances practised within the system of truth enacted in the judge's summation of her trial.

The deep truth of the verdict of Lisé's trial has been theorised, here, as the 'desired endpoint' of a narrative told as the summation of the trial. This narrative performance becomes the affirmation of a moral order through the coherent organisation of events, objects and subjects. The moral order affirmed through the narrative performance achieves, in the desired endpoint of the narrative, a 'deep truth'. In this case, that 'deep truth' is "only one beyond reasonable doubt" (Douzinas & Warrington with McVeigh, 1991, p.50), but nonetheless deep enough to judge criminal responsibility and mental health, to enforce penal sanctions of the State, and to serve as the product of a 'justice system'. Simultaneously, the moral order of the 'system' legitimates a telling which historicises the

event, and the relationships among subjects and objects, told. From this theorising of the judge's summation, the question of deep truth becomes a question of the 'exclusions and disturbances' performed in the telling so as to effect a coherent trajectory towards that truth. It *is* also a question of morality.

Exclusions and disturbances traced in the reading of the judge's summation traverse the constitution of woman-mother-childkiller and the subjection of psychological discourse to the authority of the Law, for the Law. These exclusions and disturbances have been theorised, here, as informing a moral tension constituting the narrative: the moral tension between crime and disease, criminal responsibility and insanity. What is at stake in the resolution of the moral tension, and the 'endpoint' of the narrative, is the deep truth of the event, and relationships between subjects and objects, told.

Exclusion and disturbance have been traced through the relationship between reason and insanity, between emotion and morality. The privileging of reason in the criteria for proving criminal responsibility and the exclusion of emotion in the standards of legal proof, trace sexual difference onto the constitution of the legal subject, crime and insanity through the phallogentric positioning of woman as either the same as man or his 'other': as either the same, reasonable subject, or the other, emotional subject. Historically this constitutes the woman who commits a crime as abnormal, deviant, at the same time her 'otherness', her 'excess, emotion', constitutes her as criminally responsible, since it is neither 'disease of mind' nor 'defect of reason'. So, exclusion of emotion traced through sexual difference implicates phallogentrism in the moral order

which is affirmed through a 'deep truth' constituting the woman as criminally responsible and abnormal. The moral tension between crime and disease, in the case of a woman, is resolved, in part, through the morality of phallocentrism.

As resource for the narrative, the 'value' of emotion within the psychological constitution of mental disorders, especially personality disorders, is traced as an exclusion from the constitution of the legal category 'insanity'. Within the text of psychological knowledge, legitimated by the Law in this case, those disorders which value emotion through its inclusion in the constitution of the disorder, are gendered. The trace of sexual difference appears in the footnotes of the reading, as excluded from the testimony iterated in the judge's summation. They are, therefore, excluded from the deep truth of the event of the crime and also from the moral tension enacted through the iterated testimony. These traces of sexual difference take the form of gendered prevalence rates of diagnosis. And the 'gendered rates', themselves, exclude any historicising of the relationship between psychology and women, especially from women's points of view. At the same time, they privilege women's 'access' to diagnosis of mental disorders generally, and to those which value emotion historically. Through these textual practices of 'gendering', sexual difference is traced onto a classification of mental disorder which values emotion and excludes the specific histories of women in relation to psychology. These practices position woman, phallogcentrically, as the other of man through her privileged relationship with value of emotion, and the same as man, in as much as 'her' history remains unspecified. The subjection of psychological discourse to the Law, in this case, resources the narrative resolution of the moral tension

between crime and disease, in part, through the morality of phallogentrism. The deep truth *is* a question of morality.

The process of psychology's 'subjugation' to the Law includes a disturbance of the system of knowledge construction through which psychological discourse authorises the legitimacy of psychological knowledge of mental disorder: the system of scientific methodology, and the model of the scientist-practitioner within that system. This disturbance displaces the 'facts' of psychological knowledges to the position of 'opinion' within the practices of legal discourse. Psychology's subjugation to the Law as been theorised, here, as the process through which the boundary between psychology and Law is established and maintained. The process implicates social power relationships among the discourses in the constitution of their 'territory'. These power relations are supplementary within the legitimate text of psychological knowledge, in this case. According to this text, it is the appearance of a difference in purpose which demarcates the boundary between psychology and the Law at the place of their co-articulation. The Law is concerned with the judgement of criminal responsibility and the imposition of penal sanction. Psychology is concerned with the diagnosis of mental disorder and treatment interventions. As an effect of the subjugation of psychology, this demarcation delimits psychological knowledges, in this case, to resourcing evidence related to diagnosis since it is diagnosis, not treatment intervention which 'corresponds' to the legal process of judgement. That there is a lack of correspondence between penal sanction and treatment intervention disturbs psychological knowledges of mental disorder, on their own terms. Tracing these disturbances onto social power relations among legal and psychological discourses,

