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The Question of Evil and Feminist Legal Scholarship

In this article, we argue that feminist legal scholars should engage directly and explicitly with the question of evil. Part I summarises key facts surrounding the prosecution and life-long imprisonment of Myra Hindley, one of a tiny number of women involved in multiple killings of children in recent British history. Part II reviews a range of commentaries on Hindley, noting in particular the repeated use of two narratives: the first of these insists that Hindley is an icon of female evil; the second, less popular one, seeks to position her as a victim. In Part III, the article broadens out and we explain why we think feminist legal scholars should look at the question of evil. In large part, the emphasis is on anticipating the range of possible objections to this argument, and on trying to answer these objections by showing how a focus on evil might benefit feminist legal thinking – specifically in relation to the categories of perpetrator and victim and, more generally, in relation to laws motivated by a desire to secure women's human rights.

Keywords:

Agency; evil; feminist legal scholarship; victims; women who kill

In this article, we argue that feminist legal scholars should engage directly and explicitly with the question of evil. This is a difficult and risk-laden argument, and we are uncertain how it will be received. It may be seen as apposite, in particular because of the marked increased in the use of the language of evil in political rhetoric and also perhaps because of the surge of interest in evil in other academic disciplines. On the other hand, however, there is a risk that the argument will be dismissed as reckless, or

even as indecent (on the assumption that evil is something one should not attempt to explain). Less dramatically, there is a risk that it will be deemed low status; as something that has no claim to priority attention from feminist legal scholars. In light of these concerns, this article focuses on *why* feminist legal scholars should examine the question of evil. In other words, it does not sketch a proposal for a feminist legal account of evil: its aim, instead, is to argue for a particular orientation.

The structure of the article is as follows. In Parts I and II, we try to provide a context for the overall argument. Part I summarises key facts surrounding the prosecution and life-long imprisonment of Myra Hindley, one of a tiny number of women involved in multiple killings of children in recent British history. Part II reviews a range of commentaries on Hindley, noting in particular the repeated use of two narratives: the first of these insists that Hindley is an icon of female evil; the second, less popular one, seeks to position her as a victim. In Part III, the article broadens out and we explain why we think feminist legal scholars should look at the question of evil. In large part, the emphasis is on anticipating the range of possible objections to this argument, and on trying to answer these objections by showing how a focus on evil might benefit feminist legal thinking – specifically in relation to the categories of perpetrator and victim and, more generally, in relation to laws motivated by a desire to secure women's human rights.

I: MYRA HINDLEY: A NARRATIVE

Between November 1963 and October 1965, a series of murders, involving abduction and assault, took place in and around Manchester, England. In 1966, a 27-year-old man, Ian Brady, was tried for three of these murders (those of Leslie Ann Downey, aged 10; Edward Evans, aged 17; and John Kilbride, aged 12). He was convicted and sentenced to mandatory life imprisonment under the Murder (Abolition of the Death Penalty) Act 1965. His co-accused was a 23-year-old woman called Myra Hindley. She and Brady worked at the same chemical company in Manchester and had begun a relationship in 1961. The Crown's case was that 'Brady was the initiator of these crimes, and the actual killer; she was cast as his willing accomplice, corrupted and dominated by him' (*R v Secretary of State for the Home Department, ex p Hindley* [1998] Q.B. 751, 760, per Lord Bingham CJ). The jury found Hindley guilty of the

murders of Downey and Evans, and she was sentenced to mandatory life imprisonment. She was also found guilty of being an accessory after the fact in the murder of Kilbride, for which she was sentenced to a term of seven years.

The murders, the discovery on Saddleworth Moor of the bodies of two of the victims, and the ensuing trial 'received intense publicity, and aroused deep public enmity towards both Brady and [Hindley]' (ibid.). An audio tape, played in evidence, recording the forcible gagging and photographing of one of the victims, Lesley Ann Downey, caused particular anger. In passing sentence, the trial judge 'in any foreseeable future' and that Hindley 'apart from some dramatic conversion' should be 'kept in prison for a very long time' ([1998] Q.B. 751, 760). Twelve years later, Lord Chief Justice Widgery advised the Home Office that, in his view, it was too early to discuss what the ultimate term of imprisonment for Hindley ought to be, but that it would be expected that a woman would serve a shorter term than her male co-defendant (ibid., 761). Subsequently, in 1982, Lord Lane, the then Lord Chief Justice, recommended a tariff of no less than 25 years for Hindley (and that Brady never be released). In 1985, the then Home Secretary, Leon Brittan, concluded that a tariff of 30 years imprisonment would be appropriate for Hindley.[1]

In the mid-1980s, Ian Brady was transferred from the prison system to a psychiatric hospital (*R v Ashworth Hospital Authority, ex p Brady* (2001) 58 B.M.L.R.173). In 1987, Hindley broke her silence and disclosed to the police, who were investigating claims of additional murders, that Brady and herself were responsible for a total of five murders between 1963 and 1965. The two additional victims were Keith Bennett, aged 12, and Pauline Reade, aged 16. Hindley also confessed to greater knowledge and involvement in the three murders that were the subject of the 1966 trial. After agreeing to return to the Saddleworth Moor to locate the remaining graves, the body of Pauline Reade was finally discovered in July 1987. Keith Bennett's body has never been found.

In 1990, David Waddington, the then Home Secretary, increased Hindley's tariff from 30 years to 'whole life'; in other words, he decided that she was to remain in prison until her death. This information was only communicated to Hindley in December 1994, following a decision of the House of Lords which forced the Home Office to

abandon its policy of keeping prisoners unaware of their tariff details (*R v Secretary of State for the Home Department, ex p Doody* [1994] 1 A.C. 531). Hindley's 'whole life' tariff was subsequently confirmed by Michael Howard and Jack Straw, successive Conservative and Labour Home Secretaries.

