

**THE UNIVERSITY OF HULL**

**Women who Kill their Abusive Partners: an Analysis of Queer Theory, Social Justice  
and the Criminal Law**

**Being a Thesis submitted for the Degree of Doctor of Philosophy**

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**by**

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## PREFACE

This thesis is concerned with analysing the criminal law's treatment of women who kill their abusive partners. I developed an interest in this area as an undergraduate student whilst examining the criminal law defence of provocation. My general interest in women and the law led to the adoption of a feminist perspective which in turn led to an interest in gender theory. Initially, the aim of the thesis was to question whether women who kill should be excused or justified by the criminal law, and thus scrutinise the legal aspects of particular defences. However, whilst studying gender theory, I became increasingly interested in how queer theory, or more specifically, the work of Judith Butler, may contribute to the examination of the law's treatment of abused women who kill.

I would like to take this opportunity to thank my supervisors, Dr Gerry Johnstone and Dr Rachel Alsop at the University of Hull for their constant support and constructive criticism over the past five years. Thanks also to my former GTA colleagues and the many friends that I made whilst working at the University of Hull. I would also like to thank my friends and colleagues at Liverpool John Moores University. Special thanks to Dr Lorie Charlesworth, Anita Ellis and Carmel Flanagan for their continued support over the last year of study. Good friends Meena Kumari and Jacqueline Cuthbert have also provided much needed support and friendship over the years - thank you.

I would like to thank Justice for Women and Sandra McNeill for inviting me to the attend the trial of Diana Butler.

Finally, I would like to thank my parents, Geoffrey and Margaret Carline, for their emotional and financial support over the many years that I have been a student, and my husband, David Evans, whose love and support has enabled me to finish this work.

I would like to dedicate this work to my parents, Geoffrey and Margaret Carline, and to my husband, David Evans.

## ABSTRACT

This thesis examines the criminal law's treatment of women who kill their abusive partners through a theoretical framework developed from queer theory and social justice. More specifically, in relation to queer theory, the thesis considers the work of Judith Butler and her notions of gender as performativity, cultural intelligibility, materialisation and resignification. The model of social justice used is drawn from the work of Iris Marion Young. One particular aspect of her model of social justice is considered to be pertinent: cultural imperialism. Cultural imperialism maintains that an injustice in the form of domination and oppression is committed when inferior social groups are constructed from the outside by the dominant social group and where their particular characteristics are rendered 'Other'.

The thesis applies the work of these two authors to a number of criminal cases in order to analyse the following issues: the construction of a woman's identity by the legal system; the existence of differences between women - particularly racial, cultural and ethnic differences - and the possibility of achieving justice within the existing criminal law. The thesis scrutinises Court of Appeal judgments and provides a close reading of two cases: Zoorah Shah, who remains convicted for murder, and Diana Butler, who was, on retrial, convicted for manslaughter on the grounds of diminished responsibility.

I argue that the murder/manslaughter and custody/probation distinctions are linked to the unintelligible/intelligible gender distinction. I further argue that in those cases in which a manslaughter conviction is achieved, the result can be seen to be both at once

just and unjust. Whereas it may be 'legally just' when compared to cases involving men who have killed their partners, it is also 'socially unjust' due to the cultural imperialistic manner in which a woman's identity is constructed. Furthermore, the thesis highlights that, in addition to prevailing gender scripts to which women must conform, there also exists racial regulatory scripts which impact upon the construction of a woman's identity and her perceived cultural intelligibility. Attention is also paid to the instability of meaning which is considered to provide an opportunity for subversive transformation.

In the conclusion the thesis forwards an overview of a proposed defence, which is based upon a reformulation of the battered woman syndrome and the defence of duress. This defence is considered to offer a more socially just outcome for women who kill.



## INTRODUCTION

### **General Introduction**

During the 1990s two cases involving women who killed their partners received significant attention from the media. Both Sara Thornton<sup>1</sup> and Kiranjit Ahluwalia<sup>2</sup> killed their partners after suffering a tremendous amount of abuse, and were, initially, convicted of murder. Sara Thornton killed Malcolm Thornton by stabbing him in the stomach whereas Kiranjit Ahluwalia killed her husband whilst he was asleep by setting fire to his bedroom. He died of his injuries 6 days later. The plight of women such as Thornton and Ahluwalia lead to the establishment of Justice for Women in 1991, which campaigned against their murder convictions. One of the main strategies adopted by Justice for Women was to highlight the discrepancies between the legal treatment of women and men who kill their partners. Whereas the courts usually find a man guilty of manslaughter on the grounds of provocation, women are overwhelmingly convicted of murder.<sup>3</sup> Additionally, it appears that a man must endure much less in order for his killing to be excused or partially justified.<sup>4</sup> Groups such as Justice for Women and Southall Black Sisters, which campaigned on behalf of Kiranjit Ahluwalia and, more recently, Zoora Shah, have played a vital role in highlighting the perceived injustice which women who kill their abusive partners receive.

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<sup>1</sup> *R v Thornton* [1992] 1 All ER 306; *R v Thornton (No.2)* [1996] 2 Cr App R 108

<sup>2</sup> *R v Ahluwalia* [1993] 96 Cr App R 133

<sup>3</sup> See for example the cases outlined in the *Justice for Women Information Pack* [Justice for Women; London; 2ed] p. 47 and pp. 49-54

<sup>4</sup> *Ibid.*

Eventually the Court of Appeal heard the cases of Sara Thornton and Kiranjit Ahluwalia. Their convictions were quashed and retrials ordered. At the retrial the two women were convicted of manslaughter on the grounds of diminished responsibility. This indicates that the defendant's responsibility for the homicide was reduced, due to some abnormality of mind or mental instability, and has significant legal consequences, (primarily in relation to the sentence received). This may seem to be a just, logical, and possibly a compassionate result. A conviction for the less serious offence of manslaughter indicates society's disapproval of her actions, yet compassion is shown through the court's recognition of her unbalanced mental state, caused by the prolonged domestic violence suffered. Thus, in such circumstances, a murder conviction, which carries a life sentence, tremendous social stigma and condemnation, was appropriately considered to be unduly harsh. In contrast, as the sentence for manslaughter is discretionary, it is able to reflect the extenuating circumstances that the woman was placed in. Those who campaigned on behalf of these women considered the ultimate manslaughter convictions to be a victory, perhaps even a just result. This thesis, however, questions the form of justice that is actually achieved in such cases. It is accepted that a 'legal justice' may have been achieved in some cases, in the sense that 'like cases are treated alike', and the sentence is based upon an acceptable analysis of the blameworthiness of the offender. But, it is argued, a wider social injustice is perpetuated, as the women tend to be constructed in a negative light. Such a negative construction invariably occurs due to the continual reliance upon psychiatric evidence in cases involving women who kill their abusive partners, and thus it is argued that the women are generally defined as mentally ill, as opposed to the so called 'reasonable man' which operates as a standard within the law.

Moreover, it is also argued that the narrow conception of 'legal justice' also fails to deal adequately with those differences which exist between women.

Generally women kill less than men. During 1999/2000 211 men and only 21 women were convicted of homicide.<sup>5</sup> Statistics also illustrate that significantly more women are killed by a current or former partner (92), as compared to men (27). Research also indicates that men who kill are more likely to receive a conviction for murder than a woman. Overall, for 1999/2000 54% of men received a murder conviction as opposed to 38% of women.<sup>6</sup> However, as illustrated by Justice for Women,<sup>7</sup> the picture appears to be different in relation to domestic homicides. Why is it that in the circumstances of domestic homicide the preferred conviction for a woman appears to be murder, whereas men tend to be convicted for manslaughter? This discrepancy between men and women has led to an immense amount of research, by academics, practitioners and campaigning groups. Overwhelming, this work has tended to adopt a comparative approach, focusing on those cases in which women have been convicted of murder and men have been convicted of manslaughter.<sup>8</sup> A recent article in *The Guardian* illustrates this fact.<sup>9</sup> The article, which celebrates the 10<sup>th</sup> birthday

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<sup>5</sup> Homicide includes murder, voluntary and involuntary manslaughter and infanticide.

<sup>6</sup> All statistics are taken from the *Criminal Statistics for England and Wales - Statistics relating to Crime and Criminal Proceedings for the Year 1999* [The Stationery Office; December 2000] Chapter 4

<sup>7</sup> See for example the cases outlined in the *Justice for Women Information Pack* p. 47 and pp. 49-54

<sup>8</sup> See for example *Justice for Women Information Pack*; Bandalli S "Battered Wives and Provocation" (1992) 142, *NLJ* 212-213; Bandalli S "Provocation - A Cautionary Note" *Journal of Law and Society* (1995) 22, 398-409; McColgan A "General Defences" in Bibbings L & Nicohlson D *Feminist Perspectives on Criminal Law* [Cavendish; London; 2000] chapter 8

<sup>9</sup> Cooke R, "Snap Decisions" *The Guardian* Tuesday 30 October 2001.

of Justice for Women, commences with the case of Josephine Smith, who killed her husband on 30<sup>th</sup> July 1992 by shooting him, after years of physical, sexual and mental abuse. She was convicted of murder in 1993 after the jury declined to accept her defence of diminished responsibility. Only a couple of months later, the article reports, Roy Greech, who killed his wife after finding out she was having an affair, received a two-year suspended sentence. Whereas Smith received a life sentence, Greech had his freedom. (Fortunately, on November 4 2002 the Court of Appeal quashed Josephine Smith's conviction for murder and found her guilty for manslaughter on the grounds of provocation. Nevertheless, she still served 9 years in prison. The Court of Appeal sentenced her to 10 years, but ruled that she should be released immediately).<sup>10</sup> It can be seen that situation has not really changed much since 1892, when Matilda Blake reported that the 'killing of a wife was more likely to result in a manslaughter rather than a murder charge.'<sup>11</sup>

This comparative approach indicates that sexism and double standards may be evident in the criminal justice system. Commentators<sup>12</sup> argue that the law (or the legal requirements) is male in the sense that it is based on male characteristics. Thus women who kill their abusive partners, many after suffering years of horrific physical,

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<sup>10</sup> Verkaik R "Court Frees Woman who Shot Abusive Husband" *The Independent* 5 November 2002

<sup>11</sup> Cited in Mooney J, *Gender, Violence and the Social Order* [Macmillan; London; 2000] p. 70

<sup>12</sup> see for example O'Donovan K "Defences for Battered Women who Kill" *Journal of Law and Society* (1991) 18, 219-237; O'Donovan K "Law's Knowledge: The Judge, The Expert, the Battered Woman, and Her Syndrome" *Journal of Law and Society* (1993) 20, 427-439; Schneider E M "Equal Rights to Trial for Women: Sex Bias in the Law" *Harvard Civil-Rights-Civil Liberties Law Rev* (1980) 15, 623-647; Taylor L J "Provoked Reason in Men and Women: Heat-of-Passion and Imperfect Self-Defense" *U.C.L.A Law Rev* 33 (1986) 1679-1735

sexual and mental violence, struggle to have their experiences recognised by the legal machinery, and are frequently convicted of murder. This fact is clearly illustrated by the cases of *Thornton*<sup>13</sup> (who had to appeal against her conviction twice) and *Ahluwalia*.<sup>14</sup> Without the support of campaign groups who asserted that the law should take into account the abuse they have suffered, it is arguable that these two women would still be serving life in prison, with the legal system showing little regard or empathy for the years of abuse they have suffered. Indeed, for many, many years domestic violence has been at worst accepted and at best ignored by society, the police and the courts, and this impacts upon the perpetrator's understanding of domestic violence. Hearn explains:

“[Domestic] violence has been accepted, condoned, normalized and ignored both by individuals and institutions. It has been seen as a ‘private’ matter. Individual men’s perceptions of violence to women are themselves affected by the definitions and constructions produced and reproduced in agencies.”<sup>15</sup>

The issue of the law's treatment of women who kill their abusive partners has received substantial academic attention. Generally, the literature advances two different perspectives that are ostensibly based on the sameness (that men and women should be treated the same)/difference (that the differences between men and women should be recognised) binary. It is argued by some that the law applies double standards, in that it treats women differently to men, and requires women to conform to standards which are not required of men.<sup>16</sup> Alternatively, it is argued that the law is based on

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<sup>13</sup> [1992] 1 All ER 306; *R v Thornton (No 2)* [1996] 2 Cr App R 108

<sup>14</sup> [1993] 96 Cr App R 133

<sup>15</sup> Hearn J *The Violences of Men* [Sage; London; 1998] p. 8

<sup>16</sup> Nicolson D “Telling Tales, Gender Discrimination, Gender Construction and Battered Women who Kill” *Feminist Legal Studies* (1995) III, 185-206 p. 185 and O’Donovan K “Defences for Battered Women Who Kill” p. 221

male characteristics, and thus excludes the experiences of women. In relation to the former argument, that the law discriminates against women by applying different standards, historically the killing of a wife by her husband was categorised as a less serious offence than when a wife killed her spouse. Whereas the husband was charged with murder, the wife faced a charge of petty treason.<sup>17</sup> Such double standards are also evident in recent case law. Bandalli<sup>18</sup> examines the differences between female and male cases of provocation, focusing on the representation of the female. She argues that it is the woman, as opposed to the man, who is under scrutiny, whether she is the victim or the perpetrator. This argument is developed by Nicolson,<sup>19</sup> who illustrates that the recognition of female differences and experiences may take the form of a gender construction based on sexist stereotypes which perpetuate female subordination. Similar to Bandalli, Nicolson identifies that the legal construction of women, involves a trial of the defendant's character, and being judged against a societal standard of the 'appropriate femininity', which incorporates three divergent elements: 'domesticity, sexuality and pathology.'<sup>20</sup> Nicolson contrasts the cases of *Ahluwalia*<sup>21</sup> and *Thornton*,<sup>22</sup> noting that whereas Kiranjit Ahluwalia was constructed and judged to have acted in correspondence with the societal standard, Sara Thornton fell outside. Hence, whereas Ahluwalia received a conviction for diminished responsibility, Thornton's conviction for murder (at the time the article was written)

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<sup>17</sup> O'Donovan K "Defences for Battered Women who Kill" p. 221

<sup>18</sup> Bandalli S "Battered Wives and Provocation" p. 212; Bandalli S "Provocation - A Cautionary Note"

<sup>19</sup> Nicolson D "Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill"

<sup>20</sup> *Ibid.*, pp. 185-188

<sup>21</sup> [1993] 96 Cr App Rep 133

<sup>22</sup> [1992] 1 All ER 306

remained.<sup>23</sup> This gender construction leads to double standards. Whereas men are judged solely on whether they fall into legal structures, women are judged against a societal standard, which ensures that they are rendered either mentally abnormal, if they correspond, or murderers, if they do not. Hence the assertion that female criminals are either mad or bad. These articles do not, however, suggest how a standard that recognises both genders may be incorporated without falling liable to stereotypical gender construction.

The notion that female criminals are considered to be either mad or bad can be seen to relate to the images of deviant women which have developed over time in both court cases and the media. Such images have, arguably, had a significant effect upon the legal treatment of women who kill their abusive partners. Women who commit crime are frequently constructed as being doubly-deviant. As noted above, not only have they violated rules of conduct, they have also contravened roles of appropriate gender behaviour. One particular theory which recognises that women are not considered to be capable of committing crime, due to their feminine nature, is the chivalry theory. This theory argues that women are treated significantly more leniently than men by the police and the courts as they considered to be less disposed to commit crime. Women are constructed as weak, passive and dependent upon men, and thus in need of protection. As Carroll explains, these stereotypes:

“...create[] a more protective attitude toward women. In the context of the criminal justice system, women’s weak and passive nature make them less attractive, if not less eligible, candidates for imprisonment.”<sup>24</sup>

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<sup>23</sup> Nicolson D “Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill” pp. 190-194

<sup>24</sup> Carroll J “Images of Deviant Women and Capital Sentencing Among Female Offenders: Exploring the Outer Limits of the Eighth Amendment and Articulate Theories of Justice” *Tex L. Rev* 75 (1997)

However, as those women who commit serious crimes, such as homicide, clearly contravene the chivalry theory's stereotype of femininity, they are thus seen as being doubly deviant, or evil.

Heidensohn in *Women and Crime*<sup>25</sup> outlines the different images of deviant women, and considers how these impact upon the treatment female offenders. In particular, Heidensohn illustrates that, in comparison to male deviant behaviour, there exists a limited range of images of deviant women. Moreover, those images of women which do exist tend to be based upon a dichotomy. As Feinman states:

“In the modern criminal justice system women are viewed according to attitudes that derive in large measure from classical Greece and Rome and medieval Europe. Both pagan mythology and Judeo-Christian theology present women with a dual nature either as madonnas or as whores.”<sup>26</sup>

In addition to the madonna/whore dichotomy, Heidensohn also illustrates that deviant women have been depicted as witches, not-woman or masculine, unfeminine women or as suffering from disturbed hormones.<sup>27</sup> Hence this has in turn lead to the image of the deviant women as being either bad or mad. Such a construction in turn impacts upon the treatment of women by the criminal justice system. A woman who is constructed as bad may receive an unduly harsh sentence, as she is doubly deviant, or, if considered to be mad, may be compelled to undergo (in)appropriate medical

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1413 p. 1417-1418 see also Keitner C I “Victim or Vamp? Images of Violent Women in the Criminal Justice System” *Colum. J. Gender & Law* 11 (2002) 38

<sup>25</sup> Heidensohn F *Women and Crime* [MacMillan Press Ltd; London; 2<sup>nd</sup> ed; 1996]

<sup>26</sup> Feinman C *Women in the Criminal Justice System* [Praeger; New York; 1980] p. 1 cited *ibid.*, p. 90

<sup>27</sup> Heidensohn F *Women and Crime* chp 6



treatment. What is significant is that, unlike male offenders, there is no image of a 'normal' delinquent woman. Heidensohn states:

“Amongst them all, [images of deviant women] there is no conception of the 'normal' exuberant delinquency characteristic of males. Any woman would be damaged by being portrayed as a witch or a whore; and while a sick female deviant may be less punitively treated, she will attract other stigma...”<sup>28</sup>

Thus, the criminal justice system's relatively harsh treatment of women who kill their abusive partners can be seen to be related to the images of deviant women. Women who kill are constructed as either being evil and posing a potential treat to the security of society, or as mad and therefore needing medical treatment.<sup>29</sup>

The argument that the law excludes women is based on the premise that the law is male. O'Donovan states: '[a]s a cultural artifact law is male; yet it aspires to represent

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<sup>28</sup> Ibid., p. 95

<sup>29</sup> The medicalisation of women within the criminal justice system is analysed by Allen H in *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* [Open University Press; Milton Keynes; 1987]. Allen adopts a foucauldian discourse analysis in order to explore the reasons behind the seemingly disproportionate use of psychiatric disposals for female offenders. However, she illustrates that, despite the continued reliance upon psychiatric disposals, the perceived 'madness' or mental illness in women tends to be constructed as normal feminine behaviour. Allen states: '...the courts tend to go on perceiving their female offenders as 'relatively normal women', and it is often their apparent conformity and competence that make them so acceptable as psychiatric patients'. (p. xi).

The issue of medicalisation, normalisation and the law is also considered by Smart C *Feminism and the Power of Law* [Routledge; London; 1989]; Hunt A & Wickham G *Foucault and Law* [Pluto Press; London; 1998] and Sumner C "Foucault, Gender and the Censure of Deviance" in Gelsthorpe L & Morris A ed *Feminist Perspectives in Criminology* [Open University Press; Milton Keynes; 1990] chp

us all.’<sup>30</sup> This is a criticism that has invariably arisen in relation to the defences and their requirements and one which has been made by many feminist academics.<sup>31</sup> The law is, theoretically, applicable to both men and women, the defences are not prima facie gender specific, they are gender neutral, thus representing us all. On closer examination, however, it is apparent that the law has a male bias. It has developed in connection with, and thus incorporates, those characteristics and mannerisms that are generally considered to be masculine. Hence, whereas the veneer of the law is gender neutral, its essence is male. As stated by O’Donovan, it is frequently asserted that the legal defences correspond solely to masculine ‘definitions and behavioural practices’ whereas the women’s experience is entirely disregarded. This male bias or formal equality discrimination<sup>32</sup> is partly due to the fact that homicide is predominately committed by men, and to the fact that the authors of law are generally men,<sup>33</sup> and this has the effect of silencing and ‘othering’ women who kill. Thus it follows that women’s differences should be integrated into the law, as noted by Fiora-Gormally: ‘...until there is a set of social and behavioural norms which

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<sup>30</sup> O’Donovan K “Law’s Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome” p. 435

<sup>31</sup> See for example Schneider E M “Equal Rights to Trial for women: Sex Bias in the Law” and Taylor L J “Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense”

<sup>32</sup> Nicolson D “Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill” p. 185

<sup>33</sup> O’Donovan K “Defences for Battered Women Who Kill” pp. 220

are fairly similar for men and women, it is unjust to apply identical standards to defendants of different sexes at trial from homicide.’<sup>34</sup>

However, this so-called special treatment approach has been criticised on the basis that it labels women as deviant, and perpetuates stereotypes about femininity.<sup>35</sup> Additionally, a difference-based approach tends to assume a homogenous experience and ignore differences that exist between women.<sup>36</sup> O’Donovan<sup>37</sup> appears to adopt this approach as, although she recognises that such differences do exist, she appears to advocate the ‘commonality’ approach, in that those differences which should be focused upon are those which exist between men and women, as this is what all women have in common. A similar approach is adopted by Nicolson<sup>38</sup> in his comparison of Sara Thornton and Kiranjit Ahluwalia. His analysis of how Thornton is ‘othered’ by standards of appropriate femininity could also take into account the significant racial and cultural differences which exist between the two women, and how Ahluwalia could potentially be constructed as ‘other’ to white women. Adopting an approach which tends to represent women as an homogenous group may marginalize women such as Zoorah Shah, who, as an Asian woman and one who is

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<sup>34</sup> Fiora-Gormally N “Battered Wives Who Kill: Double Standard Out of Court, Single Standard in?” *Law and Human Behaviour* 2 (1978) 133-165 pg 164, cited in Chan W “Legal Equality and Domestic Homicides” *Int J of the Sociology of Law* (1997) 25, 203-229 p. 213

<sup>35</sup> Chan W “Legal Equality and Domestic Homicides” pp. 222-223

<sup>36</sup> Ibid.

<sup>37</sup> O’Donovan K “Law’s Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome” p. 435

<sup>38</sup> Nicolson D “Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill”

unable to speak English, will still remain 'Other' given a standard which concentrates solely on one particular form of femininity.

Hence, much of the literature has concerned itself with the sameness/difference issue: either the law should treat women the same as men, or recognise their specific differences. The sameness approach, however, encounters significant criticism, in that it is phallogentric, according supremacy to masculinity, and presents a double-edged sword for women. If a woman corresponds to this standard she is likely to be labelled a 'masculine woman',<sup>39</sup> however, if she does not correspond, she is likely to be convicted of murder. The difference approach is equally problematic in that it assumes commonality, ignores differences between women, and can lead to the adoption of stereotypical and harmful constructions of femininity, which may in turn lead to a greater discrimination against women who kill. Furthermore, both the approaches can be criticised on the grounds that they tend to be essentialist, as they adopt the universalising categories of 'Man' and 'Woman'. Chan<sup>40</sup> suggests the way in which to avoid the conflict between equality and difference is to cease presenting them as dichotomous, and reveal the power relationships that exist when they are placed as such. She concurs with Scott<sup>41</sup> in an approach which requires an 'analysis of gender categories which serve as the normative statements organizing cultural understandings of social difference' to accompany any declaration of difference.<sup>42</sup>

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<sup>39</sup> Chan W "Legal Equality and Domestic Homicides" pp. 221-222

<sup>40</sup> Ibid.

<sup>41</sup> Scott J *Gender and the Politics of History* [Columbia University Press; New York; 1988]

<sup>42</sup> Chan W "Legal Equality and Domestic Homicides" pp. 223-224

This thesis aims to provide an analysis of gender and questions whether justice for battered women is attainable under the present criminal law by scrutinising the identity categories<sup>43</sup> adopted by the courts in cases involving women who kill their violent partners. Importantly, significant attention is paid to the differences that exist between women. The research provides a contribution to knowledge via an analysis of the legal responses to battered women who kill their abusers through a new theoretical framework. My framework is developed from concepts of justice and queer theory and will be used to scrutinise specific cases and the battered woman syndrome. I will highlight how the existing legal structure both achieves justice and continues an injustice. The work of two authors in particular is used to develop this framework. In relation to justice the work of Iris Marion Young in *Justice and the Politics of Difference*,<sup>44</sup> is used to show how and why the present legal approach leads to wider social injustice. Such theories will also be used to suggest how a law that accommodates plurality and difference may be created and justified. In relation to queer theory the work of Judith Butler, in particular, is applied. Specifically, the thesis draws upon two aspects of Butler's work: the notions of performativity and intelligible genders as discussed in *Gender Trouble*<sup>45</sup> and *Bodies That Matter*.<sup>46</sup> Butler, while advocating the recognition of difference, calls for a deconstruction of categories and

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<sup>43</sup> The term identity categories is preferred to gender categories as the latter arguably presumes that gender is the most important form of identity and thus tending to relegate the importance of other axis of identity. Additionally, it can also lead to the assumption that different axis of identity are separate as opposed to intertwined. For example, all gender is raced, and all race is gendered.

<sup>44</sup> Young I M *Justice and the Politics of Difference* [Princeton University Press; Princeton, New Jersey, 1990]

<sup>45</sup> Butler J *Gender Trouble: Feminism and the Subversion of Identity* [Routledge; London; 2 ed 1999]

<sup>46</sup> Butler J *Bodies that Matter: On the Discursive Limits of Sex* [Routledge; London; 1993]

binary oppositions, and thus argues against the use of universalising labels such as 'man' and 'woman'. The difficulty with universal labels lies in their assumption of an experience and subjectivity that is universal to all women or men. This has the disadvantage of denying or devaluing other differences, such as race, culture, class and sexuality. The case of Zoorah Shah provides a contemporary and controversial example. A significant factor was Shah's race and culture, issues that may not be recognised in a universalising category of woman, which, it could be argued, is based on the particular experiences of white, middle class women. As the thesis provides a close reading of two cases, Zoorah Shah and Diana Butler, the contribution made is also empirical. The reading adopts a queer theory perspective and provides a detailed and critical analysis of the identity categories used in these two cases.

The main argument of the thesis is that the comparative approach that is invariably adopted by feminist academics and campaigners perpetuates the impasse which has developed in relation to the sameness/difference debate. It is argued that the analysis should be shifted or expanded to focus upon comparing women with women and to consider the different outcomes of cases and to further analyse the way in which identity is constructed by the judiciary. The thesis will argue that the recognition of differences between women is vital to understanding why one woman may receive a conviction for murder whereas another will be convicted for manslaughter. An interest in the existence of differences between women developed into examining a deconstruction of the category 'woman', and questioning its ontological nature. This approach precipitated examining the existence of a female experience or a female voice, one that the law could reflect. Consequently, the thesis is concerned with law as a 'gendering practice': how the law creates subjectivity and gender; how the law

constructs identity. The concept of law as a gendering practice is premised on postmodern and poststructural theories that reject law as a homogenous and static concept.

Chunn and Lacombe <sup>47</sup> outline how the postmodern approach differs from the one taken by sameness and difference feminists. Both sameness and difference strategies adopt 'the 'modern' instrumentalist view of law,'<sup>48</sup> which depicts law as either the liberator (liberal feminism) or the oppressor (radical feminism). However, as Chunn and Lacombe illustrate, this depiction of law fails to encapsulate its true complexities and adopts a rather trans-historical and universal notion of law and the state, thus failing to recognise how their meaning and influence can and does alter through time and place. They state: '[f]ar from being fixed and immutable, state, law and patriarchy are historically and culturally specific relations, and they assume new forms with different content over time.'<sup>49</sup> Furthermore, for postmodernists, law is a discourse that can be deconstructed and altered through the existence of counter-discourses, which can have an uneven effect, sometimes liberating, some times oppressing. Law becomes a site of struggle, a site where struggles over meaning are played out. In addition, this postmodern notion of law also adopts a view of the subject as constructed as opposed to natural and innate. A succinct definition of concepts of subject and subjectivity is provided by Weedon, who states '[s]ubjectivity is used to refer to the conscious and unconscious thoughts and emotion of the individual, her

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<sup>47</sup> Chunn D.E and Lacombe D *Law as a Gendering Practice* [Oxford University Press; Oxford; 2000]

<sup>48</sup> Ibid., p. 2

<sup>49</sup> Ibid., p. 9

sense of herself and her ways of understanding her relation to the world.’<sup>50</sup> In contrast to the humanist view of the subject as unique, fixed and coherent, a postmodern/poststructuralist approach conceives the subject as socially constructed, fragmented, conflicting and continually in process. The subject is constituted through different identity categories and law is considered to be a discourse that produces these categories and subject positions. As opposed to merely reflecting different experiences and identities, the law actually creates them. Thus in relation to the women who kill their abusive partners, their subjectivity is constituted through the identity categories generated by the legislature and the courts. Hence the subject is not an autonomous, free agent, but, rather, is constituted by the law. Law is amongst a number of discourses through which ‘woman’ is constructed, however, as Chunn and Lacombe argue ‘...understanding the role of law in the construction of gender is all the more important today because law is so pervasive, having penetrated almost every minute corners of our lives.’<sup>51</sup> Hence, the law and the courtroom become the site of struggle over the battered woman’s identity. The identity categories used by the courts are identified and scrutinised in order to investigate how identities are negotiated, and which identities appear to lead to manslaughter as opposed to a murder conviction. This in turn permits an evaluation as to whether or not justice has been achieved - in the sense of a social justice that is concerned with representation. Moreover, when considering law reform proposals, it is also important to recognise that every identity category or subject position is based on exclusions. An identity is defined by what it is not. Hence all reform proposals will effectively exclude some categories of women. In addition, an identity category will also have effects beyond

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<sup>50</sup> Weedon C *Feminist Practice and Poststructuralist Theory* [Blackwell; Oxford; 1987] p. 32

<sup>51</sup> Chunn D.E and Lacombe D *Law as a Gendering Practice* p. 17



its initial intention. For example, whereas the battered woman syndrome was developed with good intentions (to assist the woman who suffers abuse) it has been used in a negative manner, a manner which constructs women as mentally unstable. Thus any reform project needs to constantly re-examine the identities that it produces, the effects of those identities, and whom is excluded.

In addition to presenting an overview of the thesis' chapters, this introduction also provides an insight into the wider picture of domestic violence in order to locate its arguments. In particular, an insight into the social and legal attitudes towards domestic violence highlights an historic acceptance of such behaviour, which undoubtedly impacts on the opinions a judge and jury may hold of a woman who kills her abusive partner. If domestic violence is considered to be acceptable, or at least an action not worthy of a serious criminal sanction, it is unlikely that the courts will consider a killing to be an understandable or even an excusable response. Prior to outlining the legal acceptance of domestic violence, an overview of the definitions of such abuse will be provided in order to provide some insight into the types of violence women suffer.

### **Definitions of Domestic Violence**

The Law Commission, in its report on domestic violence (which eventually lead to the Family Law Act 1996) states:

“The term “violence” itself is often used in two senses. In its narrower meaning it describes the use or threat of physical force against a victim in the form of an assault or battery. But in the context of the family, there is also a wider meaning which extends to abuse beyond the more typical instances of physical assaults to include any form of physical, sexual or psychological molestation or harassment which has a serious detrimental effect upon the



health and well-being of the victim, albeit there is no “violence” involved in the sense of physical force.”<sup>52</sup>

It is important to recognise that violence suffered by women is not just restricted to physical violence, but also includes a range of other activities that are not so readily associated with the word 'violence'. This is also the approach taken by Article 2 of The United Nations Declaration on the Elimination of Violence Against Women 1993, which states that violence against women includes the following:

“...physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation.”<sup>53</sup>

Such a definition clearly covers the range of domestic violence suffered by women who kill their abusive partners. This definition is also important as it highlights that abuse can also include sexual and psychological violence. One major issue with domestic violence is the familial or intimate aspect. For a woman to be a victim of domestic violence must she be living with her abuser? The manner in which the United Nations Declaration is limiting is that it states that it is violence 'occurring in the family'. Although non-spousal violence is also included, it does potentially exclude violence inflicted upon women who are separated from their partner, or not living with their partner. This in particular could be seen to be problematic in relation to the case of Zoora Shah, as she was abused by a man she was neither married to, nor living with.

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<sup>52</sup> Law Commission No 207 *Family Law: Domestic Violence and Occupation of the Family Home* [1992; London; HMSO] para 2.3

The perceptions of the victim of domestic violence are seen to be very important when trying to provide a definition. Dobash and Dobash<sup>54</sup> comment that male perpetrators tend to understate their actions, describing their actions as trivial, and not really violence. What has been recognised by survivors, activists and researchers is that the abuse often included activities ‘...which was [not] immediately recognisable as violence - but which was intended to dominate and control an abused woman's behaviour and choices.’<sup>55</sup> Women's Aid defines domestic violence as ‘physical, psychological, sexual or financial violence that takes place within an intimate or family type relationship and forms a pattern or coercive and controlling behaviour.’<sup>56</sup> This second definition has the advantage of including intimate relationships, hence it may apply to women such as Zoora Shah.

### **Legal Acceptance of Domestic Violence**

During the Eighteenth Century, the law condoned the use of violence by men in order to ensure his authoritarian position within the family. Blackstone's Commentaries held family life to be within the private sphere, and thus outside the legitimate scope of the law, as opposed to public acts which may cause damage to society. This position was heavily criticised by J S Mill, in *The Subjection of Women*,<sup>57</sup> which is stated to be the ‘...first significant document to spark the raising of public

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<sup>53</sup> United Declaration on the Elimination of Violence Against Women; General Assembly Resolution 48/104; 20 December 1993

<sup>54</sup> Dobash R E et al *Changing Violent Men* [Sage; Thousand Oakes, California; 2000] see chapter 2

<sup>55</sup> [www.womensaid.org.uk](http://www.womensaid.org.uk)

<sup>56</sup> Ibid.

<sup>57</sup> Mill J S *The Subjection of Women* [Longmans; London; 1869]

consciousness about the plight of battered wives.’<sup>58</sup> Nevertheless, Nineteenth Century Common Law still permitted a husband to beat his wife, the only restriction being the ‘Rule of Thumb’, which stated that the instrument used must be a rod no larger than his thumb, and this rule remained in force until 1878. The Nineteenth Century did see a number of legislative challenges to ‘wife abuse’, such as the Better Prevention and Punishment of Aggravated Assault Upon Women and Children Act, passed in 1853, which introduced new penalties for wife beating. In addition, legislation introduced in this period provided women more rights in relation to separation and divorce, such examples include the Matrimonial Causes Act 1878. This Act allowed women to obtain a separation order from the magistrates on the grounds of cruelty provided that there was evidence of a specific physical assault incident. Women were gradually granted more rights over their property<sup>59</sup> and the courts also had the power to grant and enforce maintenance orders.<sup>60</sup> Furthermore, the end of the Nineteenth Century also witnessed that abolition of a husband’s right to imprison his wife if she refused sexual intercourse. However, as noted by Hearn, the advances in the legal arena were not mirrored in the family sphere:

“[B]y the end of the Nineteenth Century in practice very little had shifted the nature of men’s authority relations over women in marriage. Men’s day-to-day domination and authority was routinely reinforced by the state, for example, the avoidance of intervention in ‘marital disputes’ by the police.”<sup>61</sup>

Legal reform concerning regarding domestic violence largely disappeared until the 1970s and it is suggested that this was due to the absence of a strong women's

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<sup>58</sup> Dutton D C *The Domestic Assault of Women: Psychological and Criminal Justice Perspectives* [UBC Press; Vancouver; 1995] p. 21

<sup>59</sup> Married Woman’s Property Act 1870

<sup>60</sup> Summary Jurisdiction (Married Woman) Act 1895

<sup>61</sup> Hearn J *The Violences of Men* p. 10

movement during this period.<sup>62</sup> Mooney states that '[a]fter 1970 the women's liberation movement grew rapidly and feminists began to examine and speak of their experiences of violence and provide support for other women who had been subject to abuse by men.'<sup>63</sup> Erin Pizzey opened the first women's refuge in 1971.

Since the 1970s a number of legislative provisions have been enacted enabling the courts to grant an abused woman an injunction against the perpetrator.<sup>64</sup> Such legal interventions, however, tend to be civil remedies, and the criminal justice system has consistently failed women who have suffered domestic violence. Domestic violence has overwhelmingly been perceived as a private issue (hence the use of family law remedies) as opposed to a public issue (hence the reluctance on behalf of the state to intervene). The most recent law reform is provided by section IV of the Family Law Act 1996,<sup>65</sup> which aims to increase the effectiveness and accessibility of civil law remedies. Under the Act a woman who suffers domestic violence may obtain an occupation order, which relates to the occupation of the family home, or a non-molestation order which prohibits further violence and abuse. Significantly, these orders are not ancillary orders, hence they do not have to be attached to any other form of proceedings such as divorce. Advances in criminal law have not been deliberate. For example, the Protection from Harassment Act 1997 provides some criminal law protection for women who are continuously harassed and stalked by their abusive partners, however the act was not actually created to be used to address the

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<sup>62</sup> Mooney J *Gender Violence and the Social Order* p. 73

<sup>63</sup> *Ibid.*, p. 74

<sup>64</sup> Domestic Violence and Matrimonial Proceedings Act 1976, Matrimonial Homes Act 1983

<sup>65</sup> The Family Law Act 1996 was the end result of the Law Commission's report No 207 *Family Law: Domestic Violence and Occupation of the Family Home*

problem of domestic violence but to prevent 'stalking'. Sections 1 and 2 of the act make it an offence for a person to pursue a course of conduct that amounts to harassment of another. Section 4 of the Act introduces the more serious offence of engaging in a course of conduct that causes another person to fear that violence will be used against them. The Act defines a course of conduct as at least two incidents.

In addition to the Prevention of Harassment Act 1997, some aspects of domestic violence also fall under the Offences Against the Person Act 1861 and sexual violence is prohibited by the Sexual Offences Act 1956 (as amended). However, although in theory these Acts should provide a sufficient remedy, in practice they generate unsatisfactory results. Generally, the courts and the police have shown little sympathy for women who suffer domestic violence and little mercy for women who kill their abusive partners. It was not until the 1990s that proactive police measures were adopted by the introduction of Domestic Violence Units, and these units were developed in part in response to the criticisms that the state does little to intervene in domestic violence cases. It is stated that the units: '...aim...to help ensure the safety of women and children by intervening with offenders and supporting victims. That is, to protect specific abused women as well as potential victims.'<sup>66</sup> Despite the changes in police responses, evidence indicates that the criminal justice system still considers domestic violence to be less serious than other comparable assaults. Disproportionately, the charges in domestic violence cases tend to be reduced from s47 (assault occasioning actual bodily harm) to s39 (assault), additionally, such cases

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<sup>66</sup> Lewis R, Dobash R, Dobash R and Cavanagh K "Law's Progressive Potential: The Value of Engagement with the Law for Domestic Violence." *Social and Legal Studies* (2001) 10(1), 150-130 p.

tend to be confined to the magistrates courts. 94% of domestic assault cases are dealt with by a magistrate, as opposed to 79% of non-domestic assault cases.<sup>67</sup> Additionally, the sentences passed in domestic cases are disproportionately more lenient than non-domestic cases. Overwhelmingly, perpetrators of domestic violence are likely to receive a conditional discharge or a small fine. Such sentences fail to protect the victim and construct domestic violence as 'trifling and non-criminal.'<sup>68</sup>

Hence it can be seen that a woman who is charged with the murder of her abusive partner immediately faces a difficulty within the criminal justice system due to the historical acceptance of domestic violence and the reticence shown by both the courts and police towards accepting such violence as a serious issue. Although attitudes are now changing, it is not difficult to understand why, on the whole, the law has been fairly reluctant to show sympathy and mercy towards women who kill their abusive partners.

## **Chapter Overview**

Gender theory and, in particular, the work of Judith Butler, is considered in chapter 2. The chapter provides an overview of feminist and gender theory in order to trace the development of postmodern feminism and queer theory. Attention is paid to sameness feminism, difference feminism and the impact of black and post-colonial feminism. In relation to Judith Butler's work, her ideas of gender as performativity, materialisation and cultural intelligibility are considered. The chapter also deals with criticisms of

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<sup>67</sup> Cretney A and Davis A "Prosecuting Domestic Assault: Victims Failing Courts, or Courts Failing Victims." *The Howard Journal* (1997) May 36(2), 146-157 p. 149

Butler's work and argues that adopting such a deconstructive approach does not necessarily entail the complete elimination of the category 'woman'.