enables the appearance of psychology's supplementary relationship with the Law: while disturbed on its own terms, psychology's subjugation to the Law enables the Law to enact its own process and purpose of judgement: verdict and penal sanction.

While the process of psychology's 'subjugation' to the Law includes a disturbance of psychology's knowledge system and the 'purpose' of that system in psychology's own terms, the exclusions also practised as subjugation include psychology's own exclusion of the histories of women's relationship with psychology. These 'double' exclusions enable an ease of co-articulation in the phallogentric positioning of women within the circle of psychology's response and the Law. Tracing these exclusions onto the social power relations among the discourses open both psychological and legal discourse to the question of the morality of phallogentrism. The deep truth of Law, purchased through the subjugation of psychological discourse to the Law, *is* a question of morality.

Questioning the morality of phallogentrism at a site of psychology's subjugation to the Law, where both discourses enable the phallogentric positioning of women through practices of exclusion disturbs the ~~concept~~ of deep truth purchased through legal and psychology knowledge systems. Here, sexual difference has been traced onto the 'common sense' and 'logical argument' founding the process of legitimation and authorisation of Law's deep truth. Both common sense and logical argument exclude 'the excess of reason, emotion', and both occupy positions determining 'fact' as an 'objective representation of the criminal event', beyond reasonable doubt. Sexual difference may also be traced

onto the scientific methodology and clinical gaze founding the process of legitimation and authorisation of psychology's 'opinions' resourcing Law's deep truth. Scientific methodology and the clinical gaze also exclude the 'excess of reason, emotion', and also determine 'fact', on their own terms, as an 'objective representation'; in this case, a representation of mental health and mental disorder. It is this double 'objectivity' of Law's deep truth, purchased through the subjugation of psychological discourse, which is disturbed by tracing practices of exclusion and disturbance onto the texts of Law's process of judgement and opening both psychological and legal discourse to the question of the morality of phallogentrism.

As a deconstructive reading, disturbing the objectivity of Law's 'deep truth' has involved tracing social power relations constituting sexual difference and the differences between psychology and Law. These 'differences' are traced as an effect of systems of signification, and question the *politics* of social relations of domination and subordination, subjugation, authorisation, legitimation, resistance and protest. The inclusion of politics with morality as questions disturbing the 'deep truth' of Law's process of judgement has been theorised, here, as an ethical response. The ethical response regards - brings into view, makes visible, articulates - the morality and politics of relationships within the circle of response and the other/Other. The ethical response is a responsible response. The deep truth of Law *is* a question of responsibility.

Responsibility has been theorised, here, as 'something' of which there can be no objective knowledge. The deep truth of Law as a judgement of criminal responsibility founded on 'objective knowledge' of the facts of the criminal act and the condition of the accused's mind, depends on

responsibility as intentionality, rational subjectivity and, the coherence of an act.

The displacement of responsibility from an object known through a process of judgement, beyond reasonable doubt, to the morality and politics of relationships within the circle of response and the other/Other calls into question objective knowledge of intentionality, rational subjectivity and the coherence of an act. Intentionality is constituted as rational foreknowledge, controlled by reason so that a defect of reason constitutes insanity, while a defect of morality (an excess of reason) constitutes criminal responsibility. The singularity of an intention to commit an act with prohibited consequences constitutes the condition of mind necessary to judge criminal responsibility. Rational subjectivity is constituted as the singular process of reason governing intention. Rational subjectivity excludes emotion, and enables foreknowledge and reasoned choice. The coherence of an event is constituted through the textual, temporal and causal, organisation of relations between subjects and objects so as to effect intelligibility and bring a singular act into view. Together intentionality, rational subjectivity and the coherence of an act constitute the value of the singularity and a moment in which a particular rational subject intends and carries out an act known to have prohibited consequences. As the Law judges responsibility, the value of singularity is assumed and affirmed at the moment objective knowledge of responsibility is legitimated through judgement. The deep truth of Law is constituted at the same moment the value of singularity is authorised through the constitution of criminal responsibility. The process of judgement exercises and constitutes the force of law, enforcing a moral order privileging singularity in the name of justice. Deep truth *is* a

question of justice.