In 1997, Hindley sought judicial review of the system of whole life tariffs and of the decisions of successive Home Secretaries to impose and maintain such a tariff in her case. Her application was unsuccessful. The core of the reasoning in the lower courts was that there was nothing unlawful about increasing a tariff which the Home Secretary wished to class as 'provisional', provided the prisoner had no legitimate expectation otherwise; furthermore, Hindley's admissions in 1987 of greater criminal responsibility permitted full reconsideration of her tariff. In March 2000, the Law Lords, in dismissing Hindley's appeal, unanimously rejected her argument that a 'whole life' tariff was grossly disproportionate given her age at the time of the murders, the alleged dominance of Brady over her, the length of her imprisonment (34 years), and the allegedly politically-motivated actions of successive Home Secretaries in keeping her in prison. Writing for the court, Lord Steyn emphasised that:

> even in the sordid history of crimes against children the murders committed by Hindley, jointly with Ian Brady, were uniquely evil. … They abducted, terrified, tortured and killed their victims before burying their bodies on Saddleworth Moor. … The pitiless and depraved ordeal of the victims, and the torment of their families, place these crimes in terms of comparative wickedness in an exceptional category (*Ex p Hindley* [2001] 1 A.C. 410, 420).

On 15 November 2002, after 36 years of incarceration, Hindley died of bronchial pneumonia and hypertension, aged 60. Ten days later, the House of Lords used section 4 of the Human Rights Act 1998 to declare the Home Secretary's role in fixing tariffs in mandatory life cases incompatible with Article 6 of the European Convention on Human Rights (*R v Secretary of State for the Home Department, ex p Anderson* [2002] UKHL 46).[2]

It was reported that 20 local undertakers refused to handle the funeral service of Hindley. One undertaker is alleged to have asked: how would people feel 'if it was

their mother or their grandfather in the same chapel of rest or in the same hearse as Myra Hindley?' (quoted in Hawkins 2004). Hindley's death was covered by both national and international media; references to her as an icon of modern evil were ubiquitous.

II: OTHER NARRATIVES ON HINDLEY

The references that dominated news reports on Hindley's death were a common feature of many different narratives on her life and crimes. To illustrate this point and, more importantly, to demonstrate how the repeated reference to evil has shaped analyses of Hindley, we use this section to review a range of commentaries on her. Emphasis is placed on three types of commentary: first, popular accounts (specifically, media, 'expert' and autobiographical accounts); secondly, official law reports and correspondence, which we use to highlight judicial comments on Hindley's character and actions; and third and finally, academic commentaries, where our focus is on how and where Hindley has been the subject of detailed analysis.

Popular accounts

In one of the obituaries written about Hindley it was said that 'a small group of once popular Christian names … have fallen out of use because of their association with one hated individual. In Germany, Adolfs under 60 are thin on the ground. And you can count on the fingers of one hand the number of Myras born in this country since 1966' (Standford, *The Guardian*, 16 November 2002). The writer also observed that Hindley's name was 'only ever used in tabloid newspapers with the qualifying adjective "evil"'(ibid.). The *Sun* newspaper headline announcing her death was typical of the tabloid reportage: it read, 'Child killer Myra Hindley is rotting in hell at last'. In the accompanying article, Hindley was described as 'Britain's most hated woman' (16 November 2002). A *Daily Mail* report on the same day adopted a similar stance, reminding its readers that '[t]he murders appalled the nation' and emphasising that 'the fact that a woman was so deeply involved made Hindley a personification of evil'.

Unsurprisingly, perhaps, image was key to many media reports on Hindley. A black and white photograph, taken in the police station at the time of her arrest, appeared repeatedly in both tabloid and non-tabloid newspapers. In it, her peroxide hair was 'swept up and back and [there was] a fixed, almost defiant, look in the eyes' (Stanford, 2002). The enduring power of the photograph was made clear in 1997 when a reproduction of it, made by an artist using children's handprint images, had ink and eggs thrown at it in protest when it was displayed as part of a British Academy exhibition.

The photograph's alleged meaning – that Hindley was 'pure evil' – was reinforced by the tabloids' unceasing interest in the case, and by their use of a range of 'authoritative sources' (including ex-prisoners, handwriting experts, trial reporters, relatives of the victims, friends and relatives of Hindley herself, and a police officer who heard her 1987 confession to the murders of Reade and Bennett), each of whom spoke in support of the dominant narrative. Further endorsement of its meaning seems to have been generated by the banding together of Hindley with both mythical and real-life 'monsters'. Hindley was variously described as Satan, a She-Devil, Medusa, and as 'a model for Clytemnestra' or something 'more terrible, like one of Fuseli's nightmare women drawn giant-size'(Johnson, quoted in Birch, 1993, p. 51). As regards 'real-life' monsters, Hindley was linked to the 'Angel of Death, Beverley Allitt, a nurse who was convicted in 1993 of murdering four children in her care and of attempting to murder three other children, and to Rosemary West who was convicted in 1995 of the murder of 10 girls/women (allegedly committed with her husband, who hanged himself before the trial). Allitt was depicted as the 'most monstrous woman since Myra Hindley' (quoted in Jewkes, 2004, p. 123). And, in 1995, the *Daily Mail* reported that West and Hindley had formed a relationship: 'Rose West and Myra Hindley have formed a macabre friendship in jail … the two most evil women in Britain, both openly bi-sexual – have been seen holding hands in Durham prison' (Wykes, 1998, p. 239).