The main thrust of the third chapter on theories of justice is to identify and critique the idea of justice which is frequently appealed to by those academics and campaigners concerned with highlighting the plight of women who kill: 'legal justice'. The chapter commences with an overview of a number of different theories and continues to provide a detailed and critical analysis of formal or legal justice, which can be defined as 'treating like cases alike'. This overview includes an examination of the concepts of equality and impartiality. The appeal to legal justice is critiqued via Iris Marion Young's *Justice and the Politics of Difference*.<sup>69</sup> In particular, Young argues that impartiality is based upon a logic of identity that creates and maintains hierarchical binaries and works to suppress and 'other' differences. Young argues that the view which is considered to be impartial is, conversely, very much partial, as it is based on the perspectives and experiences of the dominant group within society. The chapter argues that an approach which continues to appeal to a 'legal justice', which compares women who kill with men who kill, operates in a negative manner, a manner which perpetuates the silencing and 'othering' of women.

In order to move away from maintaining the male/female binary and the associated power relations, it is argued that the focus should shift to an alternative form of justice. The contention here is that Young's conception of social justice enables an

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<sup>68</sup> Ibid., pp. 146-157 p. 152 Edwards S *Policing Domestic Violence: Women, the Law and the State*, [Sage; London; 1987] p. 232

<sup>69</sup> Young I M *Justice and the Politics of Difference*



evaluation of legal rules, procedures and outcomes. Young argues that domination and oppression are the cornerstone of social injustice and that they are produced and perpetuated via five different elements: exploitation, marginalisation, powerlessness, cultural imperialism and violence. In particular, it is considered that cultural imperialism, which argues that women are defined from the outside, and violence, as the criminal justice process arguably condones violence against women, are the main forms of domination and oppression suffered by women who kill. The chapter concludes by applying queer theory to Young's notion of social justice, particularly the issue of cultural imperialism. In so doing this critique addresses in particular the problems with Young's assertion that oppressed groups should construct their own identity.

Chapter 4 provides an examination of the existing defences available to women who kill their abusive partners and of the literature which has provided a critical analysis of the law. The three main defences that are examined are: Provocation, Diminished Responsibility and Self Defence. Whereas the former two defences are partial, leading to a conviction for the lesser offence of manslaughter, the latter is a full defence, and thus if successful will lead to an outright acquittal. In relation to provocation, the chapter examines the legal requirements of the defence and how they have affected women who kill their abusive partners. Provocation requires the existence of three elements: 1) provocative conduct, 2) loss of self-control, and 3) the requirement that a reasonable person should react in the same manner as the defendant. One of the main feminist arguments regarding provocation is that its requirements are based on masculine characteristics and this serves to silence and 'other' women. In particular, this is considered to be the case in relation to a sudden

and temporary loss of self-control. The chapter outlines the arguments forwarded by commentators that women tend to have a slow burn anger, and that the law should be amended in order to recognise this. Amongst others, the cases of *Thornton*<sup>70</sup> and *Ahluwalia*<sup>71</sup> are considered. Another related issue, which is identified as problematic, is the law's recognition of cumulative provocation and the effect that this has on the battered woman and her self control. Although it is recognised that the law has developed to consider the whole history of the violence suffered, particularly in the case of *R v Humphreys*<sup>72</sup> the requirement of a sudden and temporary loss of self-control remains a formidable barrier to the success of the defence.

The objective requirement that a reasonable person must react in a similar manner is also analysed and identified as posing considerable difficulties. Much discussion has focused on the extent to which a defendant's characteristics should be attributed to the reasonable person, and, until recently, the law has drawn a distinction between the level of self control expected and the gravity of the provocation. Chapter 4 focuses specifically on the issue of the level of self-control, whereas the problem of characteristics relevant to the gravity of the provocation is considered in the chapter on the battered woman syndrome (chapter 5). It is recognised that this distinction between self-control and gravity is now somewhat legally irrelevant due to the House of Lords' decision in *R v Smith*.<sup>73</sup> This judgment is also considered in detail in chapter 5.

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<sup>70</sup> [1992] 1 All ER 306 and *R v Thornton* (No. 2) [1996] 2 Cr App Rep 108

<sup>71</sup> [1993] 96 Cr App Rep 133

<sup>72</sup> [1995] 4 All ER 1008

In relation to diminished responsibility, which is contained within S2 of the Homicide Act 1957, it is argued that despite the general success of this defence, its continued use is exceptionally problematic as it focuses upon the woman's mental state as opposed to the violence she has suffered. Finally the chapter scrutinises the issue of self-defence. This defence permits defensive action that is deemed necessary. This has led to the establishment of a number of requirements: imminency, belief in serious harm, proportionality and (in some jurisdictions) a duty to retreat. The chapter provides a detailed and critical examination of these requirements and it is noted that this defence is the one least likely to be accepted by the courts. As with provocation, it is argued that the requirements are based on masculine characteristics and this excludes the battered woman who kills. The chapter outlines the advances that have been made, specifically in relation to the requirement that the defensive force must be reasonable. The American case of *State v Wanrow*,<sup>74</sup> and related commentaries are considered. In this case the Supreme Court recognised that in addition to adopting a subjective viewpoint as to whether or not harm was threatened, the courts should judge the reasonableness of the force used subjectively. Hence, when evaluating whether or not a woman acted in self-defence, a purely subjective approach is adopted. This enables the jury to consider all the relevant circumstances leading to the fatal act, not just the moments immediately preceding. It is argued that this approach is significantly more progressive than the one adopted presently in England and Wales. The recent case of *R v Martin*<sup>75</sup> is analysed. In this case the Court of Appeal reaffirmed that whereas whether or not the force was necessary would be

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<sup>73</sup> [2000] 3 WLR 654

<sup>74</sup> 88 Wash. 2d 221, 559 P.2d 548 (1977)

<sup>75</sup> [2002] 1 Cr App R 27

judged from the perspective of the defendant, the reasonableness of the amount of force used is to be judged objectively.

Overall, the chapter illustrates through a detailed and critical examination of the existing law defences and academic commentary that the law, both as it presently stands and how it is applied, fails to deal adequately with women who kill their abusive partners.

Chapter 5 examines the development and the application of the battered woman syndrome. A detailed and critical analysis of the two constitutive elements of the concept - learned helplessness and the cycle theory of violence - is provided along with a discussion as to why the syndrome was developed, to provide an answer to the question 'why do women remain in violent relationships' and secondly to aid the defence of women who kill their abusive partners. It is recognised that in both America and Canada the syndrome has had some success in helping to achieve complete acquittals for women who kill when argued in relation to self-defence.

In relation to provocation, it is recognised that the major area of contention is the extent to which the battered woman syndrome amounts to a relevant characteristic, which affects the gravity of the provocation in relation to the objective test. A number of cases are discussed including *Ahluwalia*,<sup>76</sup> *Humphreys*,<sup>77</sup> *R v Morhall*<sup>78</sup>

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<sup>76</sup> [1993] 96 Cr App Rep 133

<sup>77</sup> [1995] 4 All ER 1008

<sup>78</sup> [1995] 3 All ER 659

and *Luc Thiet Thuan v R.*<sup>79</sup> In addition the academic arguments surrounding this issue are also scrutinised. This section is concluded with an assessment of the impact of the House of Lords' decision in *Smith*.<sup>80</sup>

One of the most radical judicial acknowledgements of the battered woman syndrome and its legal application was provided in the Canadian case of *Lavallee v R.*<sup>81</sup> the judgement of which is examined. In this case the Supreme Court of Canada recognised the applicability of the syndrome and it was used successfully to argue that the woman acted in self-defence when she shot her abusive partner in the back. The case recognises that the syndrome operates to bring the perspectives of battered women into the legal arena, and thus counters those requirements which are based upon and reflect the male experience. The court held that Lavallee believed that she would be killed that night and therefore she acted in self-defence. This approach is very progressive, as it challenges the meaning of imminence. However, the syndrome has not been used in other jurisdictions to execute such a fundamental change in perception.

The chapter continues to question the necessity of the syndrome and to discuss the comments that it has attracted. The syndrome has received significant criticism from feminist and other academics in relation to three elements: its methodology, its ideology, and the judicial application. The chapter concludes by recognising the dilemma for feminist academics and campaigners: the use of the syndrome is

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<sup>79</sup> [1996] 2 All ER 1035

<sup>80</sup> [2000] 3 WLR 654

problematic as it constructs women in a negative manner, however, it does appear to bring about results, in the sense that it can either lead to a conviction for manslaughter as opposed to murder, or a complete acquittal.

The chapter on Critique and Construction provides an analysis of the feminist critique of the law and the law's construction of women who kill their abusive partners. One of the major criticisms of the existing law is that it is inherently male and works to silence, exclude and 'other' women, especially battered women who kill. Additionally, many feminist academics argue that the law employs double standards, in that women are treated differently to men. Through comparing cases involving women who kill with men who kill, it transpires that the law, in both scenarios, invariably blames the woman. These two arguments: that the law is male and that the law employs double standards; can be seen to reflect two different approaches within feminist theory, approaches which advocate that women should be treated equally to men; and approaches which emphasise difference, thus maintaining that differences between men and women should be recognised. The chapter then commences the examination of the law's construction of identity. Twelve Court of Appeal cases are subjected to scrutiny, and particular attention is paid to the defences of provocation and self-defence, the use of expert evidence in general and the battered woman syndrome in particular and the factors which have affected the sentence a woman has received when convicted of manslaughter.

Chapters 7 and 8 develop the examination of identity categories by providing a close reading of the cases of Zoorah Shah and Diana Butler. Chapter 7 deals with the Court

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<sup>81</sup> [1990] 1 SCR 852

of Appeal judgment concerning Zoorah Shah. Amongst other crimes, Shah was convicted for the murder of Mohammed Azam, whom she poisoned with arsenic. The reading of the case adopts a queer theory perspective. In particular, it draws upon the work of Judith Butler and her notions of performativity and intelligible genders. The reading traces the construction of Zoorah Shah from the first trial through to the Court of Appeal and argues that the dismissal of her appeal turned upon the construction of Shah as an unintelligible gender. The chapter engages in a detailed examination of the case presented at the first trial and investigates the grounds on which the appeal was dismissed. The appeal argued for the admission of fresh evidence, much of which was presented in a report prepared by Southall Black Sisters, alleging that Mohammed Azam and others had physically and sexually abused Zoorah, and also outlining that the defence presented at the first trial was based on lies. Under s23 Criminal Appeal Act 1968 the Court of Appeal had a discretion to allow fresh evidence to be adduced. The chapter focuses on two elements which the Court had taken into account: 1) whether the evidence is capable of belief and 2) whether there is a reasonable explanation for the failure to adduce the evidence in the first trial. It is noted that these issues are pertinent to the appellant's character, as the main question is whether or not Shah can be believed.

Through an investigation of the court's evaluation of these two issues, the chapter argues that the Court of Appeal constructs Zoorah Shah as an unintelligible gender. Three factors in particular are emphasised: 1) the court's misgivings regarding the lack of any 'suspicious bruising', and how the body is considered to tell the truth of Zoorah's situation; 2) Zoorah's contravention of racial as well as gendered scripts and 2) the naming of Zoorah as an 'unusual woman'. It is argued that this is a powerful

interpellation which works to silence and subordinate Zoora. When analysing the judgment particular attention is paid to the issues of race, ethnicity and culture.

Chapter 8 provides a close reading of the appeal and re-trial of Diana Butler, who was initially convicted for the murder of her partner, Roger Carlin. The chapter examines both the Court of Appeal judgment and the re-trial, and scrutinises how Diana Butler is given an identity, or placed within an identity category by the court; an identity which is negotiated by the defence and prosecution lawyers and the judge (but not the jury); an identity which is constructed for her, but not by her, but which she must internalise in order to achieve some sense of justice. A number of theoretical arguments are used in order to provide a detailed analysis of the case and the construction of Diana's identity. In particular, the chapter looks at the concepts of narrative, materialisation, resignification and the formation of the psyche. The discussion highlights how the different narratives which are evident in both the appeal and the retrial go some way to construct Diana's identity, and how narrative can also be subject to a powerful resignification, a resignification which impacts upon the construction of Diana's identity to such an extent that she is eventually convicted for manslaughter on the grounds of diminished responsibility.

The shift in the focus of the case from the first trial, appeal and retrial is commented upon and it is argued that this change in time focus is accompanied with a change in the meaning of the historical narrative and this in turn impacts upon the construction of Diana. The section on the retrial discusses a number of issues, including how the dialogues between Diana and Roger materialise on the body of Diana and thus have a real impact on her behaviour. A comparison with the Zoora Shah case is provided,



which focuses upon the issue of intelligibility and ethnicity. Particular attention is paid to the resignification of an event which occurred between Diana and her former husband, John Butler and the role of the defence and prosecution in negotiating this change in narrative, and how the defence transform the meaning of this event from a negative to a positive, in order to construct a very different woman.

Chapter 9 offers conclusions and also forwards a suggested reform proposal, which is based upon the defence of duress of circumstances and a re-working of the battered woman syndrome. In order to reach such conclusions, however, I will begin by discussing one element of the theoretical framework which forms the basis of this thesis: gender theory or, more specifically, queer theory.

## **GENDER THEORY**

### **From Liberalism to Postmodernism: The development of Queer Theory**

#### **Introduction**

The main aim of this thesis is to scrutinise the law's treatment of women who kill through a new theoretical framework, one developed from theories of justice and gender. This chapter explores key debates within gender theory and how they might have significance for legal understandings of women who kill their abusive partners. Specifically, the chapter explores the work of queer theorist Judith Butler. In addition to examining the main aspects of Butler's work which are employed in the thesis, the chapter will trace the genealogy of feminist theory/gender theory in order to facilitate an insight into three issues: the evolution of queer theory and Judith Butler's arguments; the distinctions between Judith Butler and other gender theorists; and the criticisms of Judith Butler's work.

The influence of queer theory and Judith Butler has not been limited to gender theory. Increasingly, those legal scholars who are concerned to explore how the law interacts with issues of gender and homosexuality, are turning to this theoretical approach to provide new insights into a diverse range of issues. A queer theory approach has been used to analyse and deconstruct cases concerning the legal rights and status of lesbian, gay and transgendered persons;<sup>1</sup> to 'explore the relationship between property and

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<sup>1</sup> see Beger N J "Queer Readings of Europe: Gender Identity, Sexual Orientation and the (Im)Potency of Rights Politics at the European Court of Justice" *Social and Legal Studies* (2000) 9(2) 249-270; Moran L, Monk D and Beresford S ed *Legal Queeries: Lesbian, Gay and Transgender Legal Studies* [Continuum Publishing Group; London; 1998]; Sharpe A "Transgender Performance and the

personality through the lens of sexuality'<sup>2</sup> to consider the US Supreme Court's refusal to recognise the right of an Irish-Gay collective to march and communicate their pro-gay message.<sup>3</sup> In relation to feminist issues, queer theory and the work of Judith Butler has been used to investigate how the law produces sex and gender.<sup>4</sup> These writings generally draw upon Butler's notion of gender as performativity and consider how identity categories and binaries can be disrupted.

In relation to this thesis, the adoption of queer theory and Butler's work developed due to an interest in the perceived differences which exist between men and women, and between women. The issue of female or feminine difference has taken a central place in feminist/gender theory and has had significant impact on all areas of feminist theory, politics and philosophy, including law reform, epistemology, ontology and moral theory. The manner in which difference is recognised and conceptualised, however, depends significantly upon the strand of theory which one adopts. It is generally recognised that, over the years, three varying approaches have developed.

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Discriminating Gaze: A Critique of Anti-Discrimination Regulatory Regimes" *Social and Legal Studies* (1999) 8(1), 5-24

<sup>2</sup> Davies M "Queer Property, Queer Persons: Self-Ownership and Beyond" *Social & Legal Studies* (1999) 8(3), 327-352

<sup>3</sup> Yalda C A "Walking the Straight and Narrow: Performative Sexuality and the First Amendment after Hurley" *Social & Legal Studies* (1999) 8(1), 25-45

<sup>4</sup> see for example: Chunn D E and Lacombe D *Law as a Gendering Practice*; Keywood K "More than a Woman? Embodiment and Sexual Difference in Medical Law" *Feminist Legal Studies* (2000) 8(3), 319-342, Loizidou E "The Trouble with Rape: Gender Matters and Legal 'Transformations'" *Feminist Legal Studies* (1999) 7(3), 275-297

Labelled as Sameness, Difference and Postmodernism by Hekman,<sup>5</sup> and Inclusion, Reversal and Divergence by Squires,<sup>6</sup> these three different approaches are also evidenced within feminist conceptions of law and approaches to law reform. Smart categorises these to be 1) law is sexist, 2) law is male and 3) law as gendered.<sup>7</sup>

The conceptions of difference advanced by these theories is, overwhelmingly, reflected by the respective label. Sameness, or inclusion, is to a large extent epitomised by liberal feminism/gender theory which argues that any differences which do exist between men and women should not be used to justify any divergence of treatment. Liberal feminists state that women should be subject to the same standards and laws as men. They call for equal and impartial treatment. Conversely, difference or reversal feminism calls for a recognition and, in some cases, a celebration of feminine difference. As opposed to rendering such differences as inconsequential or irrelevant, this strand argues that liberation for women would not be achieved by ignoring women's difference and requiring women to act the same as men, but via laws and theories which recognise the specificity of feminine characteristics and women's experience. Such an approach either argues that female and male characteristics should be given equal weight or that femininity should be placed in a superior position to masculinity.

The approach taken by postmodern or displacement feminists is altogether different. It argues that both sameness and difference maintain the masculine/feminine and

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<sup>5</sup> Hekman S J *Future of Differences: Truth and Method in Feminist Theory* [Polity Press, Cambridge; 1999]

<sup>6</sup> Squires J *Gender in Political Theory* [Polity Press; Oxford; 1999]

<sup>7</sup> Smart C *Law, Crime and Sexuality: Essays in Feminism* [Sage Publications; London; 1995] chp 11

male/female binary. This is shown to be problematic as it tends to focus on gender difference at the expense of other differences, such as race, class and sexuality. Postmodernism, however, acknowledges that the experience of white middle class women, those whom have generally been the foundation for feminist theory, fails to recognise significant differences between women. Moreover, it is argued that adopting a stance which fails to acknowledge the diverse experiences of women obscures the power relationships between women (and between men), and also ignores the white woman's role in imperialism. Taken to its extreme, this approach completely deconstructs the category 'woman', suggesting that it cannot be used as the foundation of feminist or gender theory. It argues that the concept of a natural woman is a linguistic and also a normative construct and it challenges the notion of an autonomous subject, a concept which is generally relied upon in the other two approaches. Postmodern feminist theorists argue that maintaining the male/female binary retains the power relationships which construct the oppressive gender identities which feminists are fighting against and also exclude and repress different gender identities. Within this approach the main focus of inquiry shifts from analysing how feminism should represent women in the law, to examine both how the law is gendered and how it creates gendered identities.<sup>8</sup> It is within this category that queer theory can be placed.

The emphasis of the thesis is to examine how identity, and therefore the differences between women, are constructed and constituted by the legal system itself. The analysis draws on the experiences of women who kill their abusive partners and their

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<sup>8</sup> see for example Conaghan J "Reassessing the Feminist Theoretical Project in Law" *Journal of Law and Society* (2000) 27(3), 351-385

treatment by the legal system. Some may argue that, instead of working within the present political and legal system, we should change the system, (as it has a causal role in the problems faced by these women) or work entirely outside it. Nevertheless, refiguring politics and the criminal justice system is not the focus of this piece of work. The aim of this project is to provide insights into the way in which the present system creates identity and to scrutinise the form of justice which is achieved in some cases.

### **Social Constructionism and Liberal Feminism**

Within feminist theory the argument that some aspects of identity, such as femininity and masculinity, are socially constructed, can be traced back to the liberal or sameness feminism. Within the 20<sup>th</sup> Century, liberal or sameness feminism is generally associated with the work of Simone de Beauvoir who, amongst others, draws upon the social constructionist movement which developed significantly in the 1960s. Drawing upon the work of Jean-Paul Sartre, and specially his work *Being and Nothingness*,<sup>9</sup> de Beauvoir (in *The Second Sex*)<sup>10</sup> argued that women are not biologically determined, rather, they learn to become women: they are socially constructed, hence her famous quote: 'One is not born, but rather becomes, a woman.'<sup>11</sup> This social constructionist approach is generally contrasted to biological essentialism.<sup>12</sup> As Diana Fuss explains:

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<sup>9</sup> Sartre J P *Being and Nothingness an essay on Phenomenological Ontology* [Methuen; London; 1969]

<sup>10</sup> de Beauvoir S *The Second Sex* [Picador; London; 1989]

<sup>11</sup> Ibid., p. 295

<sup>12</sup> Essentialism is defined by Grosz E as '...the existence of fixed characteristics, given attributes, and a historical functions which limit the possibilities of change and thus of social reorganisation'. Biologism is seen to be a specific form of essentialism '... in which women's essence is defined in terms of their biological capacities.' Grosz E "Conclusion: A note on essentialism and difference" in Gunew S ed *Feminist Knowledge: Critique and Construct* [Routledge; London; 1990] pp. 332-344 p. 334.

'Essentialism is classically defined as a belief in true essence-that which is most irreducible, unchanging, and therefore constitutive of a person or a thing.'<sup>13</sup> Thus a constructionist within the liberal feminist camp would reject such biological determinism and regard femininity and masculinity to be products of society. Constructionism is underlined by the sex/gender distinction. This binary, which is considered to reflect the nature/culture binary, considers that whereas sex (male/female) is natural, gender (masculinity/femininity) is completely social.

de Beauvoir also developed the discussion of Woman as Other to Man's One, and relies upon the binary of Self/Other, which corresponds to Man/Woman binary. Whereas Man is characterised by subjectivity, autonomy, rationality and transcendence, Woman is defined as opposite to this, she is bound by her immanence and lacks subjectivity. Moreover, although the masculine is the positive side of the dichotomy, it is also seen to be neutral - the standard that defines humanity: 'She is defined and differentiated with reference to man and not he with reference to her; she is incidental; the inessential as opposed to the essential. He is the Subject, he is Absolute - she is Other.'<sup>14</sup> This, for de Beauvoir, forms the basis of women's oppression. In order to be liberated, they must become the Self. They must exceed their immanence and achieve transcendence, adopting those characteristics associated with the masculine. Positioning Man as the One or Self, and Woman as the Other was adopted by those working within feminist jurisprudence. Due to the male biased nature of the 'objective' standards of humanity which were embedded within the law,

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Biologism is just seen as one form of essentialism. Essentialism can take many different forms, such as biological, social or linguistic.

<sup>13</sup> Fuss D *Essentially Speaking: Feminism, Nature and Difference* [Routledge; London;1989] p. 2

<sup>14</sup> de Beauvoir S *The Second Sex* p. 16

women were judged against a masculine criteria. Hence women becomes Other to the law.

The way for women to escape this situation is, however, not to rejoice in their otherness and turn it into a positive attribute, an approach which de Beauvoir did recognise, but to throw off their shackles of Otherness. Hence it is argued that, as gender is social it can be changed, women can develop those characteristics generally associated with masculinity. Moreover, because the differences between men and women are socially constructed the sex of an individual cannot be used to justify differential treatment. Hence, the political project of liberal feminism aims to abolish, the differences between men and women, or, in the very least, render these differences irrelevant. In relation to feminism and feminist legal theory, the advantages of such an approach are self-evident. Sex discrimination has frequently, especially within the realm of employment law, emanated from the notion that women are different to men, and thus should not be given the same work opportunities or the same wages. By adopting a policy of assimilation such a stance is quickly dismissed.

This approach to equal treatment and non-discrimination on the grounds of sex can be seen to be enshrined in Article 14 of the European Convention on Human Rights and Fundamental Freedoms, which states:

“The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

As this Article illustrates, the plea to equal treatment is not just limited to sex, but also to other perceived ‘differences’, and thus in addition to the Sex Discrimination Act 1975, this requirement of non-discrimination is also contained within the Race



Relations Act 1976 and the Disability Discrimination Act 1995. Non-discrimination against women is also specifically addressed in the Convention on the Elimination of Discrimination Against Women. Article 1 defines discrimination as:

“...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise of women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

There are, however, many criticisms of this approach. Firstly, it is considered to be essentialist, which may seem to be rather surprising due to the constructionist accounts of femininity. This criticism stems from the fact that liberal/sameness feminism still posits that there is a universal, ahistoric biological woman, and posits Man and Woman to be natural, ontological categories. Whereas femininity is considered to be a social construct, the existence of two, natural, biological sexes is taken as a given. As Nicholson argues:

“Many of those who accept the idea that character is socially formed and thus reject the idea that it emanates from biology do not necessarily reject the idea that biology is the site of character formation. ... They still view the physiological self as the "given" upon which specific characteristics are "superimposed"; it provides the location for establishing where specific social influences are to go.”<sup>15</sup>

Such an approach leads to a ‘coat-rack’ view of identity, where ‘the body is viewed as a type of rack upon which differing cultural artifacts...are thrown or superimposed.’<sup>16</sup>

In addition, in its belief in transcendence and objectivity, the liberal feminist approach clearly believes that one can obtain a view-point outside the cultural world, a position which postmodern social constructionists would negate. The other well rehearsed argument against this liberal approach is that it requires women to be like men. The

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<sup>15</sup> Nicholson L “Interpreting Gender” in Nicholson L and Seidman S *Social Postmodernism: Beyond Identity Politics* [Cambridge University Press; Cambridge; 1995] pp. 39-67 p. 41

<sup>16</sup> *Ibid.*, p. 41

standards and laws which are to be applied to women are not universal and objective, but are male. As Young explains, with assimilation women arrive to the scene after the standards have been set, and these standards have been set by the dominant group in society (male). Furthermore, this assimilation approach also allows the dominant group to disregard their own specificity.<sup>17</sup> Secondly, promoting sameness can lead to the devaluing or the rejection of feminine specificity. This has caused some liberal feminists to denigrate femininity, one of the most extreme examples of this is Simone de Beauvoir's vilification of motherhood and the female body. Adopting a stance which is criticised by other liberal feminists,<sup>18</sup> motherhood for de Beauvoir is, like other feminine characteristics, a social construct, and a construct which must be erased in order for women to gain equality.<sup>19</sup> Although such a position is an extreme, it illustrates how liberal/sameness necessarily entails the rejection of feminine characteristics, in favour of supposedly objective (read: masculine) characteristics, a position which is rejected by many difference feminists. Finally, evidence also suggest that there is a significant divergence between the letter of the law stating that women and men should be treated equally and its practical application. One example is that of the Sex Discrimination Act 1975. In relation to equal pay research indicates that men are generally paid more for the same job as their female counterparts. An Equal Pay Task Force, which was established in 1999 by the Equal Opportunities Commission, reported that with regards to full time work, women earn 18% less than men, and on a part time basis, women earn 39% less.<sup>20</sup>

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<sup>17</sup> Young I M *Justice and the Politics of Difference* pp. 164-165

<sup>18</sup> See Hekman S *The Future of Differences Truth and Method in Feminist Theory* p. 9

<sup>19</sup> *Ibid.*, pp. 9-10

<sup>20</sup> Equal Pay Task Force; Equal Opportunities Commission; 27 February 2001

In contrast to this sameness/liberal approach which suggests the erasure of feminine difference, sexual difference theorists argue for a recognition and at times a celebration of femininity. It is to this particular strand of theory I now turn.

## Sexual Difference

Luce Irigaray commences her book *je, tu, nous Toward a Culture of Difference*<sup>21</sup> with a discussion of Simone de Beauvoir's *The Second Sex*<sup>22</sup> arguing that, as opposed to escaping their female body and motherhood, women should find a value in these attributes, and indeed this is considered to be essential if women are to demand and secure 'equivalent sexed rights', rights which are necessarily different. In stark contrast to liberal feminism, equality, for Irigaray, requires a recognition of sexual difference:

"Equality between men and women cannot be achieved without a theory of gender as sexed and a rewriting of the rights and obligations of each sex, *qua* different, in social rights and obligations."<sup>23</sup>

As sexual difference is posited as the cause of women's oppression, Irigaray argues that liberation will only be achieved via sexual difference. The eradication of oppression requires not that difference be erased but that the values of each gender should be defined. In Irigaray's view the grip which patriarchal and phallogentric models have had on civilisation work as a significant impediment to determining such gender values.<sup>24</sup> The importance of recognising and accepting differences as opposed to considering them to be irrelevant is also accepted by Iris Marion Young. Young argues that the liberatory nature of the politics of assimilation was challenged by 'movements of the oppressed.' As opposed to striving for justice as equal treatment

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<sup>21</sup> Irigaray L *je, tu, nous Toward a Culture of Difference* [Routledge; London; 1993]

<sup>22</sup> de Beauvoir S *The Second Sex*

<sup>23</sup> Irigaray L *je, tu, nous Toward a Culture of Difference* p. 13

<sup>24</sup> *Ibid* pp. 12-13

oppressed groups argue that 'a positive self-definition of group difference is in fact more liberatory.'<sup>25</sup>

Much of Irigaray's work is based on the premise that woman's identity is repressed and silenced by the patriarchal nature of the symbolic order - that which produces the speaking subject. This argument is premised on, and also critiques, Lacan's adoption of Freud's Oedipus complex to show how a subject is constituted through language. She argues that women cannot talk as women, as language is male, due to the phallus being placed as the transcendental signifier. Within the patriarchal symbolic order not only do women have to 'speak like men' but also any representations of them are inevitably masculine:

"To claim that the feminine can be expressed in the form of a concept is to allow oneself to be caught up again in a system of 'masculine' representations, in which women are trapped in a system of meaning which serves the autoaffection of the (masculine) subject."<sup>26</sup>

This differs significantly from other difference feminists, especially standpoint feminists, who believe that the woman can speak the truth about her experience and can develop their own representations of femininity. Working from Irigaray's premise such representations are masculine - they do not uncover the real feminine, hence they continue to be oppressive.

Irigaray argues that women need to develop their own language, to be able to 'speak (as) woman, as opposed to speaking of woman and speaking (as) man.'<sup>27</sup> This,

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<sup>25</sup> Young I M *Justice and the Politics of Difference* p. 157

<sup>26</sup> Irigaray L *This Sex Which is Not One* [Cornell University Press; New York; 1985] pp. 122-3; see also Weedon C *Feminism, Theory and the Politics of Difference* [Blackwell; Oxford; 1999] p. 90

<sup>27</sup> Irigaray L *This Sex Which is Not One* pp. 135-136

however, entails the development of a feminine subjectivity. She argues that we do not know woman as feminine feminine, but only as masculine feminine, the phallic feminine. What is required, in contrast to a male defined female otherness, is a maternal feminine subjectivity, which necessitates the development of a female imaginary, and this for Irigaray lies in the theorising of women's sexuality. In stark contrast to male sexuality, which is unified, female sexuality is fluid, plural and multiple - signified by the existence of two lips. The two lips are used in a figurative sense, or, as Diana Fuss argues, in a metonymic manner. Irigaray argues that, due to the two lips, female sexuality cannot be reduced to a unity, but rather is both singular and double: 'Thus, within herself, she is already two-but not divisible into one(s).'<sup>28</sup> Hence, Irigaray asserts that there is, inside every woman, a true female subjectivity, which needs to be uncovered, via the female imaginary, in order for women to develop their own voice, and escape oppression.

Despite recognising that women's subjectivity is repressed by the phallic symbolic order, and that what we know as women now is constructed by masculine discourse, she argues, unlike Simone de Beauvoir, that we are born women:

"Your/my body doesn't acquire its sex through an operation. Through the action of some power, function or organ. Without any intervention or special manipulation, you are a woman already."<sup>29</sup>

She states that 'by our two lips we are women' from the start - but we are women confined by the 'fatherland', arguing:

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<sup>28</sup> Ibid., p. 24 see also Fuss D *Essentially Speaking: Feminism, Nature and Difference* p. 58

<sup>29</sup> Irigaray L *This Sex Which is Not One* Ibid., p. 211

“It’s not that we have a territory of our own; but their fatherland, family, home, discourse, imprison us in enclosed spaces where we cannot keep on moving, living, as ourselves. Their properties are our exile.”<sup>30</sup>

Hence, for Irigaray women do already exist, but what we know about them, and how they speak, is constructed by masculine discourse, and in contrast to the social constructionist position adopted by the sameness/liberal feminists, Irigaray advocates the discovery and recognition of a feminine subjectivity.

In connection with the recognition of a distinct feminine subjectivity, Irigaray develops her notion of Sexuate Rights, which lays down specific legal rights and duties for women, which should be distinct from the specific legal rights and duties of men. She states that it is essential to define women's civil identity, because without their own identity:

“...it is to be expected, unfortunately, that they will conform to the only existing models, supposedly neutral, but in fact male. Hence the need to redefine the objective content of civil rights as they apply to men and women, - since the neutral individual is nothing but a cultural fiction - and to attempt to establish the legal bases of possible reciprocity between the sexes.”<sup>31</sup>

In relation to women, she includes the following Sexuate Rights: The right to human dignity, the right to human identity, mutual mother-child duties, a civil right for women to defend their lives and the lives of their children, and the right to equal representation in all places where civil or religious decisions are taken.<sup>32</sup>

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<sup>30</sup> Ibid., p. 212

<sup>31</sup> Irigaray L *Thinking the Difference*, transl, Montin K [Athlone; London; 1994] p. 75 cited in Lacey N *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* [Hart Publishing; Oxford; 1998] p. 213

<sup>32</sup> Irigaray L *je, tu, nous Toward a Culture of Difference* pp. 78-90

One of the major difficulties with an approach which emphasises female difference, however, is that it can be used in a negative manner, a manner which justifies discrimination against women, as opposed to a recognition of their particular circumstances. One case which is generally cited to illustrate this problem is *Equal Employment Opportunity Commission v Sears Roebuck & Co.*<sup>33</sup> The U.S. Court of Appeal upheld the decision to dismiss ten charges of sex discrimination against Sears. The charges related to the perceived unequal rate at which women were hired for sales position when compared to men. Statistics illustrated that ‘...although two-thirds of the applications and promotion candidates for commission sales positions were women, women constituted only one-fourth of those actually hired or promoted.’<sup>34</sup> Sears justified this practice by using expert evidence to effect that the character traits generally associated with men, for example, competitive and work-centred, as opposed to those generally associated with women, such as nurturing, selflessness and relation-centred, were more suited to a sales position. Hence, the existence of female difference was used in a negative manner to justify unequal employment opportunities. A similar argument has been used in connection to Irigaray's sexuate rights. Nicola Lacey states that the rights forwarded ‘...recapitulates stereotyped and disempowering visions of femininity, and fixes women within "a feminine culture" as valued and defined by men in a heterosexist world.’<sup>35</sup>

This recognition of some kind of true female identity or subjectivity is also recognised by standpoint feminism, although, as mentioned above, standpoint feminism adopts a rather different approach to the one offered by Irigaray. Standpoint theory turns to the

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<sup>33</sup> 839 F.2d 302 (7<sup>th</sup> Circuit 1988)

<sup>34</sup> Frug M J *Postmodern Legal Feminism* [Routledge; London; 1992] p. 12

<sup>35</sup> Lacey N *Unspeakable Subjects: Feminist Essays in Legal and Social Theory* p. 216

views and perspectives of oppressed and subordinated people in order to develop knowledge claims. It argues that, although knowledge and reality is in a sense socially constructed, generated via material life and experiences, women can access a view which ‘...exposes the real relations among human beings.’<sup>36</sup> As opposed to the dominant group in society, whose view is considered to be ‘...partial and perverse,’<sup>37</sup> women have an epistemological privilege which stems from their oppression. According to standpoint feminists, those who are in a subordinated position advance a perspective that is ‘...less partial and distorted, and therefore more reliable,’<sup>38</sup> than those in a dominant position. The main criticism, however, of both Irigaray and standpoint feminism is their use of ‘woman’ as a signifier which represents all women. The arguments presented by both sameness/liberal feminism and those feminists who advocate the acceptance of female difference has been criticised as focusing on white, middle class women. In particular, black women have argued that their experiences are excluded by this universal woman.<sup>39</sup>

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<sup>36</sup> Hartsock N “The Feminist Standpoint: Developing a Ground for Specifically Historical Materialism” pg 153 in Kemp S and Squires J *Feminisms: an Oxford Reader* [Oxford University Press; Oxford; 1997] 152-160

<sup>37</sup> Ibid.

<sup>38</sup> Jagger A “Love and Knowledge: Emotion in Feminist Epistemology” in Kemp S and Squires J *Feminisms* pp. 188-193 p. 192

<sup>39</sup> The work of Sandra Harding, however, forwards a theory of standpoint feminism which not only recognises the different experiences of women, but also attempts to deconstruct the essentialist/relativist dichotomy. Harding in *The Science Question in Feminism* [Cornell University Press; New York; 1986] maintains that the diverse situations of women means that it is impossible to develop only one feminist standpoint, and therefore advocates a move away from a single coherent theory. In *Whose Science? Whose Knowledge?* Harding develops ‘...the logic of standpoint theory in ways that more vigorously pull it away from its modernist origins and more clearly enable it to advance some postmodernist goals.’



## Black Feminism

bell hooks in *Ain't I a Woman*<sup>40</sup> examines the development of the women's movement and those which it represents and argues that the feminism has overwhelmingly presented the experiences of white middle/upper class women as the experience of all women, thus excluding the experiences of non-white women and working class women, who remain unrepresented. In addition to excluding the black women's voice, hooks argues that the women's movement is based on racist foundations. She states: '[for] black women the issue is not whether white women are more or less racist than white men, but that they are racist'<sup>41</sup> The racism of feminism is not, however, overt but exists in the exclusion of black women's voices and the adoption of racial stereotypes.<sup>42</sup> She is highly critical of the woman-black men slave analogies which the women's movement made during the 1800's, stating that their experiences bear little,

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(p. 106). She advances the notion of 'strong objectivity' which, whilst recognising that all knowledge is socially situated, maintains that some '...social situation tends to generate the most objective knowledge claims.' (p. 142) Thus, Harding argues that feminist research should '...start from the situations of women in devalued and oppressed races, classes and cultures', as she argues that this will enable researchers to '...learn even more about the social and natural orders...'. (p. 179-180). Hence, Harding's work aims to reconcile standpoint theory with postmodernism, a project which is continued in *Is Science Multicultural? Postcolonialisms, Feminism and Epistemology* [Indiana University Press; 1998] in order to recognise the diverse situations of women, without descending into relativism. Such an approach therefore potentially enables the experiences of marginalised groups to be acknowledged without resorting to essentialist notions.