The judgement of responsibility has been theorised here as the desired endpoint of a narrative performance iterating legal and psychological discourse. The process of judgement becomes a process of 'decision' in which legal doctrine governs and enforces common sense, reasonable doubt, and probability as the standards of exclusion determining objective knowledge or criminal responsibility. The process of judgement is a sequence of decisions that cut: an enactment of the violence of exclusions and disturbances which purchase deep truth.

At the moment of decision, which is the moment the name of justice is exercised as Law, cuts determine objective knowledge of criminal responsibility and the deep truth of the event of the crime. The singularity of the event of the crime, judged and constituted as a moment in which a particular rational subject intends and carries out an act known to have prohibited consequences is a singularity thoroughly saturated with the universal value of singularity authorising intentionality, rational subjectivity, and the coherence of an act as criterion of responsibility. The cuts determining objective knowledge of criminal responsibility, violate the specificity of an historical moment through excluding, at least, the multiplicities effected through the simultaneous presence of 'reason' *and* 'emotion', and 'foreknowledge' *and* 'irrationality', along with the multiple possibilities of intelligibility offered as 'event'. The cuts determining the deep truth of an event as a crime, depend for their enactment on the silence of universal values of singularity. To speak in the name of justice, the Law must authorise (and iterate) universals and speak the deep truth of a crime as if there were no universals (iterated) in the specific case

judged.

Our common [European] axiom is that to be just or unjust and to exercise justice, I must be free and responsible for my actions, my behaviour, my thought, my decisions (Derrida, 1990, p.961).

In the sense that they have been theorised here, to be just, I must be intentional, rational, and act knowingly to produce the coherence of an act with foreknown consequences: I must enact *mens rea* and *actus reus*.

But this freedom or this decision of the just, if it is one, must follow a law or a prescription, a rule... it must have the power to be of the calculable or the programmable order, for example as an act of fairness (Derrida, 1990, p.961).

Our common axiom, and in as much as that axiom is sense, our common sense, of the just, necessarily follows a rule, a law, a calculation, held in common. And in as much as justice values singularity, the force of a rule, a law, a calculation, may be legal, legitimate and authorised, but the decision that cuts reduces the name of justice to the calculable, and is not, necessarily an enactment of justice.

Disturbing the deep truth of Law (and its supplement) displaces responsibility from the enforcement of the value of singularity onto regard for the morality and politics of relationships within the circle of response and the other/Other. This disturbance also displaces the name of justice onto the values of undecidability and equivocation. Within the circle of response and the other/Other, undecidability and equivocation refuse to 'calculate' the multiplicity of the other, or to formulate the other's irreducibility.

... there is no justice except to the degree that some event is possible which, as event, exceeds calculation, rules, programs, anticipations and so forth. Justice as the experience of

absolute alterity is unrepresentable, but it is the chance of the event and the condition of history (Derrida, 1990, p.971).

In as much as justice, which “addresses itself to singularity, to the singularity of the other” (p.955), is unrepresentable it is also already impossible.

In a gesture towards the impossible, justice, this thesis has refused to question the event. Rather, questions have addressed exclusions and disturbances purchasing the deep truth of Lisé Turner’s guilt. Among these exclusions and disturbances are traces of sexual difference, the effects of power relations governed by phallogocentric morality, and the specificity of Lisé’s history as-a-woman. Within the circle of response and the other/Other the ethics of judgement in the matter of a mother killing babies becomes a question of responsible response to the call of woman. As a question, the ethical response defers justice towards the movement between the specificity, alterity and incalculability of an event and the possibility of a common, shared intelligibility of a woman’s history. The specificity of the event, its absolute alterity remains unrepresentable “but it is the chance of the event and the condition of history” (p.971). The possibility of a common, shared intelligibility of a woman’s story remains conditioned by speaking in response to the incalculability of the other, in the presence of the other’s undecidability, and in the foreknowledge of the impossibility of speaking the ‘one’ without saying the other.

She who knows she cannot speak of them without speaking of herself, of history without involving her story, also knows that she cannot make a gesture without activating the to and fro movement of life (Trinh, 1988, p.76).