Whilst 'monsterisation' and 'mythification' (Morrissey, 2003, p. 25) were central to the tabloid stories about Hindley, the argument that she might have been a victim and the possibility of her redemption or rehabilitation received little coverage. In line with this, her repeated descriptions of the hold that Brady had over her during their

relationship had no apparent effect on the tabloids' preferred narrative. Nor was there any obvious shift in the narrative following her mid-1980s confession. For the most part, the confession was represented as self-serving. More generally, as one obituary writer noted, 'the more that convincing evidence was presented of her transformation, the more the myth grew, in response, that she was a manipulative schemer, prepared to trick anyone to be free' (Stanford, 2002).[3]

Similar themes can be found in the commentaries of 'experts' (by which we mean, those who observed Hindley at her trial, had contact with her while she was in prison, or knew her in some other way). The most notable feature of the majority of these commentaries was their singular focus on Hindley as an evil woman. In an unauthorised biography published in 1988, female relatives of two her victims were said to believe that '[she] was and is a monster, an evil creature who cannot be discussed rationally' (Ritchie, 1998, p. 290). And, on Hindley's death, one of these women, Winnie Johnson observed '[s]he was pure evil to the very last' (*The Sun*, 16 November 2000). Many 'experts' used their own observations of Hindley's appearance as supporting evidence. For example, Pamela Hansford Johnson, a reporter who was present at the trial and later wrote a book on the murders, described Hindley's hairstyle as 'too massive for the wedge-shaped face; in itself it bears an uneasy suggestion of fetishism'. She also said that Hindley had 'a great strangeness, and the kind of authority one might expect to find in a woman guard of a concentration camp' (1967, pp. 22-23). Another trial-observer expressed the view that Hindley 'was a very hard case indeed. A few tears, a bit of genuine embarrassment and shame might have served her own cause better' (Ritchie, 1988, p. 116).[4] The relatives of two of her victims also chose to focus on her appearance when, two decades later, pictures were released to the press of Hindley in an academic gown at her Open University graduation ceremony: the mother of Lesley Ann Downey is reported as having described the graduation gown as 'the Cloak of Satan', and Pauline Reade's brother insisted that 'Satan in satin is still Satan' (Birch, 1993, p. 55)

These 'expert' commentators also placed particular emphasis on Hindley's sexual practices – with Ian Brady[5] and with female partners whilst she was in prison. Her behaviour, it was suggested, provided further evidence of her depravity; her 'alleged lesbianism' (Ritchie, 1998) was also said to demonstrate her ability to manipulate

other people.[6] Hindley's sanity was also cited as evidence against her by the experts: Lesley Ann Downey's mother remarked that Brady 'at least had the decency to go mad' (quoted in Birch, 1993, p. 55). And the apparent consensus that, having escaped the death penalty, she deserved 'additional' punishment, worked against her too: a fellow prisoner, who attacked Hindley so severely that she 'had to eat through a straw' for six weeks and needed cosmetic surgery, described being 'treated like a hero' by prison staff: 'The incident … had been set up … "I heard one officer say to another: "I've been waiting twelve years for someone to do that"' (Kirsta, 1994, p. 109).

Different themes preoccupied a minority of 'expert' commentators. Individuals in this latter group – including Lord Longford and Fr Bert White, Hindley's former prison chaplain – campaigned for Hindley's release, describing her as a political prisoner held hostage by successive Home Secretaries fearful of a vengeful tabloid press. These commentators also emphasised that there were 'two Myras' (*The Guardian*, 18 May 1998): first, the Myra before and after Ian Brady, and secondly, the Myra of the arrest photograph who represented 'Britain's most evil woman'. Their efforts drew the scorn of the tabloids, and they were depicted as 'loonies' and 'do-gooders' who had been duped by a manipulative woman.[7]

The third and final popular source we summarise here is the autobiographical material provided by Hindley. From the mid-1980s onwards, Hindley spoke about her crimes and about her relationship with Brady. She emphasised the influence he had held over her. It came, she said, from her infatuation with him and also from her fear of him: 'He was God. It was as if there was a part of me that didn't belong to me, that hadn't been there before and wasn't there afterwards' (quoted in Birch, 1993, p. 41). She explained her not-guilty plea and subsequent 20-year silence, saying '[f]or years I just blocked it; I couldn't talk about it or even admit it to myself' (ibid., p. 59). She did not deny her own blameworthiness. 'I'm not saying that he took over my mind or anything, or that I wasn't responsible for what I did, but I just couldn't say "no" to him' (ibid., p. 41). On occasion, she described herself as 'more culpable than Brady is, even though he committed the crimes': 'Not only did I procure the victims for him, I knew it was wrong, to put it mildly, that what we were doing was evil and depraved, whereas he subscribed to de Sade's philosophy, that murder was for pleasure' (*The*

Guardian, 29 February 2000). Hindley also drew attention to her status as 'a haunting reminder of the unthinkable and unknowable' (*The Guardian*, 19 December 1997), observing that 'together with that awful mugshot',[8] the majority of people preferred to keep her 'frozen in time'.

Judicial accounts

Judicial attitudes to Hindley appeared to harden over time, perhaps because of her admission in 1987 of her role in two other murders and her greater knowledge and complicity in the three murders for which she was tried in 1966. The trial judge and, later, Lord Chief Justice Lane had contemplated Hindley's eventual release, noting 'material differences'[9] between her case and that of Brady. In a letter to the Home Secretary, dated 8 May 1966, the trial judge commented:

> Though I believe that Brady is wicked beyond belief without hope of redemption (short of a miracle), I cannot feel the same is necessarily true of Hindley once she is removed from his influence. At present she is as deeply corrupted as Brady but it is not so long ago that she was taking instruction in the Roman Catholic Church and was a communicant and a normal sort of girl (quoted by Lord Bingham CJ in *Hindley* [1998] Q.B. 751, 760).