<sup>40</sup> hooks b *Ain't I a Woman: Black Women and Feminism* [Pluto Press; London; 1982]

<sup>41</sup> Ibid., p. 124

<sup>42</sup> Ibid., p. 137

if any, similarities. Although she recognises that women were legally considered to be property during this period, ‘...she was in no way subjected to the de-humanization and brutal oppression that was the lot of the slave.’ She states that the women’s movement was ‘...simply appropriating the horror of the slave experience to enhance their own cause’<sup>43</sup>

By using the term ‘woman’ to represent all women, white feminists ignore their own racial specificity. In an argument very similar to that presented by Young in relation to white middle class men, bell hooks notes that, in a ‘racist imperialist society,’ it is only the dominant race who is in the privileged position to dismiss their racial identity, to present their experiences as universal.<sup>44</sup> As explained by Weedon ‘[r]ather than being a racially marked category, whiteness signifies an absence of colour.’<sup>45</sup> and thus it is only non-white people who are racially marked. hooks suggests that the use of a universal ‘woman’ served white women in two ways, firstly, it enabled them to distinguish themselves from white men, indicating that they did not share their racist ideology, and secondly, that it allowed them to disguise their racism, classism, and their role as oppressors, as it represented, falsely, that all women were united.<sup>46</sup> However, due to the failure of white women to confront their racism and the division between black and white women, the feminist dream of ‘sisterhood’ was not achieved.<sup>47</sup>

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<sup>43</sup> Ibid., p. 126

<sup>44</sup> Ibid., p. 138

<sup>45</sup> Weedon C *Feminism, Theory and the Politics of Difference* p. 154

<sup>46</sup> hooks b *Ain’t I a Woman: Black Women and Feminism* pp. 140-141

<sup>47</sup> Ibid., p. 121

The perceived difficulty with a feminism which fails to recognise racial difference, is that it fails to distinguish between different levels of oppression and discrimination. Although it is recognised that white middle class women are discriminated against, hooks argues that they do not face the same level of oppression as other women, she states that ‘...as a group they are not oppressed as poor white, black or yellow women.’<sup>48</sup> White feminism failed, she argues, to acknowledge that some women are more oppressed than others, some women are privileged in terms of their class, race and education, and this alienated many black women.<sup>49</sup> Moreover, the common oppression was termed in women’s exclusion from work, power and economic independence. Hence, as opposed to fighting against white capitalist patriarchy, this was what feminism aspired to, this was the key to their liberation, an approach which, in the opinion of hooks, illustrates the ‘...totally narcissistic, classist and racist...’ nature of white feminism.<sup>50</sup> Furthermore, with its acceptance of white capitalism, feminism was not engaged with abolishing sexist oppression, but strove for women to become ‘surrogate men’,<sup>51</sup> an argument which is frequently presented against liberal feminism. Thus the feminist fight was concerned with opening up access to those institutions and structures from which they had thus far been excluded. It did not, however, fight against the sexist nature of these institutions and structures. Such a state of affairs led hooks to predict that the future for feminism was bleak. What was necessary was a feminism which countered its racist and classist presumptions, and presented a politics and ideology which represented the interests of all women, not just a privileged group. hooks considered that the responsibility of feminism extended

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<sup>48</sup> Ibid., p. 145

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid., p. 192

beyond securing women's equality with men, to also include overthrowing all forms of oppression in society.<sup>52</sup>

It seems that hooks presented feminism with an almost impossible task. She was against separate groups which focused solely on the issues faced by black women, as this was divisive and reinforced racism. She required feminism to present a united front of women but, at the same time, to recognise that all women do not suffer the same oppression. In addition to fighting for all women's rights, she also states that feminism should eradicate all forms of oppression in society. hooks does not present any idea of what such a movement would look like, and how it should handle clashes in interests, which would surely arise if feminism were to fight against every form of oppression. Although it is important to recognise that women are not all the same, and are oppressed in different ways, it is difficult to see how feminism could do this and still present, at all times, a united front. Moreover, she does appear to suggest that it is black women who hold the key to the real oppression of all women, she states:

“Individual black feminists despaired as we witnessed the appropriation of feminist ideology by elitist, racist white women. We were unable to usurp leadership positions within the movement so that we could spread an authentic message of feminist revolution.”<sup>53</sup>

This argument appears to adopt the position that black women are the ‘...keepers of the holy grail...’<sup>54</sup> as they suffer triple oppression (race, class and gender). But just what is this authentic message? And, furthermore, whose interests and perspectives is it based upon? Undoubtedly, feminism has, in the past, failed to hear the voices of

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<sup>52</sup> Ibid., pp. 194-195

<sup>53</sup> Ibid., p. 189

<sup>54</sup> Mirza HS ed *Black British Feminism: A Reader*. [Routledge; London; 1997] p. 9 see also Weedon C *Feminism, Theory and the Politics of Difference* pp. 168-169

black women, but presuming that there is an true feminism will undoubtedly exclude some other group of women. Although hooks emphasises the existence of non-white and working class women, she pays no regard to disabled or lesbian women, and how their oppression may be ignored in an authentic feminism, which is premised upon the experiences of black women.

The issue of black women and abusive relationships is considered by Ammons in relation to African-American women. Ammons<sup>55</sup> argues that African-American women tend to feel that shelters for abused women only serve the interests of white women. This being due to the connection between the development of shelters and the women's movement, which tends to be based on white women. Within the UK, the specific situation of Asian women and their responses to domestic violence is emphasised by Southall Black Sisters.<sup>56</sup> However, although such work emphasises differences between women, there remains a commitment, perhaps due to political necessity, to retain some form of alliance with other feminist groups dealing with domestic violence issues.<sup>57</sup> The main issue in which racial and cultural differences between women have been considered crucial is in relation the laws response to female genital mutilation. One of the main criticisms of white western legal feminism is that it tends to view such practices with 'Western-eyes'. In particular, Gunning argues:

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<sup>55</sup> Ammons L "Mules, Madonnas, Babies. Bathwater, Racial Imagery and Stereotypes: The African-American woman and the Battered Woman Syndrome" *Wis. L Rev* (1995), 1003

<sup>56</sup> see for example Patel R "Southall Black Sisters and Alliances across the Divisions of Race, Gender and Class" in Hanmer J and Itzin C ed *Home Truths about Domestic Violence, Feminist Influences on Policy and Practice. A Reader* [Routledge; London; 2000] pp. 197-184

<sup>57</sup> Patel mentions the development of a temporary alliance with the Townswomen's Guild and Women's Institute in relation to the issue of the law of provocation. *Ibid.*, p. 171

“In addition to the caution and care that the legacy of imperialism requires Western feminists to take in appreciating and participating in truly egalitarian relationships with women in non-western cultures, the general air of superiority and self-righteousness must wither upon reviewing where we have come from and how far we still have to go within our own cultures.”<sup>58</sup>

Gunning emphasises that, just as Western women may consider genital surgery as ‘culturally challenging’, non-western women view practices such as breast enlargement in the same light.<sup>59</sup>

Overwhelmingly, however, the criticisms advanced by non-white women have tended to lead legal feminism into a more postmodern approach.

### **Postmodernism**

The arguments of feminists who have sought to illustrate the gendered nature of supposedly universal and gender neutral concepts, and the arguments of black feminists, which illustrate the exclusivity of the universal notion of ‘woman’, highlights a move towards the acceptance of different perspectives and different truths, an approach which is significantly developed by postmodern feminism. Postmodernism disputes the Enlightenment claims of universality, transcendental reasoning and the objective notions of Reality and Truth. Hence, there is no truth which is ahistoric, acultural or representative of all human beings regardless of sex/gender, race, class, ethnicity etc. This leads to the argument that the modernist views present false generalisations and false universals. To some extent, however, this postmodern turn brings significant difficulties for feminism. Feminism, similar to

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<sup>58</sup> Gunning I “Arrogant Perception, World-travelling and Multicultural Feminism: The Case of Female Genital Surgeries” cited in Bridgeman J and Millns S *Feminist Perspectives on Law: Law's Engagement with the Female Body* [Sweet & Maxwell; London; 1998] p. 592

<sup>59</sup> Ibid.,

modernism, has come under criticism for being totalizing, essentialist, reductionist, and presenting false generalisations and universals. Modernist strands of feminism attempt to reveal women's experience and perspective, women's view of the world and to identify the factor which causes women's oppression. This view has been criticised as representing the experiences and perceptions of white, middle class, western, heterosexual women, thus excluding the voices of many different women. The difficulty lies in the definition of a woman. What is woman, or who are women? Women are not one homogeneous group with the same experiences, but a diverse group, with a multitude of experiences. There are differences between women, such as race, class, ethnicity, sexuality. Feminism amounts to an essentialist politics due to its presentation of a unitary theory which relies upon an essential woman. In addition, similar criticisms have been made against black feminism, which generally assumed a fixed identity. These criticisms led to the development of theories which recognised and explored a notion of subjectivity which was fluid and contingent, as opposed to innate and fixed. In particular this work has been carried out by postcolonialist and queer theorists.

With the growing influence of postmodernism, black feminism moved away from the notion of a fixed identity and to recognise that the subject is multiple and changing. Such approaches take a genealogical view and examine how bodies are constructed through discourses of race and gender. Attention to the construction of third world and black women has been undertaken by postcolonial feminism, which charges western feminists with discursively colonialisng third world women, due to their assumption that third world women amount to an homogeneous category. Hence, whereas bell hooks criticised feminism for ignoring black women, postcolonial

feminists argue that, although western feminism does now pay attention to third world women, it tends to assume that all such women suffer the same form of struggles and oppression, and fails to place such women in their specific historical and cultural location.<sup>60</sup> Such insights gain significant importance when considering cases such as Zoorah Shah.

hooks in her later work *Yearning: Race, Gender and Cultural Politics*<sup>61</sup> recognises the positive nature of postmodernism when theorising race and ethnicity. As with gender, such an approach disputes essentialist notions of race, thus opening up multiple black identities, an approach which was not recognised in *Ain't I a Woman*,<sup>62</sup> which overwhelmingly presented black women as an homogenous category, despite criticising the women's movement for assuming that the term woman could represent the experiences of all women. The importance of postmodernism for race and ethnicity lies in its counter to white imperialism, as hooks explains:

“It...challenges colonial imperialist paradigms of black identity which represent blackness one-dimensionally in ways that reinforce and sustain white supremacy. This discourse created the idea of the ‘primitive’ and promoted the notion of an ‘authentic’ experience, seeing as ‘natural’ those expressions of black life which conform to a pre-existing stereotype”<sup>63</sup>

Chandra Talpade Mohanty in “Under Western Eyes: Feminist Scholarships and Colonial Discourses”<sup>64</sup> traces the way in which western feminists discursively

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<sup>60</sup> Conversely, however, it could be argued that post-colonial feminists homogenise the ideas of western feminists.

<sup>61</sup> hooks b *Yearning: Race, Gender and Cultural Politics* [Turnaround: London; 1991] p. 28

<sup>62</sup> hooks b *Ain't I A Woman?*

<sup>63</sup> hooks b *Yearning: Race, Gender and Cultural Politics* p. 28

<sup>64</sup> Mohanty CT “Under Western Eyes: Feminist Scholarship and Colonial Discourses” in Padimi Mongia *Contemporary Postcolonial Theory: A Reader* [Arnold: London; 1996] pp. 172-197



construct third world women, and how third world women are colonised by this construction. Mohanty examines a number of western feminist texts which analyse the third world woman in a number of different social contexts, these are: women as victims of male violence, women as universal dependants, married women as victims of the colonial process, women and familial systems, women and religious ideologies and women and the development process.

In all of these different contexts western feminism assumes a singular monolithic third world woman which exists prior to her entry into specific social relations, and thus her material and historical specificity is ignored. Women are characterised first and foremost by their gender. Gender identity is considered to be over and above ethnic and social identity, which presumes a 'monolithic notion of sexual difference'.<sup>65</sup> This notion assumes that sexual difference equates with female subordination, and that all women are subordinated in the same manner by men. As Mohanty explains: 'Men exploit, women are exploited.'<sup>66</sup> She argues against this on the basis that '...such simplistic formulations are historically reductive; they are also ineffectual in designing strategies to combat oppressions. All they do is reinforce divisions between men and women.'<sup>67</sup> In order to develop effective political strategies which challenge oppressive social structures, it is important to recognise differences between third world women, and how the same practice may have a divergent meaning in different cultures. When western feminists analyse the situation of third world women they simply add on 'third world difference' to 'sexual difference'. This 'third world difference', that which

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<sup>65</sup> Ibid., p. 183

<sup>66</sup> Ibid.

<sup>67</sup> Ibid.

oppresses women in the third world, is assumed to be the same for all women. Mohanty considers that it is through such methods that power is exercised over third world women, as they are constructed '...as a homogeneous powerless group.'<sup>68</sup> This is significant when one considers Western feminist self-presentation. Western women are discursively constructed as '...secular, liberated and having control over their lives'.<sup>69</sup> and Mohanty argues that this self-presentation would become problematic in the absence of a homogeneous powerless third world woman. Hence, although western feminist theory has acknowledged the criticism advanced by hooks in *'Ain't I a Woman'*<sup>70</sup> and has commenced to recognise that the white female experience is not the experience of all women, it has tended to apply its universalising tendencies to the experiences of third world women. There are social, cultural and ideological differences between third world women which must be recognised.

### **Queer Theory**

Queer theory is usually contrasted with identity politics and indeed is very critical of the approach adopted by identity politics. As Fuss explains, the term identity politics is generally used to refer to a form of politics which is premised '...on a sense of personal identity',<sup>71</sup> and shared characteristics. Although feminism and the women's movement could be described as a classic example of identity politics as it is based on the sense of what it means to be a 'woman', identity politics tends to move away from

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<sup>68</sup> Ibid., p. 177

<sup>69</sup> Ibid., p. 192

<sup>70</sup> hooks b *Ain't I a Woman?*

<sup>71</sup> Fuss D *Essentially Speaking: Feminism, Nature and Difference* p. 97

the ‘...homogenizing tendencies of second wave feminism’,<sup>72</sup> as it allows a recognition of differences between women. As Hekman states:

“Identity politics offers a plethora of identities from which women can choose. Instead of being limited to one general and necessarily hierarchical category of ‘woman’, women can choose an identity that fits them, one that resonates with their particular situation.”<sup>73</sup>

However, queer theorists argue that a politics based on identity tends to produce an identity which a) becomes fixed within the group, thus requiring conformatity if individuals are to be accepted within the group and b) becomes fixed outside the group, thus becoming ‘...a vehicle by which state power is extended rather than limited.’<sup>74</sup> A queer theory approach problematises the use of identity categories and develops the postmodern notion of an unstable, fluid and constructed subject.

In relation to feminist theory it is the work of queer theorist Judith Butler which appears to have had the most profound effect. Butler commences her deconstruction of feminist theory in her book *Gender Trouble*<sup>75</sup> and develops her arguments further in *Bodies that Matter*.<sup>76</sup> In addition to problematising the use of the term ‘woman’ as the foundation of a feminist politics, Butler also deconstructs the sex/gender distinction and advances the notion of gender as performativity. As outlined above, liberal feminists argue that gender is socially constructed, as opposed to being naturally determined by sex. Butler questions the assumption that the sex/gender binary reflects the nature/nurture binary. She argues that, if gender is not presumed by sex, then there

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<sup>72</sup> Hekman S “Feminism, Identity and Identity Politics” *Feminist Theory* (2000) 1(3), 289-308 p. 290

<sup>73</sup> Ibid.

<sup>74</sup> Ibid p. 297

<sup>75</sup> Butler J *Gender Trouble: Feminism and the Subversion of Identity*

<sup>76</sup> Butler J *Bodies that Matter: On the Discursive Limits of “Sex”*

is no reason to assume that there are only two genders. Insisting that there are only two genders leads to the inference that gender is premised on sex. As Butler argues: '[t]he presumption of a binary gender system implicitly retains the belief in a mimetic relation of gender to sex whereby gender mirrors sex or is otherwise restricted by it.'<sup>77</sup> Butler reverses the sex/gender distinction, arguing that gender precedes sex. She argues that gender, as a discursive creation, constructs sex as prediscursive and natural:

“Gender ought not to be conceived merely as the cultural inscription of meaning on a pre-given sex (a juridical conception); gender must also designate the very apparatus of production whereby the sexes themselves are created. ... [g]ender is ... the discursive/cultural means by which ‘sexed nature’ or ‘a natural sex’ is produced and established as ‘prediscursive,’ prior to culture, a political neutral surface on which culture acts.”<sup>78</sup>

Hence, it is the binary gender system which generates the idea that there are two natural sexes. This leads Butler to criticise feminists, such as de Beauvoir, who insist on the sex/gender distinction, as this maintains the binary gender system, which in turn reinforces compulsory heterosexuality. She argues that:

“[t]he institution of a compulsory and naturalized heterosexuality requires and regulates gender as a binary relation in which the masculine term is differentiated from a feminine term, and this differentiation is accomplished through the practices of heterosexual desire.”<sup>79</sup>

Thus, the sex/gender distinction retains the male/female binary, which many feminists have strove to displace.

One of Butler's important insights is her insistence that there is no actor behind the mask of gender. Whereas some postmodernists may put forward a 'weak' form of

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<sup>77</sup> Butler *J Gender Trouble* p. 10

<sup>78</sup> *Ibid.*, p. 11

<sup>79</sup> *Ibid.*, p. 30

postmodernism, recognising that the subject is situated in discourse,<sup>80</sup> Butler takes the argument a step further, stating that I is constituted by these discourses: ‘...it is clearly not the case the “I” presides over the positions that have constituted me, shuffling through them instrumentally. ... The ‘I’ who would select between them is always already constituted by them.’<sup>81</sup> Moreover, these positions are not just discourses, but are ‘...fully embodied organizing principles of material practices and institutional arrangements...’.<sup>82</sup> Whereas some social constructionist approaches appear to recognise that the reality of women differs due to the existence of other differences, they still seem to hold on to some pre-discursive or natural concept of woman. Queer theory, on the other hand, completely deconstructs the notion of woman (and man) as a natural construct, stating that woman is nothing but a linguistic concept, a concept which is embedded in power relationships. This approach has been seen to call for the ‘The Death of Man’:

“Postmodernists wish to destroy all essential conceptions of human being or nature... In fact Man is a social, historical or linguistics artifact, not a noumenal or transcendental Being. . . . Man is forever caught in the web of fictive meaning, in chains of signification, in which the subject is merely another position in language.”<sup>83</sup>

In stark contrast to the modernist notion of the self as essential and fixed, Butler argues that there is no autonomous self behind gender, and develops the notion of gender as

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<sup>80</sup> see for example Benhabib S “Feminism and the Question of Postmodernism” in Giddens A et al *Polity Reader in Gender Studies* [Polity Press; Cambridge; 1994] 76-92

<sup>81</sup> Butler J “Contingent Foundations: Feminism and the Question of Postmodernism” in Butler J and Scott J W *Feminists Theorize the Political* [Routledge: London; 1992] pp. 3-21 p. 9

<sup>82</sup> Ibid.

<sup>83</sup> Flax J *Psychoanalysis, Feminism and Postmodernism in the Contemporary West* [University of California Press, Berkeley, California; 1990] p. 32, cited in Benhabib S “Feminism and the Question of Postmodernism” p. 76

performativity. It is the performance of gender which constitutes an individual's subjectivity or identity. 'There is no gender identity behind the expressions of gender; that identity is performatively constituted by the very 'expressions' that are said to be its results.'<sup>84</sup> Gender is considered to be the '...repeated stylization of the body, a set of repeated acts within a rigid regulatory frame that congeal over time to produce the appearance of substance, of a natural sort of being.'<sup>85</sup> This latter quote draws attention to two important facets of Butler's notion of gender as performance.

Firstly, the performance is not a one off single action, but a repetition, as '...performative 'acts' must be reproduced to become efficacious.'<sup>86</sup> This concept of gender identity as a repeated performance draws upon Derrida's notion of iterability, which recognises that words and terms have meanings which are cited when they are used. When one uses the term 'woman', one is citing its previous meaning. However, these meanings are unstable and an utterance may not necessarily reproduce the same meaning. Hence, in relation to gender, gender is a repeated performance which cites previous performances, and has meaning due to those previous performances: "...performativity cannot be understood outside a process of iterability, a regularized and constrained repetition of norms."<sup>87</sup> However, as meaning is unstable, the effect of two performances may not necessarily be the same.

Secondly, one is compelled to perform one's gender due to regulatory regime of compulsory heterosexuality. The repeated performance is not performed by a subject

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<sup>84</sup> Butler *J Gender Trouble* p. 33

<sup>85</sup> *Ibid.*, pp. 43-44

<sup>86</sup> Butler *J Bodies that Matter* p.107

<sup>87</sup> *Ibid.*, p. 95

voluntarily, as the subject is only constituted through the repeated performance: ‘...this repetition is not performed by a subject; this repetition is what enables a subject and constitutes the temporal condition for the subject.’<sup>88</sup> Butler refutes the suggestion that one chooses which gender to perform. Performativity does not mean that ‘...one woke in the morning, perused the closet or some more open space for the gender of choice, donned the gender for the day, and then restored the garment to its place at night.’<sup>89</sup> According to Butler, gender is a compelled performance, compelled by the threat of punishment. Under the regulatory regime of compulsory heterosexuality, certain genders are rendered intelligible: ““Intelligible” genders are those which in some sense institute and maintain relations of coherence and continuity among sex, gender, sexual practice, and desire.”<sup>90</sup> Those genders which distort this coherence are culturally unintelligible, hence there are certain identities which cannot exist.<sup>91</sup> It is only through a repeated compelled performance that gender is produce as natural and unified.

Once it is recognised that gender is a compelled 'effect', the arguments for retaining a feminist politics which is based on some stable notion of identity, such as woman, begin to diminish. Some commentators have expressed concern that the deconstructive approach of queer theory may actually lead to the death of feminism.

Weedon states:

“What it means to be a woman is a social and historical phenomenon. This move away from any fixed or essential qualities of women or femininity, which

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<sup>88</sup> Ibid.

<sup>89</sup> Ibid., p. x

<sup>90</sup> Butler *J Gender Trouble* p. 23

<sup>91</sup> Ibid.

might be thought to unite all women, is often seen as a betrayal of women and the feminist cause.”<sup>92</sup>

With such an approach, it is clear how some feminists feared the complete destruction of a feminist movement which posits ‘woman’ as its foundation. Benhabib<sup>93</sup> argues that such an approach can, however, be reconciled with postmodernism if we adopt a what she labels a ‘weak-version’. This approach maintains that there is a pre-discursive I, an I which is possessed with autonomy and rationality, but it is an I which is ‘radically situated’, as opposed to transcendental and objective. The subject is situated within a context of various social, linguistic and discursive practices, which mediate and frame an individual’s experiences. Hence the self is to be seen within its historical and cultural context. It does appear that the concept of an essential or natural ‘woman’ is compatible with this ‘weak-version’ of postmodern. Under such an approach it appears that ‘woman’ does exist, but we have to ensure that we view her in her specific historical and cultural context. The problem with this approach, however, from a queer theory perspective, is that it retains the sex/gender distinction. Benhabib’s notion of ‘weak-postmodernism’ is an example of what Nicholson labels biological foundationalism. Sex is used as a coat rack upon which gender (as culturally and historically constructed) is thrown upon.<sup>94</sup>

Moreover, from a queer theory perspective, the subject of feminism is actually produced by feminism. As Butler explains in the beginning of *Gender Trouble*:

“...the juridical formation of language and politics that represents women as ‘the subject’ of feminism is itself a discursive formation and effect of a given version of representational politics. And the feminist subject turns out to be

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<sup>92</sup> Weedon C *Feminist Practice and Poststructuralist Theory* p. 175

<sup>93</sup> Benhabib S “Feminism and the Question of Postmodernism”

<sup>94</sup> Nicholson L “Interpreting Gender” p. 41



discursively constituted by the very political system that is supposed to facilitate its emancipation.”<sup>95</sup>

Feminism actually produces the subject which it seeks to represent. Moreover, this woman will always be based on exclusions, some women will remain abject to the subject of feminism. Thus, in contrast to creating unity, separation within the movement occurs. Butler questions: ‘Through what exclusions has the feminist subject been constructed, and how do those excluded domains return to haunt the ‘integrity’ and ‘unity’ of the feminist ‘we’?’<sup>96</sup> Hence, whenever feminism speaks on behalf of women, it is at once constructing that subject and excluding other identities. Such an argument has significant ramifications when considering law reform proposals, as it needs to be recognised that every use of the term ‘woman’, or ‘battered woman’ is, firstly, only created by that very discourse which names it, and secondly, works to exclude some other women who suffer abuse.

Butler argues that the project for feminism is to uncover the excluded subjectivities which the woman of feminism is based upon: ‘...the task is to interrogate what the theoretical move that establishes foundations authorizes, and what precisely it excludes or forecloses.’<sup>97</sup> Butler does, however, recognise that the use of the term ‘woman’ is politically necessary and efficacious. Nevertheless, feminism also needs to accept that ‘...the minute that the category of women is invoked as describing the constituency for which feminism speaks, an internal debate invariably begins over what the descriptive content of that term will be.’<sup>98</sup> This appears to require the necessity to firstly be

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<sup>95</sup> Butler J *Gender Trouble* p. 4

<sup>96</sup> Butler J “Contingent Foundations” p. 14

<sup>97</sup> *Ibid.*, p. 7

<sup>98</sup> *Ibid.*, p. 15

aware of the exclusionary nature of any identity category and secondly, to constantly revisit the description of 'woman', which has been constructed.

In response to the work of Judith Butler, attempts have been made to reconcile the constructed and constituted nature of woman and the need for a feminist politics which actually represents women. One such attempt is provided by Iris Marion Young. She advances the notion of 'Gender as Seriality'<sup>99</sup> which adopts Sartre's concept of seriality<sup>100</sup> in order to solve the following perceived dilemma in feminist politics: '[w]e want and need to describe women as a group, yet it appears that we cannot do so without being normalizing and essentialist.'<sup>101</sup> This argument proposes a conception of gender which is anti-essentialist, in that it avoids the requirement that women must share common characteristics and does not rely on self-identity. In particular, she distinguishes between a social group and a series. Whereas a group is composed of individuals who are knowingly united towards a collective aim or goal, a series is a number of individuals, a social collective, who are brought together or united passively due to the existence of some objective material fact which orientates their actions. They are not united through some shared identity, but due to their relation with a material object, or what Sartre calls *pratico-inert* objects. A very simplistic example used by Young is that of a queue of people waiting for a bus. Whereas they do not identify with each other or share some essential commonality, they are passively linked by their actions towards an objective materiality - the bus. This approach can be

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<sup>99</sup> Young I M "Gender as Seriality: Thinking about Women as a Social Collective" in Nicholson L and Seidman S *Social Postmodernism: Beyond Identity Politics* pp.187-215

<sup>100</sup> see Sartre, J-P 'Critique of Dialectical Reason' Trans Smith A S, ed Ere J [New Left Books; London; 1976] cited Ibid.

<sup>101</sup> Young I M "Gender as Seriality: Thinking about Women as a Social Collective" p. 197

applied to women who suffer domestic violence, and those women who kill their abusive partners. Women who suffer violence are passively connected by the actions of the abusers, the existence of agencies which offer help, the police and the courts. Some women may form a self-conscious group in order to campaign about this issue, but many women will remain in the series. In relation to women who kill their abusive partners, a series is formed due to the objective materiality of their actions, their treatment by the courts and the conviction they receive. In this sense, two series emerge: those who are passively connected by a conviction for manslaughter and those who are passively connected by a conviction for murder. However, the women who are part of these series may have very little in common apart from the objective materiality of killing their abusive partners and their treatment by the legal system. From these series self-conscious groups emerge: such as Justice for Women and Southall Black Sisters.

Although Butler's work has had a major impact on feminist and gender theory, it has also been strongly criticised by both feminist and other academics. Arguments presented against Butler are summed up in an article by Nussbaum.<sup>102</sup> In addition to criticising Butler's writing style, which is described as teasing and exasperating, she is very critical of Butler's use of parody as political action and her '...proud neglect of the material side of life.'<sup>103</sup> For Butler, one of the aims of feminism is to produce subversive gender identities. This is to be achieved through the use of parody, Butler states that '[t]he task is not whether to repeat, but how to repeat.'<sup>104</sup> And such a

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<sup>102</sup> Nussbaum M C "The Hip Defeatism of Judith Butler: The Professor of Parody" (1999) (Feb) 22 *The New Republic* 1999 (Feb), 37-45

<sup>103</sup> *Ibid* p. 43

<sup>104</sup> Butler J *Gender Trouble* p. 189

parodic repetition would work to expose the ‘...illusion of gender identity as an intractable depth and inner substance.’<sup>105</sup> However, as Nussbaum states:

“[P]arodic performance is not so bad when you are a powerful tenured academic in a liberal university. But here is where Butler’s focus on the symbolic, her proud neglect for the material side of life, becomes a fatal blindness. For women who are hungry, illiterate, disenfranchised, beaten, raped, it is not sexy or liberating to reenact, however parodically, the conditions of hunger, illiteracy, disenfranchisement, beating and rape.”<sup>106</sup>

I would agree with Nussbaum on this point. It is very difficult to see how parodic performance of gender can be of any assistance to those women who eventually kill their partners after suffering years of horrific abuse. However, such a criticism should not be taken to suggest that Butler’s work has no relevance to the concrete situation of women. In her insistence that gender is a performance (which is illustrated by the potential of parody) Butler makes it possible to question the forms of femininity and masculinity which are constructed as natural by the law and the judiciary. If gender is a performance, any stereotypical reaction to abuse is also a performance, it is not a natural reaction as such, and thus one can question the law’s insistence on requiring women (and men) to react in a certain manner. Such an approach also cautions feminists when producing law reform proposals. As many reform proposals relating to women who kill suggest that certain reactions should be either excused or justified, they also appear to construct some reactions as ‘natural’ and therefore correct. Butler states:

“...feminism ought to be careful not to idealize certain expressions of gender that, in turn, produces forms of hierarchy and exclusion. In particular, I [oppose] those regimes of truth that stipulate[] that certain kinds of gendered expressions were found to be false or derivative, and others, true and original.”<sup>107</sup>

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<sup>105</sup> Ibid., p. 187

<sup>106</sup> Nussbaum M C “The Hip Defeatism of Judith Butler: The Professor of Parody” p. 43

<sup>107</sup> Butler J *Gender Trouble* p. viii

Nussbaum also argues that parody and subversive performances can be used in a manner which may wield harmful consequences. It may be used by those within positions of privilege to perpetuate oppression and discrimination and this is due, she argues, to Butler's failure to advance '...a normative theory of social justice and human dignity.'<sup>108</sup> Butler fails to provide any indication as to which performance will have a positive subversive effect, a requirement which Nussbaum seems to demand. Butler, however, addresses this issue in her preface to the second edition of *Gender Trouble*.<sup>109</sup> She states that her project is not a prescription along the lines of '...subvert gender in the way that I say, and life will be good.'<sup>110</sup> Indeed for Butler, a judgement which delineates the subversive from the non-subversive performances is bound to fail as, firstly, any judgement would be made out of context, and secondly, such judgements would fail to survive over time: '[j]ust as metaphors lose their metaphoricity as they congeal through time into concepts, so subversive performances always run the risk of becoming deadening clichés through their repetition...'.<sup>111</sup> Hence, for Butler, the aim is not to indicate the subversive value of any performance, as its very subversive nature may wane over time. Butler states that her main concern is to expose what constitutes '...an intelligible life,' and '...how...presumptions about normative gender and sexuality determine in advance what will qualify as the 'human' and the 'liveable',<sup>112</sup> a project which has been continued in her recent work on *Violence, Mourning and Politics*.<sup>113</sup>

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<sup>108</sup> Nussbaum M C "The Hip Defeatism of Judith Butler: The Professor of Parody" p. 42

<sup>109</sup> Butler J *Gender Trouble*

<sup>110</sup> Ibid., p. xxi

<sup>111</sup> Ibid.

<sup>112</sup> Ibid p. xxii

Butler is also criticised for failing to adequately deal with the body. Within feminist and gender theory two polarised views of the role played by the biological body in the construction of gender identity have emerged. On the one hand, gender identity is considered to be an effect of our biological bodies, an approach which is generally considered to be essentialist. On the other hand, any link between the body and identity or subjectivity is severed, and identity is considered to be socially constructed as opposed to biologically constructed. This latter approach regards bodies ‘...as blank sheets which either via social practices of segregation or the operation of layers of cultural meaning, are turned into gendered subjects.’<sup>114</sup> In relation to Butler, it is through the repeated performed acts of gender that the body is styled as either male or female. The sex of the body is not a natural phenomenon, from which gender identity flows, it is, rather, the gender identity which constitutes the sex of the body. The body is regulated and produced by discourses. Additionally, we can only view bodies through the lens of existing discourse, we can not view them or think about them in their ‘natural’ state. An approach which presents the body as a social construct, however, fails to comprehend the reality of the body, that we are embodied beings. We are both enabled and limited by our bodies. In particular, the body has a significant role for the abused woman. In addition to psychological violence, women suffer bodily injury, both physical and sexual. The pain and injuries they suffer are not constructions, but a reality. Butler recognises the existence of this issue, as she acknowledges the query: ‘...surely bodies live and die; eat and sleep, feel pain, pleasure; endure illness and violence; and these facts ...cannot be dismissed as mere

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<sup>113</sup> Butler J *Violence, Politics and Mourning* Paper presented at UCL 8 March 2002

<sup>114</sup> Alsop R et al *Theorising Gender* [Polity Press; Oxford; 2001] p. 214

construction.’<sup>115</sup> When one is considering the construction of a woman’s identity who is abused, it is important to remember that she suffers real bodily injury, although the abused body can only be viewed via regulatory norms. The body is always mediated.

Butler, in *Bodies that Matter*,<sup>116</sup> addresses the issue of bodies through the notion of materialization, as she attempts to ‘link the question materiality of the body to the performativity of gender’.<sup>117</sup> When analysing the materiality of the body, Butler focuses on sexual difference, which is considered by many to be a natural biological fact. Butler however, drawing upon Foucault, argues that sex is never a ‘...simple fact or static condition of the body...’.<sup>118</sup> Sex is also a regulatory ideal, a norm, which actually ‘...produces the bodies it governs...’,<sup>119</sup> and bodies are compelled to materialize the norms of sex, a process which is never complete. Bodies are always in the process of materializing, they are an effect of power. Power produces the body:

“What constitutes the fixity of the body, its contours, its movements, will be fully material, but materiality will be rethought as the effect of power, as power’s most productive effect. And there will be no way to understand “gender” as a cultural construct which is imposed upon the surface or matter, understood either as “the body” or its given sex. Rather, once “sex” itself is understood in its normativity, the materiality of the body will not be thinkable apart from the materialization of that regulatory norm.”<sup>120</sup>

Hence, although the body is material, it is a real thing, not just a construct, the body itself, its shape and movements, are produced by power, through the regulatory ideal of sex which impacts upon the body, and bodies are always in the process of

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<sup>115</sup> Butler J *Bodies that Matter* p. xi

<sup>116</sup> Ibid.

<sup>117</sup> Ibid., p. 1

<sup>118</sup> Ibid., p. 2

<sup>119</sup> Ibid., p.1

<sup>120</sup> Ibid.

materialising the norm of sex. The body is not a site or surface which simply bears constructions, such as gender, but is actually itself socially constructed. And as the body is in a process of materialization, the regulatory regime of sex produces some bodies which are culturally intelligible, and some bodies which are not.

The main concern for Butler, through her notion of gender as performativity and materialization, is to uncover which lives are constructed as culturally intelligible, and those which are not. This is a concern which is carried forward to this thesis, and whilst examining the identity categories used by the courts, attention will be paid to which identities are considered or constructed as intelligible, and which identities are excluded.

## **Conclusion**

This chapter introduced one of the underlying theoretical premises for the thesis: gender theory, or more specifically, queer theory and the work of Judith Butler. The concept of gender as performativity is central to the close reading of the Zoora Shah case the retrial of Diana Butler. Moreover, the chapter on Zoora Shah will also consider issues relating to post-colonial theory, race and performativity. The discussion regarding to the use of identity categories, and their potential to be exclusionary and essentialising are particularly relevant to the next chapter on Theories of Justice and will be developed in more detail in the relevant chapters.



## THEORIES OF JUSTICE

### **Iris Marion Young and the Law: Towards a Theory of Social Justice**

#### **Introduction**

This chapter examines the theory of justice which will be used as part of the theoretical framework to scrutinise the law's treatment of women who kill their abusive partners. In particular, a distinction is drawn between 'legal justice', which tends to be concerned with the correct and equal application of the law, and 'social justice', which provides an evaluative standard by which to assess the defences to murder and the judicial construction of women who kill. It is argued that an appeal to legal justice retains the sameness/difference impasse which has been reached within feminist theory, both legal and otherwise. Legal justice is based upon a comparison between men who kill their partners and women who kill their partners, and hence tends to focus on the perceived differences, or otherwise, between men and women. It is argued that whereas this focus has been vital to emphasising the diversity in the law's treatment of men and women, what is needed now is a consideration of the wider issue of social justice, and a recognition of the differences which exist between women. To this end, the chapter draws upon Iris Marion Young's concept of social justice,<sup>1</sup> but also submits Young's approach to a critique from the perspective of queer theory.

Justice is a term that frequently arises in literature concerning women who kill their abusive partners. For example, an article which discusses the law's treatment of Emma Humphreys, and questions the differential treatment men and women who kill

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<sup>1</sup> See Young I M *Justice and the Politics of Difference*

their partners receive, leads with the headline 'A Gender Scale of Justice.'<sup>2</sup> In relation to the case of Zoorah Shah another newspaper article reported that the foreman of the jury which convicted Zoorah for murder, stated that fresh evidence indicated that her conviction was 'unjust'.<sup>3</sup> I argue that the main approach which has been adopted by feminists and those who campaign on behalf of battered women is a comparative approach. Natasha Walter, writing in *The Independent*,<sup>4</sup> presented an argument highlighting the injustice suffered by Zoorah Shah. This was accomplished with reference to the case of David Hampson, who was convicted of manslaughter on the grounds of diminished responsibility, and was imprisoned for six years. In contrast, Zoorah Shah is serving a life sentence for murder. Hampson killed his wife due to her 'nagging', indeed she is described by the judge as a 'nagging bitch' and the judge stated that he had been provoked by her 'calculated' behaviour. Zoorah Shah, on the other hand, suffered sexual, physical and mental abuse for a number of years, and the Court of Appeal branded her a liar, who had no self respect. One cannot doubt the claim that this affronts our sense of justice, and cases such as this suggest that the judiciary and the criminal justice system tend to be both sexist and racist. The argument that the law and the criminal justice system is sexist is based upon the consideration that the treatment and outcome of cases involving battered women who kill is at variance with cases involving men who kill their partners. Hence it is considered that the law is applied unequally and inconsistently and this amounts to an

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<sup>2</sup> Campbell D, "A Gender Scale of Justice" *The Guardian*, 9 March 1998 G2 p. 2

<sup>3</sup> Wainwright M, "Verdict against abused Asian Woman was 'Unjust'." *The Guardian*, 30 September 1998 p. 12

<sup>4</sup> Walter N "They both killed their partners. But which one got life?" *The Independent* 1 November 1999, p. 5

injustice. I argue that this perceived injustice is based on an appeal to a narrow notion of 'legal' justice which excludes a consideration of a wider 'social justice'.

## **Legal Justice**

Although the term legal justice may be open to a number of different interpretations, this thesis adopts a construction which maintains that legal justice is achieved when the law is applied correctly. Such a concept of legal justice is based upon the natural law requirement that like cases are treated alike and therefore thus requires equality.

Lloyd formulates this requirement into three principles:

- “1. That there shall be rules laying down how people are to be treated in given cases;
2. that such rules shall be general in character, that they shall provide that everyone who qualifies as falling within the scope of the rule shall be governed by it;
3. justice requires that these general rules shall be applied impartially, applied without discrimination, or fear or favour, to all those whose cases fall within the scope of the rules.”<sup>5</sup>

It is generally considered that the necessity of impartiality flows from the requirement of equality. In order for judges to apply the law equally and treat like cases alike, they must be impartial and disregard personal emotions. Thus justice is considered to be a cold virtue. Justice is impartial, dispassionate, impersonal, and unemotional. As stated by Perelman: ‘...the machine is without passion.’<sup>6</sup> The judge may only justifiably take into consideration those characteristics/circumstances which are determined to be legally relevant to the case in question.<sup>7</sup> This is clearly represented by the allegory of justice: a blindfolded woman holding the scales of justice. Heller

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<sup>5</sup> Lloyd D *The Idea of Law* [Penguin; London; 1991] pg 121

<sup>6</sup> Perelman C H *The Idea of Justice and the Logic of Argument* p. 62

<sup>7</sup> see Buchanan and Mathieu ‘Philosophy and Justice’ in Cohen ed *Justice: Views from the Social Sciences* [Plenum Press; London; 1986] pp. 11-45 p. 16

contrasts this with the image of dynamic or substantive justice, which is represented by Gitto in the chapel of Arena:

“Justice appears here as a queen holding a statute in both hands, the angel of war and the angel of peace, the latter being heavier than the former. And the figure is not blindfolded; her eyes look forward, into the future.”<sup>8</sup>

The requirement of impartiality is, furthermore, associated with the search for a universal, objective, transcendental standpoint, ‘a view from nowhere’, which can be obtained by any rational person.<sup>9</sup> Hence, the ability to judge impartially is seen to be the ‘hallmark of moral reason’.<sup>10</sup>

Thus, legal justice, is objective, impartial, and is concerned solely with the equal and correct application of the law. This can be linked with the rule of law which eschews subjectivity, as noted by Douzinas and Warrington, ‘...the main requirement of the rule of law in its contemporary version of legality is that all subjective and relative value should be excluded from the operation of the legal system.’<sup>11</sup> Furthermore, the law dictates the relevant characteristics or circumstances which are used to categorise individuals. The defence of provocation provides an example of this. The defence requires the existence of three elements: i) provocative conduct ii) loss of self control on the part of the accused; and iii) the provocation must be sufficient so as to cause a reasonable person to act in the same manner. Any defendant charged with murder who displays such attributes should be subject to this defence. If the rules are applied

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<sup>8</sup> Heller A *Beyond Justice* p. 10

<sup>9</sup> Young I M *Justice and the Politics of Difference* p. 112

<sup>10</sup> *Ibid.*, pg 99

<sup>11</sup> Douzinas C and Warrington R *Justice Miscarried: Ethics and Aesthetics in Law* [Harvester Wheatsheaf; London; 1994] p. 150

impartially, then legal justice is achieved. This form of justice requires the law to be objective and universal, as it must be applicable to all. Thus problems arise when the defence is, in reality, based on male characteristics.