Before this...

Late last year I visited Lisé. On my way I was thinking about her courage in telling her story so that I met her on her terms: as a child killer. I was thinking of her courage in wanting to make a difference, for others, so that it “never happens again”. I remembered a story she tells; “there are no roses at the bottom of my garden”. And I took Lisé a rose bush for her courage. We planted it together, me for her courage and she for her girls.

My innocent babies,
I am sorry. Please forgive me. I did love you. I did. It all got so mixed up in my head. Now my head is clear I am able to face the painful truth. I brought you into the world. You trusted me. There is no excuse for what I did. I live with that daily. I survive knowing that somehow you are in a better place. [...], you knew I loved you. I am telling you for the first time: I love you too little [...]. You will stay in my heart always.
Rest peacefully now.
Mummy.

(Lisé Turner, cited in Bungay, 1998, p.136).

Appendix A

Meeting Lisé

I met Lisé through my mother's sister, Ronda Bungay. Ronda was writing her book, telling the stories of women who kill. In supporting Ronda's writing, I became familiar with the stories she was telling and I met some of the women who told their stories. By chance, I happened to visit Ronda as she was writing Lisé's story and we talked about motherhood, and she and me and Lisé.

Some time later I met Lisé for the first time when Ronda asked me to pick her up and bring her to lunch. I was impressed, and overwhelmed, as she told me about herself, and her relationship with Ronda, including the way she had negotiated telling Ronda her story in the hope that she could make a difference. She hopes that by understanding how it was for her to have killed children others could learn the risks and dangers of her life. She made it clear to me that her guilt was not in question. She insisted that if I had any relationship with her it had to start by accepting her guilt. I do. This was the starting place of our relationship. I had not asked her anything before she called me to respond on condition I consented to her guilt.

Over lunch Lisé told us how it had been for her to work on Ronda's book, to know that she could trust Ronda, about her other relationships, her partner, her mother. She talked us about her parole and how she felt about not being able to go back to Christchurch where her babies are buried. And we talked to her about our children. She told us about the process of accepting her guilt, how difficult it had been and how hard she had worked to accept it. We affirmed the difficulty, which was incomprehensible to us. She talked about

how she understood killing the babies from where she is now, but that she hadn't always understood it that way. And we talked about women's experiences and how we come to understand our own, and about how we have variously understood ourselves through different processes. She told us how she felt about the other baby she had killed, another mother's baby. She did not see herself as a victim, and we tried not to see her that way. She told us about wanting to be a good mother. And we talked about motherhood. We talked about writing, and the process of writing, and research. We told her about psychology, and the absence of women's histories. She told us about wanting to write a book, herself, about her process.

When we took Lisé home she asked if she could be our friend, and she added that friendship always comes first. Then she said "but if you were to ring me in the next six weeks or so and ask me if you could do something with my story I would talk about it". And when I rang, we did.

Lisé told me that friendship always comes first. And our friendship always comes before the beginning of this thesis...

Appendix B

Lisé's Consent



School of Psychology
Private Bag 11 222,
Palmerston North,
New Zealand
Telephone: 64 6 356 9099
Facsimile: 64 6 350 5673

Dear Lisé,

This is the letter we talked about when I visited you last Saturday. As we discussed, my research is about the psychological expert testimony that is used in trials. I have already done quite a lot of work on the relationship between psychology and the law, and the kinds of things that psychologists are allowed to say, and not allowed to say. With your permission I would like to use the transcript of your trial as an example of the way that psychology is used in expert testimony. As you know, I am especially interested in the way that psychological evidence affects what can be said about the kinds of experiences that women have. I think this is particularly important in expert testimony because of the way that the law limits what psychologists can say anyway. So far, it seems that any testimony about a woman's life experience which focuses on her relationships with other people, or the way in which being a woman affects her experience is left out.

If you are still agreeable to me using the transcript of your trial as an example, could you please sign the form at the bottom of this letter and return it to me in the envelope I've enclosed. I have sent two copies of this letter so that you can keep one. I'll ring you sometime during the week.

Thanks

Consent Form

I, Lisé Jane Turner, give my permission for the transcript of my trial held in Christchurch during 1984, to be used for research purposes by Leigh Coombes at Massey University.

Lisé Turner

Te Kunenga ki Pūrehuroa

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