The sentiments of the senior judiciary who dismissed Hindley's judicial review application were markedly different from those of the trial judge: Lord Steyn put it most starkly, emphasising that Hindley's 'role in the murders was pivotal. Without her active participation the five children would probably still be alive today' (2000, p. 392). All of the judges who considered her case were in agreement, however, on Hindley's sanity; she was, in the words of Lord Steyn, 'a woman of competent understanding'. In addition, although the judges appeared to be concerned about the risk of the prisoner release process being tainted by '[Hindley's] notoriety and the public obloquy which would fall on any Home Secretary who ordered her release'(1998, p. 779 per Lord Bingham CJ), there was also a clear resonance between the language used by some of the judges and the dominant popular language surrounding the case. The trial judge, for example, said that he was convinced that Hindley and Brady viewed those who were horrified by their crimes as '"morons" and

beneath contempt' (1998, p. 760); and, as mentioned earlier, in the House of Lords, Lord Steyn observed that 'in terms of comparative wickedness' the crimes were in an 'exceptional category': 'even in the sordid history of crimes against children [these murders] were uniquely evil'(2000, p. 392). Furthermore, in justifying the penalty of a 'whole life' tariff, Lord Steyn also observed that 'before 1965 persons convicted of heinous murders were sentenced to death and executed' (2001, p. 416).

Academic accounts

We turn now to two groups of academic commentaries on Hindley: the first drawn from the disciplines of criminology, sociology and cultural studies; the second, much smaller group, drawn from the discipline of law. We begin with the former, drawing out three points of common emphasis in the commentaries.

Criminological, sociological and cultural studies' scholars have emphasised, first, that we have stories or narratives about Myra Hindley: in other words, the facts (about her and about her crimes) and understandings of them are, and will always be, contested (e.g., Hawkins, 2004).[10] The second point of emphasis concerns legal and media constructions of Hindley's criminality. The commentators point to the gendered nature of these constructions, noting how they relied on the idea of Hindley as evil or 'bad' (her sanity excluded 'madness', the other side of the classic dichotomous frame for female offenders) and, occasionally and controversially, on the idea of woman-as-victim. Many different aspects of the legal and media constructions are drawn upon to support this argument: the incessant use and dominant interpretation of the original black-and-white arrest photograph;[11] the emphasis on Hindley's allegedly depraved sexual practices; the ways in which she was linked to both real-life and mythical female 'monsters', such as Medusa; the apparent resentment towards her sanity; and the greater revulsion felt towards her than towards Brady (because their crimes involved the abuse of children and she had therefore violated women's natural instinct for nurturing) (see especially, Ballinger, 2000; Birch, 1993; Jewkes, 2004; Storrs, 2004; and Morrissey, 2003).

The third and final aspect of consensus in these commentaries, and the one to which we shall return in Part III, is that what '[t]he mythology of Myra Hindley reveals,

above all', is 'that we do not have a language to represent female killings' (Birch, 1993, p. 61). Belinda Morrissey suggests that the problem is most acute when a woman kills with a male partner for sexual motives: '[k]illing in league with a man apparently places female murders even further beyond the pale than their counterparts who kill alone' (2000, p. 111). Of course, it might be objected that these arguments have no application to Hindley who, as the account provided in this section demonstrates, was described as bad or evil and, occasionally, as a victim – as 'just another woman conscripted by a dangerous man' (Campbell, *The Independent on Sunday* 17 November 2002). In response, it needs to be emphasised that the argument being made by Birch, Morrissey and others[12] is not that there is absolutely no language available for 'telling stories about women who kill', but rather that the subject positions are remarkably limited – the women have to be mad, bad or victims – and, crucially, that none of them admit of female agency.

In the other group of academic commentaries we examined – those written by lawyers – we were surprised to find that, over a 40-year timespan, there was only a tiny amount of detailed coverage (although brief references to her case were common, for example in women & the law and criminal law/criminal justice literature). There were only three full-length articles on Hindley published in British law journals between 1966 and 2005. One of these, by Jason Schone in the *International Journal of the Sociology of Law* in 2000, argues that Hindley, the 'hardest of hard cases', had a corrosive effect on English penal policy, discouraging the judiciary from confronting the anomalies in the treatment of mandatory life prisoners.[13] The second article, by David Gurnham in *Legal Studies* in 2003, uses the Hindley judicial review litigation to explore the role of retributivism as a principled justification for punishment. The third article, by Jo Winter in *Social & Legal Studies* in 2002, deals with the role of judicial summing up in the murder trials of Myra Hindley and Rosemary West. Winter highlights how references to gender and sexuality were used in the summations in both trials, but she also points out that in Hindley's trial there was far less appeal to these discourses. Thus, although the prosecution placed considerable emphasis on Hindley's alleged sexual aggressiveness and on the crimes themselves as a violation of norms of femininity and maternity, the judge's summation avoided these discourses and focused instead on the strong incriminating evidence.

In our opinion, the most striking feature of the legal literature is the general absence therefrom of *feminist legal scholarship*. There are some brief comments in various feminist legal texts (most often in the context of a discussion of the mad/bad dichotomy that ensnares women who kill[14]) and, as noted above, Winter's article analyses the role of gender and sexuality in the summing up in the trial. But, these references aside, there is nothing else on Hindley. This absence intrigues us: there appear to be many good reasons for feminist legal scholars to write about her. She is, for example, one of a small number of female killers in the UK, and she is one of the even smaller group who killed more than once. There is also the fact that there is 40 years of commentary depicting her as an icon of female evil, as well as a range of accounts of her victimisation by Brady and by a criminal justice system which was subject to the political whims of successive Home Secretaries. More pertinently perhaps, as outlined above, there is a significant body of feminist scholarship within the social sciences emphasising both the widespread feminist silence on women's violence and the potentially adverse consequences of this silence. Given all of these reasons for feminist legal scholars to write about Hindley, it seemed to us that it was important to ask the question: what explains the silence?[15]

III. THE QUESTION OF EVIL AND FEMINIST LEGAL SCHOLARSHIP

The answer, we think, may lie in what we would describe as a *double bind* affecting feminist legal scholars. We have chosen this description because, in trying to understand, intellectually, why feminists working within law have been silent about Myra Hindley, we have found it easiest to think in terms of a specific feminist legal explanation and a complementary law-in-general one. In what follows, we suggest that the first component of the double bind – which is labelled as feminist legal rather than feminist in an effort to capture the particularity of *legal* feminism – is the privileging in feminist legal work of one particular narrative on women who kill. We also suggest that this privileging is reinforced by the suppression of interest in the question of evil that is evident generally in legal scholarship and practice.