In appealing to legal justice when considering cases of battered women who kill, the major concern is with the application of the law. In comparing women and men who kill their partners, and claiming that an injustice has been committed, the accusation is that there is a lack of equality between the two. In cases in which the battered woman receives a conviction for manslaughter it appears that justice has been achieved, due to the equal application of the law. This approach suggests that battered women share the same essential characteristics as those men who kill their partners, and hence they should be subject to the same criminal defences. They fall within the same group, and thus different treatment, for example when a woman receives a murder conviction and a man is convicted for manslaughter, amounts to double standards. The essential characteristics, or perhaps properly referred to as circumstances, can be classified as a domestic homicide which takes place after severe or prolonged provocation or in mitigating circumstances. In a legal context, this, it is suggested, places the female and male defendant in the same group, and hence requires equality of treatment. Like cases should be treated as alike. There are a number of cases which do indicate that battered women are receiving similar treatment to their male counterparts, and thus legal justice. In the cases of *R v Gardner*,<sup>12</sup> *R v Grainger*<sup>13</sup> and *R v Howell*,<sup>14</sup> for example, the women were convicted for manslaughter on the grounds of provocation,

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<sup>12</sup> [1992] 14 Cr App R (S) 364

<sup>13</sup> [1997] 1 Cr App R (S) 271

<sup>14</sup> [1998] 1 Cr App R (S) 229

a partial defence which is generally used for, and indeed was developed to deal with, cases in which husbands kill their wives on finding that she is or has been unfaithful. There is also a plethora of cases in which a battered woman has received a conviction for manslaughter on the ground of diminished responsibility (which is based upon mental impairment) one such case is that of *R v Hobson*.<sup>15</sup>

Arguments based on equality of treatment are undoubtedly valid, and when one considers the difference between Zoora Shah and David Hampson, appealing to justice in its legal sense sends a clear message about the bias of the criminal justice system. A problem arises, however, on three levels. Firstly, this conception is very narrow, due to its exclusive interest with procedure and legal application. This conception which has received criticism from some feminists, as presenting itself as a universal view, while it is, in reality, a masculine conception of justice. Secondly, this conception does not itself criticise the law or offer any guidance as to the construction of relevant differences, and thirdly, it does not enable us to evaluate those cases in which this legal justice is achieved.

In relation to the first criticism, some feminists assert that there are different male and female conceptions of justice. One of the main proponents of a female conception of the justice is Carol Gilligan,<sup>16</sup> who argues that women have a different style of moral

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<sup>15</sup> [1998] 1 Cr App R 31

<sup>16</sup> Gilligan C *In A Different Voice, Psychological Theory and Women's Development* [Harvard University Press; London; 1996]. Gilligan's theory was developed from the moral judgements of two eleven year old children, a boy named Jake and a girl named Amy. Gilligan presented them with the same moral dilemma, the dilemma of a man named Heinz who can not afford to buy a drug which is needed to save the life of his wife. Both are asked whether Heinz should steal the drug. Gilligan

reasoning to men. The resulting different standpoints are then related to formulations of justice. legal justice, with its insistence on impartiality, neutrality and objectivity, is based on masculine attributes. In contrast to this, a more female centred concept of justice focuses upon notions of responsibility, care and connection.<sup>17</sup> The ideal of impartiality is scrutinised by Young,<sup>18</sup> in her attempt to provide a notion of social justice which can be utilised by social groups fighting against oppression. The requirement of equality necessitates the judge focusing on those factors which are legally deemed to be relevant. All other considerations are immaterial, thus requiring an impartial application of the rules. Young argues that this approach denies or represses difference in three ways.<sup>19</sup> Firstly, impartiality requires a situation to be reduced to a common essence, which entails a rejection of particularity. Secondly, it denies multiple forms of feeling, as dispassion rejects desire or affection. In order to be impartial, the reasoner must disassociate the entity from the particular concrete situation, this requires ‘...abstracting from the particularity of bodily being, its needs and inclinations, and from the feelings that attach to the experienced particularity of things and events.’<sup>20</sup> Thirdly, subjectivity is reduced from a plural to a single essence, as the impartial reasoner is searching for a universal, transcendental point of view, which is attainable by any rational individual, hence denying the individuality of the reasoner. Furthermore, Young argues that impartiality is impossible ‘...because the

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argues that their answers (Jake, yes; Amy, no) were reached via very different moral reasoning. The two forms of moral reasoning are then presented as ‘male’ and ‘female’.

<sup>17</sup> Daly K “Criminal Justice Ideologies and Practices in Different Voices: Some Feminist Questions about Justice” *Int Journal of the Sociology of Law* (1989) 14, 1-18 pg 1

<sup>18</sup> Young I M *Justice and the Politics of Difference*

<sup>19</sup> *Ibid.*, pg 100-101

<sup>20</sup> *Ibid.*, pg 100

particularities of context and affiliation cannot and should not be removed from moral reasoning.’<sup>21</sup> Every situation is placed within a specific social and historical context, and these need to be understood before a moral judgement can be made.<sup>22</sup> Furthermore, it is argued that moral judgements are only made by those who have an interest in the outcome of a situation.

Young argues that impartiality relies on a logic of identity, that is premised on a construction of reason which amounts to ‘...an urge to think things together, to reduce them to unity.’<sup>23</sup> In order to attain this unity a commonality is searched for: ‘[r]eason seeks essence, a single formula that classifies concrete particulars as inside or outside a category, something common to all things that belong in the category.’<sup>24</sup> One can clearly observe the connection between this construction of reason and the notion of formal justice as equality discussed above. An observation which is unsurprising, due to the connection made between justice and reason or rationality.<sup>25</sup> The logic of identity constructs stable categories and aims to bring within this category a number of entities or situations by focusing on their similarities. One can compare this to the law, especially the criminal law, which constructs certain actions or circumstances as either a criminal act or a defence, and then, through the process of the impartial judge, judges those which fall within such categories. This approach, however, denies the situatedness and particularity of the specific situation. As Young states: ‘...the urge to

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<sup>21</sup> Ibid., pg 97

<sup>22</sup> Ibid.

<sup>23</sup> Ibid., pg 98

<sup>24</sup> Ibid.

<sup>25</sup> see Perelman C H *Justice Law and Argument*



bring [situations or entities] into unity under a category or principle necessarily entails expelling some of the properties of the entities or situations.’<sup>26</sup>

The aim of the logic of identity is necessarily unsuccessful due to its failure to recognise that, in reality, situations and entities as well as being different, share similarities, and thus they are neither completely identical nor opposed. Moreover, difference is vital to the understanding and the definition of concepts: ‘[n]o utterance can have meaning unless it stands out differentiated from another.’<sup>27</sup> Hence the meaning of the term man is dependent on the term woman. Thus differences should not be rendered Other by a process which is a fiction. As opposed to creating unity, the logic of identity is seen to create dichotomies and binary oppositions. Whilst attempting to bring within a category all those subjectivities which contain a common essence, the logic of impartiality turns those that are merely different into an absolute Other. ‘Difference thus becomes a hierarchical opposition between what lies inside and outside the category, valuing more what lies inside than what lies outside.’<sup>28</sup> In order to compensate for this failure, the logic of identity rejects differences which cannot be assimilated with the impartial ideal. Thus differences are constructed as ‘Other’ to the impartial ideal.

This masculine concept of the rule of law and legal justice is considered to have failed to ‘...fulfil its promise of equality.’<sup>29</sup> Indeed there is now much discussion on

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<sup>26</sup> Young I M *Justice and the Politics of Difference* p. 99

<sup>27</sup> *Ibid.*, p. 98

<sup>28</sup> *Ibid.*, p. 102

<sup>29</sup> O’Donovan K ‘Engendering Justice: Women’s Perspectives and the Rule of Law’ *Uni of Toronto Law Journal* (1989) 39, 127-148

whether the law can, in its present form, provide a solution to the problems of sex discrimination. Law is seen to both advance and deny women's claims to equality. It is argued that law, under the guise of neutrality, actually maintains the status quo. This is achieved through its ability to define the boundaries and state which characteristics or circumstances are relevant or irrelevant.<sup>30</sup> Young categorises this as one of the '...ideological functions of the ideal of impartiality...' <sup>31</sup> which works to reproduce relations of domination and oppression. Law is considered to be impartial, in that it corresponds to the general interest of a society and has equal application. Law is not based on one particular standpoint. Hence, for justice to be achieved, the judge merely has to apply the law impartially. This is, however, a fallacy. Impartiality involves a universalisation of the particular. The privileged groups in society constructs their standpoint and characteristics to be normal and impersonal.

Young states:

“The situated assumptions and commitments that derive from particular histories, experiences, and affiliations rush to fill the vacuum created by counterfactual abstraction; but now they are asserted as “objective” assumptions about human nature or moral psychology.” <sup>32</sup>

In addition, insistence on the possibility of impartiality enables the privileged group to deny that their characteristics and standpoint are, in fact, situated and particular, as opposed to objective and normal. <sup>33</sup>

This in turn silences and oppresses those who are different. This can be seen to be extremely prevalent in case of women who kill their abusive partners. Via the

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<sup>30</sup> Ibid., pp. 129-130

<sup>31</sup> Young I M *Justice and the Politics of Difference* p. 112

<sup>32</sup> Ibid., p. 115

<sup>33</sup> Ibid., p. 116

'objective' definitions of provocation and self defence, law denies the woman's claim that she acted under either severe provocation or in fear for her life, and instead labels her as a murderer or as suffering from a mental disorder. The legally relevant circumstances silence her perception of the situation. Through such approaches we can identify the power relations hidden inside the concept of justice. If a conviction for manslaughter requires the court to construct a female defendant her actions as based on mental instability or mental illness, this 'legal justice' perpetuates the domination and oppression of women, by reinforcing negative stereotypes of gender.

It is not without significance that these difficulties arise due to the fundamental role played by the notions of equality and impartiality in the concept of 'legal' justice. Furthermore, the difficulties are reinforced by the comparative approach taken by some legal feminists<sup>34</sup> when analysing the achievement of justice for battered women who kill. As mentioned above, although such a comparative approach is strategically useful for highlighting the sexist nature of the law and the criminal justice system, it is based on an assimilationist approach, which requires the denial of difference. In order for the law, however, to construct the battered woman's experience to fit within the existing defence categories, thus achieving equal application of the law and treating like cases as like, recourse to psychiatric evidence is made. In this sense the achievement of justice involves a negotiation.

By maintaining that battered women should receive equal treatment to men who kill their partners, feminists who adopt this position are neglecting the specific nature of

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<sup>34</sup> See for example Justice for Women Information Pack 2ed; Bandalli S "Battered wives and provocation", Bandalli S "Provocation - A Cautionary Note" McColgan A "General Defences"

the battered woman's situation. Focus needs to be placed solely on cases of women who kill. With the law at present, the battered woman is in a perpetual state of Otherness. On a conviction of murder, she becomes Other to those to whom she is compared - male defendants who kill their partners - as she falls outside the defence categories which are considered to be objective and universal, whereas he falls within. Or she receives a conviction for manslaughter with the aid of psychiatric evidence, and thus becomes Other as she falls outside the universal categories of rationality and reason. What is required is a substantive notion of justice which enables the existing legal defences to be criticised and which provides assistance for constructing law reform and new defences. Thus, although in one sense justice is seen to exist in conformity to the law, it also needs to be recognised that the law itself can, and perhaps should, be subjected to other external and independent methods of evaluation. The standard of the law itself must also be just, as Perelman cites, '[t]rue justice...consists not in the correct application of a rule, but in the correct application of a just rule.'<sup>35</sup> In addition to this, it is also necessary to have a notion of justice which offers guidance on the relevant and irrelevant characteristics. As stated by Campbell 'A theory of justice must...., be able to identify and connect the reasons for differential treatment which have distinctively to do with justice.'<sup>36</sup>

## **Social Justice**

Perhaps the most famous theory of social justice is that forwarded by Rawls.<sup>37</sup> Rawls' conception of justice is based on a social contract. The basic rules of justice are those

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<sup>35</sup> Perelman C H *The Idea of Justice* p. 45

<sup>36</sup> Campbell T *Justice* p. 34

<sup>37</sup> Rawls J A *Theory of Justice*

which would be agreed to by those in the original position when placed behind a veil of ignorance. This veil would prevent the individuals from knowing their individual characteristics and their position in society. Hence the subsequent rules would, theoretically, have the greatest benefit to those who have the least, or, as explained by Richards '...the best worst result is secured: the minimum is maximized.'<sup>38</sup> Without considering in the detail the criticisms of Rawls' theory,<sup>39</sup> it might suffice to state that, as his theory concentrates invariably on the distribution of social and economic goods, it offers little assistance for the present project. Indeed the majority of the theories which deal with social justice concentrate on the distribution of material goods, and hence cannot be used to evaluate the requirements of legal defences or the use of psychiatric evidence in relation to women who kill their abusive partners. To this end, Young's approach to social justice will be adopted.

### **Iris Marion Young's Conception Of Social Justice**

Young examines the claims of injustice which are forwarded by subordinate social movements, noting how the contemporary theories of social justice have little to offer these groups. As argued above, notions of impartiality and equality, in fact, lead to the assimilation with the dominant groups construction of objective reality, and thus render 'Other' those social groups with different characteristics. Furthermore, Young notes that the majority of social justice theories are based on the distribution of

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<sup>38</sup> Richards D J A "Justice and Equality" in Regan and Van Devere *And Justice For All: New Introductory Essays in Ethics and Public Policy* [Rowman and Littlefield; Totowa; 1982] 241-263, p. 250

<sup>39</sup> see for example Barry B *The Liberal Theory of Justice* [Clarendon Press; Oxford; 1973] Daniels N ed *Reading Rawls: Critical Studies on Rawls' A Theory of Justice* [Blackwell; Oxford; 1975] Wolff R P *Understanding Rawls* [Princeton University Press; Princeton, NJ; 1977]

material goods, and this fails to evaluate critically the context and structure of institutions and society.<sup>40</sup> Young<sup>41</sup> recognises that there are some theories of social justice which do consider the distribution of non-material goods, such as: 'prestige and self-respect',<sup>42</sup> and 'productive tasks, opportunities for development, citizenship, authority and honour',<sup>43</sup> however, these tend to be misleading and inadequate. Applying the logic of distribution to such non-material effects overextends the principle of distribution, as it constructs as 'things' those aspects which are better described as relations and rules, hence yielding a deceptive image of those issues with which justice is concerned. This can be explained through the notion of rights. Young explains:

“[r]ights are not fruitfully conceived as possessions. Rights are relationships not things; they are institutionally defined rules specifying what people can do in relation to one another. Rights refer to doing more than having, to social relationships that enable or constrain actions.”<sup>44</sup>

From this example, it can be seen how such an approach shifts the analysis from those processes which generate rights and the distribution of rights, to the outcome of this distribution.<sup>45</sup> In order to understand how rights, opportunities and power are distributed among the society one must be able to analyse and evaluate the processes and rules which have an impact on their patterns of 'distribution'. Moreover, this distributive idea of social justice tends to construct individuals as 'atoms', who develop their characteristics and capacities independently of the social context, as

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<sup>40</sup> Young I M *Justice and the Politics of Difference* pp. 21-22

<sup>41</sup> *Ibid.*, p. 24

<sup>42</sup> Miller D *Social Justice* [Clarendon Press; Oxford; 1976]

<sup>43</sup> Galston W *Justice and the Human Good* [University of Chicago Press; Chicago; 1980]

<sup>44</sup> Young I M *Justice and the Politics of Difference* p. 25

<sup>45</sup> *Ibid.*, p. 28

opposed to recognising that individuals are also a product of the social rules and processes. Hence it is necessary to have a concept of social justice which evaluates processes in addition to, but not excluding, outcomes.

As mentioned earlier, substantive justice is generally concerned with outcomes, and formal or legal justice is concerned with the correct application of rules and procedures. What Young develops is a notion of justice which enables one to evaluate the production of those rules and procedures and the outcomes which ensue.

### **Domination and Oppression**

Young argues that social justice should be able to deal with issues of domination and oppression, as opposed to solely concentrating on distribution of social and economic goods. The general concept of justice on which she bases her analysis is premised on a communicative ethic, in that the concern of justice focuses upon participation in decision making. She argues for a fully participatory democracy, where all individuals are able to be involved in the political decision making processes. The main regard of social justice is, in Young's conception, enabling. Justice is concerned with the '...institutional conditions necessary for the development and exercise of individual's capacities and collective communication and cooperation',<sup>46</sup> in addition to distribution. Domination and oppression are cited as the two main 'disabling constraints',<sup>47</sup> and thus amount to injustice. It is this definition of injustice that provides a substantive theory which can be used to criticise the existing law, legal procedures and case outcomes. If the approaches adopted in cases of battered women

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<sup>46</sup> Ibid., p. 39

<sup>47</sup> Ibid.

who kill lead to the existence of domination and oppression, then they can be seen to perpetrate an injustice, despite the achievement of legal justice. It is clear how these cases have a significant impact on women as a whole, as they enhance the barriers against women's full participation in society.

Young recognises that oppression extends beyond those societies which are ruled by tyranny, but also refers to the '...everyday practices of a well-intentioned liberal society.'<sup>48</sup> Oppression, in addition to being structural and institutionalised, also manifests within '...unquestioned norms, habits and symbols.'<sup>49</sup> Hence injustice can flow from the '...unconscious assumptions and reactions of well-meaning people in ordinary interactions, media and cultural stereotypes..in short, the normal processes of everyday life.'<sup>50</sup> In adopting this 'extended structural' definition of oppression, Young embraces a Foucauldian conception of the relationship of oppression, recognising that it does not necessarily require a 'dyadic relationship' between the oppressor and the oppressed.<sup>51</sup> Injustice can be perpetuated by those who simply go about their everyday life, and who do not see themselves as 'agents of oppression.'<sup>52</sup> Hence it is stated that oppression and injustice will not simply be eradicated merely by reforming the law. This is a significant point, which understands that change other than legal change is necessary, a point which is agreed upon within this research. Although it is important to provide an adequate legal response to cases involving women who kill, it is also necessary to deal with the problem of domestic violence outside, as well as

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<sup>48</sup> Ibid., p. 41

<sup>49</sup> Ibid., p. 41

<sup>50</sup> Ibid.

<sup>51</sup> Ibid., pp. 41-42

<sup>52</sup> Ibid.



inside, the criminal justice system. A major factor is changing society's perception of and response to women who suffer domestic violence, as is being tackled by women's groups such as Zero Tolerance.

Young argues that all oppressed social groups share a common essence, in that they are restricted or unable to express their feelings or needs and are unable to enhance adequately and employ their abilities. Nevertheless, it is recognised that locating a common source of oppression or domination is unfeasible, and indeed any such search has invariably developed into '...fruitless disputes about whose oppression is more fundamental or more grave.'<sup>53</sup> With this in mind, Young develops a five-fold conception of social justice: exploitation, marginalization, powerlessness, which relate primarily to the social division of labour, and cultural imperialism and violence, which concern other social relations. In particular, it is the latter two notions which are of relevance to this thesis. Cultural imperialism refers to the process by which the dominant or privileged group within society construct their specific characteristics, standpoints and perspectives as normal, neutral and universal, whilst at the same time essentialising, stereotyping, 'Othering' and rendering invisible the perspectives of other social groups. The dominant group use their own perspectives as an objective norm which social groups are measured against and those who differ are '...reconstructed largely as deviant and [inferior]'.<sup>54</sup> Hence the oppressed group:

"...find themselves defined from the outside, positioned, placed, by a network of dominant meanings they experience as arising from elsewhere, from those with whom they do not identify and who do not identify with them."<sup>55</sup>

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<sup>53</sup> Ibid., p. 40

<sup>54</sup> Ibid., p. 59

<sup>55</sup> Ibid.

Such cultural imperialism is reinforced by the ideal of impartiality, as it also involves ‘...the universalization of a dominant group's experience and culture, and its establishment as the norm.’<sup>56</sup> The ideal of impartiality is based on the characteristics of the dominant group.

Violence as a form of social injustice refers not simply to an act of violence itself, but also includes its social context and the manner in which it is frequently justified (she asked for it) and tolerated. Furthermore, it is systemic, as it is directed towards certain individuals simply because they are member of a specific social group. Young relates this form of oppression to cultural imperialism, asserting that violence frequently occurs due to an attempt on behalf of the oppressed group to ‘assert their own subjectivity’ through rejecting the construction imposed upon them by the dominant group.<sup>57</sup>

The main argument is that the experiences and reactions of battered women are constructed within the law from an outside perspective, a perspective which draws upon stereotypes of women as mentally unstable or mentally ill. This is achieved primarily through the use of defences such as diminished responsibility and the use of expert evidence, especially the use of the battered woman syndrome. This can be seen to be a form of cultural imperialism. In such a situation, although a battered woman may receive justice in the form of ‘treating like alike’, a wider social injustice has been perpetrated. In addition to cultural imperialism, the social injustice of violence occurs when a woman who kills her abusive partner and receives a conviction for

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<sup>56</sup> Ibid., p. 61

<sup>57</sup> Ibid., pp. 61-63

murder. This can be seen as legitimating and justifying the domestic violence she suffered.

### **The Possibility of a Postmodern Social Justice?**

Although adopting a model of social justice provides a framework with which to scrutinise the existing law, it arguably contradicts the deconstructive tendencies of queer theory, as examined in the last chapter. As argued by Nussbaum,<sup>58</sup> Judith Butler appears to abandon a concern with universal notions such as rights, equality and justice. This abandonment is not, however, particular to queer theory, but a symptom of the influence of postmodernism and poststructuralism. More generally, as Harvey states: '[t]he effect of the poststructuralist critique of universalism has been to render any application of social justice problematic.'<sup>59</sup> Harvey recognises that the application of any universal standard to a range of heterogeneous situations will necessarily amount to injustice in some particular circumstances. However, there also appears to be a reluctance to abandon an appeal to some form of normative or moral standard, as the complete rejection of any such standards may lead to the situation where 'anything goes'. Nevertheless, as Conaghan recognises, the fear of using any normative or moral value has crept into the domain of legal feminism, and this has had negative repercussions for the transformative aspect of feminist work. Conaghan notes with surprise the:

“...coyness demonstrated by many feminists confronted with the normative impulses which fuel their scholarly efforts. There is a detectable lack of enthusiasm in contemporary feminism for critical self-reflection about the

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<sup>58</sup> Nussbaum M C “The Hip Defeatism of Judith Butler: The Professor of Parody”

<sup>59</sup> Harvey D “Class Relations, Social Justice and the Politics of Difference” p. 95

moral or ethical values lurking in the shadows of feminist theoretical engagement.”<sup>60</sup>

Conaghan locates this reticence in the postmodern notion that any norm or standard necessarily amounts to a coercive regulatory ideal. Legal feminism is reluctant to use normative values which tend to conflict with postmodern tendencies. Thus it has to be questioned whether a deconstructive project can also employ norms, such as social justice.

In relation to feminist legal theory,<sup>61</sup> it has been argued that deconstruction alone is insufficient, as projects always necessarily involve a normative element. This point is forwarded by Ahmed, who argues that legal feminism is concerned with changing, as well as describing and deconstructing, social and legal arrangements. Legal feminism is concerned with ‘...prescribing and effecting transformation, informed by a range of normative ideals.’<sup>62</sup> Legal feminism is a practical project as well as a theoretical project, it is generally aimed at improving the situation of women. Such an argument is clearly applicable to this thesis.

Over recent years, with the growing influence of postmodernism, it is felt that the once close connection between feminist politics and feminist theory, has almost vanished. As Conaghan states ‘[t]he contention emerging is that this symbiotic

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<sup>60</sup> Conaghan J “Reassessing the Feminist Theoretical Project in Law” p. 376

<sup>61</sup> The terms feminist legal theory and legal feminists are used generally to represent those who approach law from any one of the many varied feminist perspectives. For detailed overview of the diverse approaches adopted by legal feminist see Conaghan J “Reassessing the Feminist Theoretical Project in Law”

<sup>62</sup> Ahmed S “Deconstruction and Law’s Other: Towards a Feminist Theory of Embodied Legal Rights” *Social & Legal Studies* (1995) 4, 55-73 p. 75

relationship is breaking down as feminist theory moves in a direction in which practical politics cannot/will not follow.’<sup>63</sup> In relation to this thesis, although a deconstructive approach is used, and indeed considered to be necessary, due to the concern with the legal and judicial construction of identity, the concern goes beyond deconstructing identity categories and stretches to changing the actual law, and the construction of an identity which is considered to be socially just. Although this does appear to conflict with Butler’s criticism of identity categories, as noted in the previous chapter, Butler herself recognises that a feminist politics may necessarily need to retain a notion of woman – a normative identity. However, this needs to be accompanied with a constant deconstruction of the proposed identity or reform proposal. Such an approach has been labelled ‘affirmative postmodernism’, as it does not necessitate the complete rejection of norms and values.<sup>64</sup> This approach is adopted by Balkin who argues that: ‘[d]econstruction is not a denial of the legitimacy of rules and principles, it is an affirmation of human possibilities that have been overlooked or forgotten in the privileging of particular legal issues.’<sup>65</sup>

Significantly, Young’s conception of social justice can be located within a postmodern approach to subjectivity, as it is based on a politics of difference.<sup>66</sup> A politics of difference is generally asserted to be the opposite to assimilation in that it,

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<sup>63</sup> Conaghan J “Reassessing the Feminist Theoretical Project in Law” p. 356

<sup>64</sup> McCoubrey H & White N D *Textbook on Jurisprudence* [Blackstone Press Ltd; London; 3<sup>rd</sup> ed; 1999] p. 261

<sup>65</sup> Balkin “Deconstructive Practice and Legal Theory” *Yale Law Journal* (1987) 96, 743 p. 763

<sup>66</sup> Squires J “Representing Groups, Deconstructing Identities” *Feminist Theory* (2001) 2(1), 7-27.

Squires states that a Politics of Difference, and is an ‘...attempt to explode the dichotomy between ‘equality and difference.’ p. 17

in contrast to a unified and objective public, calls for the recognition of group divergences and the existence of plural and multifaceted cultures and norms. The politics calls for the retention of the idea of social groups and categories (a position that is dismissed to some extent by queer theory) as it is argued that society is constructed by social groups some of which are dominant and some of which are oppressed. Moreover, the retention of some form of group autonomy or solidarity is recognised by Young to be an ‘...important vehicle for empowerment and the development of a group specific voice’.<sup>67</sup> The main aim of a politics of difference is to reconstruct group identities and the meaning of differences in a positive manner. This subsequently provides the oppressed social group with a standpoint from which the ‘norms’ of society can be scrutinised. Whereas assimilationist politics are considered to be oppressive, a politics based on the positive recognition of difference is argued by Young to be emancipatory and liberating. This is due to the insistence that the identities of different social groups should, in the very least, be valued, and at times are to be considered to be more valuable than those associated with the dominant group. There is, however, a real danger connected to the assertion of group difference, as it may provide the grounds for discriminatory treatment, as Young explains: ‘...any admission by oppressed groups that they are different from the dominant group risks justifying anew the subordination, special marking, and exclusion of those groups.’<sup>68</sup> This fear is justified, and is exemplified by the American case of *Equal Employment Opportunity v Sears, Roebuck & Co.*<sup>69</sup> as discussed in the previous chapter. Such an argument is also applicable to the battered

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<sup>67</sup> Young I M *Justice and The Politics of Difference* p. 168

<sup>68</sup> *Ibid.*, p. 168

<sup>69</sup> 839 F.2d 302 (7<sup>th</sup> Cir. 1988)

woman syndrome. Although the syndrome has brought about, in some cases, an advantageous result in the court room, it is clearly a double edged sword. The specificity of the battered woman is allowed, but only in a manner which reaffirms her negative characteristics: passivity and mental instability. Her difference has not been constructed in a positive light.

Furthermore, the call for the recognition of differences appears to militate against years of political activism which argued that all human beings are of equal moral worth. Young cites Boxill in order to illustrate this predicament: '[o]n the one hand, we must overcome segregation because it denies the idea of human brotherhood; on the other hand, to overcome segregation we must self-segregate and therefore also deny the idea of human brotherhood.'<sup>70</sup> In order to overcome such an impasse, Young asserts that social groups need to reclaim the meaning of difference, and this is to be done by distinguishing between an oppressive meaning of difference and an emancipatory meaning of difference. The oppressive meaning of difference is considered by Young to be essentialist. Submitting to the logic of identity, this approach measures differences against a supposedly objective norm and defines them as '...absolute otherness, mutual exclusion, [and] categorical opposition.'<sup>71</sup> In contrast to this, differences in the emancipatory meaning are defined as '...specificity, variation, [and] heterogeneity.'<sup>72</sup> Moreover, difference is considered to be a relation as opposed to a specific attribute. Hence, differences only appear when some comparison between groups is undertaken and this highlights the specificity of all

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<sup>70</sup> Boxill B *Blacks and Social Justice* [Rowman and Alanheld; Totowa, N.J.; 1984] p. 174; see Young I M *Justice and the Politics of Difference* p. 169

<sup>71</sup> Young I M *Justice and the Politics of Difference* p. 169

<sup>72</sup> *Ibid.*, pg 171

groups, including the dominant group in society. To quote Young: '[d]ifference thus emerges not as a description of attributes of a group, but as a function of the relations between groups and the interaction of groups with institutions.'<sup>73</sup>

In addition, in contrast to being defined by the dominant group, the emancipatory version places the meaning of difference within the hands of the oppressed group. They define their own positive identity, and this identity is created and constructed as opposed to innate. Hence, an emancipatory meaning of difference leads to the recognition that membership to a social group is not through fixed attributes or a common identity, as this would be essentialist, but through a shared affinity. Young explains:

“Affinity names the manner of sharing assumptions, affective bonding, and networking that recognizably differentiates groups from one another, but not according to some common nature....Group identity is constructed from a flowing process in which individuals identify themselves and others in terms of groups, and thus group identity itself flows and shifts with changes in social process.”<sup>74</sup>

A group's identity is not fixed nor innate, but relational, fluid and open to change. To further explain the emergence of social groups, Young forwards the notion of seriality, (as examined in the previous chapter) in order to illustrate how social groups come into being. Once a social group comes into being, they should have the power to define their own identity. However, to avoid falling into the trap of an essentialist identity politics, whereby constructed identities become fixed and determined, it must be recognised that the identity proposed is, firstly, based on exclusions and secondly,

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<sup>73</sup> Ibid.

<sup>74</sup> Ibid., pg 172



may be used in a manner which is unforeseen and may have negative consequences.<sup>75</sup>

The exclusionary foundations must be recognised and constantly deconstructed. Such an approach has been labelled 'double movement feminism.'<sup>76</sup> This form of feminism draws upon Butler's notion of a double movement which is to:

“...invoke the category and, hence, provisionally to institute an identity and at the same time to open the category as a site of permanent political contest. That the term is questionable does not mean that we ought not to use it, but neither does the necessity to use it mean that we ought not perpetually to interrogate the exclusions by which it proceeds.”<sup>77</sup>

## Conclusion

This chapter has examined and critiqued the concept of justice which is conventionally appealed to in cases involving women who kill their abusive partners: the concept of legal justice. It is argued that although the appeal to a legal justice, based on treating like cases alike, has emphasised the divergence of legal treatment between men and women who kill their partners, it limits the examination to the sameness or difference between men and women, and ignores the differences between women. A move towards a social justice, which is based upon a notion of a relational and non-essential social group, permits an evaluation of the legal treatment of women beyond that offered by legal justice. It provides a standard by which the actual legal construction of identity may be evaluated. Moreover, this move away from a strict

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<sup>75</sup> Young argues against claims by some commentators, such as Elshtain J B *Democracy on Trial* [Basic Books; New York; 1995], that her position amounts to an identity politics, see Young I M 'Difference as a Resource for Democratic Communication' in Boham J & Rehg W eds *Deliberative Democracy: Essays on Reason and Politics* [Cambridge, MA: MIT Press; 1997] 383-407 cited in Squires J "Representing Groups, Deconstructing Identities"

<sup>76</sup> Sandland R "Seeing Double? Or, Why 'To Be or Not To Be' is (Not) the Question for Feminist Legal Studies" *Social Legal Studies* (1998) 7(3), 307-338

<sup>77</sup> Butler J *Bodies that Matter* pp. 221-2

legal justice enables one to recognise the differences between women, and how different women are treated. This conception of social justice can be utilised not just to compare women with men, but also women with women. Whereas some women may receive a socially just result, other women may not.

I argue that Young's concept of social justice can be reconciled with the deconstructive tendencies of queer theory, as identity is considered to be socially constructed and open to constant change. Additionally, Young recognises that women will, necessarily, fall into more than one social group, which may result in conflict, and some women may suffer cultural imperialism at the hands of other women. Any feminist notion of woman will, unavoidably, involve cultural imperialism. However a constant deconstruction of the identity adopted will, arguably, avoid some of the essentialising tendencies of identity politics. The next chapter will commence the examination of the existing criminal law defences to murder.

## THE DEFENCES

### The Limitations of the Existing Criminal Law Defences to Murder

#### Introduction

This chapter details the existing criminal law defences which might be available to women who kill their abusive partners: provocation, diminished responsibility and self defence. In addition to examining the requirements of each defence, the chapter includes a discussion of the relevant existing literature on criminal law defences for women who kill. This literature is not limited to articles specifically discussing women who kill, but also considers those which have discussed the legal requirements of the defences in general. In addition, the chapter adopts a comparative stance. Hence defences and relevant literature from a number of different jurisdictions are also scrutinised, in particular, American and Canada.

Criminal law defences are distinguished by some legal scholars to be either an excuse or a justification, both recognising that the defendant is not entirely blameworthy.<sup>1</sup> This distinction, despite an absence of official legal recognition, achieves significance when determining which defence should apply, as it attempts to explain the battered woman's actions. Excusatory defences recognise that the defendant has committed a wrongful, illegal act. Nevertheless, they exonerate the defendant on the basis that she was not entirely responsible for her actions, due to incapacity or some other mitigating factor. Her inability to engage adequately in free will renders the

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<sup>1</sup> See for example Robinson P "Criminal Law Defences: A Systematic Analysis" *Col LR* (1982) 82, 199 and Williams G "The Theory of Excuses" *Crim LR* (1982) 732

application of criminal liability inappropriate.<sup>2</sup> Justification, on the other hand, legitimises the defendant's actions. The final result is considered to transcend the harm which has been committed, thus amounting to socially justifiable or even commendable behaviour.<sup>3</sup> Another possible explanation is to recognise that the defendant's course of action is identical to that which would have been adopted by any other reasonable person faced with such circumstances.

On the whole, the distinction between excuses and justification relates to the focus of the inquiry. Whereas the former concentrates on the mental state of the defendant, the latter is concerned with her actions.<sup>4</sup> Furthermore, defences are either full or partial. A successful plea of a full defence will lead to an outright acquittal, a complete exoneration, whereas a partial defence will lead to a conviction of a less serious offence. Thus a successful partial defence to the crime of murder can lead to a conviction of manslaughter.

## **Provocation**

Provocation amounts to a partial defence to murder which submits to a compassion for human frailty, enabling a jury to find the accused guilty of manslaughter when it is shown that they killed in the heat of passion due to the victim's provocative conduct.<sup>5</sup>

Alternatively, it could be argued that the defence recognises the reduced culpability of

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<sup>2</sup> Robinson P "Criminal Law Defences: A Systematic Analysis" p. 221.

<sup>3</sup> see Ibid. and Williams G "The Theory of Excuses"

<sup>4</sup> Robinson P "Criminal Law Defences: A Systematic Analysis" p. 229.

<sup>5</sup> Greene J "A Provocation Defence for Battered Women Who Kill?" *Adelaide LR* (1989) 12, 145-163 p. 145; Taylor L J "Provoked Reason in Men and Women; Heat of Passion Manslaughter and Imperfect Self-Defense" p. 1684

the accused as the victim is also to blame, as he or she precipitated the killing.<sup>6</sup> Section 3 of the Homicide Act 1957 states that the presence of provocation is a question of fact, to be decided by the jury, who will be directed by the judge as to the legal definitions. A successful plea of provocation requires the satisfaction of three requirements: firstly, there must be provocative conduct; secondly the accused must have suffered a loss of self-control, which is the subjective, factual requirement; and, thirdly, it is questioned whether a reasonable person would have reacted in a similar manner, this amounts to the objective, evaluative requirement. The wording in section 3 and the Court of Appeal in *R v Doughty*<sup>7</sup> clearly established that words as well as acts may amount to provocation. Furthermore, the fact that the provocative conduct is lawful will not exclude the defence. These requirements are generally reflective of the defence in jurisdictions other than England and Wales.

An overview of the historical development of the defence is provided by Taylor.<sup>8</sup> Crucially, she argues that provocation has developed in relation to masculine emotions and reactions, protecting masculine interests, thus consequently excluding the female experience. This biased development is considered to be due to two factors. Firstly criminal defendants are, overwhelmingly, men and, secondly, the authors, enforcers and interpretators of the criminal law: judges, legislators, police officers and juries; have also historically been men.<sup>9</sup> This has led to the contention that it is generally from a ‘...male-centred perspective that the reduction of an

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<sup>6</sup> Greene J “A Provocation Defence for Battered Women Who Kill?” p. 145

<sup>7</sup> [1986] 83 Cr App R 319

<sup>8</sup> Taylor L J “Provoked Reason in Men and Women; Heat of Passion Manslaughter and Imperfect Self-Defense”

<sup>9</sup> *Ibid.*, p. 1681

intentional killing from murder to manslaughter is capable of being regarded as a compassion to human infirmity.’<sup>10</sup>

By 1707, the English courts established a number of circumstances which were considered sufficiently provocative to warrant mitigation. Such situations included an assault on the accused or a friend, illegal arrest and the accused’s wife being caught in the act of adultery.<sup>11</sup> Indeed this latter situation is often cited to be the ‘traditional example of extreme provocation’<sup>12</sup> thus condoning men’s sexual jealousy, rationalising the consequent acts of violence and excusing male killing of women.<sup>13</sup>

Hence, it is argued that:

“[f]rom a feminist perspective the existence of such mitigation simply reinforces in the law that which public institutions ought in fact to be seeking to eradicate, namely, the acceptance that there is something natural, inevitable, and hence in some [legal] sense to be recognised forgivable about men’s violence against women, and their violence in general.”<sup>14</sup>

Thus it is contended that the experiences of women in general, and battered women in particular, are excluded by the defence of provocation as it is based on male reactions and masculine behaviour.

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<sup>10</sup> Horder J *Provocation and Responsibility* [Clarendon Press; Oxford; 1992] p. 194

<sup>11</sup> Taylor L J “Provoked Reason in Men and Women; Heat of Passion Manslaughter and Imperfect Self-Defense” p. 1685

<sup>12</sup> Smith and Hogan *Criminal Law* [Butterworths; London; 1988] p. 335

<sup>13</sup> Beri S “Justice for Women Who Kill: A New Way?” *The Australian Feminist Law Journal* (1997) 8, 113-125 p. 121

<sup>14</sup> Horder J *Provocation and Responsibility* p. 194

## **Sudden and temporary loss of self-control**

The loss of self control suffered by the accused must be sudden and temporary, as held by the House of Lords in *R v Duffy*.<sup>15</sup> Indeed, the judgement of Devlin J in this case is generally considered to provide the authoritative definition of provocation:

“Provocation is some act or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused, a sudden and temporary loss of self control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.”<sup>16</sup>

The requirement of a sudden and temporary loss of self control has proved to be a major hurdle for women who kill their abusive partners. Evidence of a time lapse between the provocative act and the fatal act is taken to indicate that the accused was able to recover her self control and therefore militates against a successful pleading of the defence. This is arguably due to the court’s endeavour to police the barrier between provocation and private revenge. As noted by Lord Chief Justice Taylor in *R v Ahluwalia*:<sup>17</sup>

“Time for reflection may show that after the provocative conduct makes its impact on the mind of the defendant, he or she kept or regained self control. The passage of time following the provocation may also show that the subsequent attack was planned or based on motives, such as revenge or punishment, inconsistent with the loss of self control and therefore with the defence of provocation.”<sup>18</sup>

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<sup>15</sup> [1949] 1 All ER 932

<sup>16</sup> Ibid. as cited by Lord Goddard

<sup>17</sup> [1993] 96 Cr App R 133

<sup>18</sup> Ibid. p.138

It is argued by some that this requirement of suddenness reflects masculine reactions to provocation, whereas women tend to have a slow burn anger.<sup>19</sup> A provoked killing occurs in the 'heat of the moment' with a build up of anger, culminating in a loss of control. The provocative conduct 'lights a fuse which can ignite violence.'<sup>20</sup> Young suggests '[j]ust as the lighting of fuses and exploding bomb are tropes which feature in male action movies which exclude the perspectives of women, this characterisation of anger does not include the emotions experienced by many battered women.'<sup>21</sup> In contrast to a sudden loss of control which occurs immediately after provocative conduct, some battered women kill their abusers after a significant time lapse, thus falling outside the legal definition of provocation. Hence, the requirement of suddenness encompasses the male reaction and anger, a predominately male emotion, but ignores the different emotions, such as fear and despair, and the reactions of some women.<sup>22</sup>

To a limited extent, the Court of Appeal in *Ahluwalia*<sup>23</sup> recognised the existence of a female slow burn anger as they categorised a time delay as evidential. Hence, the

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<sup>19</sup>see for example Nicolson D and Sanghvi R "Battered Women and Provocation: The Implications of *Ahluwalia*" *Crim L R* (1993), p. 730; Young A "Conjugal Homicide and Legal Violence: A Comparative Analysis" *Osgood Hall L J* 31 (1991) 761 p. 771

<sup>20</sup> Young A "Conjugal Homicide and Legal Violence: A Comparative Analysis" p. 771

<sup>21</sup> Ibid. see also Beri S "Justice for Women Who Kill: A New Way?" p. 121-122

<sup>22</sup> Donnelly M "Battered Women Who Kill and the Criminal Law Defences" *Irish Criminal L J* (1993) 161-172 pp. 168-169; Edwards S "Battered Women - In Fear of Luc's Shadow" *Denning LJ* (1997) 75-105 p. 90; Nicolson D and Sanghvi R "Battered Women and Provocation: The Implications of *Ahluwalia*" p. 730; Wannop A L "Battered Woman Syndrome and the Defence of Battered Women in Canada and England" *Suffolk Transnational L Rev* (1995) 19, 251-272 pp. 256-257.

<sup>23</sup> [1993] 96 Cr App R 133



longer the delay the stronger the evidence that the accused regained her self-control. A time lapse will not, however, as a matter of law, exclude the defence of provocation.<sup>24</sup> Numerous commentators have viewed the Court of Appeal's categorisation as a judicial acceptance of slow burn anger and thus advantageous to the plight of battered women who kill.<sup>25</sup> Nevertheless, one must remember that in *Ahluwalia*<sup>26</sup> the conviction for manslaughter was eventually decided on the basis of diminished responsibility, and the Court of Appeal in *R v Thornton*<sup>27</sup> reiterated that the loss of control must be sudden and temporary. Categorising a time lapse as evidentiary, rather than a legal rule, is only one small step towards accepting a female slow burn anger reaction to provocation. Battered women still contend with the discrimination which is inherent in a male formulation and application of the law.<sup>28</sup>

The perceived injustice of excluding a slow burn anger is further exacerbated when one recognises that battered women have usually endured years of physical abuse. This may lead to a continual build up of anger/emotion which is finally lost on a 'last straw' basis. A killing in these circumstances relates to the notion of cumulative provocation, which is defined by Waik to involve:

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<sup>24</sup> see Edwards S "Battered Women - In Fear of Luc's Shadow" p. 90

<sup>25</sup> Nicolson D and Sanghvi R "Battered Women and Provocation: The Implications of Ahluwalia" p. 731; Yeo S H M "The Role of Provocation in the Law of Provocation" *Anglo-American Law Review* (1997), 431-460 p. 437

<sup>26</sup> [1993] 96 Cr App R 133

<sup>27</sup> [1992] 1 All ER 306

<sup>28</sup> see Horder J *Responsibility and Provocation* and Horder J "Provocation and Loss of Self Control" *LQR* 108 (1992) 191-193 for the argument that the Court of Appeal's insistence of retaining the suddenness requirement has no legal basis.

“...a course of cruel or violent conduct by the deceased, often in a violent setting, lasting over a substantial period of time, which cumulates in the victim of that conduct...intentionally killing the tormentor.”<sup>29</sup>

The House of Lords initially considered evidence of cumulative violence to be irrelevant to a plea of provocation. Devlin J stated ‘...the further removed an incident is from the crime the less it counts.’<sup>30</sup> The question of self control would therefore be judged solely in relation to the provoker’s final act. Hence, if a battered woman finally lost control and killed in response to a relatively trivial act, after years of constant provocation, a murder conviction is invariably likely to follow, although it could still be open for the jury to find provocation. Furthermore, a long-standing history of abuse was held to connote circumstances of revenge killing. Thus in the case of *R v Ibrams*<sup>31</sup> the Court of Appeal concurred with the trial judge in holding that a killing committed 5 days after the provocative act was not a case of provocation, despite the years of abuse she had suffered. Instead, it was held that the circumstances denoted a revenge killing. This narrow time frame adopted by the law has received substantial criticism. Wasik argues:

“It seems unrealistic and unfair to impose a heavier sentence on a defendant who has struggled, perhaps for years, to cope with a bullying and tyrannical husband or father, and who has one day snapped under objectively trivial or no immediate provocation than on one who has reacted spontaneously to strong provocation received on an isolated occasion. The former is certainly not more obviously blameworthy than the latter.”<sup>32</sup>

For a while the judiciary appeared to be undecided as to whether cumulative provocation should offer mitigation or connote a revenge killing.<sup>33</sup> This confusion

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<sup>29</sup> Wasik M “Cumulative Provocation and Domestic Killing” *Crim LR* (1982) 29-37 p. 29

<sup>30</sup> *R v Duffy* [1949] 1 All ER 932

<sup>31</sup> [1982] 74 Cr App R 154

<sup>32</sup> Wasik M “Cumulative Provocation and Domestic Killing” p. 36

<sup>33</sup> *Ibid.*

has, however, now been resolved. The Court of Appeal in *R v Humphreys*<sup>34</sup> held that the whole history of provocative conduct between the accused and her victim was relevant to the question of self control. Furthermore, to enable a jury to fully comprehend the importance of long term abuse, it was stated that a trial judge should deliver an in-depth analysis of the past incidents.<sup>35</sup> The relevance of cumulative provocation was also emphasised by the Privy Council in *Luc Thiet Thuan v R.*<sup>36</sup>

Lord Goff stated:

“...it may be open to a defendant to establish provocation in circumstances in which the act of the deceased, though relatively unprovocative if taken in isolation, was the last of a series of acts which finally provoked the loss of self-control by the defendant and so precipitated his extreme reaction which led to the death of the deceased.”<sup>37</sup>

Despite these auspicious developments, battered women still struggle to fulfil the requirement of a sudden and temporary loss of self-control. As O’Donovan observes,

“[t]he very nature of prolonged violence, the apparent initial tolerance by the victim, and her failure to respond violently immediately is contrary to the ‘heat of the moment’ quality which is required by the current definition of provocation.”<sup>38</sup>

### **Recognition of fear?**

Although fear is generally considered to be the emotion connected to self-defence there has been some judicial acceptance that it may also be the emotion underlying a provoked killing. The Australian High Court has stated:

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<sup>34</sup> [1995] 4 All ER 1008

<sup>35</sup> see Nicolson D and Sanghvi R “More Justice for Battered Women” *NLJ* (1995) 146, 1122-1124

<sup>36</sup> [1996] 2 All E R 1033

<sup>37</sup> *Ibid.*, p. 1047

<sup>38</sup> O’Donovan K “Defences for Battered Women Who Kill” p. 223

“No doubt it is true to say that primarily anger is a feature of provocation and fear a feature of self-defence. But it is too much to say that fear caused by an act of provocation cannot give rise to a defence of provocation.”<sup>39</sup>

As Yeo notes, in order to recognise and accept the social reality of battered women, it is vital that the law also recognises fear as an underlying emotion,<sup>40</sup> a step which has recently occurred within this jurisdiction. Lord Hoffman in the House of Lords case of *R v Smith*<sup>41</sup> stated that in cases involving battered woman ‘...the law now recognises that the emotions which may cause loss of self-control are not confined to anger but may include fear and despair.’<sup>42</sup> Tarrant, however, questions the advantage which this approach may confer on battered women. If the fear is based on reasonable grounds, then this should lead to an outright acquittal on the basis on self-defence, which recognises that the defendant’s actions were justified, rather than merely excused. If, however, the fear is unreasonable, provocation, constructed in this manner appears to imitate the defence of excessive self-defence. Although such an extension is undoubtedly beneficial for battered women, Tarrant expresses concern that it may ‘...appropriate...evidence of fear which would otherwise found a claim of self defence’.<sup>43</sup> Hence, if a battered women kills in fear the courts may readily apply the defence of provocation, as opposed to self defence, thus convicting her of manslaughter in circumstances which an acquittal may be appropriate.

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<sup>39</sup> *Van den Heek v R* (1986) 161 CLR 158 at 167; cited in Yeo S H M “The Role of Gender in the Law of Provocation” p. 437 see also Tarrant S “Something is Pushing Them to the Side of their Own Lives: A Feminist Critique of Law and Laws” *U.W.A.L Rev* (1990) 20, 573-606 p. 595

<sup>40</sup> Yeo S H M “The Role of Provocation in the Law of Provocation” p. 438

<sup>41</sup> [2000] 3 W.L.R 654

<sup>42</sup> *Ibid.*, p. 673

<sup>43</sup> Tarrant S “Something is Pushing Them to the Side of their Own Lives: A Feminist Critique of Law and Laws” p. 596

Overall, as Baker maintains, the restricted nature of the suddenness requirement fails to comprehend the disparate range of domestic abuse homicides, specifically those in which the homicide appears to be a reasonable choice, being a response to an intolerable, inescapable situation. In this situation, it is argued that her actions should be partially excused, not due to the loss of self-control, but to the practical impossibility of remaining within the law, i.e. not killing.<sup>44</sup> Such an approach may be supported by adopting a different theoretical basis. Highlighting the inadequacy of the human frailty rationale, Greene argues that society places particular categories of people in provocative situations, and thus full blame should not be attached when they kill as society should also shoulder some of the blame. Hence:

“[v]ictims of domestic violence...suffer directly at the hands of their abusers. Indirectly, however, battered women and children are victimised by widespread societal acceptance of wife and child beating coupled with the failure of the legal system to effectively intervene on their behalf. Society therefore ought not be heard to condemn completely the battered wife or child who is provoked to kill is or her abuser.”<sup>45</sup>

Whereas it is important for the law to recognise such mitigating circumstances, perhaps the situation would be better reflected by allowing duress of circumstances<sup>46</sup> to be a partial defence to murder.

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<sup>44</sup> Baker B M “Provocation as a Defence for Abused Women who Kill?” *The Canadian Journal of Law and Jurisprudence* (1998) XI, 193-211

<sup>45</sup> Greene J “A Provocation Defence for Battered Women Who Kill?” p. 146

<sup>46</sup> The defence of duress can be described as an excusatory defence which recognises that the will of the defendant was overborne either due to the threats of a third party, or because of the surrounding circumstances. See for example *R v Hudson and Taylor* [1971] 2 QB 202 and *R v Martin* [1989] 1 All ER 65. This defence will be considered in the conclusion.

## Objective loss of self control

The objective strand of the provocation defence, the reasonable person standard, evaluates the conduct of the accused and requires a level of self control which is considered reasonable. This issue was recently considered by the House of Lords in the case of *Smith*,<sup>47</sup> a decision which appears to have significantly reduced, if not completely eroded, the standard of a reasonable person.

In order to present a successful plea of provocation, it must be shown that a reasonable person would have reacted in a manner similar to the defendant. The reasonable person test received a strict interpretation by the House of Lord in *R v Bedder*.<sup>48</sup> Their Lordships refused to acknowledge the unusual individual physical characteristic (impotency) of the accused when considering the effect of the provocation on a reasonable person, despite it being relevant to the provocative conduct in question.<sup>49</sup> This arguably harsh approach was modified by the House of Lords in *DPP v Camplin*<sup>50</sup> in which it was held that certain characteristics of the accused may be attributed to the reasonable person. To quote Lord Diplock:

“The reasonable man...is a person having the power and control to be expected of an ordinary person of the same sex and age of the accused, but in other

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<sup>47</sup> [2000] 3 WLR 654

<sup>48</sup> [1954] 2 All ER 801

<sup>49</sup> The defendant in this case was impotent and killed a prostate after she had made fun of his infliction. When applying the reasonable person test the House of Lords considered whether a reasonable man, who was not impotent, would have lost self control and killed in these circumstances.

<sup>50</sup> [1978] 2 All ER 168 In this case the defendant was a 15 year old boy who killed the victim by hitting him over the head with a chapatti pan after being sexually assaulted by him. The House of Lords held that his age should amount to a relevant characteristic when assessing whether a reasonable person would have reacted a similar manner.

respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that question is not merely whether such a person would in like circumstance be provoked to lose his self control but also whether he would react to the provocation as the accused did."<sup>51</sup>

As with the law of self-defence, this objective standard has brought countless problems for battered women who kill their abusers. As Taylor comments, standards of reasonableness within the law have been developed solely in relation to the 'ideal' man. Indeed, it is noted that '[t]here is not a single common-law reference to a reasonable woman'<sup>52</sup> which is considered by Taylor to be unremarkable due to the legal status of the woman in the nineteenth century, who were, once married, 'legally dead and subject to government by her husband'.<sup>53</sup> Criminal law has generally required women to conform to the standard of a reasonable man, as opposed to the reasonable woman. Indeed, some commentators have argued that the term 'reasonable woman' is an oxymoron: 'as to what might be involved in the law of the reasonable woman, we follow precedent and venture no opinion....leaving open the question of whether conjoining 'reasonable' and 'woman' creates a contradiction in terms.'<sup>54</sup> Thus such an approach can be seen to be based on a construction of women as emotional and tied to their bodies, unable to achieve those characteristics which are generally associated with males: transcendence, rationality and reasonableness. Hence, it is only male characteristics which are deemed to be reasonable. However, the lack of reference to the 'reasonable woman' can also be explained via the

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<sup>51</sup> Ibid. p. 175

<sup>52</sup> Taylor L J "Provoked Reason in Men and Women; heat of Passion Manslaughter and Imperfect Self Defence" p. 1690

<sup>53</sup> Ibid.

<sup>54</sup> Weber J K "Some Provoking Aspects of Voluntary Manslaughter Law" (1981) 10 *Anglo American LR* 159-179 p. 175

convention of using masculine nouns and pronouns, a convention which has only recently changed.

It is through the application of the reasonable man standard that the law 'others' women. The phrase 'reasonable man' or 'reasonable person' purports to be a standard which is applicable to both men and women. A problem, however, arises when the standard is not gender neutral, but is based on men's understandings of reasonableness and reflects masculine characteristics and behaviour. By presenting male behaviour and responses as the universal standard, an injustice in the form of cultural imperialism is committed. Man forms the 'norm', the standard in society, and woman are outside this, hence her own experience is excluded. Hence women's standpoint and experiences, are disregarded and this includes the battered woman's experience of violence and abuse suffered at the hands of her partner. Moreover, it is argued by Young that the legal interpretation and application of this standard actually legitimises the battering of women<sup>55</sup> and hence injustice in the form of violence also committed. It is, however, argued by some that the presence of two different standards of self control - one for men and one for women - infringes the principle of equality. In order for men and women to be treated equally, their actions should be judged against one standard - the reasonable person standard.<sup>56</sup> This argument, however, loses weight when it is realised that the reasonable person is actually the reasonable man and requiring women to comply to such a standard does not confer equal treatment before the law.

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<sup>55</sup> Young A "Conjugal Homicide and Legal Violence: A Comparative Analysis" p. 780

<sup>56</sup> Yeo S H M "The Role of Gender in the Law of Provocation" pp. 448-449



The House of Lords in *Camplin*<sup>57</sup> recognised that the gender and age of the accused is relevant to the level of self control expected, thus the action of a woman who kills her abuser will be judged against the objective standard of a reasonable woman. To some extent this is considered to be progressive and beneficial to women, as it goes some way to enabling their perceptions to emanate.<sup>58</sup> Nevertheless, the opinions of some commentators indicate how a 'reasonable woman' standard may actually be interpreted in a discriminatory manner. Williams<sup>59</sup> argues that the sex of the defendant in relation to the expected self control should be irrelevant, as it may lead to unjust results. This argument is based on the consideration that women possess a higher control level, due to the oestrogen in their blood as opposed to androgen. He states that the proposition that sex should be relevant '...would operate to the disadvantage of the gentle sex.'<sup>60</sup> Such an opinion perpetuates stereotypes of women as passive, links gender inextricably to biology and reinforces the view that women are able to endure male violence and thus any violent reaction is inexcusable, and unfeminine.<sup>61</sup> It therefore constructs those women who do kill as 'aberrational and evil monsters or excessively pathological.'<sup>62</sup> Hence, whilst it is important for a 'reasonable woman standard' to emerge, enabling the female experience to enter the

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<sup>57</sup> [1978] 2 All ER 168

<sup>58</sup> O'Donovan K "Defences for Battered Women who Kill" p. 226

<sup>59</sup> Williams G "Textbook of Criminal Law" [Stevens; London; 2 ed 1983] p. 539

<sup>60</sup> Ibid.

<sup>61</sup> Such a biological essentialist view, which basis women's identity and characteristic in her biology, has been subject to much criticism. See chapter 2 see also Kaplan G T and Rogers L J "The Definition of Male and Female, Biological Reductionism and the Sanction or Normality" in Gunew S *Feminist Knowledge, Critique and Construct* pp. 205-228

<sup>62</sup> Yeo S H M "The Role of Gender in the Law of Provocation" pp. 450-451

legal arena, care must be taken to ensure that the women's perspective is not formulated by such patriarchal stereotypes, as this involves the injustice of cultural imperialism. Women are defined from the outside and they have no control or say in their identity.

In addition to sharing the same sex and age as the defendant, Lord Diplock in *Camplin*<sup>63</sup> also stated that the reasonable person may possess those characteristics of the defendant which affect the gravity of the provocation. Such traits will not, however, affect the level of self-control the accused is expected to maintain. This distinction, however, has now been abolished by the case of *Smith*.<sup>64</sup> Hence, characteristics in addition to the age and sex of the accused may also affect the level of self-control society would expect the accused to possess. In the *Smith*<sup>65</sup> case, it was recognised that the accused's depression could be taken into account when assessing the level of self-control, although it was not in any particular way connected to the provocation. The impact of *Smith*<sup>66</sup> and the issue of whether the battered woman syndrome amounts to a relevant characteristic will be analysed in chapter 5.

### **Provocation - a suitable defence for battered women?**

Whilst an examination of the legal requirements of provocation highlight how the defence excludes the battered woman's experience, can also be questioned whether provocation is actually an appropriate defence for battered women. This issue is

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<sup>63</sup> [1978] 2 All ER 168

<sup>64</sup> [2000] 3 WLR 654

<sup>65</sup> Ibid.

<sup>66</sup> Ibid.

analysed by Baker<sup>67</sup> in reference to the Canadian jurisdiction. One important aspect in this jurisdiction is the apparent applicability of self defence for women who kill their abusers, following the landmark decision of *Lavallee v The Queen*.<sup>68</sup> Baker argues that self-defence is not, by itself, sufficient to provide justice for battered women. Firstly, as opposed to self-defence, which is justificatory, provocation is a partial excuse, thus allowing a defence for murder in those cases in which a complete justification is not considered appropriate. Secondly, the circumstances in which domestic abuse homicides are committed are not homogeneous, but diverse, thus highlighting the need for excusatory as well as justificatory defences. Thirdly, it is noted that provocation focuses on a different time frame. Whereas self-defence is concerned with a an impending attack, provocation is centred upon the actions committed after an attack has taken place. Although this latter point would certainly be applicable in the English jurisdiction, its relevancy to Canada is disputable in light of the *Lavallee*<sup>69</sup> case, in which the fatal action took place after a violent assault, when the batterer was walking away.<sup>70</sup> Baker also argues that opening the provocation defence to battered women recognises that they may also kill in anger, in addition to fear. She suggests that many women do kill in anger, however this is generally not acknowledged due to the social and cultural constructions of gender, which present women as passive. Thus the law of provocation should be interpreted to include the typical form of female slow burn anger.<sup>71</sup>

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<sup>67</sup> Baker B M “Provocation as a Defence for Abused Women who Kill”

<sup>68</sup> [1990] 1 S.C.R. 852, 55 C.C (3d) 97

<sup>69</sup> [1990] 1 SCR 852

<sup>70</sup> Baker B M “Provocation as a Defence for Abused Women who Kill” p. 195

<sup>71</sup> Ibid. pp. 196-198

Sheehy, Stubbs and Tolmie present a number of cogent arguments against using the defence of provocation.<sup>72</sup> One of the main concerns is that the courts may automatically assume that provocation as opposed to self-defence is the most appropriate defence, a situation which Tolmie<sup>73</sup> illustrates has occurred in Australia. Such an assumption prevents the case of the battered woman being evaluated in the context of self defence, and fails to distinguish a homicide which is committed in order to protect the woman and perhaps her children, from those which are generally dealt with under the law of provocation, such as sexual jealousy. Provocation labels the actions of the battered woman as 'unreasonable and extraordinary', thus suggesting that the woman's perception that she was trapped within a life threatening situation within her home and unable to obtain adequate legal protection, was an irrational, emotional over-reaction. Furthermore, those who do not act in such an emotional manner may have difficulties explaining their behaviour.<sup>74</sup>

Tolmie argues that the law of provocation allows the experiences of women as victims of domestic abuse to be recognised, but in a manner which denies them complete validation. Their actions are constructed as 'irrational but excusable individual responses to individual problems' as opposed to 'legitimate responses to circumstances that reflect deeper structural problems which women, as a gender, face

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<sup>72</sup> Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: the Battered Woman Syndrome and its Limitations" *Crim Law J* (1992) 16, 369-394 pp. 378-379

<sup>73</sup> Tolmie J "Provocation or Self Defence For Battered Women Who Kill" in Yeo S H M *Partial Excuses to Murder* [Federation Press; Australia; 1991] 61-79

<sup>74</sup> Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: the Battered Woman Syndrome and its Limitations"

within society.’<sup>75</sup> The defence suggests that her response to the domestic violence, as opposed to the actual violence suffered, is a departure from ‘normal existence’, and thus fails to address the problem of domestic abuse.<sup>76</sup> Labelling the homicide as provoked is considered to maintain the public/private distinction which places the family within the private sphere, free from state intervention, and the ideology of the family as a loving, caring, institution. Provocation suggests that the homicide involved ‘private passions and emotions running wildly out of control,’ as opposed to recognising that ‘women may be trapped and justified in fighting for their lives within their most intimate relationship.’<sup>77</sup> It is also argued that the preference given to physical abuse over emotional abuse by the defence undermines the claims of provocation by those women who have suffered psychological abuse. This argument, however, could also be presented against self-defence.<sup>78</sup>

Nevertheless, provocation as a defence still remains useful for the plight of battered women. As Baker argued, not all cases of domestic abuse homicide are the same, and thus it is important for women to a range of defences available to them. Justice for battered women should not be linked to one defence. What is required is justice for all women, which requires the law to accommodate the different experiences of women in all areas, not just in one defence.

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<sup>75</sup> Tolmie J “Provocation or Self Defence For Battered Women Who Kill” p. 66

<sup>76</sup> Tarrant S “Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws” p. 573

<sup>77</sup> Tolmie J “Provocation or Self-Defence for Battered Women who Kill” p. 67

<sup>78</sup> Sheehy E A, Stubbs J and Tolmie J “Defending the Battered Woman on Trial: the Battered Woman Syndrome and its Limitations”

## Diminished Responsibility

Another possible defence for battered women is diminished responsibility which, similar to provocation, is a partial defence, thus leading to a conviction for manslaughter. The defence is contained within section 2 of the Homicide Act 1957, which states:

“(1) Where a person kills or is party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his actions and omissions in doing or being party to the killing.”

Lord Parker CJ in *R v Byrne*<sup>79</sup> defined ‘abnormality of mind’ as:

“... a state of mind so different from that of ordinary human beings that the reasonable man would define it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.”<sup>80</sup>

It has been said that whereas provocation is a defence for ‘normal’ people, diminished responsibility provides a defence for ‘abnormal people’.<sup>81</sup> Indeed Williams stated:

“Provocation is traditionally a defence for ‘normal’ people. Abnormal people can shelter under it, but only on the same conditions as apply to normal ones. If they want their abnormality to be taken into account they must raise a defence appropriate to them – insanity or diminished responsibility.”<sup>82</sup>

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<sup>79</sup> [1960] 2 QB 396

<sup>80</sup> *Ibid.*, p. 403

<sup>81</sup> Mousourakis M *Criminal Responsibility and Partial Excuses* [Ashgate Publishing Ltd; Hants; 1998] p. 163

<sup>82</sup> Williams G *Textbook of Criminal Law* p. 544

However, it can now be seen that this distinction between ‘normal’ and ‘abnormal’ has been somewhat reduced due to the House of Lord’s decision in the case of *Smith*,<sup>83</sup> which is considered in further detail in chapter 5.

As required by section 2, this abnormality of mind has to substantially impair the defendant’s mental responsibility, and although medical evidence may be called upon, whether or not the defendant’s responsibility is substantially impaired is ultimately a question of degree to be decided by the jury. Lord Parker CJ in *Byrne*<sup>84</sup> stated:

“[m]edical evidence is, of course, relevant, but the question involved a decision not merely as to whether there was some impairment of the mental responsibility of the accused but whether such impairment can properly be called ‘substantial’, a matter upon which juries may quite legitimately differ from doctors.”<sup>85</sup>

The role of the jury in deciding whether or not the defendant has a substantially impaired responsibility as led some to argue that the success of the defence depends upon the sympathies of the jury.<sup>86</sup> As argued by Williams: ‘...the defence is interpreted in accordance with the morality of the case rather than as an application of psychiatric concepts. Where sympathy is evoked...it seems to be dissolving into what is virtually the equivalent of a mitigating circumstance.’<sup>87</sup> Thus a successful defence depends less upon the influence of the medical or psychiatric evidence and more upon the perceived worthiness of the defendant.

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<sup>83</sup> [2000] 3 WLR 654

<sup>84</sup> [1960] 2 QB 396

<sup>85</sup> Ibid. p. 406

<sup>86</sup> Mousourakis M *Criminal Responsibility and Partial Excuses* p. 170

<sup>87</sup> Williams G *Textbook of Criminal Law* p. 693 see Mousourakis M *Criminal Responsibility and Partial Excuses* p.170

Diminished responsibility has frequently been successful in cases involving cumulative provocation,<sup>88</sup> thus indicating that such women are looked upon in a sympathetic light. In contrast to the both provocation and self-defence, however, much less ink has been spilt on the defence of diminished responsibility. This is arguably due to two reasons, firstly, the law seems to have little difficulty in incorporating the battered woman who kills into the requirements of the defence, unlike provocation and self defence. As McColgan states '[I]n 1996 and 1997 women indicted for homicide were about twice as likely as men to be convicted of section 2 manslaughter.'<sup>89</sup> Secondly, the majority of commentators are in agreement that the defence is inappropriate for battered women. Such arguments are presented by O'Donovan<sup>90</sup> who states that, firstly, the defence focuses on the mental state of the battered woman as opposed to the violence she suffered. Thus, as opposed to arguing that she is responsible for actions, but justified in taken such a course of conduct, due to the actions of the deceased, she is presented as suffering from an abnormality of mind. Rather than placing the blame on the deceased, '[h]er personality, characteristics, and problems are on trial.'<sup>91</sup> Secondly, diminished responsibility labels the battered woman as crazy and incapable, which perpetuates stereotypes of women as irrational, sick or mad. It is also suggested that, unless such attitudes change, violence against women will persist.<sup>92</sup> Furthermore, if too much stress is placed on the mental abnormality there is a possibility that she may receive an

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<sup>88</sup> O'Donovan K "Defences for Battered Women Who Kill" p. 229

<sup>89</sup> McColgan A *General Defences* p. 140

<sup>90</sup> O'Donovan K "Defences for Battered Women Who Kill" p. 229-230

<sup>91</sup> Ibid. p. 230

<sup>92</sup> Wannop A L "Battered Woman Syndrome and the Defence of Battered Women in Canada and England" p. 270



inappropriate sentence, for example one that focuses upon psychiatric treatment, as opposed to a sentence which is concerned with punishment. Thirdly, the defence fails to further the plight for battered women as a group.<sup>93</sup> In order for the law to change and recognise the experiences of women and the danger they face within the home, the requirements of other defences must be challenged.

### **Self-Defence**

The final defence which may apply to battered women who kill is self defence. In contrast to provocation and diminished responsibility, it is a full defence, hence a successful plea will lead to an outright acquittal, as opposed to a conviction for manslaughter. Another important aspect of this defence is that it is justificatory. The actions of the battered woman are justified, she is not considered to have committed an unlawful act. This may be distinguished from diminished responsibility, and, to a degree, provocation, which are excusatory defences. Under an excusatory defence the act is still considered unlawful, however the actor is not considered to be entirely or fully responsible for their action, due to their mental instability.

Self defence developed as a common law defence, and, on a basic level, allows the defendant to use a level of defensive force which is considered reasonable and necessary. To quote Lord Morris in *Palmer v The Queen*:<sup>94</sup>

“It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do what is reasonably necessary.”<sup>95</sup>

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<sup>93</sup> O'Donovan K “Defences for Battered Women Who Kill” pp. 229-230

<sup>94</sup> [1971] AC 814 Privy Council

<sup>95</sup> *Ibid.*, p. 831

The doctrine balances two different interests: society's interest in upholding the sanctity of human life, and the societal and individual interest in a right to protection. Hence, the law justifies only those killings which are necessary to avoid serious bodily harm or death.<sup>96</sup> As with provocation, the male based development of this defence has tended to exclude the female experience and reaction.<sup>97</sup> Indeed, Gilliespie's examination of self defence law in America illustrates that from the early 1200s to the beginning of the Twentieth Century only three American appeal cases dealing with self defence involved female defendants.<sup>98</sup>

The requirements of self-defence differ slightly from jurisdiction to jurisdiction, but the stipulation that the defensive force must be necessary has generally led to the establishment of four principles: imminency; genuine (and in some jurisdictions, a reasonable) belief in serious harm; proportionality or reasonable force; and, in some jurisdictions, a duty to retreat. These requirements are considered to exclude evidence which is vital to a battered woman's self defence case, and to deny them equal protection under the law.<sup>99</sup>

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<sup>96</sup> Castel J "Discerning Justice for Battered Women Who Kill" *Toronto Faculty of Law Rev* (1990) 48, 229-258 p. 235; Seuffert N "Battered Women and Self Defence" *New Zealand University Law Rev* (1997) 19, 292-328 p. 298.

<sup>97</sup> Gillespie C K *Justifiable Homicide* [Ohio State University Press, Columbus, 1989] pp. 31-49

<sup>98</sup> *Ibid.*, pp. 48-49

<sup>99</sup> Schneider E "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense" pp. 636-638

## Imminency

This element permits defensive action to be taken against an ensuing attack, and also permits pre-emptive strikes. To quote Lord Griffiths in *Beckford v R*<sup>100</sup> ‘...a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike.’<sup>101</sup> In order to be justifiable, the pre-emptive strike must be in response to some imminent danger. Thus, the requirement of imminence focuses solely on those moments preceding the killing.<sup>102</sup> A killing will not be justified if it is committed after the attack has occurred, as this is considered to be an act of revenge, as opposed to self defence. Nor is it justified if it is committed in response to a threat of some distant future harm.<sup>103</sup> Such an approach embodies the construction of the appropriate masculine behaviour as brave, courageous and assertive, and thus it may be seen as ‘a guide to manly behaviour in dangerous circumstances.’<sup>104</sup> As Gillespie asserts:

“A real man, a brave man, faces his adversary in a fair fight. He does not sneakily lie in a bush or shoot an enemy in the back or kill him while he is asleep. He does not panic and kill someone who is just blustering and making threats....These are the acts of cowards and villains.”<sup>105</sup>

Through her examination of the development of self-defence, Gillespie notes how this requirement of imminence applies to situations in which men have historically found themselves: one time encounters involving disputes between neighbours, fights

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<sup>100</sup> [1988] AC 130

<sup>101</sup> Ibid., p. 144

<sup>102</sup> Castel J “Discerning Justice for Battered Women Who Kill” p. 237

<sup>103</sup> Gillespie C K *Justifiable Homicide* p. 67; Schneider “Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense” p. 634

<sup>104</sup> Gillespie C K *Justifiable Homicide* p. 67

<sup>105</sup> Ibid.

involving bullies and strangers and arguments over women.<sup>106</sup> In such situations, the requirement that the attack must be either in process or imminent and inevitable is understandable, as it prevents defensive action taking place before there is any real threat of harm. This explanation of the imminence requirement is also expressed by Court in the Canadian case of *Lavallee*:<sup>107</sup>

“The sense in which “imminent” is used conjures up the image of an “uplifted knife” or a pointed gun. . . . If there was a significant time interval between the original unlawful assault and the accused’s response, one tends to suspect that the accused was motivated by revenge rather than self-defence. In the paradigmatic case of a one-time barroom brawl between two men of equal size and strength, this inference makes sense . . . one can always take the opportunity to flee or call for the police.”<sup>108</sup>

The situation with battered women is, however, completely different and cannot be conceived of in terms of the one time encounter. The battered woman becomes trapped inside an abusive relationship, living under a constant threat of the next beating, not knowing when this may take place and whether this time it may lead to her death. Hence, even during those times when she is not actually being physically assaulted, she is living in fear of her life,<sup>109</sup> and thus it is suggested that a battered woman lives with a constant imminent threat of serious harm or death.<sup>110</sup> Furthermore, verbal threats of future violence by someone who has inflicted abuse and carried out previous threats are not comparable to those delivered by a stranger.

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<sup>106</sup> Ibid., see also Castel J “Discerning Justice for Battered Women Who Kill” p. 237

<sup>107</sup> [1990] 1 SCR 852

<sup>108</sup> Ibid., p. 879; see also Seuffert N “Battered Women and Self-Defence” p. 300

<sup>109</sup> Tolmie J “Provocation or Self-Defensive for Battered Women Who Kill” p. 68

<sup>110</sup> Gillespie C K *Justifiable Homicide* p. 58; Willoughby M J “Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?” *The Uni of Kansas L Rev* (1989) 38, 169-192 p. 182

As Gillespie illustrates, 'mere' threats have regularly preceded a wife's death at the hands of her husband.<sup>111</sup>

Nevertheless, if a battered woman kills her abuser in anticipation of a future attack, knowing this to be inevitable, but not necessarily imminent, self-defence will be precluded. As King CJ commented in *The Queen v R*,<sup>112</sup> if a battered woman, after many years of abuse, killed her partner, believing this to be the only way in which she could protect herself and her children from future harm, self-defence would not be applicable, as other methods of protection which are lawful and peaceful must be adopted: '[t]he law of a well-ordered and civilised society cannot countenance ... killing as a means of averting some apprehended harm in the future.'<sup>113</sup> Such an approach, however, assumes that other means of protection are realistically available to battered women, and that she has the psychological and economic ability to leave the relationship; an assumption which is questioned by many commentators.<sup>114</sup> Furthermore, it is suggested that this supposition imposes on battered women a duty

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<sup>111</sup> Gillespie C K *Justifiable Homicide* p. 68; Castel J R "Discerning Justice for Battered Women Who Kill" pp. 240-241 see also Willoughby M J "Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?" pp. 184-185

<sup>112</sup> (1987) 71 ALR 641

<sup>113</sup> *Ibid.*, see also See Tolmie J "Provocation of Self-Defense for Battered Women Who Kill" p. 68; Castel J R "Discerning Justice for Battered Women Who Kill" p. 238

<sup>114</sup> Tolmie J "Provocation or Self-Defence for Battered Women Who Kill" pp. 68-69; Castel J "Discerning Justice for Battered Women Who Kill" pp. 237-240; Willoughby M J "Rendering Each Woman Her Due: Can a Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?" pp. 185-187; See the following chapter on the Battered Woman Syndrome, which also notes the ineffectual response of society, police and judiciary in providing battered women with adequate protection.

to retreat, in the absence of considering whether it would be reasonable to retreat in each individual case.<sup>115</sup>

A minority of battered women kill under non-confrontational circumstances,<sup>116</sup> for example when the abuser is asleep, as in the case of *Ahluwalia*.<sup>117</sup> This could be considered to be a fairly unsurprising situation considering the possible escalation of violence which is likely to occur if she attempts to physically defend herself during an attack.<sup>118</sup> The Kansas Supreme Court in *State v Stewart*<sup>119</sup> ruled that, by law, a battered woman who killed her abuser whilst he was sleeping was not entitled to a self-defence instruction: ‘...when a battered woman kills her sleeping spouse when there is no imminent danger, the killing is not reasonably necessary and a self-defense instruction may not be given.’<sup>120</sup> Thus, in such circumstances, the imminence requirement provides an insurmountable obstacle.

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<sup>115</sup> Tolmie J “Provocation or Self-Defence for Battered Women Who Kill” p.69

<sup>116</sup> See Nourse V J “Self-Defense and Subjectivity” *U. Chi. L. Rev* (2001) 68, 1235. Nourse, in her survey of 20 years of American case law estimates that cases in which battered women killed in a non-confrontation situation amounts to under 10% of the cases considered. Three quarters of battered women killed in a confrontational situation.

<sup>117</sup> [1993] 96 Cr App R 133

<sup>118</sup> Castel J “Discerning Justice for Battered Women Who Kill” p. 240; Schneider E “Equal Rights to Rights for Women: Sex Bias in the Law of Self-Defense” p. 634; Sheehy E.A, Stubbs J and Tolmie J “Defending the Battered Woman on Trial: The Battered Woman Syndrome and its Limitations” p. 372

<sup>119</sup> 243 Kan. 639, 763 P.2d 572 (1988) see Willoughby M J “Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defense When She Kills Her Sleeping Batterer?”

<sup>120</sup> 243 Kan at 649, 763 P 2.d at 579, see Willoughby M J “Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?” pp. 176-177

Furthermore, the requirement also poses difficulties for those battered women who kill during an actual confrontation, as it focuses on a very narrow time-frame of events. Only those actions of the deceased committed immediately before the killing occurred will be considered. Hence previous acts of violence are considered to be separate, isolated events. Evidence of the deceased's previous on-going abuse towards the accused may, however, be crucial to explaining why she perceived the threatened harm to be serious or life threatening,<sup>121</sup> as Schneider explains:

“Subtle motions or threats that might not signify danger to an outsider or to the trier of fact acquire added meaning for a battered woman whose survival depends on an intimate knowledge of her assailant.”<sup>122</sup>

Conversely, such evidence may also be perilous. The courts may view previous violence as a motivation for a revenge killing, as opposed to a killing committed in fear of her life, and consider that the homicide was unreasonable as she had survived the previous beatings.<sup>123</sup>

The restrictions established by the requirement of imminency are stated to ‘...represent the most profound instance of the exclusion of women's experience.’<sup>124</sup> Tarrant explains that by concentrating on those events which immediately precede attack, the killing is thus seen to be committed ‘in response to an extraordinary eruption in normal existence,’ and thus adheres to the image of the one-off

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<sup>121</sup> Tolmie J “Provocation or Self-Defence for Battered Women Who Kill” p. 69 Castel J R “Discerning Justice for Battered Women Who Kill” p. 237

<sup>122</sup> Schneider E “Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense” p. 634

<sup>123</sup> Tolmie J “Provocation or Self-Defence for Battered Women Who Kill” pp. 69-70

<sup>124</sup> Tarrant S “Something is Pushing Them to the Side of their Own Lives: A Feminist Critique of Law and Laws” p. 597

confrontation between two strangers.<sup>125</sup> In contrast, battered women are seen to kill in response to their 'ordinary existence.' Their abuse is part of their every day 'normal' life, and this is what they respond to. They are not responding to a one off attack which is a deviation from their every day life. It is this defence against normal existence which the law is unable to comprehend and accommodate, which is emphasised by the narrow focus which imminence requires.

The meaning of imminence is scrutinised by Nourse<sup>126</sup> in her survey of homicide cases spanning twenty years. She argues that the meaning of imminence is much wider than the existence of a time lapse between the threat and the killing. It tends to carry a number of other meanings. 'The case law shows that imminence has many meanings; indeed, imminence often operates as a proxy for any number of other self-defense factors – for example, strength of threat, retreat, proportionality, and aggression.'<sup>127</sup> Hence, even in a case where the killing occurs during a confrontation, the issue of imminence will be raised even though it appears to be irrelevant. One example provided is the case of *State v Hundley*.<sup>128</sup> Hundley, shot and killed her abusive partner after he broke into the hotel room to which she had fled to escape. Once he had brutalized and raped her he proceeded to 'pound[] a beer bottle (a source of injury in the past) on the table and ordered her to get cigarettes.'<sup>129</sup> Feeling threatened, she pointed a gun at him, at which point he laughed and declared 'You are

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<sup>125</sup> Ibid., p. 598

<sup>126</sup> Nourse V J "Self-Defense and Subjectivity"

<sup>127</sup> Ibid., p. 1236

<sup>128</sup> 236 Kan 461 693, P2d 475 (1985)

<sup>129</sup> Ibid., p. 475-176



dead, bitch, now'<sup>130</sup> and reached for the beer bottle. Hundley then pulled the trigger. The issue for the appeal court was whether the trial judge had correctly directed the jury as the requirement of 'immediate harm' as opposed to 'imminent harm'. However, as Nourse argues, imminence was not strictly an issue here, in the sense that there was no time lapse between the threat and the defensive action. The defensive action was carried out during a confrontation. What was really in issue here, Nourse argues, was the severity of the threat and the ability to retreat. However, the trial court constructed this as an issue of imminency.