The double bind

Looking first at the feminist legal component of the double bind, we would nominate two principal obstacles to analysis of Myra Hindley, and of women killers like her, by feminists working within law. The first of these obstacles is that, for understandable and laudable reasons, violence *against* women has been the central motif of many feminist legal engagements; the second is that, in common with other forms of feminism, until very recently legal feminism paid relatively little attention to the role that 'positive' models of female agency ought to play in both theory and practice.[16] Viewed together, these obstacles help to explain the ascent and enduring power of the feminist legal narrative of woman-as-victim. In crude terms, this narrative is privileged because 'it is harder to defend [a woman like Hindley] who has apparently willingly committed heinous acts of cruelty than one whose actions resulted from duress or oppression' (Morrissey, 2003, p. 156); there is also, of course, the barrier posed by the need to condemn the crimes, and the perceived risk that analysis might somehow be seen as, or even lead to, a justification of them. Less crudely, the narrative's power can be attributed to the important role it performs in complexifying the traditional mad/bad dichotomy surrounding women criminals and in forcing acknowledgement of the oppressive and unjust circumstances of many women's lives. Yet, however convincing the reasons for the feminist legal emphasis on woman-as-victim, the silence surrounding Myra Hindley brings us back to a series of difficult questions: if the constructions of violent women in feminist legal scholarship privilege woman-as-victim, exclude (for the most part) women involved in sadistic murders,[17] and have only recently and in very specific situations emphasised ideas of self-defence and self-preservation which permit discussion of the agency of violent women, what implications does this have for feminist legal thinking on perpetrators, on victims and, more generally, on women's human rights? Later in the article we provide a series of answers to these questions; first, however, we want to explain why we think that the feminist legal component of the double bind is reinforced by lawyers' wilful and persistent avoidance of the subject of evil. In making this argument, we draw on David Fraser's recent work analysing lawyers' representation of Nazi law as an aberration. We also aim to show how contemporary trends in one of the central legal responses to the Holocaust – international human rights law and lawyering – appear to support Fraser's argument that we must construct 'a collective memory of the Holocaust as a *lawful* phenomenon' (2005, p. 6, our emphasis).

We suspect that, for many readers, Fraser's argument will be deeply counter-intuitive; for some, it will be outrageous. Such reactions are unsurprising: he is challenging not just what we know about Nazi Germany but also what we know and *want to know* about ourselves and our discipline. Broadly speaking, what we know is that Nazi Germany was a 'criminal state', that the Holocaust was 'not law': as Fraser explains, '[t]he Holocaust is absent from law schools, from legal education and from legal consciousness, precisely because it has been declared "not law"' (p. 6). Displacing this knowledge – taking Nazi Germany from its 'airtight legal quarantine' (p. 11) – is a formidable and deeply uncomfortable task; a task that brings lawyers face-to-face with what Fraser describes as the jurisprudential *continuities* between Nazi Germany and what preceded and followed it. Specifically, it would oblige us to recognise that '*evil can be and was perpetrated in, by, through and under law*' (p. 7, our emphasis) – for example, by the judges and lawyers in Nazi Germany who 'operated as they always had, if not with more vigour and enthusiasm, as the legal system adopted "Nazi legality" as its normative basis' (p. 24). Given this, it is not surprising that the post-1945 period is marked by lawyers' enduring evasion of the very centrality of law's role in evil: 'In order for us not just to understand the Nazi period and the horrors of the Holocaust, but for us to "manage" these issues, intellectually and ideologically, it has been necessary to portray history in such a way as to relieve us of any real responsibility for the evil associated with the Nazi regime' (pp. 25-26). If this is true, the question that presents itself is:

> Is the historical and legal construction of Germany 1933-1945 as radically discontinuous a necessary falsehood, a collective lie we tell ourselves in order to make the line between good and evil, justice and injustice, a brighter one? Or, is it, …a way of ignoring our own responsibilities when faced with basic questions of right and wrong?' (p. 21).

We don't attempt to answer that question here; however, we do want to note how contemporary trends in international human rights law and lawyering seem to provide support for Fraser's argument. Specifically, we want to draw attention to the fact that, amidst the widespread ascent of human rights, there are now a range of warnings of serious and extant risks. One such warning comes from David Kennedy (2004), who is concerned that 'in many contexts, transforming a harm into a "human rights

violation" may be a way of condoning or denying rather than naming and condemning it' and, moreover, that '[t]hinking of atrocity as a human rights violation captures neither the unthinkable nor the banal in evil':

> Instead we find a strange combination of clinically antiseptic analysis, throwing the illusion of cognitive control over the unthinkable, and hysterical condemnation. Together, they assert the advocate's distance from the quotidian possibility of evil. In this sense, human rights, by criminalizing harm and condensing its origin to particular violators, can serve as denial, apology, legitimation, normalization, and routinization of the very harms it seeks to condemn. (pp. 34-35)

A second warning about the ends to which human rights arguments can be put comes from Judith Butler (2004).[18] Butler points out that, in pursuit of the post-9/11 'war' against 'an axis of evil',[19] the juridical status of a category of people – the 'unlawful combatants' of Guantanamo Bay – has deliberately been attacked and that this has been done in the name of protecting (our) human rights. She goes on to say that, if we allow this attack – that is, if we agree that 'the humans who are imprisoned in Guantanamo do not count as human; [that] they … are not subjects in any legal or normative sense' (2004, p. xvi) – then human rights faces a deeply urgent challenge: namely, 'to rethink the human' (p. 90).[20]