Other factors which tend to be constructed as 'imminency' issues are: the necessity of the response; the possibility of alternative options; and the defendant's motive and emotions.<sup>131</sup> Although such alternative definitions are not limited to cases involving battered women, Nourse illustrates that this conflation of imminence with other issues, especially the ability to seek alternative courses of action, tends to take place overwhelming in cases dealing with women who kill their abusive partners.<sup>132</sup> This leads Nourse to conclude that cases which actually involve defensive action in a confrontation situation, are not seen as confrontational, due to the many meanings which have been attached to imminency.<sup>133</sup> This indicates that it is not the requirement of imminency per se which is problematic, but the court's construction of imminency. Undoubtedly, such an argument could also be extended to the requirement of a sudden and temporary loss of self-control in provocation.

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<sup>130</sup> Ibid.

<sup>131</sup> Nourse V J "Self-Defense and Subjectivity" p. 1255-1256

<sup>132</sup> Ibid., p. 1262

## Belief in Serious Harm

In order for a plea of self-defence to be successful, the law, in some jurisdictions, requires a reasonable and genuine belief in death or serious harm. However, some jurisdictions, such as England and Wales, adopt a subjective approach and stipulate that the belief need only be genuine, hence viewing the situation from the eyes of the accused, as opposed to the reasonable person. These two tests, however, should not be viewed as distinct and opposite, but rather as a continuum, along which different characteristics of the defendant are situated. Thus it is suggested that the only difference lies ‘...in the extent to which they import the defendant’s particular characteristics in to the definition of “reasonable person.”’<sup>134</sup> The more lenient test, requiring the belief to be merely genuine, has been adopted by the Court of Appeal in *R v Williams (Gladstone)*<sup>135</sup> in which it was held that defensive action may be justified, even if the accused was mistaken as to the circumstances. Moreover, there is no requirement that the mistake be reasonable, providing he genuinely believed that the force was necessary. Hence, a genuine albeit unreasonable mistake in serious harm, will not preclude a plea of self-defence. Thus the subjective nature of self defence in England and Wales provides the opportunity for the law to view the incident from the perspective of the battered woman. As McColgan argues:

“[t]he application of self-defence to many battered women who kill does not involve any alteration or extension of the defence, rather a rethinking of the way in which the requirement that the defendant’s use of force be reasonable is applied to cases other than those involving the traditional model of a one-off adversarial meeting between strangers.”<sup>136</sup>

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<sup>133</sup> Ibid., pp. 1285-1286

<sup>134</sup> Kinports K “Defending Battered Women’s Self-Defense Claims” (1988) 67 *Oregon Law Rev* 393-465 p. 411

<sup>135</sup> [1987] 3 All ER 411

<sup>136</sup> McColgan A “In Defence of Battered Women who Kill” p. 527

However, despite the subjective nature of self defence in English criminal law, very few women who kill their abusive partner are acquitted on the basis of this defence. McColgan argues that the difficulty lies ‘...not with the formal legal rules, but with informal, almost extra-legal, models of self-defence’. She states:

“[t]hese models are constructed in the imagination, owe their contours to ‘common sense’ or traditional paradigms of human behaviour and operate to block real consideration of situations which, although arguably within the legal defences’ contours, do not fit the model.”<sup>137</sup>

The requirement of objective reasonableness in other jurisdictions, however, has caused significant difficulties for battered women. To some extent, a requirement of reasonableness is necessary. As Gillespie notes, it is not expected that the law should justify the unreasonable killing of another person.<sup>138</sup> Difficulties are highlighted, however, when it is realised that the jury are required to judge the reasonableness of the battered woman’s actions in a situation which they have little, if any, understanding or comprehension.<sup>139</sup> Gillespie<sup>140</sup> examines a number of cases in which battered women have entered a plea of self-defence, which has invariably failed, and concludes that it is not an exaggeration to suggest that juries are adverse to finding a homicide committed by a woman reasonable, simply because it was committed by a woman. Furthermore, adhering to an objective standard of reasonableness renders self-defence difficult to apply to a case of domestic violence, as the intimate knowledge the battered woman holds about her abuser is excluded. As

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<sup>137</sup> McColgan A “General Defences” in Nicolson D & Bibbings L *Feminist Perspectives on Criminal Law* p. 154

<sup>138</sup> Gillespie C K *Justifiable Homicide* p. 93

<sup>139</sup> *Ibid.*

<sup>140</sup> *Ibid.*, p. 94

Tolmie notes: '[i]f this knowledge takes the form of an 'intuitive' understanding it may be impossible to articulate reasonable grounds to substantiate it.'<sup>141</sup> An objective standard ignores the insights and experience which the woman holds. It merely questions whether, in relation to present incident, her belief that she was in danger of severe bodily harm or death was reasonable, without recourse to the relationship or history. Nor does it acknowledge that a battered woman may be able to anticipate with some accuracy the extent of the harm although it may not be obvious to the reasonable person.<sup>142</sup> Furthermore, as with provocation, reasonableness is constructed by 'social mores' and relates to the male experience, and hence the standard which the woman is judged against is essentially masculine.<sup>143</sup> Women are not considered to be reasonable beings, indeed, they are constructed to be the antithesis of reasonableness, and thus unable to comply to this 'objective' standard.<sup>144</sup> Hence it is not difficult to envisage that juries may easily conclude that a woman's belief in serious harm or death was unreasonable, especially if this belief is shaped by her previous experiences.

### **Proportionality/Reasonable Force**

The requirement of reasonableness also extends to the amount of force used. In order to illustrate that the homicide was an act of self-defence the amount of force used

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<sup>141</sup> Tolmie J "Provocation or Self-Defence for Battered Women who Kill" p. 72

<sup>142</sup> Ibid., Wannop A L "The Battered Woman Syndrome and the Defence of Battered Women in Canada and England" pp. 264-265; Willoughby M J "Rendering Each Woman Her Due: Can A Battered Woman Claim Self-Defence When She Kills Her Sleeping Batterer?" pp. 182-183

<sup>143</sup> Gillespie C K *Justifiable Homicide* p. 99

<sup>144</sup> Tolmie J "Provocation or Self-Defence for Battered Women who Kill" p. 72; Schneider "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense" pp. 635-636

must be objectively reasonable.<sup>145</sup> Once again, this requirement of reasonableness presents a major hurdle for battered women. A woman has to contend with the myths and misconceptions which a judge and jury may hold and the view that it is never reasonable for a woman to kill her husband. To quote Gillespie:

“A juror who shares the old stereotype of women as irrational, emotional, inherently unreasonable creatures will not be receptive to a woman’s argument that what she did when she took someone’s life was reasonable. A juror who accepts the widespread myths-that battered women are masochists who want to be hurt or nagging shews who drive their long-suffering mates to violence-will not be inclined to find any defense against such “invited” beatings reasonable. ...A juror who believes that acquitting any woman who kills her husband will give all wives a “licence to kill”, and will result in an “open season on men,” will surely not find any such killing reasonable, no matter what the circumstances.”<sup>146</sup>

Unsurprisingly, the level of force considered justifiable is generally that which the reasonable man would have used in the circumstances. Hence, the situation is judged as though it was a fight between two men, and a woman is expected to adopt a masculine reaction. This masculine reaction demands equal retaliation, does not allow the use of a weapon against an unarmed opponent, does not permit one to kill in response to ‘mere’ threats, or wait to catch their opponent unawares.<sup>147</sup> From the picture which is developing about the manner in which a battered woman fights back, it is not difficult to see how her actions are considered to amount to unreasonable force. Even if the reasonable man is transformed into the reasonable person, the difficulties still remain. As Gillespie notes, ‘[f]ighting has always been defined by

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<sup>145</sup> see the cases of *R v Owino* [1995] Crim LR 743 and *R v Clegg* [1995] 1 All ER 334. This point was also recently reaffirmed by the Court of Appeal in the case of *R v Martin* [2002] 1 Cr App R 27. This case will be considered chapter 5 in relation to the application of the battered woman syndrome.

<sup>146</sup> Gillespie C K *Justifiable Homicide* p. 94; see also Tolmie J “Provocation or Self-Defence for Battered Women who Kill” pp. 72-73; Wells C “Domestic Violence and Self-Defence” *NLJ* (1990) 140, 127-128 p. 128

our society as a masculine activity. We automatically tend to impose male rules of behaviour on violent confrontations because those are the only ones we have.’<sup>148</sup> Hence, juries are prone to apply a masculine standard, as this is the only standard they know.

Evolving from this concept of reasonable force, is the requirement that the defensive action is proportional to the harm used or threatened. A notion which clearly has its roots in cases involving opponents of the approximate same size and fighting ability. Indeed in such cases the rule is considered to be intelligent. The situation changes slightly, however, when the fight is between a woman and a man. Is it reasonable for the law to expect a woman to meet her abusive husband fist for fist?<sup>149</sup> Especially when it is considered that women are generally not socialised to fight in such a manner.<sup>150</sup> Compelling women to respond in a style which is contrary to their socialisation effectively precludes self-defence. Furthermore, suggesting that a woman’s behaviour will only be reasonable if it mirrors a male model is considered by some to be absurd.<sup>151</sup> This requirement of equal force raises significant difficulties for battered women who have killed their unarmed abuser with a weapon, as this is seen to be disproportionate, is it, however, unreasonable? Any previous attempts to defend herself unarmed may have lead to increased violence, thus enhancing her

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<sup>147</sup> Gillespie C K *Justifiable Homicide* p. 95

<sup>148</sup> *Ibid.*, p. 100

<sup>149</sup> McColgan A “In Defence of Battered Women Who Kill” p. 520

<sup>150</sup> Gillespie C K *Justifiable Homicide* p. 99; Schneider E “Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense” p. 632

<sup>151</sup> Gillespie C K *Justifiable Homicide* p. 99

opinion that a weapon is necessary for her to properly defend herself, especially if she believes that her husband is capable of killing her with his bare hands.<sup>152</sup>

Another significant difficulty which arises in relation to the requirement of proportional force, is the judiciary's interpretation of what amounts to serious harm. Gillespie's review of battered women's self defence cases in America highlights the judiciary's unwillingness to construct a husband's unarmed attack as sufficiently grievous, despite the serious injuries which have often been inflicted. Gillespie examines the research conducted by Dr Leonre Walker and highlights that many of the severe injuries caused were inflicted without the aid of a weapon:

“The 120 women....were slapped in the face, punched with fists on their faces, heads, and bodies and stomped and kicked after they were knocked to the floor. Their arms were twist and broken, they were thrown across rooms and down stairs, and choked until they passed out. They were hurled against objects and had objects hurled against them. When they raised their arms to defend themselves, their arms and ribs were broken. Although some of the assaults involved knives and dangerous objects, the overwhelming majority of the women's injuries were inflicted by the man's hands, fists, and feet.”<sup>153</sup>

What is made clear by this research is that, despite the absence of a weapon, the level of harm inflicted by the batterer is undoubtedly grave and possibly life threatening. What is even more disturbing is the reluctance of some States in America to categorise rape and severe sexual assault as conduct amounting to serious bodily injury. The Supreme Court of California in 1978 arrived at such a construction in the case of *People v Caudillo*.<sup>154</sup> The victim suffered a severe attack by the defendant

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<sup>152</sup> Schneider E “Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense” p. 632

<sup>153</sup> Gillespie C K *Justifiable Homicide* pp. 51-52

<sup>154</sup> 121 Cal. Rptr. 859 (Cal. 1978) cited in Gillespie C K *Justifiable Homicide* pp. 65-67

who subjected her to vaginal, anal and oral rape. In the opinion of the Supreme Court such conduct did not constitute serious bodily injury.<sup>155</sup>

### **Subjective Reasonableness**

As mentioned above, the tests for reasonableness can be either objective - questioning how the reasonable person would have responded in the circumstances - or subjective, questioning the reasonableness of the action from the unique viewpoint of the specific defendant. Whereas the former position has caused unlimited difficulties for battered women, the latter position is more amenable as it allows the killing to be judged according to her perception and recognises her individual characteristics.

A significant breakthrough for battered women was delivered by the Supreme Court of Washington in the case of *State v Wanrow*.<sup>156</sup> Although this was not a battered woman case, it involved a 5'4'' woman, who had a cast on her leg and had to use a crutch, who shot and killed a 6'2'' intoxicated unarmed man, whom she knew to be a child molester, when he broke into her house, and threatened both her and her children. She was convicted for murder after the trial judge ruled that self-defence did not apply, due to the unequal application of force. This decision was overruled by the Supreme Court who stated that the requirement of objective reasonableness: 'constitutes a separate and distinct misstatement of the law and, in the context of this case, violates the respondent's right to equal protection of the law.'<sup>157</sup> Hence, when

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<sup>155</sup> Gillespie C K *Justifiable Homicide* pp. 65-67

<sup>156</sup> 88 Wash. 2d 221, 559 p.2d 548 (1977)

<sup>157</sup> 88 Wash. 2d 240, 559 P.2d at 558-59



assessing the reasonableness of the defensive force, the defendant's disparate size, strength and ability to fight must be taken into consideration.<sup>158</sup> The Supreme Court also ruled that the actions of a defendant are to be judged against her own subjective perception and knowledge, and not that of a reasonable person. Furthermore, the court strongly emphasised society's role in framing the behaviour and perceptions of women, and stated that any exclusion would lead to an unequal application of law:

“The respondent was entitled to have the jury consider her actions in the light of her own perception of the situation, including those perceptions which were the product of our nation's “long and unfortunate history of sex-discrimination.”...Until such time as the effects of that history are eradicated, care must be taken to assure that our self-defense instructions afford women the right to have their conduct judged in light of the individual handicaps which are the product of sex discrimination. To fail to do so is to deny the right of the individual woman involved to trial by the same ruled which are applicable to male defendants.”<sup>159</sup>

It may be argued that this approach is prejudicial towards men, as women are allowed to be judged against a more subjective standard, whereas the test applicable to men remains objective. This also suggests that women are not as reasonable as men, as they require a distinct standard of reasonableness.<sup>160</sup> The court, however, recognised that the standard embedded in the law is not objective, per se, but masculine, and thus can be discriminatory. It considered that: ‘...instructions on self-defense law that

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<sup>158</sup> McColgan A “In Defence of Battered Women who Kill” p. 521; Schneider E “Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense” pp. 641-642; Gillespie C K *Justifiable Homicide* p. 117

<sup>159</sup> 88 Wash 2d 240-41, 559 p.2d at 559; see Schneider E “Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense” p. 642; Scheff L S “People v Humphrey: Justice for Battered Women or Licence to Kill” *Uni of San Fran L Rev* (1997) 32, 225-260 p. 235; Gillespie C K *Justifiable Homicide* p. 117

<sup>160</sup> Taylor L J “Provoked Reason in Men and Women: Heat-Of-Passion Manslaughter and Imperfect Self-Defense” p. 1703

suggested, by persistent use of male gender, that a woman's conduct in defending herself be measured against that of a reasonable man finding himself in the same circumstances... .'<sup>161</sup> effectively remove a woman's right to equal protection under the law. Furthermore, it is argued that subjectivising the test of reasonableness does not suggest women are less reasonable or applies a separate legal standard. It merely recognises that the situations in which men and women reasonably perceive a threat of imminent serious harm may differ.<sup>162</sup> The approach also seems to correspond with the view that gender and gender differences are socially constructed, as opposed to biologically determined. Hence, such an approach suggests that the ability exists to change the manner in which women perceive and react to violence.

The court's recognition that perceptions are shaped by society's sex discrimination is undoubtedly radical and potentially has 'far-reaching implications'.<sup>163</sup> As Eber notes, women are generally not trained to fist fight, and thus often feel that a weapon is needed to defend themselves against a serious attack threatened by a man. Hence, the court would be implicitly allowing a woman to use a weapon in those situations where a man could not reasonably use more than his fists. Furthermore, it may also be implied that her perceptions, which are shaped by her emotional and economic dependency on her husband, should also be considered. This would include the

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<sup>161</sup> (1977) 559 p 2d 548 at 559; see Tolmie "Provocation or Self-Defence for Battered Women Who Kill?" p. 73

<sup>162</sup> Schneider and Jordan "Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault" *Nat J Crim De* 4 (1978) 141; p. 143 cited in Taylor L J "Provoked Reason in Men and Women; Heat of Passion Manslaughter and Imperfect Self-Defense" pp. 1704-1705

<sup>163</sup> Eber L "The Battered Wife's Dilemma: To be Kill or to be Killed" *Hastings LJ* (1981) 32, 895-931 p. 925

perception that she is unable to leave and that the action adopted is the only possible solution.<sup>164</sup> One major difficulty with the approach of the Court, however, is that it appears to equate difference with inferiority. This is clearly evidenced in their employment of the word 'handicaps'. As Scheinder points out, although sex discrimination 'is disabling to women as a class and to individual women',<sup>165</sup> the language of the Court relies on stereotypes of women as victims which suggests that the decision was due to 'patriarchal solicitude'.<sup>166</sup> Furthermore, the court prioritises difference on the grounds of gender, and implicitly rejects the significance of other differences, such as race and class.<sup>167</sup>

The Supreme Court also stated that a strict application of imminence was legally incorrect. The jury's consideration did not have to be limited to the events immediately preceding the killing, but should also take into account the defendant's knowledge of the deceased, including any previous acts of aggression thus admitting her insight that the deceased was a child molester. The fact that this knowledge may have been gained sometime in the past did not affect its relevancy:<sup>168</sup>

"It is clear that the jury is entitled to consider all the circumstances surrounding the incident in determining whether [the] defendant had

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<sup>164</sup> Ibid., pp. 925-926

<sup>165</sup> Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" *Women's Rights Law Reporter* (1986) 9, 195-222 p. 214

<sup>166</sup> Ibid., p. 214

<sup>167</sup> Taylor L J "Provoked Reason in Men and Women: Heat-Of-Passion Manslaughter and Imperfect Self-Defense" p. 1703

<sup>168</sup> Schneider E "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense" p. 643 see also Eber L "The Battered Wife's Dilemma: To be Kill or to be Killed" pp. 920-921

reasonable grounds to believe grievous bodily harm was about to be inflicted.”<sup>169</sup>

Such a construction is undoubtedly beneficial for a battered woman who has an in-depth knowledge of the defendant's propensity to be violent, the continuous nature of which is likely to render her constantly ready for defensive action.<sup>170</sup> The court also placed significant emphasis on the accused's knowledge of the deceased and implied that, in addition to its relevance in relation to the imminence requirement, it is also relevant to the reasonableness of the degree of force used.<sup>171</sup> Hence, a battered woman's knowledge of her attacker's propensity to be violent should also reflect on the level of force she used. Furthermore, expanding the jury's consideration to all the surrounding circumstances may render relevant a number of wider factors which impact on the battered woman's perception of the necessity to use violence. Such factors may include the reluctance of the police and criminal justice to offer effective protection, the limited assistance of civil remedies, and society's historical acceptance of domestic violence.<sup>172</sup>

Nevertheless, a comprehensive view of imminency does not widen the requirement to include those battered women who kill during a non-abusive period or whilst the abuser is asleep.<sup>173</sup> In such circumstances it is clearly difficult to view the battered woman under a threat of imminent serious harm. Hence, regardless of how subjective the requirements of belief in harm and reasonable force may be, self-defence will not

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<sup>169</sup> *State v Wanrow* 88 Wash 2d 236, 559 P.2d at 556

<sup>170</sup> Eber L “The Battered Wife's Dilemma: To be Kill or to be Killed” p. 921

<sup>171</sup> *Ibid.*, p. 922

<sup>172</sup> *Ibid.*, pp. 922-923

<sup>173</sup> *Ibid.*, pp. 926-927

be available. Such a situation occurred in the New Zealand case of *R v Wang*.<sup>174</sup> In New Zealand the test of self-defence appears to be subjective, indeed the statute states: 'Every one is justified in using, in the defence of himself or another, such force as, in the circumstances as he believes them to be, it is reasonable to use.'<sup>175</sup>

The defendant in this case tied her abuser up and killed him whilst he was asleep. Thus the court held that self-defence was not applicable, as she faced no immediate danger. Furthermore, in contrast to the statute, the court appeared to apply an objective test of reasonableness,<sup>176</sup> which has been attributed to the court's refusal to allow evidence of the battered woman syndrome.<sup>177</sup> This could also be linked to the judicial reluctance to construct a woman's killing of her abusive husband as justified.

Overall the *Wanrow*<sup>178</sup> decision, which took into account the size and ability of a woman when assessing the reasonableness of her defensive force against an unarmed man, develops a distinct female standard of reasonableness. Furthermore, it also indicates the judiciary's acceptance of a number of important factors: the differences between men and women in relation to acts of self-defence; the sex bias inherent in self-defence; and that a jury's evaluation of women's action may be tainted by stereotypes.<sup>179</sup> On a more theoretical level, Schneider argues that the decision blurs a

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<sup>174</sup> (1990) 2 NZLR 529; see Beri S "Justice for Women Who Kill: A New Way?" 113-125 pp. 119-120; Seuffert N "Battered Woman and Self-Defence"

<sup>175</sup> S48 Crimes Act 1961

<sup>176</sup> Beri S "Justice for Women Who Kill: A New Way?" pp. 119-120

<sup>177</sup> see Seuffert N "Battered Women and Self Defence"

<sup>178</sup> 88 Wash. 2d 221, 559 p.2d 548 (1977)

<sup>179</sup> Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" p. 213

number of binary oppositions. Firstly, the difference/sameness dichotomy is challenged through the recognition that women employ self defence in different circumstances and in a different manner to men. The court recognised that a failure to acknowledge these differences could, however, amount to a denial of equal protection. Women could be afforded equal protection if their perceived differences were explained to the jury, as then the jury are able to apply the existing legal standards. Women's differences are explained in order for them to receive the same legal protection as men.<sup>180</sup> The decision also works to redraw the distinction between excuse and justification. Whereas the actions of women, especially battered women, are usually excused, the judgement constructs her actions as justified, and attempts to challenge those stereotypes which prevent such a finding.<sup>181</sup> The individual/group dichotomy is also challenged. As Scheinder illustrates, although the court emphasised the significance and relevancy of the individual standpoint, it also recognised that the standpoint incorporates a group element. This is evidenced by the court's suggestion that some perceptions are shaped by society's sex discrimination. The experience is seen as particular - in the sense that it is different to men - but also as common - in that it is an experience which all women share. Hence '...women share a common experience which is different.'<sup>182</sup> Such an approach can, however be challenged. Do all women share a common experience? Or is the common experience based on one group of women, thus ignoring and disqualifying the experiences of other women?<sup>183</sup> Finally, the objective/subjective opposition is challenged, and the judgement indicates

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<sup>180</sup> Ibid., 213-214

<sup>181</sup> Ibid., p. 216

<sup>182</sup> Ibid., p. 217

<sup>183</sup> The question of differences among women will be explored later in chapters 6,7 and 8.

a move towards a more subjective test of reasonableness. The court *Wanrow*,<sup>184</sup> however, also recognised that the subjective includes the objective, in that a woman's subjective perception is shaped by her experience as a woman. Hence her perceptions are categorised as objective, in the sense that they are drawn from a group experience.<sup>185</sup>

### **A Duty to Retreat**

The final element of self-defence which requires consideration, is a duty to retreat. Developed during the dawning years of self-defence, this requirement excluded a successful plea of self defence if the defendant did not 'retreat to the wall' before defensive action was used. Not only does the duty oblige one to back away from the fight, it also requires one to escape, or attempt to escape, if the opportunity presents itself, and it is safe to do so.<sup>186</sup> Such a duty is also seen to be grounded in the one off unarmed encounter between two equally sized opponents. In such a situation, requiring one to swallow pride and back away before the situation escalates and results in a death, is clearly justifiable.<sup>187</sup> The situation with battered women is, however, slightly different. A battered woman is usually dependent, both economically and emotionally on her abuser, and may have no where to escape to, and no transport to escape with. She also may have ran in the past, only to be caught by her abuser and receive a severe beating. The difficulty escalates somewhat when she has children, as she may fear for their safety if she has to leave them with a

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<sup>184</sup> 88 Wash. 2d 221, 559 p.2d 548 (1977)

<sup>185</sup> Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" p. 220

<sup>186</sup> Gillespie C K *Justifiable Homicide* pp. 77-79

<sup>187</sup> *Ibid.*, p. 78

violent man.<sup>188</sup> In such circumstances, her decision not to retreat may be anything but unreasonable. As Gillespie states: ‘...a woman’s decision not to run out into night-often with no money or clothes, leaving her children behind, with no place to go, and with a violent and possibly homicidal man in pursuit-is often the most reasonable one she could make.’<sup>189</sup>

The harshness of this rule is mitigated slightly in those jurisdictions which apply the ‘castle doctrine’. This recognises that one is not required to retreat from their own home. The situation in the America is, however, muddled somewhat when the abuser is the co-occupant, or the sole owner. In some States the castle doctrine will only apply if the attacker is an intruder, and thus the battered woman is still obliged to retreat from her own home.<sup>190</sup>

In England and Wales, as with many other jurisdictions, the duty to retreat has now been abolished. Whether the harm could have been avoided, however, does have an impact on whether the defensive force is necessary and reasonable. The Court of Appeal in *R v Julien*<sup>191</sup> stated: ‘It is not, as we understand it, the law that a person threatened must take to his heels and run...but what is necessary is that he should demonstrate by his actions that he does not want to fight.’<sup>192</sup> In *R v Bird*<sup>193</sup> the Court of Appeal, approved of the following passage in Smith and Hogan:

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<sup>188</sup> Ibid., pp. 79-80

<sup>189</sup> Ibid., p. 80

<sup>190</sup> Ibid., p. 82

<sup>191</sup> [1969] 53 Cr. App. R. 407

<sup>192</sup> Ibid., p. 411

<sup>193</sup> [1985] 81 Cr App R 110



“There were formerly technical rules about the duty to retreat before using force, or at least fatal force. This is now simply a factor to be taken into account in deciding whether it was necessary to use force, and whether the force was reasonable. If the only reasonable course is to retreat, then it would appear that to stand and fight must be to use unreasonable force. There is, however, no rule of law that a person attacked is bound to run away if he can; ...”<sup>194</sup>

In some cases it may ‘...be only sensible and clearly possible to take some avoiding action.’<sup>195</sup> In light of such pronouncements, McColgan suggests that battered women will be able to demonstrate that, when viewed from their perspective, their defensive action was reasonable and retreat was not a viable option.<sup>196</sup> Hence, if a subjective stance is taken in relation to the reasonableness of the force used, theoretically speaking, the fact that she did not retreat should not present itself as a hurdle.

Difficulties arise, however, when her failure to leave the relationship is considered to be unreasonable. Although this is absolutely separate from the duty to retreat, as this concentrates solely on the time when the killing was committed, Gillespie notes that juries appear to confuse the failure to escape on the night in question with a failure to leave altogether.<sup>197</sup> This confusion is increased by the emphasis the prosecution often place on the woman’s failure to leave. They use this fact to argue that she was not genuinely afraid, that the threatened harm was not that serious or that she invited or enjoyed the beatings. Indeed, explaining why the battered woman remained in the relationship has amounted to one of the most important tasks of the defence counsel, despite its legal irrelevance.<sup>198</sup> In many cases in which the duty to retreat was

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<sup>194</sup> Ibid., pp. 114 Smith and Hogan *Criminal Law* [Butterworths; 5<sup>th</sup> ed; 1983] p. 327

<sup>195</sup> *Palmer v R (Privy Council)* [1971] A.C. 814, 831-2 per Lord Morris of Borth-y-Gest

<sup>196</sup> McColgan A “In Defence of Battered Women Who Kill” pp. 516-517

<sup>197</sup> Gillespie C K *Justifiable Homicide* p. 81

<sup>198</sup> Ibid., p. 145

considered to be an issue, women have been convicted for murdering their abuser, despite being either physically held down, pinned in a corner, or being threatening with a gun.<sup>199</sup> In other words, it appears that a duty to retreat has been enforced in situations in which retreat was not actually physically possible. Hence, it appears that a woman's failure to leave a violent relationship is considered to render her defensive action unreasonable, even if on the night in question retreat was not possible. This view is, however, based on the erroneous assumption that battered women are physically, emotionally and financially free to leave the relationship at any time.

### **Self-Defence: Still Problematic**

Despite the more subjective approach which has developed in some jurisdictions, including England and Wales, battered women continue to encounter difficulties in obtaining an acquittal on the grounds of self-defence.<sup>200</sup> In addition to the difficulties caused by the requirement of imminency and the requirement of reasonable force, especially for those who killed in non-confrontational circumstances, a barrier also exists outside the legal requirements. This barrier is consists of the reluctance on behalf of the courts and society to accept that the actions of a battered women are actually committed in self-defence. This prejudice is explained by Sheehy, Stubbs and Tolmie<sup>201</sup> to take two forms. Firstly, it is suggested that many people either deny or ignore the impact a battering relationship may have on a woman's perceptions of harm, imminency and necessity of force. Hence '...the circumstances of a battering

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<sup>199</sup> Ibid., p. 81

<sup>200</sup> see for example Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: the Battered Woman Syndrome and its Limitations" p. 375;

<sup>201</sup> Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: the Battered Woman Syndrome and its Limitations" 375-376

relationship do not translate into defensive action because they do not connote unavoidable danger to most.'<sup>202</sup> Secondly, the existence of a number of myths and misconceptions regarding battered women exist to construct her experience in a different light, for example that it was her fault for failing to leave and that she either incited the beatings or enjoyed them. Hence, battered women '...are generally judged for who they are and what they represent rather than what they individually faced, thought or did.'<sup>203</sup> It is in the context of such difficulties that the battered woman syndrome was developed.

## **Conclusion**

This chapter has provided a detailed analysis of the requirements of the defences which are normally considered available for women who kill their abusive partners. The main argument forwarded is that the legal requirements of the individual defences, especially provocation and self-defence, are based on male characteristics and hence tend to exclude the experiences and reactions of battered women. In relation to diminished responsibility, it is argued that, although this may amount to a successful defence, it fails to adequately reflect the situation of women who kill.

One major criticism of both the existing law and some of the literature which has been produced in discussion of the law is that they both tend to a) assume that certain characteristics are natural and innate, for example the female slow burn anger, as opposed to the masculine sudden and temporary loss of self control, although there

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<sup>202</sup> Ibid., p. 376

<sup>203</sup> Ibid.,

has been some recognition that reactions are socially constructed<sup>204</sup> and b) the gender categories of man, woman and battered woman are presented as homogenous categories with little consideration of whom is represented and whom is excluded. Both the law and the academic commentary tends to be normative and essentialist in that assumes that all women (and men) react in a certain way, whether this reaction is biologically determined or socially constructed. Little consideration is given to the differences between women and how these may affect their perceptions and reactions. The next chapter will continue the discussion of the defences, by analysing the impact of the battered woman syndrome.

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<sup>204</sup> see for example Gillespie C K *Justifiable Homicide* and the Supreme Court in *Wanrow* 88 Wash. 2d 221, 559 p.2d 548 (1977), which recognised that the way in which women react and fight is socially constructed, as opposed to natural and biologically determined.

# THE BATTERED WOMAN SYNDROME

## The Rise and Fall of the Battered Woman Syndrome

### Introduction

This chapter provides a discussion of the concept of the 'battered woman syndrome'. In addition to examining the main elements of the concept: learned helplessness and the cycle theory of violence, the chapter also considers the rationale behind its development, how it has been used in relation to the three defences to murder, and the criticisms of the concept. As with the previous chapter on the defences, the chapter adopts a comparative cross-national perspective. In particular, specific attention is paid to the use of the syndrome in America and Canada and how this has differed to this jurisdiction.

The syndrome was originally formulated by Lenore Walker, an American psychologist, in her book *The Battered Woman*<sup>1</sup> in an attempt to dissipate the myths and misconceptions surrounding battered women, and to answer the frequently asked question: Why do battered women remain in these relationships? Due to the frequent recurring fact that battered women did not leave their abusers, Walker argued that the answers lie not within individual psychopathology, but within psychosocial causation, and thus the concept of 'learned helplessness' was considered applicable.<sup>2</sup>

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<sup>1</sup> Walker L *The Battered Woman* [Harper & Row; New York 1979]

<sup>2</sup> *Ibid.*, p. 16

## Learned Helplessness

Learned helplessness embodies what is known as ‘the principle of reinforcement’, which relates to the relationship between voluntary responses and outcomes. If a certain response is expected to create a particular outcome, and succeeds to do so, this produces the feeling that one has been able to control that situation. This feeling of control is diminished, however, if the response fails to secure the expected outcome and no logical explanation for this failure presents itself.<sup>3</sup> Hence, if expected response-outcome relationships fail, a feeling that one lacks the ability to control the situation is likely to develop. This theory of learned helplessness was developed by psychologist Martin Seligman.<sup>4</sup> Seligman subjected dogs to sporadic electric shocks and once it became apparent that any voluntary movement would not prevent further shocks, the dogs became submissive and passive. They developed a learned helplessness. Furthermore, when an attempt was made to illustrate to the dogs that they could escape, by simply moving to the other side of the cage, or leaving the cage, the dogs still remained unresponsive. The dogs had to be taught how to engage in voluntary actions, by being physically removed from their cages.<sup>5</sup>

Hence, once a person comes to believe that they have no control over the response-outcome relationship they respond with the learned helplessness phenomenon, even if they do, in reality, possess the ability to exert control. Walker emphasizes that it is the belief that one lacks control, as opposed to the actual nature of controllability which is of consequence. Once the belief that one has the ability to control and influence a

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<sup>3</sup> Ibid., p. 44-45

<sup>4</sup> Seligman, M; Maier and Geer “Alleviation of Learned Helplessness in the Dog” *J of Abnormal Psychology* (1968) 73, 256

situation has disappeared, it becomes very difficult to regain the belief that control will ever be possible.<sup>6</sup> In relation to battered women, it is considered that learned helplessness arises due to the erratic nature of the abuse and the apparent disconnection between his abuse and her behaviour.<sup>7</sup> Walker states:

“The violence is unavoidable, she can do nothing to pacify her husband and prevent the beating. The battered woman’s inability to control the situation leads to feelings of fatalism. She perceives her husband as omnipotent and believes there is no way for her to escape or improve her life.”<sup>8</sup>

Thus, in order to comprehend why women remain in abusive relationships, Walker places significant emphasis on the concept of learned helplessness. Once abused women develop the belief that they are helpless, this belief becomes reality, and they become submissive, passive and helpless.<sup>9</sup> ‘[T]he repeated batterings, like electrical shocks, diminish the woman’s motivation to respond.’<sup>10</sup>

Dupps<sup>11</sup> also notes that, in addition to this learned helplessness, there are several other factors which prevent a battered woman from leaving the relationship, or seeking help. These include fear for her own safety and the safety of any children she may have, economic dependency, and the belief that the batterer will reform. The combination of the learned helplessness and these other factors leads to feelings of shame, as she may believe that she is a ‘bad wife’ or a masochist, and low self-

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<sup>5</sup> Walker L *The Battered Woman* pp. 45-46

<sup>6</sup> *Ibid.*, p. 46

<sup>7</sup> Kinports K “Defending Battered Women’s Self-Defense Claims” *Oregon Law Review* 67 (1988) 393

<sup>8</sup> *Ibid.*, p. 398

<sup>9</sup> Walker L *The Battered Woman* p. 47

<sup>10</sup> *Ibid.*, p. 49

<sup>11</sup> Dupps D S “Battered Lesbians: Are they entitled to a Battered Woman Defense?” *J of Family Law* (1990-1991) 29, 881-899 pp. 883-883

esteem. Furthermore the feelings of helplessness are often compounded when she turns to the police and courts for help, as they have, generally, been ineffectual in helping battered women.<sup>12</sup>

### **The Cycle Theory of Violence**

The second element of Walker's Battered Woman Syndrome, which has had an impact on the legal treatment of battered women who kill, is the cycle theory of violence. The violence which women suffer is not entirely sporadic, but cyclical with three discrete phases. The first stage, the tension building stage, involves incidents of minor battering. During this stage attempts to calm the batterer are generally made and she may become nurturing and submissive, letting the batterer know that his violence towards her is legitimate, in order to prevent any escalation of violence.<sup>13</sup> The acute battering incident, which forms the second phase, develops from the immense pressures which have accumulated during the tension building phase, and leads to uncontrollable outbursts of violence. The second stage is distinguishable from the first due to the nature of the violence. The violence tends to be destructive and lacking in control. Although the tension building phase may involve legal assaults, the acute battering incident involves incidences of serious physical, sexual and psychological violence. This second phase is also characterised by its lack of predictability. From the women's accounts of the events preceding the acute battering, Walker found that it was impossible to predict the nature of the abuse which will form the acute battering, and women who suffered this cycle of violence whilst being interviewed were unable to offer any suggestions on how to predict this

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<sup>12</sup> Ibid., pp. 886-889

<sup>13</sup> Walker L *The Battered Woman* pp. 56-59



explosion of uncontrollable violence. A factor pertinent to both phase one and two is the severe psychological trauma suffered by the battered woman, inflicted both directly by the batterer and indirectly due to the violent relationship. Indeed, in relation to the acute battering, Walker states '[s]he does not feel the pain as much as she feels psychologically trapped and unable to flee the situation.'<sup>14</sup> Realising that his behaviour is uncontrollable, and not open to reason, she responds with calmness and acquiescence. This submissive conduct is also influenced by her knowledge that any resistance from her may lead to an escalation of the violence.<sup>15</sup>

Walker draws comparisons with victims of catastrophes, noting how women during the second phase evidence symptoms of 'delayed reaction syndrome', which include 'listlessness, depression and feelings of helplessness'.<sup>16</sup> The woman is likely to isolate herself, and not to seek help, whether medical, legal or otherwise, for at least 24 hours.<sup>17</sup> Furthermore, Walker notes that battered women often feel that protection from the abuse, whether legally or otherwise is completely unattainable. 'They frequently comment that they feel their batterers are beyond the grasp of the law.'<sup>18</sup> Following this acute battering stage, the behaviour of the batterer transforms, and he becomes loving and kind. This third stage is termed loving contrition, and Walker states that this stage completes the woman's victimisation.<sup>19</sup> The batterer is full of remorse, begs for his victim's forgiveness and promises that he will never hurt her

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<sup>14</sup> Ibid., p. 63

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid., p. 64

<sup>19</sup> Ibid., p. 65

again, believing that from now on he will regain control over his actions. He has the ability to persuade both himself and his victim that this time his promises will remain true, and may take steps to prove his sincerity. Furthermore, he also believes that ‘...he has taught her such a lesson that she will never again behave in such a manner, and so he will not be tempted to beat her.’<sup>20</sup>

Any feelings of anger, fear and hurt which she may possess at the end of the acute battering phase, and any desire to leave, may dissipate due to his changed behaviour. Indeed Walker notes that although many battered women leave at the beginning of the third phase they return due to the batterer’s transformed conduct, the continuous promises to remain benevolent and emotional blackmail.<sup>21</sup> The battered woman comes to believe that the batterer shows his true nature during this phase. The ‘real person’ is this kind loving man, not the violent abusive individual who beat her during the other two phases. If only help was available, she believes, he would remain passive and loving.<sup>22</sup> As noted by Dupps, her belief that his behaviour has changed and will so remain corresponds to the ‘intermittent reinforcement theory’.<sup>23</sup> This psychological theory ‘recognizes that the period between beatings reinforces the woman’s belief that the abuse has stopped during this time.’<sup>24</sup>

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<sup>20</sup> Ibid., pp. 65-66

<sup>21</sup> Ibid., p. 66 Walker states

“...during this time...the battered woman realizes how frail and insecure her batterer really is. Included in this entreaties are threats that he will destroy his life if she does not forgive him. He reminds how much he needs her and asserts that something awful will happen to him if she leaves him.”

<sup>22</sup> Ibid., p. 68

<sup>23</sup> Dupps D S “Battered Lesbians: Are they entitled to a Battered Woman Defense?” pp. 885-886

<sup>24</sup> Ibid., pp. 885-886

Walker states that this violent relationship renders the couple completely dependent upon each other, they become a 'symbiotic pair', and it is during this third phase that this attachment is cemented, and any attempt to leave the relationship by either partner would significantly affect the other.<sup>25</sup> Unfortunately, his promises do not hold true and the loving contrite behaviour slowly turns into tension building, and the cycle runs again.<sup>26</sup> The anxiety and fear which the battered woman feels during phases one and two pervades the battered woman's life, and she becomes consumed with a 'cumulative terror',<sup>27</sup> living in constant fear of harm, even during the calm, loving periods. Indeed it is during such calm periods in the woman may decide to become proactive and use force against the batterer. Hence, Walker states that sometimes the battered woman '...strikes back during a calm period, knowing that the tension is building towards another acute battering incident, where this time she may die.'<sup>28</sup>

### **The Impact of the Battered Woman Syndrome**

The battered woman syndrome has undoubtedly enhanced the legal position of the woman who kills her abusive husband, and has, in some cases, led to an outright acquittal. As already noted, one rationale for developing the syndrome was to explain why the woman did not leave the abusive relationship, and this is generally explained

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid., p. 69

<sup>27</sup> Comment "Battered Wives Who Kill: Double Standard Out of Court, Single Standard In?" *Law and Human Behaviour* (1978) 2, 133 p. 164; Faigman D "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" *Virginia L Rev* (1986) 72, p. 627 Wallace H "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" *Pol J* (1994) 133-138; 232-236; p. 134

<sup>28</sup> Walker L *The Battered Woman Syndrome* p. 142

through the concept of learned helplessness. The second rationale, which has on the whole been exceptionally significant in proving self-defence, is to show that her killing of the batterer was reasonable, and thus justifiable, and it is to this end that the cyclical theory of violence is used. As noted by Schneider:

“The purpose of expert testimony has been to educate the judge and jury about the common experiences of battered women, to explain the context in which as individual battered woman acted, so as to lend credibility and provide a context to her explanation of actions.”<sup>29</sup>

The syndrome became central to the United States Women’s Self-Defense Law Project founded in 1978 by the Center for Constitutional Rights in order to enhance the effectiveness of lawyers who represent women who kill their abusers.<sup>30</sup> The main aim of this project has to been to ‘overcome sex-bias in the law of self-defense and to equalize treatment of women in the courts.’<sup>31</sup> Such equality was to be achieved by the recognition of difference. Thus the project aimed to secure the legal recognition of the different experiences and circumstances in which women kill. The admission of the battered woman syndrome is considered to be a ‘...logical extension of this idea.’<sup>32</sup> The testimony can be seen to work on a number of different levels. Firstly, in order to disprove any myths and misconceptions the judge and jury may hold about battered women, which may unfairly taint their evaluation of the defendant, evidence of the

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<sup>29</sup> see Schneider E “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering”; see also Dupps D S “Battered Lesbians: Are they entitled to a Battered Woman Defense?” pp. 879; 879-884, Donnelly M “Battered Women who Kill and the Criminal Law Defences” p. 163

<sup>30</sup> Schneider E “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering” p. 195

<sup>31</sup> Ibid., p. 197

<sup>32</sup> Ibid.

syndrome provides details of the shared experiences and characteristics of battered woman. The New Jersey Supreme Court in *State v Kelly*<sup>33</sup> considered that the evidence would increase the credibility of the battered woman as a witness, as it would illustrate to the jury the commonality of her experiences, who may find them incredible.<sup>34</sup> The woman is presented as a victim, thus combating any belief that she was in some way to blame for or deserved the beatings, and that such abuse is acceptable in a marital relationship.<sup>35</sup> Secondly, it also explains the psychological impact of social and economic difficulties which are generally suffered by battered women.<sup>36</sup> Thirdly, it can also illustrate why she believed the conduct of the batterer on the occasion in question presented an imminent danger of serious bodily harm or death.<sup>37</sup> Indeed, the New Jersey Supreme Court ruled that the battered woman syndrome was vital to the question of whether her belief in the imminent harm was honest, and will assist the jury in deciding the objective question: would a reasonable person also believe that an imminent threat existed.<sup>38</sup>

Overall, evidence of the battered woman syndrome has had a significant beneficial impact on cases involving women who kill their abusers, and a great number of

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<sup>33</sup> 97 NJ. 178, 197, 478, A.2d 364 (1984)

<sup>34</sup> Ibid., p. 201; Schneider E “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering” p. 209

<sup>35</sup> Schneider E “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony” p. 202; see also Seuffert N “Battered Women and Self-Defense” p. 325; Tolmie J “Provocation of Self-Defense for Battered Women Who Kill”

<sup>36</sup> Schneider E “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony” p. 203

<sup>37</sup> Ibid., p. 204

appeals have succeeded on the basis that the evidence was wrongly and unfairly excluded.<sup>39</sup> Schneider states '[i]n general the expert testimony cases have demonstrated significant judicial recognition of the depth and severity in the trial process for battered women claiming self-defense.'<sup>40</sup>

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<sup>38</sup> Ibid., p. 209; *State v Kelly* 97 NJ. 178, 197, 478, A.2d 364 (1984) at 37

<sup>39</sup> see Maguigan H "Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals" *Uni of Pennsylvania L Rev* 140 (1991) 379

<sup>40</sup> Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" p. 205

## THE BATTERED WOMAN SYNDROME AND THE DEFENCES <sup>41</sup>

### **Provocation: Characteristics and the Reasonable Person**

In relation to provocation, the objective strand of the test (whether or not a reasonable person would have reacted in a similar manner) has caused significant difficulties for the judiciary. The main problem has focused on which, if any, particular characteristics of the defendant should be attributed to the reasonable person when assessing the level of self control which society expects. The complication appeared

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<sup>41</sup> As a psychological theory, evidence of the battered woman syndrome may only be presented by an expert witness, and will only be admitted if it fulfils the jurisdiction's specific requirements relating to expert testimony. In England and Wales, the decision in the case of *R v Turner* [1975] QB 834 states that the issue on which the evidence goes to must 'be beyond the ken of the average juror' (p. 834). Thus if it is considered that the issues is within the knowledge and experience of the jury, and that a decision may be reached without an expert, than the testimony will be irrelevant. On this issue see O'Donovan "Law's Knowledge: The Judge, The Expert, The Battered Woman and Her Syndrome" p. 430 and McColgan A "In Defence of Battered Women Who Kill" p. 523. The Battered Woman Syndrome has also be held to be admissible in the following jurisdictions: Australia, see Bates F "Expert Witnesses and Battered Women-The Lighthouse Flashes" *Journal of Crim L* 58 (1994) 85-96; Sheehy E A, Stubbs J and Tolmie J "Defending Battered Women On Trial: The Battered Woman Syndrome and its Limitations"; O'Donovan "Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome" p. 431; Tyler L "The Battered Woman Syndrome in Australia" *Crim Lawyer* 44 (1994) 5; in Canada, see Young A "Conjugal Homicide and Legal Violence: A Comparative Analysis" p. 796; McColgan A "In Defence of Battered Women who Kill"; O'Donovan K "Law's Knowledge: The Judge, The Expert, The Battered Woman and Her Syndrome" pp. 429-430; Seuffert N "Battered Women and Self Defence"; and some States in America see Coffee C "A Trend Emerges: A State Survey on the Admissibility of Expert Testimony Concerning the Battered Wife Syndrome" *Journal of Family Law* 25 (1986/1987) 373-396

to be twofold: a) the definition of a relevant characteristic and b) whether it should bear any relation to the self control expected of the accused. This issue, however, seems to have been resolved by the House of Lords in the recent case of *Smith*.<sup>42</sup> The query related to the particular characteristics of the accused and whether or not they should be transferred to the reasonable person when deciding the objective strand of the defence. This confusion developed after the case of *Camplin*<sup>43</sup> within which Lord Diplock appeared to draw a distinction between the level of self control, which could only be affected by the age and the sex of the accused (hence, a 50 year old woman will be evaluated against the level of self-control of a reasonable 50 year old woman) and 'other' characteristics, which may be relevant to the gravity of the provocation. This distinction was abolished by the House of Lords in the case of *Smith*,<sup>44</sup> however *Camplin*<sup>45</sup> was not overruled, with Lord Hoffman asserting that this interpretation was actually consistent with Lord Diplock's judgment. Hoffman held the opinion that the reference to age and sex as factors which could affect the level of self-control were illustrative as opposed to exhaustive. Prior to the case of *Smith*<sup>46</sup> it was not particularly clear whether or not the battered woman syndrome would amount to a relevant characteristic which could affect the gravity of the provocation.

The issue of battered women syndrome and the objective strand of provocation first fell to be considered by the Court of Appeal in the case of *R v Ahluwalia*.<sup>47</sup> One

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<sup>42</sup> [2000] 3 WLR 654

<sup>43</sup> [1978] 2 All ER 168

<sup>44</sup> [2000] 3 WLR 654

<sup>45</sup> [1978] 2 All ER 168

<sup>46</sup> [2000] 3 WLR 654

<sup>47</sup> [1993] 96 Cr App R 133



ground of the appeal related to the trial judge's direction as to the relevancy of the appellant's characteristics. The Trial judge directed the jury thus:

“The only characteristics of the defendant about which you know specifically that might be relevant are that she is an Asian woman, married, incidentally to an Asian man, the deceased living in this country. You may think that she is an educated woman, she has a University Degree. If you find these characteristics relevant to your considerations, of course you will bear that in mind.”<sup>48</sup>

The defence, however, argued that this direction excluded a particular characteristic which could have affected the gravity of the provocation (as opposed to the level of self-control). The defence argued that Ahluwalia was suffering from battered woman syndrome, and that this characteristic had been ignored. The Court of Appeal, however, stated that no evidence was adduced before the trial judge which suggested that she was suffering from the syndrome, post-traumatic stress disorder, or any other specific condition which could amount to a ‘characteristics’,<sup>49</sup> which seems to suggest that the battered woman syndrome could amount to a relevant characteristic. The Court of Appeal did, however, state that the history of abuse suffered did not amount to a relevant characteristic as it did not amount to a characteristic which rendered the accused ‘...a different person from the ordinary run of (women) or marked off or distinguished from the ordinary woman of the community’,<sup>50</sup> a requirement which was adopted by the Court of Appeal in the case of *R v Newell*.<sup>51</sup> Ahluwalia’s appeal was actually allowed on the grounds that there was evidence which supported a plea of diminished responsibility. Hence, it appears that, whereas the battered woman syndrome could amount to a relevant characteristic, the fact of suffering long-term

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<sup>48</sup> [1993] 96 Cr App R 133 p. 140

<sup>49</sup> *Ibid.*, p. 141

<sup>50</sup> p. 141

<sup>51</sup> [1980] 71 Cr App R 311

abuse would not. What is not completely clear from the cases of *Ahluwalia*<sup>52</sup> and *Newell*,<sup>53</sup> however, is whether the characteristics are only relevant to the gravity, or whether they can also affect the level of self control.

The Court of Appeal also recognised the relevancy of other mental characteristics in the cases of *Humphreys*<sup>54</sup> and *Dryden*.<sup>55</sup> In the former case it was held that the defendant's characteristics of attention seeking and immaturity should be applied in order to decide the objective question of self control, even though they did not have any bearing on the gravity of provocation. Lord Chief Justice Taylor stated:

“The jury would, as ever, use their collective common sense to determine whether the provocation is sufficient to make a person of reasonable self-control in the totality of the circumstances (including personal characteristics) act as the defendant did.”<sup>56</sup>

Hence, the cases thus far seem to suggest that a relevant characteristic can alter the level of self-control expected of an accused. This position was, however, criticised by Lord Goff in the House of Lords case of *R v Morhall*<sup>57</sup> and in the Privy Council case of *Luc Thiet Thuan*.<sup>58</sup> Through the judgement of Lord Goff in both cases, the distinction between the standard of self control and the gravity of provocation as formulated by Lord Diplock in *Camplin*<sup>59</sup> was reasserted. Lord Goff held the correct legal approach to be that suggested by Ashworth:

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<sup>52</sup> [1993] 96 Cr App R 133

<sup>53</sup> [1980] 71 Cr App R 311

<sup>54</sup> [1995] 4 All ER 1008

<sup>55</sup> [1995] 4 All ER 987

<sup>56</sup> (1995) All ER 1008 see Edwards S “Battered Women in Fear of Luc’s Shadow” p. 92

<sup>57</sup> [1995] 3 All ER 659

<sup>58</sup> [1996] 2 All ER 1033

<sup>59</sup> [1978] 2 All ER 168

“...individual’s peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused’s level of self control should not.”<sup>60</sup>

Lord Goff declared that the approach adopted by the Court of Appeal in the cases of *Ahluwalia*,<sup>61</sup> *Humphreys*,<sup>62</sup> *Dryden*<sup>63</sup> and *Thornton (No 2)*,<sup>64</sup> was incorrect due to their reliance on the test formulated in the New Zealand case of *R v McGregor*,<sup>65</sup> which was rejected by both the House of Lords and Privy Council. This New Zealand test was composed in the absence of a defence of diminished responsibility, hence it recognises that those individual peculiarities which are sufficiently permanent and distinguish the accused from the rest of society, may reduced the standard of self control expected. Nevertheless, Lord Goff did recognise the relevancy of mental characteristics, provided they are the focus of the provocation:

“...it is of course consistent with Lord Diplock’s analysis in *Camplin*...that the mental infirmity of the defendant, if itself subject to the taunts of the deceased, may be taken into account as going to the gravity as applied to the defendant.”<sup>66</sup>

Hence, whereas the mental infirmity or personality disorder of a defendant will not be allowed to reduce the objective level of self control, it will be admitted in order to assess the gravity of the provocation, if the provocation is directed at the characteristic. In *Luc Thiet Thuan*<sup>67</sup> Lord Goff also stated that other circumstances, which may not properly amount to characteristics, may also bear relevance to the

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<sup>60</sup> Ashworth A “The Doctrine of Provocation” (1976) CLJ 292 p. 300

<sup>61</sup> [1993] 96 Cr App R 133

<sup>62</sup> [1995] 4 All ER 1008

<sup>63</sup> [1995] 4 All ER 987

<sup>64</sup> [1996] 1 WLR 1174

<sup>65</sup> [1962] NZLR 1069

<sup>66</sup> *Luc Thiet Thuan* [1996] 2 All ER 1035

<sup>67</sup> *Ibid.*

question of gravity. This suggests that evidence of cumulative provocation may be taken into account whilst assessing whether the victim's conduct was sufficiently grave to justify the response which it received. A somewhat different approach, however, was adopted by the House of Lords in the case of *Smith*.<sup>68</sup>

*Smith*, who was an alcoholic and suffered from depression, was convicted for murder after he stabbed and killed his friend during the course of an argument. The Court of Appeal allowed his appeal on the basis that his depression amounted to a relevant characteristic which should be taken into account when assessing the objective question. Furthermore, no distinction was to be made between the gravity of the provocation and the level of self-control expected. Hence, his depression could be taken into account when assessing the level of self-control he was expected to possess. The Court of Appeal substituted a conviction for manslaughter on the grounds of provocation and the Crown appealed to the House of Lords. In dismissing the appeal, Lord Hoffman, who delivered the main judgment, stated that it was not the position of the judge to tell the jury to ignore certain characteristics of the accused when assessing the objective element of provocation, as this would be to 'trespass upon their province'.<sup>69</sup> Thus, seemingly, the jury can take into account any characteristic, which presumably includes the battered woman syndrome, when considering the level of self-control the accused should be expected to maintain. Although Hoffman recognised the general principle that the 'same standards of behaviour are expected of everyone',<sup>70</sup> he also considered that the principle may

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<sup>68</sup> [2000] 3 WLR 654

<sup>69</sup> *Ibid.*, p. 668

<sup>70</sup> *Ibid.*, p. 678

'have to yield to a more important principle, which is to do justice in the particular case.'<sup>71</sup> Hence, it may be unjust for the jury to ignore a certain characteristics when assessing the level of self-control to be expected. Clearly, justice required Smith's depression to be taken into account.

Lord Hoffman, however, does not stay completely true to his statement that the judiciary should not trespass into the province of the jury, as he also states that some characteristics should be ignored. Concerned that the safety of the public does require a certain standard of self-control, an individual who kills '...when he is crossed, thwarted or disappointed in the vicissitudes of life would not be able to rely upon his antisocial propensity as even a partial excuse for killing.'<sup>72</sup> Moreover, Lord Hoffman paid particular attention to the case of *Stingel v The Queen*<sup>73</sup> in which the accused killed the lover of a woman with whom he had become infatuated. With this in mind, he stated that characteristics such as '...male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman herself or her new lover.'<sup>74</sup> Additionally, juries should be directed not to take such characteristics into account, a position which is considered by some to be 'pro-feminist'.<sup>75</sup> Hence, it appears that not all characteristics can be taken into account by the jury, but only those which are considered socially

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<sup>71</sup> Ibid.

<sup>72</sup> Ibid., p. 674

<sup>73</sup> (1990) 171 CLR 312

<sup>74</sup> [2000] 3 WLR 654 p. 674

<sup>75</sup> Edwards S "The erosions of the objective test in provocation: leaving it to the jury? R v Smith:

Towards a just law on provocation?" *Journal of Soc Wel & Fam Law* 23(2) (2001) 227-238 p. 236

acceptable. Little guidance, however, is forwarded on what is considered to be a socially acceptable or 'just' characteristic.

Under Lord Hoffman's direction, it does appear that the jury could, if they considered it just to do so, take into account the battered woman syndrome or post-traumatic stress disorder when dealing with a woman who kills her abusive partner. Indeed Lord Clyde stated:

"I would not regard it as just for a plea of provocation made by a battered wife whose condition falls short of a mental abnormality to be rejected on the ground that a reasonable person would not have reacted as she did. The reasonable person in such a case should be one who is exercising a reasonable level of self control for someone with her history, her experience and her state of mind."<sup>76</sup>

Hence, in addition to taking into account any perceived mental conditions, regard should also be taken of the fact of the abuse and the experience she has suffered.

The decision in *Smith*<sup>77</sup> has been hailed by some to be a significant breakthrough for women who kill their abusive partners.<sup>78</sup> Whether or not the battered woman syndrome is considered to reduce the level of self-control is, however, another matter. It may be argued that the phenomenon of 'learned helplessness' suggests an increased level of self-control. Additionally, simply because characteristics such as the battered woman syndrome are considered to be socially acceptable at a particular point in time this does not guarantee that they will always be viewed in such a light. As Edwards points out, Lord Hoffman's rejection of male possessiveness and jealousy is to '...turn back the hands of time and to strike at the very heart of past and current

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<sup>76</sup> *Smith* [2000] 3 WLR 654 p. 682

<sup>77</sup> *Ibid.*

<sup>78</sup> See for example Dyer C "Women who kill given court hope" *The Guardian* 20 July 2000

orthodoxy.’<sup>79</sup> Since the perceived acceptability of characteristics can alter over time, little is to prevent the battered woman syndrome or post-traumatic stress disorder becoming an unacceptable characteristic.

In addition it has been argued that the House of Lords misinterpreted *Camplin*<sup>80</sup> and also ‘brushed aside the effect of the unanimous most recent decision of the House in *Morhall...*’.<sup>81</sup> As Horder illustrates, the House of Lords in *Camplin*<sup>82</sup> and *Morhall*<sup>83</sup> considered that, whilst any of the characteristics which affect the gravity of the provocation may be considered those characteristics which make him/her less reasonable, thus reducing the standard of self control, and are considered to be repugnant or wholly inconsistent to the notion of the reasonable person, and this should not be admitted. Allowing ‘unreasonable’ characteristics to be taken into account whilst assessing the objective question of self control would demolish the justificatory aspect of the defence, the objective standard, and transform provocation into a solely excusatory defence.<sup>84</sup> Furthermore, there appears little need to extend provocation in this manner, as diminished responsibility exists to deal with those defendants who suffer from mental abnormalities.

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<sup>79</sup> Edwards S “The erosions of the objective test in provocation: leaving it to the jury? *R v Smith: Towards a just law on provocation?*” p. 236

<sup>80</sup> [1978] 2 All ER 168

<sup>81</sup> Smith J C R “*R v Smith (Morgan James)*” [2000] *Crim L R* 1004 p. 1005 see also Gardner J & Macklem T “Compassion without Respect? Nine Fallacies in *R v Smith*” (2001) *Crim LR* 623-635

<sup>82</sup> [1978] 2 All ER 168

<sup>83</sup> [1995] 3 All ER 659

<sup>84</sup> Horder J “Provocation’s Characteristic Difficulties, *R v Humphreys*” *Int J of Discrimination Law* 1 (1996) 288-294 pp. 289-290

One approach which does appear to provide some solution can be seen in the dissenting judgment of Lord Millet in *Smith*.<sup>85</sup> Lord Millet disagreed with the approach adopted by Lord Hoffman, arguing that it was inconsistent with both section 3 and Lord Diplock's judgment in *Camplin*.<sup>86</sup> In contrast to allowing the peculiar characteristics of the accused to reduce the level of self control expected, Lord Millet suggests that the objective test should be reformulated thus: '...would or might the provocation have produced the like reaction from the accused if he had exercised normal powers of self-control.'<sup>87</sup> Such an approach allows the jury to take into account 'the entire factual situation' in which the accused found themselves, and to judge how they would have reacted if they possessed the normal level of self-control. Lord Millet specifically refers to the situation of the battered woman and argues that in such a situation the jury should take into account the effect of cumulative abuse and question '...whether a woman with normal powers of self-control, subjected to the treatment which the accused received, would or might finally react as she did.'<sup>88</sup> Hence, as opposed to focusing upon her mental state and how this might have affected her level of self-control, the jury focuses specifically on the abuse she suffered.

I would agree with the proposition that the House of Lords in *Smith*<sup>89</sup> did actually misinterpret Lord Diplock's direction in *Camplin*,<sup>90</sup> which does clearly distinguish

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<sup>85</sup> see also Burton M "Intimate Homicide and the Provocation Defence – Endangering Women? R v Smith" *Feminist Legal Studies* (2001) 9, 247-258

<sup>86</sup> [1978] 2 All ER 168

<sup>87</sup> *R v Smith* [2000] 3 WLR 654 p. 715

<sup>88</sup> *Ibid.*, p. 717

<sup>89</sup> *Ibid.*



between those characteristics which affect the level of self-control (age and sex) and other characteristics which may affect the gravity of the provocation. Allowing any of the characteristics of the accused to alter the level of self-control to be expected does seem to turn the defence into a complete excusatory defence. However, difficulties arise when we start to question what is the ordinary standard of self-control. Upon whom is this standard based? Nevertheless, there is a significant difference between recognising the problematic nature of the fictitious 'reasonable person' and allowing any characteristics especially mental abnormalities, to be taken into account. Justice can be achieved in such cases by placing the 'reasonable woman' in the situation of the accused and asking how they would have reacted, as advanced by Lord Millet.<sup>91</sup> Such an approach would still protect the woman who kills her abusive partner, providing she manages to fulfil the first requirement of a sudden and temporary loss of self control, which remains the major hurdle.

### **Diminished Responsibility**

The courts in this jurisdiction have generally accepted that the battered woman syndrome provides sufficient evidence of diminished responsibility. In the case of *R v Hobson*<sup>92</sup> evidence of battered woman syndrome was not admitted at the trial, as, at that time, it was not recognised as a mental illness. The defendant appealed against her murder conviction on the grounds that she was suffering from the battered woman syndrome when she committed the homicide. The Court of Appeal upheld the appeal

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<sup>90</sup> [1978] 2 All ER 168

<sup>91</sup> see also Burton M "Intimate Homicide and the Provocation Defence – Endangering Women? *R v Smith*"

<sup>92</sup> [1997] *Crim L Rev* 759

and ordered a retrial recognising that the battered woman syndrome is now admissible and relevant to the plea of diminished responsibility.<sup>93</sup>

Applying the battered woman syndrome solely to cases of diminished responsibility, which has largely been the approach of the judiciary in England, can be seen to perpetuate images of women as passive, weak and irrational. Such an application conceptualises the battered woman syndrome as evidence of a mental disorder, as opposed to evidence that the actions of the abused woman were reasonable and should be considered as self defence, as occurs in the jurisdictions of America and Canada.<sup>94</sup> Hence, although admitting evidence of battered woman syndrome has usually led to a successful defence of diminished responsibility, thus leading to a conviction for manslaughter as opposed to murder, it accepts such stereotyped notions of women, blames their mental weaknesses for their actions, and does not challenge the legal conceptions of reasonableness.

### **Self Defence**

In America and Canada, the battered woman syndrome has proved to be most significant in relation to the plea of self-defence. In particular, it is the cycle theory of violence which has supplied the evidence necessary to prove the relevant legal requirements. It is considered that the woman's perception of the level of threatened harm is affected by her knowledge of the batterer's history of violence towards her, hence the history of past abuse is relevant to the requirement that her belief in

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<sup>93</sup> see Edwards S "Battered Women - In Fear of Luc's Shadow" pp. 103-104

<sup>94</sup> Wannop A L "Battered Woman Syndrome and the Defence of Battered Women in Canada and England" p. 270

imminent harm must be reasonable or honest.<sup>95</sup> As noted by the Supreme Court of New Jersey in *State v Kelly*:<sup>96</sup> '[t]he expert's testimony might also enable the jury to find that the battered wife, because of the prior beatings...is particularly able to predict accurately the likely extent of violence in any attack on her.'<sup>97</sup> and this could substantially impact upon the jury's determination of whether her belief was reasonable.<sup>98</sup> Nevertheless, this does appear to contradict Walkers' findings that many women caught in a cycle were unable to predict the extent of violence likely to occur during the acute battering stage.

In relation to the requirement that the amount of force used must be reasonable and proportionate to the perceived harm, the cycle theory of violence explains why it may be reasonable for a woman to use deadly force against an unarmed man, as she feels unable to free herself from a cycle of potentially deadly violence.<sup>99</sup> The admission of the expert testimony enables the question of reasonableness to be considered in the context of all the relevant circumstances,<sup>100</sup> as opposed to restricting legal relevancy to the period of time immediately preceding the fatal attack. When one adds to this the insights of the learned helplessness theory, it is clear to see how the battered woman

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<sup>95</sup> Faigman D "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" p. 628

<sup>96</sup> 478 A 2d 364 (1984)

<sup>97</sup> 97 NJ at 206, 478 A.2d at 378

<sup>98</sup> at 375; see Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" p. 211; Kazan P "Reasonableness, Gender Difference, and Self-Defense Law" *Manitoba L J* (1997) 24, 549-575 p. 554

<sup>99</sup> Faigman D "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" p. 628; Kazan P "Reasonableness, Gender Difference, and Self-Defense Law" p. 554

may believe she is truly acting in self-defence. As noted by Dupps, a battered woman's propensity to use deadly force will increase as she becomes overwhelmed by a feeling of helplessness and desperation, and starts to perceive the police as unresponsive and unable to offer protection.<sup>101</sup>

The case which is widely used to show the application of the battered woman syndrome to self-defence is *R v Lavallee*<sup>102</sup> which was decided by the Supreme Court of Canada. The accused suffered years of frequent violence at the hands of her partner, Kevin Rust. On the night in question, violence had broken out. Rust handed Lavallee a gun, who considered shooting herself, due to the fear she felt. Rust then shouted 'either you kill me or I'll get you'. She shot him in the back of the head as he was leaving the room. She was charged with second degree murder, and was acquitted by the trial court on the grounds of self-defence. The Crown appealed to the Supreme Court of Canada, which upheld her acquittal. Madam Justice Bertha Wilson, who delivered the judgement, emphasised that the law needed to recognise the experience of women, especially battered women. She thus considered that evidence of the battered woman syndrome was crucial:

"The law of self-defence was critically examined to expose its elements as reflecting and embodying male experience with violence and hence male evaluations of appropriate responses to violence. Expert evidence of the experience of battered women put a new complexion on self-defence from the perspective of a battered woman."<sup>103</sup>

The impact of the syndrome on the plea of self-defence also received recognition:

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<sup>100</sup> Schneider E "Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense"

<sup>101</sup> Dupps D S "Battered Lesbians: Are they entitled to a Battered Woman Defense?" p. 890

<sup>102</sup> [1990] 1 SCR 852

<sup>103</sup> Hon B Wilson "Women, the family and the Constitutional Protection of Privacy" [unpublished] quoted in Young A "Conjugal Homicide and Legal Violence: A Comparative Analysis" p. 794

“Angelique Lavallee was acquitted when the social reality of wife battering and its documented effects on women victims was not only taken into account but was incorporated into the legal concept of self-defence.”<sup>104</sup>

Justice Wilson considered that the situation must be considered from the perspective of the woman; to do otherwise would be to deny women equal rights to legal protection.<sup>105</sup>

The requirement that the defendant must have a reasonable belief in imminent harm clearly posed a problem for Angelique Lavallee as the deceased was walking away from the defendant when the shot was fired. The Supreme Court, however, rejected the approach taken in previous cases which considered a perception of serious bodily harm or death to be intrinsically unreasonable in the absence of an ongoing confrontation.<sup>106</sup> The Court relied on evidence of the battered woman syndrome to paint a broader picture of imminency, showing how the accused’s perception of harm was not unreasonable in the circumstances. The court stated: ‘...the appellant’s shooting of the deceased was a final desperate act by a woman who sincerely believed that she would be killed that night.’<sup>107</sup> The battered woman’s ability to predict the onset of violence, and the fact that the violence had recently intensified, rendered her belief in imminent harm reasonable.<sup>108</sup>

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<sup>104</sup> Ibid.

<sup>105</sup> (1990) 555 C.C.C. (3d) 97 at 115; see Schuller “The Impact of Battered Woman Syndrome Testimony on Jury Decision-Making: Lavallee v R Reconsidered” *Windsor Yearbook of Access to Justice* (1990) 10, 105-126 p. 113

<sup>106</sup> *Lavallee v R* [1990] 1 SCR 852 p. 877; see Seuffert N “Battered Women and Self-Defense” pp. 309-310

<sup>107</sup> *Lavallee v R* [1990] 1 SCR 852 p. 859

<sup>108</sup> Ibid., p. 822; see Seuffert N “Battered Women and Self-Defense” p. 310

Furthermore, the Supreme Court of Canada widened the concept of a pre-emptive strike. It was held that a battered woman was not required to wait until the threats were executed for her defensive action to be considered reasonable and necessary, as this would sentence her to 'murder by instalment'.<sup>109</sup> The court also appeared to consider that a time lapse between the threat and the homicide would not, as a matter of law, exclude a plea of self-defence. The court justified this opinion by comparing the position of a battered woman to that of a hostage:

“The situation of the battered woman as described [by the expert witness] strikes me as somewhat analogous to that of a hostage. If the captor tells her that he will kill her in three days time, is it potentially reasonable for her to seize an opportunity presented on the first day to kill the captor or must she wait until he makes the attempt on the third day?”<sup>110</sup>

The impact of the battered woman syndrome is well illustrated by contrasting two cases. The syndrome was only admitted in one case. Seuffert<sup>111</sup> compares the Canadian case, *Lavallee*<sup>112</sup> with the New Zealand case of *R v Wang*,<sup>113</sup> in which the defendant killed her abuser whilst he was sleeping. Whereas *Lavallee* was acquitted, *Wang* was convicted of manslaughter on the grounds of provocation, as opposed to murder. It is suggested that one of the reasons for the divergence in the law's response

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<sup>109</sup> (1990) 555 C.C.C. (3d) 97 at 120; see Schuller “The Impact of Battered Woman Syndrome Testimony on Jury Decision-Making: *Lavallee v R* Reconsidered p. 111; Seuffert N “Battered Women and Self-Defense”; Willoughby M J “Rendering Each Woman her Due: Can a Battered Woman claim Self-Defence when she Kills her Sleeping Batterer?” p. 187

<sup>110</sup> *Lavallee v R* [1990] 1 SCR 852 p. 889; see Seuffert N “Battered Women and Self-Defense” pp. 310-311

<sup>111</sup> Seuffert N “Battered Women and Self-Defense”

<sup>112</sup> [1990] 1 SCR 852

<sup>113</sup> [1990] 2 NZLR 529

is the acceptance of the battered woman syndrome in *Lavallee*,<sup>114</sup> and its rejection in *Wang*.<sup>115</sup> Hence, despite evidence of extreme violence and threats of death to herself and her family, including death threats on the night the killing was committed, her actions were considered to be unreasonable. Seuffert contends that if the court had accepted evidence of the battered woman syndrome, this would have enabled the jury to accept that the defendant's perception of the threat of imminent harm was reasonable, and how it was impossible for her to leave the relationship. Indeed she testified that she '...had to kill him, there was no other way.'<sup>116</sup>

Indeed, it appears that Wang was rather like the hostage referred to by Madam Justice Bertha Wilson. She was trapped inside the relationship, and on the times she had managed to leave, she was forced to return. Thus, it does appear that if the reasoning of the Supreme Court of Canada was applied to the *Wang*<sup>117</sup> case, an acquittal may have followed. Nevertheless, although the facts of the cases are similar, there is a significant difference. In addition to the racial and cultural differences, the deceased in *Wang*<sup>118</sup> was asleep when he was killed. Hence the threat of harm is further removed that in the *Lavallee*<sup>119</sup> case, when the deceased could quite easily have turned around and carried out his threat. That is not to suggest that killing a sleeping batterer should never be considered an act of self-defence, and that the harm is not to be seen as imminent or inevitable, but that the situation is different, and requires

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<sup>114</sup> [1990] 1 SCR 852

<sup>115</sup> [1990] 2 NZLR 539

<sup>116</sup> Ibid. p. 677

<sup>117</sup> Ibid.

<sup>118</sup> Ibid.

<sup>119</sup> [1990] 1 SCR 852

further analysis. Using the battered woman syndrome to 'fit' such a situation into the existing requirements of self defence does not explore whether such a killing is or should be justified, legally and morally. Furthermore, *Wang*<sup>120</sup> was not convicted of murder, but of manslaughter on the grounds of provocation, an outcome which would be considered a victory in this jurisdiction, especially with the existence of a substantial time lapse. The difficulty with Seuffert's analysis is that she appears to assume that self-defence is the appropriate defence for all battered women, without considering whether a different defence would perhaps be more fitting.

### **Self-Defence, Reasonable Force and the Battered Woman Syndrome in England: The Tony Martin Case**

In this jurisdiction, the issue of reasonable force and expert testimony was considered recently by the Court of Appeal in the case of *R v Martin*.<sup>121</sup> Martin killed a 16 year old boy by shooting him in the back during an alleged burglary. Martin claimed that, as he had been burgled a number of times previously, he believed his house was particularly vulnerable to invasion and that on the night he questioned he genuinely feared for his life and was acting in self-defence. He appealed against his conviction for murder on the basis that there was compelling evidence to support a plea of either self-defence or diminished responsibility.

One ground of appeal alleged that certain medical evidence should have been taken into account by the jury when they were assessing whether the level of force he used was reasonable. This evidence illustrated that Martin was, at the time of the shooting,

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<sup>120</sup> [1990] 2 NZLR 529

<sup>121</sup> [2002] 1 Cr App R 27



suffering from depression and a paranoid personality disorder. As noted in chapter 4, within this jurisdiction self-defence adopts both a subjective and objective test.<sup>122</sup> The circumstances are viewed as the defendant honestly believed them to be, there is no requirement that this belief should be reasonable. However, the level of force used is judged from an objective standard. Hence the jury decide whether, in the circumstances as believed by the defendant, the level of force used was reasonable. In the first trial, the jury considered that the force used by Martin was unreasonable in the circumstances he believed them to be and the Court of Appeal rejected the claim that his medical characteristics should be taken into account when assessing the reasonableness of the force used. Lord Woolf CJ stated:

“We would accept that the jury are entitled to take into account in relation to self-defence the physical characteristics of the defendant. However, we would not agree that it is appropriate, except in exceptional circumstances which would make the evidence especially probative, in deciding whether excessive force has been used to take into account whether the defendant is suffering from some psychiatric condition.”<sup>123</sup>

Hence, although a jury may take into account the size and strength of a woman who kills her abusive partner, as these amount to physical characteristics, any mental abnormality will be irrelevant. Thus, unless the situation of a woman who kills her abusive partner amounts to one of the exceptional circumstances, and the battered woman syndrome is especially probative, evidence of the syndrome will not be admitted in relation to the issue of whether the level of force used as reasonable.

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<sup>122</sup> see Rees T & Smith J C “Case Comment: Homicide: Murder Excessive Force in Self-Defence”

*Crim L R* (2002) Feb, 136-139:

“It is well established that the law of private defence involves the application of a combination of subjective and objective tests. The defendant is to be judged on the facts as he honestly believed them to be, whether reasonable or not. But he may use only force as is reasonable in those supposed circumstances.” (p. 137)

<sup>123</sup> [2002] 1 Cr App R 27 at p. 45 para 67

## Criticisms of the Concept of the Battered Woman Syndrome

Despite the undoubtedly virtuous motive behind the development of the syndrome, and its success in Jurisdictions such as Canada and United States in relation to a plea of self-defence, the syndrome has received a plethora of criticisms, from both feminists and other academic commentators.<sup>124</sup> This criticism has been directed at a number of different elements: methodology, judicial application and the ideology of the theory.

One of the most pronounced criticisms of the theory was presented by Faigman, writing in 1986, when the impact of the syndrome was reaching its zenith. He notes, '[t]he scholarly commentary has overwhelmingly endorsed the use of the battered woman syndrome evidence.'<sup>125</sup> But whilst Faigman agrees that social science research should be utilised in cases involving battered women, he argues that the syndrome should not be admitted into court, on the basis that its validity is questionable.<sup>126</sup>

Firstly, he criticises the ethics of Lenore Walker, noting that she appears willing to offer testimony even in what he considers to be implausible cases. Faigman presents *State v Martin*<sup>127</sup> as evidence of such misplaced willingness, suggesting that it

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<sup>124</sup> see for example Faigman D "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" pp. 619-620 Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trials: The Battered Woman Syndrome and its Limitations"; Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering"

<sup>125</sup> Faigman D "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" pp. 619-620

<sup>126</sup> Ibid., p. 624

<sup>127</sup> 666 S.W.2d 895 (Mo. Ct. App. 1984)

involves an attempt to extend the requirement of imminence 'almost to infinity'.<sup>128</sup> In this case Helen Martin was violently abused by her husband for five years, until their separation in 1980. At this time her husband, Ronald, moved in with another woman, and threatened to blow-up the defendant's house, for insurance purposes. Fearing he would do so, she hired a man named Bratcher for £10,000 to kill Ronald. Ronald was killed by being shot and hit on the head when he visited the house on December 5th in order to sign some papers. After this Helen went out to celebrate a friend's birthday. She reported Ronald missing on the 6th and paid his insurance policy on the 7th. After the body was discovered on the 8th, Helen confessed to her involvement. Upon being convicted for murder, Martin appealed on the grounds that evidence of the battered woman syndrome was wrongfully excluded, and intended to call Lenore Walker as an expert witness. The appeal was rejected by the Missouri Court of Appeal, on the basis that the evidence did not support, in this case, a plea of self-defence. Faigman, however, considered Walker's willingness to categorise Martin as a case of legitimate self-defence to be deeply disturbing, and suggests that this questions her credibility as an expert witness in other cases involving battered women.<sup>129</sup>

This analysis is, however, also open to criticism. Firstly, evidence of the battered woman syndrome in such a case is valuable as it may explain how many battered women are still in severe danger despite leaving the relationship, as many women are abused and killed after separation. Furthermore, Walker is merely presenting

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<sup>128</sup> Faigman D "The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent" pp. 631-632

<sup>129</sup> Ibid., pp. 631-633

evidence as to the affects on a long-term battering relationship, the jury will then decide, if the judge permits the plea of self-defence, whether or not it is a case of justifiable homicide. The expert witness does not decide whether or not the facts fulfil the legal requirements of self-defence. However, such evidence may be highly influential.

Nevertheless, these concerns may not be completely unfounded. In the recent case involving Helen Cummings,<sup>130</sup> the battered woman syndrome was admitted in order to support in her defence for killing her unfaithful husband. Although it appears that she had previously been attacked, the main factor seems to have been the husband's unfaithfulness and the fact that he would flaunt this by leaving revealing photographs for Cummings to see. Two points can be made in relation to this. Firstly, it is difficult to see how the battered woman syndrome applies to a situation involving infidelity, as it is based on the nature of and the effect of a cycle of physical abuse. Secondly, Cummings shot and killed her husband after finding revealing photographs, which had been left on purposes for her to find, hence, a more fitting defence would be that of provocation. If the battered woman syndrome is increasingly applied to such situations, this will undoubtedly reduce the credibility of such evidence, and perpetuate the criticism that it is merely a device used to present women who kill with an excuse.

### **Methodological Criticisms**

The validity of the methodology used by Walker receives Faigman's assiduous scrutiny, and several flaws within the cycle theory of violence and learned

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<sup>130</sup> "Baby Daughter for Nurse who Killed Husband" *The Independent* Friday 3 October 1998 p. 11

helplessness are highlighted. Faigman argues that the cycle theory is, at the very best, tenuously supported by the empirical research.<sup>131</sup> The theory is considered to embody five significant methodological and interpretative flaws.