Arguments against feminist legal engagement with evil

Having now outlined the double bind – that the feminist legal silence on Myra Hindley can be explained by the privileging of the narrative of woman-as-victim in combination with lawyers' general avoidance of the issue of evil – we turn directly to the article's overall aim: namely, to argue for feminist legal engagement with the question of evil. As we noted at the outset, this feels like unsafe ground: our argument could provoke hostility or derision, or it could simply be dismissed as a non-starter. Probably the most damning response would be one that accused us of indecency. At the core of this response is the belief that there is a moral reason to avoid inquiry into evil. In seeking to explain, one might be drawn into a process of ranking degrees of evil that could be both disrespectful of victims and impossible in practice. More

importantly, perhaps, there is the risk that 'to explain something is to justify it – at least to a point' (Neiman, 2001, p. 43). Yet, as Hannah Arendt (1964) and others have emphasised, there is a moral counter-response to this moral concern: namely, it is also important not to mythologise evil. Furthermore, if the call to avoid inquiry rests on the belief that there has been little or no exploration of evil in the recent past, it is surely misguided: as Susan Neiman has shown, although one of the accepted characteristics of twentieth-century philosophy is 'the absence of explicit discussion of the problem of evil' (2002, p. 288), this problem is, in fact, *the* central concern in the history of philosophy and the 'guiding force of modern thought' (ibid., pp. 2-3). Overall, therefore, our response, following Neiman, would be that '[t]he idea that there are things we should be uneasy about understanding is an idea [that] ought to guide inquiry into the problem of evil, but not preclude it' (2001, p. 45). Hence, feminist legal scholars – like all those who purport to inquire into evil – can choose to proceed in a critical fashion, alert to the temptation of mythologising evil and its opposite, the temptation to believe in the possibility of definitive understanding.

A second negative response to our argument might run as follows: feminist legal engagement with the question of evil would not be sensible – it would be a distraction from important priorities and, worse, it might be reckless. There are several possible variants on this response. The objection might, for example, centre on the point that evil is the language of immediate aftermath; that it is not, and cannot be, the language of explanation or analysis. Or the objection might be that evil is an awkward and uncomfortable subject because of its heavy theological resonance. This latter objection has particular force following the embrace of the language of evil in contemporary political rhetoric, especially that of US neo-conservatives (e.g., Frum and Perle, 2003; Bernstein, 2005). The essence of the objection, as Zizek (1999) explains, is not just that the term 'evil' is used to demonise others but, more particularly, that it is 'a moralizing term that diminishes the possibilities for carrying out effective political critique'.

These are powerful objections. In building answers to them, one possibility would be to follow Arendt (1959) and insist that the terms of religious discourse ought not to belong to religion alone. Another related response would be to argue that there are sometimes good reasons not to see the religious and the political as opposites: a

sentiment that is religious can also be political – it can, in other words, act as a political intervention (Bell, 2005). More generally, in line with recent critical theory that challenges the commonly-accepted division between the religious and the secular,[21] and in recognition of the rise of religion in public life (especially but not exclusively in the US), there is good reason to question the sense of sureness that defines things as *either* religious *or* secular. A final and, we think, vital response would insist that if evil is directly linked to human suffering – and this seems undeniable – then feminist legal scholars can and must engage with evil: in short, to accept the argument that the study of evil has to remain within its historical deity-based parameters would require a perverse renunciation of a key tenet of feminist legal scholarship. It would also undermine the possibility of seeing feminist legal scholarship as a form of critique that can be both political *and* moral.

We turn finally to a third negative response to our argument. The nub of this response is that our argument is a non-starter because what we are proposing is already underway. The objection, in other words, is that there is nothing new or of interest here: there *is* feminist legal engagement with the question of evil, just as there is engagement by feminist scholars working in other disciplines.[22] The evidence in support of this response is substantial. Feminists working within law have long focused on victims' point of view: the abused, the raped, the battered. As part of this, legal feminists have given detailed attention to crimes such as spousal killings and infanticide, and there has also been vigorous debate on laws against incitement to hatred on the grounds of gender. Quite clearly, a strong argument can be made that this work should be seen as representing sustained, if indirect, engagement with evil. Moreover, this argument is bolstered by the fact that, in recent decades, legal feminists have also been active in the burgeoning field of international criminal law, thereby facilitating legal recognition of harms such as mass rape and sexual slavery (e.g., Charlesworth and Chinkin, 2000).

This response, for us, is the most powerful of the three. It reminds us that the longstanding feminist legal commitment to focusing on victims – on women, on children (e.g., Young, 1996; Smart, 1999), and more recently on men as victims (e.g., Collier, 1998) – has had important effects. Most crucially, it reminds us that, by using the experiences of victims to change patterns of thinking on what counts as a harm

and what counts as culpable wrongdoing, legal feminists can legitimately claim that they have focused on evil or, perhaps more accurately, on evils, plural. Yet we still think that there is a need for explicit engagement with the question of evil by feminists working within law and also, as we explain below, for that engagement to be focused on perpetrators as well as on victims. In the remainder of this article, we shall try to explain why we take this view.

Why feminist legal scholars should look at the question of evil

The first reason is that we believe that engagement with evil would help to develop the narrative of woman-as-victim. As discussed earlier, this narrative is both dominant and increasingly controversial in feminist legal work. Its popular reception also seems progressively more difficult to handle. Consider, for example, recent campaigns, such as the one in the UK for fathers' rights, which present women/mothers as consistently and unfairly privileged at mens/fathers' expense. There is also the complication presented by the dominance of a law-and-order politics that centres victims' rights. Overall, therefore, it seems fair to suggest that, politically, 'being a victim' is a crowded and complex identity.

For feminists working within law, we think that one promising, albeit uncomfortable, response to this would be to tamper intentionally with the standard oppositional narrative of victim and perpetrator. Specifically, we think that there is a need for greater plurality in feminist legal constructions of victims. As noted above, the need arises, in part, because of the privileging of the narrative of 'woman-as-victim' within feminist legal scholarship. It is made more pressing following the emergence of accounts of women's participation in the genocide in Rwanda and the former Yugoslavia (Jamieson, 1999).[23] And, returning for a moment to the context that prompted this article – namely, the feminist legal silence on Myra Hindley – it can also be argued that greater plurality in constructions of victims might have made it easier to discuss Hindley. It might, for example, have made it possible to consider whether she could have been a victim who chose to harm other victims because of her fear of Ian Brady. There are certainly traces of this identity in some of Hindley's own accounts of her role in the crimes, as well as in the comments of the trial judge and

others who emphasised that, before meeting Brady, Hindley was ‘a normal sort of girl’.

In building more complex accounts of victims, we believe that the role of victims in oppressing other victims needs to be examined and, in this regard, we find both Primo Levi's ‘gray zone’ (1989) and Claudia Card’s (2002/5) related but broader concept, ‘gray area’, to be particularly helpful. The concepts of gray zone and gray area will not encompass all those who are both victim and perpetrator (and, in discussing them, we are not implying that they necessarily apply to Hindley); their value lies in the fact that they focus attention on the most morally ambiguous or complex of victim-perpetrators. In *The Drowned and the Saved*, Levi used the term ‘gray zone’ to describe the position of ghetto and concentration camp prisoners who were ‘offered’ authority over fellow prisoners and were then rewarded (perhaps with extra food or a less imminent death) for the roles they played in supporting the regime (for example, as camp doctors, as domestic workers for officers, as ghetto police, as members of ghetto councils,[24] or as part of the camp squad responsible for cremations). Gray zones, Levi argued, ‘confuse our need to judge’ (1989, p. 42): the people in these zones are victims, but they are also perpetrators – they are, in other words, victims who, under conditions of extraordinary stress, have chosen to inflict harm and suffering on fellow victims. In our view, it is precisely because of this power to confuse that the concept of the gray zone ought to be explored by feminists working within law; as Card explains, the gray zone ‘complicates our understandings of the choices people make in oppressive circumstances, our assessments of the moral positions of victims of oppression, and our view of the responsibilities victims may have to and for one another’ (p. 221).

In her recent book, *The Atrocity Paradigm: A Theory of Evil*, Card introduces the concept of a ‘gray area’, using it alongside gray zone ‘for less desperate cases that share morally important features’ (ibid.), so that she can study patterns in different situations where victims are also perpetrators without ‘misappropriating the experience of Holocaust victims’. Card argues that gray areas can and have developed ‘wherever the evils of oppression are severe, widespread, and lasting’ (p. 223), and she cites slavery as an example of the sort of oppression she has in mind. But she also cautions against over-wide definition of gray zones and areas – definitions that

purport to include all those who are both victims and perpetrators – because, she says, they lead us to lose the important focus on the morally complex or ambiguous victim who chooses to oppress other victims: 'Like Levi, [Card understands] gray zones … specifically to result from choices that are neither gratuitously nor willfully [sic] evil but that nevertheless implicate choosers who are themselves victims in perpetrating evils against others who are already also victims, paradigmatically victims of the same evils as the choosers' (p. 232).

In using the concepts of gray zone and gray area, feminist legal scholars could, of course, look at perpetrators; that is, those who deliberately set out to create victims who oppress fellow victims. Here, however, what we are proposing is that legal feminists examine the actual victim-perpetrators of these gray spaces. We believe that this examination should help to pluralise victim narratives. To give a specific example, a focus on gray zones and areas, and more broadly on victim-perpetrators, is an appropriate supplement to other feminist work pertinent to post-conflict situations – such as the scholarship drawing on notions of sexual purity and contamination (Douglas, 1966). Amongst other things, a focus on gray zones and areas requires thorough engagement with the idea of different levels of responsibility: is there a relevant difference, for example, between a woman who is a bystander to mass rape and a woman who, under duress, participates in mass rape? If there are many women bystanders, how if at all does it change the response?[25] In addition, as Card points out, it requires engagement with questions of motivation: she suggests that we consider the case of a person who enters the gray zone with the intention of sabotaging it (pp. 225-226).

The second reason why we think that there needs to be explicit feminist legal engagement with the question of evil relates to one of the ways in which women's human rights have been invoked in recent years. What we have in mind here is the attempt to create a direct link between the 'rescue' and promotion of women's human rights and the rhetoric of combating evil in a post-9/11 world. Consider, for example, the way in which the need to 'liberate' Afghan women was used as a secondary justification for the US-led military intervention against the Taliban in 2001. This justification – which was emphasised by both Laura Bush and Cherie Blair, as well as by their husbands and others – was used not only to legitimise the military

intervention but also to block discussion of alternative responses. Moreover, as Iris Marion Young (2002) has pointed out, on occasion – as for example in Laura Bush's address to the UN Commission on the Status of Women on International Women's Day in 2002 – it has seemed that the liberation of women is a key component, not only in justifying the military intervention, but more generally in the ongoing 'war on terrorism':

> The terrorist attacks of September 11 galvanized the international community. Many of us have drawn valuable lessons from the tragedies. People around the world are looking closely at the roles women play in their societies. Afghanistan under the Taliban gave the world a sobering example of a country where women were denied their rights and their place in society. Today, the world is helping Afghan women return to the lives they once knew. ... This a time of rebuilding – of unprecedented opportunity – thank to efforts led by the United Nations, the United States, the new Afghan government, and our allies around the world. (quoted in Young, p. 18)

In closing the article, we want to return to the case of Myra Hindley in order to suggest a third reason why feminists working within law should look at the question of evil. Earlier in this section, we argued that greater plurality in constructions of victims might have facilitated consideration of Hindley's 'greyness': that is, of whether she was simultaneously a victim and a perpetrator of oppression. Here, in recognition of the need to admit of the possibility that Hindley was a *perpetrator* – rather than a victim, or a victim who was also a perpetrator – we want to suggest that feminist legal scholars should also use the dominant narrative on Hindley (that she was an icon of female evil) to examine the need for *agentic* models of women who kill.[26] In her study of female killers, Morrissey drew attention to the ongoing feminist unwillingness to consider the possibility of women's agency in cases where the facts suggest a combination of sexual sadism and murder by a male/female partnership; cases such as that of the Canadian Karla Homolka, who with her male partner abducted, raped and killed two teenage girls in 1993, and who was captured in hours of videotapes actively participating in the sexual assault of the victims (San Roque, 1999). This line of inquiry will fit with the broader interest in positive models of agency that has surfaced recently in feminist scholarship. That interest has led already

to two well-developed accounts of agency – a performative account from feminists such as Judith Butler (1993) and a pragmatic one from Habermasian feminists such as Seyla Benhabib (1992). More generally, at a time when contemporary world politics is marked by a preoccupation with demonisation, inquiry into the agency of perpetrators of ‘extreme’ acts is surely a pressing concern (Hudson, 2003).

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[1] This decision was later characterised as a 'provisional conclusion' in *Hindley* [2000].

[2] Article 6, ECHR guarantees that an 'independent and impartial' tribunal will be responsible for imposing a sentence. In *Stafford v UK* (2002) 35 E.H.R.R. 32, the ECtHR concluded that the Home Secretary's role in setting a tariff was equivalent to a judicial function, which could not legitimately be performed by a member of the executive.

[3] The constant representation of Hindley as beyond redemption raises the more general question of law's ability to accommodate redemption, a topic which has been pursued in legal scholarship on the death penalty and also on post-conflict processes of truth and reconciliation.

[4] Note, however, the conflicting account of another commentator (Masters, 2002); he observes that when Hindley heard the tape recording in court, she 'hung her head' and 'prompted to react, she said: "I am ashamed"'.

[5] This theme was also taken up by the trial judge who asked: 'Smith [the main prosecution witness] is being attacked for his taste in pornography, but what do you think of a man 10 years his senior and a woman of twenty two, who take photographs like that of a little girl [Lesley Ann Downey]' (quoted in Winter, 2002, p. 350).

[6] For discussion of popular and legal representations of lesbianism and criminality, see Millbank (1996) and (2004).

[7] In understanding the negative response to Lord Longford's appeal for public forgiveness of Hindley, 'the sinner', it might be useful to consider the contrasting approaches of Catholicism and Protestantism to the question of redemption: whilst

New Testament forgiveness is a strong theme in the former, the emphasis in the latter tends to be on Old Testament punishment and retribution.

[8] 'After four sleepless nights, she says, she went to the police station and was ushered into a bare room with a single chair in the middle. Images flashed through her mind of the interrogation scene from films, and she was terrified. To hide her fear, she glared at the policeman; then a flash gun went off, and the image of the "most evil woman in Britain", as the *Sun* has dubbed her, was made (Birch, 1993, p. 53).

[9] Letter of 12 January 1982 from Lord Lane CJ to the Home Office, quoted by Lord Bingham CJ in *Hindley* [1998].

[10] A similar point is made by Bell and Fox (1996) in discussing media and legal constructions of Susan Christie, a woman who murdered her male lover's wife in Northern Ireland.

[11] In later years, the photo's black-and-white quality further emphasised Hindley's 'unreal' nature; these colours were also represented as a constant reminder of the contrast between good and evil.

[12] See, similarly, Cameron and Fraser arguing that 'no language existed for speaking of a woman's lust to kill – indeed one still does not exist' (1987 p. 145).

[13] See also Padfield (2002) using *Hindley* in a discussion of tariffs in murder cases.

[14] See, eg, Kennedy (2000).

[15] Morrissey (2002) uses a similar formulation, 'Crises of Representation, or Why Don't Feminists Talk About Myra?', in an article dealing with two Australian cases of female killers.

[16] Recent critiques of the feminist legal focus on violence and the woman-as-victim narrative include, Bottomley (2004), Halley (2004) and Kapur (2002). On the

question of 'positive' models of agency within feminism, see e.g. McNay (2000; 2003) analysing both the 'negative paradigm' of subjectification generated by the influence of Foucault and Lacan and the recent development of performative and pragmatic models of agency by feminists.

[17] Morrissey (2003, pp. 30-66 and 103-133) argues that there *is* a strand of feminist legal narrative on women killers who are seen to embody revenge fantasies: see, e.g., the cases of the 'lesbian vampire killer', Tracey Wigginton, who killed a man in Queensland in 1989, and the 'lesbian prostitute killer', Aileen Wuornos, who killed seven men in Florida between 1989 and 1990.

[18] See also Orford (2003); and Razack (2004).

[19] Bar On (2003, p. 157) suggests that '[t]he association of "evil" with "axis" in this context is probably intended to evoke memories of World War II and use them to create a parallel that equates the Bush administration's "war on terrorism" with the US' war against the Axis forces; hence, against Nazi Germany and its retinue of associates and followers'.

[20] Butler also observes that we are asked not to identify certain images of faces, such as bin Laden or Saddam Hussein, as human: 'the disindentification is incited through the hyperbolic absorption of evil into the face itself, the eyes' (p. 143).

[21] See, e.g., Mendieta (2003) proposing the term 'post-secular'; and Connolly (2000) refusing the distinction between the religious and the secular.

[22] Especially, but not exclusively, in philosophy (e.g., Card, 2005; Schott, 2003a/2003b; Symposium, 2004) and criminology (Hudson, 2003; Jamieson, 1999).

[23] There is also a growing literature on women's roles in the Holocaust.

[24] See, e.g., Trunk, 1996.

[25] On the question of bystanders, including the bystander state, see also Cohen (2001).

[26] See also Collier (1997) arguing that there is a need to challenge the agentic ‘lone gunman’ narrative surrounding Thomas Hamilton, a man who killed 16 children and their teacher at a school in Dunblane, Scotland in 1996.