1. The answers received are considered dubious due to the use of leading questions.

This may enable the subjects to guess the hypothesis, whereas social science researchers are generally expected to take the necessary steps to prevent such a situation.<sup>132</sup>

2. In examining the different stages of the abuse, the interviewee's answer is substituted by the interviewer's evaluation of this response. This may render the research 'susceptible to the problem of experimenter expectations.' Any expectations held by the interviewer are liable to colour their evaluation and interpretation of the responses received.<sup>133</sup>

3. Walker fails to position the cycle theory within any framework of time. Faigman considers this to be, on a legal basis, the most crucial flaw. If the tension building stage generally occurs for a number of days, and invariably leads to a severe battering, this will have significant legal consequence; however, a tension building stage which only occurs a few minutes before the acute battering episode is considered unlikely to establish a constant state of fear. In addition, the research fails to consider the existence of tension building episodes which do not lead to an acute battering, and whether a fourth phase of normal behaviour also exists.<sup>134</sup>

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<sup>131</sup> Faigman D "The Battered Woman Syndrome and Self-Defence: A Legal and Empirical Dissent" p. 636

<sup>132</sup> Ibid., p. 637

<sup>133</sup> Ibid., pp. 637-638

<sup>134</sup> Ibid., p. 638

4. An empirical relation between the cycle theory and the cumulative terror which consumes the battered woman is not revealed. Faigman notes that the research offers little support for the contention that the woman is gripped by fear, during phases one and two, and will resort to any lengths necessary to end the abuse.<sup>135</sup>
5. Finally, evidence of a distinct cycle of violence is not actually demonstrated by the results. The data provided by Walker does not clearly establish that all the battered women studied experienced a full cycle of violence. Walker founds the existence of a cycle on the follow statistics: '[i]n 65% of all cases...there was evidence of a tension-building phase prior to the battering. In 58% of all cases there was evidence of loving contrition afterward.'<sup>136</sup> Hence, Faigman calculates:

“if sixty-five percent of all subjects experience tension building before an acute battering incident and fifty-eight percent of all subjects experience loving contrition after an acute battering, then it is likely that only about thirty-eight percent of the women actually experienced the entire cycle.”<sup>137</sup>

The Learned Helplessness theory is also considered to be flawed, both theoretically and methodologically, as it involves a misapplication of the theory as developed by Seligman. As noted above, once the dogs became helpless, inciting them to take control became almost impossible. This is considered to be theoretically inconsistent with the woman who kills her abuser. If she is rendered helpless, unable to gain control over her situation, the realisation that she has to protect herself and the resulting action is clearly contradictory. The theory fails to explain why and how the

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<sup>135</sup> Ibid., pp. 638-639

<sup>136</sup> Walker L *The Battered Woman Syndrome* p. 177

<sup>137</sup> Faigman D “The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent” p.

battered women are able to reassert control and kill their abuser.<sup>138</sup> Moreover, women, unlike animals, are still able to gain rational and assertive thoughts, thus it needs to be questioned whether or not an experiment based upon the reactions of dogs can offer any insight into the effect of ongoing domestic violence. Furthermore, it is questioned whether it is the woman, or society and agencies which are supposed to provide support and protection, which suffer from learned helplessness.<sup>139</sup>

Faigman also argues that the feelings and emotions which Walker cites as evidencing learned helplessness have not been established as 'uniquely indicative of that condition'. Although they are undoubtedly linked to learned helplessness, presenting them as evidence of the syndrome is theoretically problematic. Furthermore, Faigman notes that Walker's research did not involve a control group of non-battered women, against whom the reasonableness of the battered women's actions could be measured. Finally, only a handful of the women studied actually killed their abusers, and the research failed to compare and contrast these women to the majority of the subjects.<sup>140</sup>

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<sup>138</sup> Ibid., pp. 640-641 see also McColgan "In Defence of Battered Women Who Kill" p. 525; Nicolson D and Sanghiv R "Battered Women and Provocation: The Implications of Ahuwalia" p. 734  
O'Donovan "Defences for Battered Women Who Kill" p. 232; Sheehy E A, Stubbs J and Tolmie J  
"Defending the Battered Woman on Trials: The Battered Woman Syndrome and its Limitations" p. 384

<sup>139</sup> Seuffert N "Battered Women and Self-Defence" p. 303

<sup>140</sup> Ibid., p. 642-463; Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: The Battered Woman Syndrome and its Limitations" p. 385

## Judicial Application

A further criticism relates to the manner in which the concept is applied by the courts. Through an examination of the judgement in *State v Kelly*,<sup>141</sup> Schneider<sup>142</sup> emphasises the adverse problems which have arisen due to the use of the battered woman syndrome. This decision indicates that the problems relate to relevancy of the syndrome. As opposed to considering the testimony as primarily relevant to the reasonableness of her killing, thus focusing primarily on the cycle of violence, the fear which this engenders, and how this renders her killing reasonable, the courts have overwhelmingly considered the syndrome as primarily relevant to the woman's inability to leave and the concept of learned helplessness:

“The crucial issue of fact which this expert's testimony would bear is why, given such allegedly severe and constant beatings, combined with threats to kill, the defendant had not long ago left the deceased...”<sup>143</sup>

Hence, whereas the court considers the testimony to be crucial when explaining why the woman remained in the relationship, and in refuting the myths and misconceptions, it is considered to be less pertinent in explaining why the killing was reasonable:

“The difficulty with the expert's testimony is that it sounds as if an expert is giving knowledge to a jury about something the jury knows as well as anyone else namely, the reasonableness of a person's fear of imminent serious danger. This is not at all, however, what this testimony is directly aimed at.”<sup>144</sup>

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<sup>141</sup> 97 NJ 178, 197, 478 A.2d 364 (1984)

<sup>142</sup> Schneider E “Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering” p. 211

<sup>143</sup> *State v Kelly* 97 NJ at 205, 478 A.2d at 377 see Schneider E “Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering” p. 209

<sup>144</sup> *State v Kelly* 97 NJ at 206, 478 A.2d at 378 see Schneider E “Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering” p. 210



The court did suggest that the testimony might emphasise the battered woman's unique ability to predict the extent to which she was threatened, and also assist the jury in determining the honesty of the defendant's belief. This concession, however, is contradicted and undermined by other parts of the judgement:

“No expert is needed...to tell the jury the logical conclusions, namely that a person who has in fact been severely and continuously beaten might very well reasonably fear that the imminent beating she was about to suffer could be either life-threatening or pose a risk of serious injury.”<sup>145</sup>

The judgment appears to contain a puzzling discrepancy. One of the court's rationales for admitting expert evidence on the battered woman syndrome is based on the need to educate the jury as to the reality of the situation, as their knowledge and views on domestic violence are likely to be obscured by existing myths and stereotypes. The court, however, suggests that the jury is able to determine the reasonableness of her action and belief, without the aid of the expert testimony; it is considered to be within the realm of their knowledge. Hence, although the jury are assisted by expert testimony with regards her failure to leave, no such aid is given in relation to assessing the requirement of reasonableness.

The question of reasonableness in the law of self-defence presents one of the most significant difficulties for battered women and, in most cases, expert testimony regarding this requirement is considered to be the crucially important. The approach taken by the Supreme Court of New Jersey, however, fails to adequately address this issue.<sup>146</sup> As Schneider notes:

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<sup>145</sup> Ibid.

<sup>146</sup> Schneider E “Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering” p. 211

“Expert testimony, admitted for the purpose of explaining why the battered woman did not leave, does not help the jury answer the question whether she was reasonable in acting violently in order to save her life.”<sup>147</sup>

It is argued by Schneider that the reasonableness of the battered woman’s belief and actions do not fall within the realm of the jury’s knowledge. Without expert testimony the jury is unlikely to comprehend the precision with which the defendant is able to calculate the closeness and severity of the next beating.<sup>148</sup> This approach is considered to expose the resilience and extent of the sex discrimination inherent in the law of self-defence. Courts seem to consider that the syndrome is principally relevant to the question of why the woman did not leave the relationship, as opposed to explaining why her actions were reasonable.<sup>149</sup>

Moreover, some fear that the syndrome may actually undermine a plea of self-defence, as opposed to supporting it, due to the conflict between the requirement of reasonableness and the pathological nature of the syndrome.<sup>150</sup> Although many feminists argue that the syndrome does not amount to a pathological condition, courts have tended to view it as evidence of mental instability or insanity. Kazan argues that this view is not unreasonable, due to the psychological symptoms which are held to be constitutive of the syndrome. It is stated that ‘insofar that these symptoms refer to a pattern of cognitive impairment...evidence that a woman is suffering from such symptoms may justifiably be interpreted by the courts as an indication that her reasoning may be impaired.’<sup>151</sup> Thus a finding that one is suffering from the battered

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<sup>147</sup> Ibid.

<sup>148</sup> Ibid., p. 211

<sup>149</sup> Ibid., p. 210

<sup>150</sup> Kazan P “Reasonableness, Gender Difference and Self-Defense Law”

<sup>151</sup> Ibid., pp. 556-557

woman syndrome is consistent with a ruling that the actions are unreasonable, thus undermining the claim of self defence. Kazan thus argues that ‘...the psychological symptoms of learned helplessness and heightened sensitivity may interfere with a battered woman’s ability to accurately perceive and respond to her situation in a reasonable manner.’<sup>152</sup>

Proponents of the battered woman syndrome argue that these psychological symptoms do not render the perceptions and responses unreasonable. They simply assert how any normal person faced with an aberrant and extremely dangerous situation would react, thus the syndrome illustrates a ‘...terrified human being’s normal response to an abnormal and life threatening situation.’<sup>153</sup> Hence, her actions should not be constructed as unreasonable. It is thus argued that the court’s insistence on presenting the syndrome as a ‘mental disorder’ is due to the inherent sexism with the criminal justice system and society.<sup>154</sup> Kazan, however, disputes this contention, and states that the conception of the syndrome as a mental disorder is due to the fact that the psychological symptoms referred to do ostensibly seriously effect the battered woman’s cognitive abilities. Hence the reasonableness, although it may be normal for those in such situations, does not correspond to ‘our ordinary conceptions of reasonableness’, which perceives a reasonable belief to be one which ‘...is formed and held on the basis of ordinary reliable evidence as acquired by unimpaired perception

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<sup>152</sup> Ibid., p. 558

<sup>153</sup> Walker L *Terrifying Love* (New York: Harper and Row, 1989) p. 180 cited by Kazan P “Reasonableness, Gender Difference and Self-Defense Law” p. 559

<sup>154</sup> Kazan P “Reasonableness, Gender Difference, and Self-Defense Law” p. 559

and evaluated through normally sound reasoning and judgement.<sup>155</sup> It is a different conception of reasonableness, one which is not free from mental impairment.

### **Ideological Criticisms**

It is argued that the court's eagerness to focus on the learned helplessness element of the syndrome arguably arises from the ease with which they can label women as helpless and passive. Judicial acceptance is forthcoming when the testimony highlights the personal and shared weakness of women, as opposed to the reasonableness of their actions. Battered women are constructed to be psychologically unsound and emotional, not as women who have inevitably responded in a rational, capable and positive manner to a life threatening situation. The women and their actions are rationalised through a discourse of victimisation which removes their agency and fails to clarify their perceived necessity to act.<sup>156</sup> Indeed, such a construction forms one of the main ideological criticisms of the battered woman syndrome. As opposed to countering images of women as passive, sick and helpless, the theory can be seen to perpetuate these stereotypes,<sup>157</sup> which is compounded by the weight placed on the theory of learned helplessness by the judiciary. Focusing on the psychological state of the defendant, suggests that the syndrome is a form of personal incapacity, such as diminished responsibility, or insanity, medicalises the battered

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<sup>155</sup> Schoop, Sturgis & Sullivan "Battered Woman Syndrome, Expert Testimony, and the Distinction Between Justification and Excuse" *U Illinois L Rev* 45 (1994) 92; cited by Kazan P "Reasonableness, Gender Difference and Self-Defense Law" p. 562

<sup>156</sup> Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering" p. 213

<sup>157</sup> *Ibid.*, pp. 214-215

women, and individualises the problem. They are presented as 'sick' as opposed to 'bad'.<sup>158</sup>

However, it can be argued that the syndrome, does not, per se, medicalise the woman, as it should not be considered as forensic.<sup>159</sup> The battered woman syndrome merely describes the situation in which the battered woman finds herself in and is unable to escape, and is considered by some to be insufficiently scientifically valid to amount to expert forensic evidence.<sup>160</sup> Hence, it could be argued that the battered woman syndrome does not actually medicalise women, as it is not a medical concept. In contrast, perhaps it is the willingness of the medical and legal profession to accept the battered woman syndrome as a medical syndrome, and a desire to construct the woman as ill or medically abnormal which leads to medicalisation. Hence, it is not the syndrome per se which is problematic, but the manner in which it is interpreted and applied.

Another criticism relates to the perceived necessity of using the concept in order for the female experience to enter the legal arena. As O'Donovan questions: '[w]hy can't

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<sup>158</sup>see Nicolson D and Sanghvi R "Battered Women and Provocation: The Implications of Ahluwalia" p. 734; O'Donovan "Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome" p. 431; Schneider E "Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony of Battering" p. 199; Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: The Battered Woman Syndrome and its Limitations" p. 384 and p. 387

<sup>159</sup> Feckleton I "Contemporary Comment: When Plight Makes Right - The Forensic Abuse Syndrome" *Crim LJ* (1994) 18, p. 29

<sup>160</sup> Feckleton I "Contemporary Comment: When Plight Makes Right - The Forensic Abuse Syndrome" p. 31

women's experiences be accommodated by law without resort to experts?'<sup>161</sup> Whereas the experiences and perceptions of the 'reasonable man' are considered inherent common sense, exempt from elucidation, the 'reasonable woman' appears to be a concept unknown to the law.<sup>162</sup> Furthermore, as Sheehy, Stubbs and Tolmie note, constructing the issue as beyond the knowledge of the average juror suggests that domestic violence is a rare occurrence, whereas such abuse is, unfortunately, all too common. Constructing domestic violence as an exceptional phenomenon enables solutions to be individualised, thus neglecting the social and political dynamics of male violence.<sup>163</sup>

Additionally, a judicial ruling that the syndrome is relevant in a certain case implies that the defendant reacted as a reasonable woman with battered woman syndrome. This, however, appears to suggest that the battering itself fails adequately to excuse or justify the homicide,<sup>164</sup> and may also lead to the adoption of a separate standard, a 'bona fide' battered woman test.<sup>165</sup> Hence a battered woman's experiences are reconstructed to adhere to medical discourse,<sup>166</sup> and those who have suffered many

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<sup>161</sup> O'Donovan "Law's Knowledge: The Judge, The Expert, the Battered Woman and her Syndrome" p. 430

<sup>162</sup> Ibid., pp. 429-431

<sup>163</sup> Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trials: The Battered Woman Syndrome and its Limitations" p. 384

<sup>164</sup> Wells C "Battered Women Syndrome and defences to homicide: Where now?" *Legal Studies* (1994) 14, 266-276

<sup>165</sup> Ibid. and Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trials: The Battered Woman Syndrome and its Limitations" p. 386

<sup>166</sup> Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trials: The Battered Woman Syndrome and its Limitations" p. 384

years of abuse but do not fall within the stereotype of the battered woman presented by the syndrome are unlikely to present a successful defence. This could be crucial, as it is considered that the syndrome is primarily based on the experiences of white middle class women, and thus fails to represent women from different backgrounds.<sup>167</sup> Admission of the battered woman syndrome also fails to alter the apparatus which actually represents her actions as unreasonable - the structure of the law and the legal concept of reasonableness<sup>168</sup> - and may lead to favourable decisions being reached out of sympathy as opposed to an adherence to the legal rules.<sup>169</sup> The focus of the jury is misdirected, with the evaluation of reasonableness concentrating on whether it was reasonable for her to remain in the relationship, as opposed to whether the homicide was reasonable given her physical demeanour and perception of danger.<sup>170</sup> The importance with which the judiciary and society appears to attach to the fact that the battered woman stayed with her abuser is shown by Sheehy, Stubbs and Tolmie to presuppose a number of factors.<sup>171</sup> Firstly, it is assumed that she has not left the relationship, however, many women do leave but eventually return either through coercion or emotional blackmail. Secondly, it assumes that the violence and the threat to her life will cease if she leaves, which is not supported by homicide statistics. It does not acknowledge that many women are forced to stay precisely

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<sup>167</sup> Chan W "Legal Equality and Domestic Homicides" p. 206

<sup>168</sup> Tarrant S "Something is Pushing Them to the Side of their Own Lives: A Feminist critique of Law and Laws" p. 604; Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trials: The Battered Woman Syndrome and its Limitations" p. 386

<sup>169</sup> Chan W "Legal Equality and Domestic Homicides"

<sup>170</sup> McColgan A "In Defence of Battered Women Who Kill" p. 525

<sup>171</sup> Sheehy E A, Stubbs J and Tolmie J "Defending the Battered Woman on Trial: The Battered Woman Syndrome and its Limitations" p. 385-386

because of the threats and violence, nor does it acknowledge the research which highlights the inadequacy of the police and domestic violence agencies. More importantly, it disregards the lack of alternative housing and financial resources for battered women, especially those with children. Indeed, the existence of children impacts significantly on the decision to leave and their interests are often given priority over her own.

The dilemma for feminist commentators and defence advocates is vivid. The battered woman syndrome is necessary in order for women to combat the sex-bias inherent in the defences to murder and the myths surrounding battered women, yet an application of the theory perpetuates stereotypes and renders the female experience as outside the realm of the average juror's knowledge.

## **Conclusion**

This chapter has analysed the development of the concept of the battered woman syndrome, how it has been used in relation to the three main defences, and the criticisms of the syndrome. The syndrome has had an impact on all three of the defences, but has been more successful in relation to self-defence in America and Canada. In this jurisdiction, the battered woman syndrome is generally considered to amount to evidence of diminished responsibility, however with the House of Lords ruling in the case of Smith, the syndrome may be used more in relation the partial defence of provocation. Despite its advances, the syndrome has come under considerable criticism, as it tends to perpetuate women as passive and sick. The next chapter will draw upon some of the issues raised in this chapter and commence the



critical analysis of the defences and the battered woman syndrome via a scrutiny of a number of Court of Appeal cases involving women who kill their abusive partners.

## CRITIQUE AND CONSTRUCTION

### **Introduction**

Chapters 4 and 5 provided a discussion of both the criminal law defences and the concept of the battered woman syndrome. The aim of this chapter is twofold: to draw together the main criticisms which relate to the law's treatment of women who kill their abusive partners, as considered in chapters 4 and 5 and to highlight the problems with this approach, and to move the debate forward in a manner which avoids the essentialising tendencies of the sameness/difference debate, which tends to assume a monolithic woman and disregards differences which exist between women. In particular, the chapter will examine the construction of identity, an endeavour which will be further developed in chapters 7 and 8.

### **The Existing Criticisms**

Two main arguments have presented themselves in the existing literature dealing with the criminal law and women who kill their abusive partners: first, the law is presented as being gender neutral, yet it is shown to be based on male experiences and behaviour, hence excluding women's experiences and second, the law treats women more harshly than men as it applies double standards. Invariably, the suggested solutions to these perceived problems have centred around the issue of equal treatment or different treatment, thus drawing upon the sameness (men and women should be treated the same)/difference (any differences between men and women should be recognised) debate which has been a major issue within feminist theory.<sup>1</sup> The

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<sup>1</sup> As discussed in chapter 2.

argument that the law is male argues for a recognition of women's difference, such as the approach adopted by the Supreme Courts in the cases of *Wanrow*<sup>2</sup> and *Lavallee*;<sup>3</sup> whereas an argument that the law applies double standards proposes that women and men should be treated equally. Both of these arguments, to an extent, appeal to the notion of equality, especially legal equality or legal justice, albeit in very different ways.

**'As a cultural artifact law is male; yet it aspires to represent us all.'**<sup>4</sup>

Throughout the discussion of the criminal law defences and the battered woman syndrome the criticism that the law is male has invariably arisen in relation to the specific requirements of the defences.<sup>5</sup> As noted in the introduction, this argument precedes along the lines that the law is, theoretically gender natural, applicable to both men and women. However, it is argued that, in reality, the law is based upon and thus reflects the experiences of men. This has the consequence of excluding the potentially different experiences of women. It is generally argued that the male bias is due to two factors, first that murder is, overwhelmingly, committed by men, and second, the law is generally written by men.<sup>6</sup>

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<sup>2</sup> 88 Wash. 2d 221, 559 p.2d 548 (1977)

<sup>3</sup> [1990] 1 S.C.R. 852, 55 C.C (3d) 97

<sup>4</sup> O'Donovan K "Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome" p. 435

<sup>5</sup> Schneider E M "Equal Rights to Trial for Women: Sex Bias in the Law", Taylor L J "Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense"

<sup>6</sup> O'Donovan K "Defences for Battered Women Who Kill" p. 220

It is argued that homicide patterns vary considerably between men and women. In particular, men and women tend to kill in response to very different situations and also tend to use dissimilar methods.<sup>7</sup> Taylor notes that whereas men generally kill women in response to sexual provocation, such as adultery, women invariably kill men due to circumstances of abuse and physical violence.<sup>8</sup> Thus the argument states that as the law is based upon the experience of men, women are excluded as they fall outside the established legal categories. This legal exclusion of the female experience is considered in detail by Tarrant,<sup>9</sup> who analyses the way in which the requirements of the criminal law defences produce and perpetuate the silence of women, especially in relation to domestic violence.<sup>10</sup> This silencing occurs due to the dominance of the male gender. Gender is considered to be the main organising principle in society and, as the male gender is dominant, the voices and experiences of women are ignored. Reality and truth is based upon the male voice, the female voice is excluded. Tarrant draws upon the following quote by MacKinnon in order to emphasise this point:

“Men create the world from their own point of view, which then becomes the truth to be described. This is a closed system, not anyone's confusion.”<sup>11</sup>

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<sup>7</sup> Taylor L J “Provoked Reason in Men and Women: Heat-of-Passion Manslaughter and Imperfect Self-Defense” p. 1720-1725

<sup>8</sup> Ibid.

<sup>9</sup> Tarrant S “Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws”

<sup>10</sup> Ibid.

<sup>11</sup> MacKinnon C “Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence” *Signs: Journal of Women in Culture and Society* (1983) 8, 635 p. 638 see Tarrant S “Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws” p. 578

Meaning and reality therefore, due to the gendered nature of society, has been constructed predominately from a male perspective.<sup>12</sup> Furthermore this silencing and exclusion is perpetuated by the adoption of an epistemology which posits the existence of objective knowledge and truth which is universal, transcending time, culture and gender, existing outside the realm of human existence. In this framework, there is one reality, and it applies to us all. This reality, however, is constructed by the dominant standpoint, thus maintaining power relations and excluding the reality of divergent perspectives. Hence, the male view of reality becomes universal, and the female reality is excluded, thus perpetuating female subordination.<sup>13</sup>

In addition to the structural requirements of the defences being derived from male experiences, it is also argued that the 'reasonable man/person' is inherently male. Just as the legal requirements are supposedly gender neutral, so are the actions of the reasonable person. The reasonable person is considered to represent the objective, universal truth. As O'Donovan states, the reasonable person is '...taken to be the common sense experience of us all.'<sup>14</sup> Both feminism and postmodernism, however, dispute such universality and recognise the existence of other truths and experiences. Such epistemological theories recognise that truth and knowledge are produced by society and social relations, and thus acknowledge a 'plurality of truths or

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<sup>12</sup> Tarrant S "Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws" pp. 575-578

<sup>13</sup> Ibid p. 582

<sup>14</sup> O'Donovan "Law's Knowledge: The Judge, The Expert, The Battered Woman and Her Syndrome" pp. 425-429

perspectives'.<sup>15</sup> Such approaches question the assertion of universality and require the origin of any truth assertion to be examined. The difficulty which exists, however, is how to inject the female experience into the legal arena.<sup>16</sup>

Although both Tarrant<sup>17</sup> and O'Donovan<sup>18</sup> recognise the problematic nature of appealing to 'universals', both seem to suggest that the experiences of women, especially in relation to domestic violence, form an homogeneous category. Although Tarrant<sup>19</sup> does recognise that there are other organising principles within society, such as race, class, sexuality and disability, she argues that gender is primary and separate to these other relations. Thus gender is considered to be more significant. This is highly contestable. Moreover, each relation is concerned with a process of 'Othering.' In particular, not all the experiences of women are the same and, further, it is important to recognise that 'gender' is shaped by other relations of identity, such as race and class.<sup>20</sup>

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<sup>15</sup> Tarrant S "Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws" p. 583

<sup>16</sup> O'Donovan K "Defences for Battered Women Who Kill" p. 429

<sup>17</sup> Tarrant S "Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws"

<sup>18</sup> O'Donovan K "Defences for Battered Women Who Kill"

<sup>19</sup> Tarrant S "Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws"

<sup>20</sup> This point is explored further in chapters 7 and 8

## Double Standards

In addition to male-bias, it is also argued that the law discriminates against women as it applies 'double standards'. The law requires women to conform to different, and perhaps, higher standards than men<sup>21</sup> and/or a woman is convicted for a more serious offence i.e. murder, whereas men tend to be convicted of manslaughter.<sup>22</sup> Bandalli<sup>23</sup> argues that this unequal application of the law is due to the blame which is attached to the woman. She argues that the role of the husband is ignored whether he is the victim or the perpetrator. In both cases culpability is attached to the wife, thus it is argued

“[w]hatever the formal structure of the law, ultimately the success or failure of a provocation defence depends upon ingrained cultural judgement and the hidden agenda of this partial defence, as it operates in practice in spousal homicide, is one of female responsibility, whether as victim or offender.”<sup>24</sup>

In cases in which a husband kills his wife the provocative incident invariably consists of catching the wife committing the act of adultery or a confession of adultery. The focus in such cases remains within the matrimonial arena and the culpability of the husband is reduced as the victim is often portrayed as an inadequate and imperfect wife, attracting such comments as: ‘...the defendant has led a blameless life and everything he said in court would be accepted without hesitation.’<sup>25</sup> In the case of Bisla Singh, the defendant strangled his wife to death, in order to shut her up, after she

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<sup>21</sup> Nicolson D “Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill” p. 185 and O’Donovan K “Defences for Battered Women Who Kill” p. 221

<sup>22</sup> Bandalli S “Battered Wives and Provocation”; Bandalli S “Provocation - A Cautionary Note”, Justice for Women [www.jfw.org](http://www.jfw.org); O’Donovan K “Defences for Battered Women who Kill” p. 221

<sup>23</sup> See Bandalli S “Battered Wives and Provocation”; Bandalli S “Provocation - A Cautionary Note”

<sup>24</sup> Bandalli S “Provocation - A Cautionary Note” p. 398

<sup>25</sup> Mr Justice Wein In the case of Robert Wright reported in *The Times*, 14 October 1975, cited by Bandalli S “Provocation - A Cautionary Note” p. 402

subjected him to verbal abuse. Allowing the plea of provocation, Judge Denison stated '...you have suffered through no fault of your own a terrible existence for a very long time.'<sup>26</sup> When one contrasts the approach taken in cases of women who kill their violent abusers the discrimination is brought sharply into focus. There is a great reluctance to focus upon blame of the abusing husbands, as highlighted in the case of *Duffy*<sup>27</sup> in which the judge stated: '[y]ou are not concerned with blame here - the blame attaching to the dead man. You are not standing in judgment on him.'<sup>28</sup>

Furthermore, Bandalli illustrates that female defendants are often constructed as dishonest, and doubt is cast upon their credibility and on the claims of abuse she suffered. Hence, whereas a male defendant receives understanding and sympathy for the nagging he suffered or the adultery his wife committed, and his killing is viewed as reasonable, a woman who suffers years of violence is faced with disbelief, and her crime as unreasonable.<sup>29</sup>

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<sup>26</sup> reported in *The Times* 30 January 1992, cited by Bandalli S "Provocation - A Cautionary Note" p. 402

<sup>27</sup> [1949] 1 All ER 932

<sup>28</sup> Ibid.

<sup>29</sup> Bandalli S "Provocation - A Cautionary Note" p. 403 In the case of *R v Thornton* [1991] 1 All E.R., 306 at 312 the Judge stated:

"There are...many unhappy, indeed miserable, husbands and wives. It is a fact of life. It has to be faced, members of the jury. But on the whole it is hardly reasonable, you may think to stab them fatally, when there are other alternatives available like walking out or going upstairs."

Yet it is clearly not unreasonable to strangle someone to death because they were nagging you.



Hence, this approach differs slightly from the argument that the law is male, in that it appears that women's difference is recognised, but only in a negative manner, one which is detrimental to her case. In addition to being judged against the legal requirements, women are also judged against a societal standard of what Nicolson calls the 'appropriate femininity'.<sup>30</sup> As noted in the introduction, Nicolson compares the cases of Sara Thornton<sup>31</sup> and Kiranjit Ahluwalia.<sup>32</sup> He attributes the difference in their convictions (Sara was convicted of murder and Kiranjit, on retrial, of manslaughter on the grounds diminished responsibility) to the ability to embody the society standard of 'appropriate femininity'. As Sara was perceived to deviate from this standard, her murder conviction (at the time the article was written)<sup>33</sup> was upheld by the Court of Appeal. Kiranjit, on the other hand, was constructed to fall within the standard, and hence a manslaughter conviction was considered appropriate.<sup>34</sup> Significantly, however, what also needs to be further addressed are the ethnic, cultural and racial differences which exist between Sara and Kiranjit, and how these also have an impact on the 'appropriate femininity'. In addition to being 'other' to men, Kiranjit is also potentially 'other' to 'woman'.

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<sup>30</sup> Nicolson D "Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill" pp. 185-188

<sup>31</sup> *R v Thornton* [1991] 1 All ER 306; *R v Thornton* (No.2) [1996] 2 Cr App Rep 108

<sup>32</sup> *R v Ahluwalia* [1993] 96 Cr App Rep 133

<sup>33</sup> See *R v Thornton* (No.2) [1996] 2 Cr App Rep 108. The Court of Appeal quashed Sarah's conviction and ordered a retrial. At the retrial she was convicted of manslaughter on the grounds of diminished responsibility.

<sup>34</sup> Nicolson D "Telling Tales: Gender Discrimination, Gender Construction and Battered Women Who Kill" pp. 190-194

## Equality

Albeit in different forms, an appeal to the notion of equality has generally been advocated as the preferred solution to these two types of discrimination. The arguments are thus: in relation to the argument that law is male, women do not receive equal treatment to their male counterparts as the law only recognises masculine behaviour, therefore equal access to criminal law defences is denied.<sup>35</sup> As highlighted in chapter 4, this argument was recognised by the respective Supreme Court in the cases of *Wanrow*<sup>36</sup> and *Lavallee*.<sup>37</sup> Furthermore, double standards criticism argues that as women are also judged against stereotypical notions of femininity, they are treated differently to men. There is, however, a potential conflict here. One argument insists that legal equality can only be achieved by accepting that there are differences between men and women which should be recognised by the law, whereas the argument against double standards suggests that legal equality can be achieved via an equal application of the law. Chan argues that this emphasis on legal equality has reduced the possibility of reform, due to a absence of a clear definition of equality.<sup>38</sup> Thus the question arises, what is legal equality? And from this question the sameness/difference debate emerges: does equality require women and men to be treated the same, or does it require the acceptance of differences?

The sameness approach suggests that women and men should be afforded the same legal treatment, ignoring any differences and emphasising the similarities. Such an

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<sup>35</sup> Chan W “Legal Equality and Domestic Homicides” p. 204

<sup>36</sup> 88 Wash. 2d 221, 559 p.2d 548 (1977)

<sup>37</sup> [1990] 1 S.C.R. 852, 55 C.C (3d) 97

<sup>38</sup> Chan W “Legal Equality and Domestic Homicides” p. 204

approach, however, encounters significant criticism: it is 'phallogentric', according to supremacy to masculinity, and thus, in order to be recognised, women have to be masculine.<sup>39</sup> The corollary to this is the integration of women's differences into the law. However, this recognition of differences has been seen to amount to special treatment, and thus infringing the classical meaning of equality.<sup>40</sup> Moreover, the recognition of female difference is subject to the criticisms as seen in chapter two. It can perpetuate stereotypical ideas of femininity and also assume a commonality of experience,<sup>41</sup> which can effectively exclude many women who do not fit within the constructed category of woman. This leads Chan to question whether the concept of equality is able to offer any assistance whatsoever.<sup>42</sup> *This thesis argues that the analysis of women who kill should move away from the yardstick of equality.* Drawing upon Young's argument, equality depends upon a logic of identity, as analysed in chapter three, and thus constructs any differences as negative, and difference is excluded, it is constructed as an 'absolute other'. The alternative to this yardstick of equality, is the concept of social justice, as discussed in chapter 3.

This general critique has highlighted the main criticisms which have frequently arisen in the literature on the law and women who kill their violent partners. To summarise, the main points which have been emphasised include: the exclusion of the woman's experience; the 'othering' of women, due to the masculine nature of the law; double standards which require women to conform to standards not expected of men; the

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<sup>39</sup> Ibid., p. 221-222

<sup>40</sup> *Daily Mail* 5 October 1994, cited Ibid., p. 218

<sup>41</sup> Chan W "Legal Equality and Domestic Homicides" pp. 222-223

<sup>42</sup> Ibid., p. 223

problem of constructing women in a detrimental stereotypical manner; and the sameness/difference debate, or whether women should have their differences accounted for, and how this is to be done whilst avoiding sexist stereotyping. *The aim of this thesis is to continue such a debate in a manner which avoids the essentialising tendencies of the sameness/difference debate. In particular, this thesis aims to highlight the differences between women by adopting a postmodern approach to identity, which recognises that subjectivity is not fixed, but is discursively constructed and fluid.* In particular, emphasis will be placed on the law's role in constructing identity. This moves the debate away from analysing how the law excludes the experiences of women, to scrutinising how the law creates identity categories. Secondly, the thesis moves away from the notion of equality, but yet still applies a normative standard, that of Iris Marion Young's social justice, in order to be able to evaluate the law and the construction of women's identities within the cases.

### **Construction of Identity**

The remainder of this chapter will focus upon twelve Court of Appeal cases and examine the construction of identity and consider some of the criticisms which can be levelled towards the existing literature dealing with women who kill. The cases are comprised of appeals against sentence and conviction. In the cases which involved an appeal against sentence all the women initially received a custodial sentence. Three of these women were convicted for manslaughter on the grounds of provocation: (*R v Gardner*,<sup>43</sup> *R v Grainger*,<sup>44</sup> and *R v Howell*<sup>45</sup>) three on the grounds of diminished

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<sup>43</sup> [1993] 14 Cr App R (S) 364

<sup>44</sup> [1997] 1 Cr App R (S) 369

<sup>45</sup> [1998] 1 Cr App R (S) 229

responsibility (*R v Fell*,<sup>46</sup> *R v Sangha*<sup>47</sup> and *R v Stubbs*<sup>48</sup>) and two due to a lack of intent (*R v Anderson*<sup>49</sup> and *R v Higgins*<sup>50</sup>). Three cases dealt with an appeal against a conviction of murder (*R v Hobson*,<sup>51</sup> *R v Muscroft*<sup>52</sup> and *R v Rossiter*<sup>53</sup>). The case of *R v Oatridge*<sup>54</sup> involves an appeal against a manslaughter conviction. By including cases which involved sentencing issues, comment can also be made on those women who have received a conviction for manslaughter at first instance, and the factors which affect the sentence can be identified.

### Overview of the Cases

In all of the cases the women had suffered long term abuse and the majority killed their partners by stabbing. Only in two of the cases did the women kill by other methods. In the case of *Howell*,<sup>55</sup> the appellant used a shot gun and in the case of *Stubbs*<sup>56</sup> the victim died after being hit over the head and then strangled. In all of the twelve cases the killing took place during the course of some confrontation, ranging

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<sup>46</sup> [2000] 2 Cr App R (S) 464

<sup>47</sup> [1997] 1 Cr. App. R. (S) 202

<sup>48</sup> [1994] 15 Cr App R (S) 57

<sup>49</sup> Unreported Monday 27 November 2000, No. 200002064/X5

<sup>50</sup> [1996] 1 Cr App R (S) 271

<sup>51</sup> [1998] 1 Cr App R 31

<sup>52</sup> [2001] EWCA 604

<sup>53</sup> [1992] 95 Cr App R 326

<sup>54</sup> [1992] 94 Cr App R 367

<sup>55</sup> [1998] 1 Cr App R (S) 229

<sup>56</sup> [1994] 15 Cr App R (S) 57

from an argument to a violent fight. Only in the case of *Anderson*<sup>57</sup> is this fact disputed. Hence, none of the cases involved a non-confrontational attack. Psychiatric evidence of some form, whether evidence of the battered woman syndrome, or evidence of depression, was explicitly referred to in all cases except two: *Rossiter*<sup>58</sup> and *Oatridge*.<sup>59</sup> Nevertheless, in the former case the murder charge was reduced to manslaughter on the grounds of provocation, and in the latter case, the woman was eventually acquitted on the grounds of self defence, thus indicating that psychiatric evidence may not always be required. *Oatridge*,<sup>60</sup> however, is the only case in which self-defence was successfully applied despite it being advanced as a defence in at least four other cases. In addition to provocation and diminished responsibility, a number of the defendants claimed that they lacked the necessary mental requirement for murder, in that they did not intend to kill or cause grievous bodily harm. This was accepted in three cases: *Higgins*,<sup>61</sup> *Anderson*<sup>62</sup> and, at the first trial, *Oatridge*.<sup>63</sup>

The Court of Appeal allowed all of the appeals against the murder convictions, and in the case of *Rossiter*<sup>64</sup> substituted a conviction for manslaughter on the grounds of provocation and sentenced the appellant to 6 years in prison. The appeal in the case of

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<sup>57</sup> Unreported Monday 27 November 2000, No. 200002064/X5

<sup>58</sup> [1992] 95 Cr App R 326

<sup>59</sup> [1992] 94 Cr App R 367

<sup>60</sup> Ibid.

<sup>61</sup> [1996] 1 Cr App R (S) 271

<sup>62</sup> Unreported Monday 27 November 2000, No. 200002064/X5

<sup>63</sup> [1992] 94 Cr App R 367

<sup>64</sup> [1992] 95 Cr App R 326

*Hobson*<sup>65</sup> was accepted due to evidence of the battered woman syndrome. The court recognised that the syndrome was now an official mental disease and capable of giving rise to the defence of diminished responsibility. In this case the Court ordered a retrial, upon which Kathleen Hobson was convicted of manslaughter on the grounds of diminished responsibility and immediately released after serving six years in custody. A retrial was also ordered in the *Muscroft*<sup>66</sup> case, due to evidence of a long-standing personality disorder giving rise to diminished responsibility. As of yet the outcome of the retrial has not been reported. Appeals against sentence were accepted in the cases of *Howell*,<sup>67</sup> (whose custodial sentence was reduced from six years to three and a half years) *Gardner*,<sup>68</sup> *Sangha*,<sup>69</sup> *Fell*<sup>70</sup> and *Higgins*<sup>71</sup> (in all of these cases the custodial sentence was varied to a probation order). As mentioned above, *Oatridge*<sup>72</sup> was acquitted on the grounds of self-defence.

This brief overview of the cases highlights a number of issues. Firstly, there does appear to be a growing acceptance, by both the judiciary and juries, that women who kill their partners after suffering long-term abuse should not be labelled murderers, but instead receive a conviction for manslaughter. However, the courts seem reluctant to accept that such women are acting in self-defence. Secondly, as provocation has been

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<sup>65</sup> [1998] 1 Cr App R 31

<sup>66</sup> [2001] EWCA 604

<sup>67</sup> [1998] 1 Cr App R (S) 229

<sup>68</sup> [1993] 14 Cr App R (S) 364

<sup>69</sup> [1997] 1 Cr. App. R. (S) 202

<sup>70</sup> [2000] 2 Cr App R (S) 464

<sup>71</sup> [1996] 1 Cr App R (S) 271

<sup>72</sup> [1992] 94 Cr App R 367

accepted in a number of the cases, it appears that the changes to the 'reasonable person' in the House of Lords case of *Smith*<sup>73</sup> may not have been as indispensable as once thought, as this defence does appear to be open to female defendants. Thirdly, the continuing persistent reliance upon some form of psychiatric evidence can be considered to be a cause of alarm. Despite the fact that the mitigating circumstances of these homicides are being recognised, this being reflected in the use of the manslaughter conviction, the courts appear reluctant either to deconstruct the stereotypical binary categories or create different identity categories for women, remaining overwhelmingly trapped within the mad/bad, victim/aggressor dichotomies.

### **Provoked Action**

Provocation was a successful defence in five of the cases. Four women were convicted of manslaughter on the grounds of provocation at first instance, and *Rossiter*<sup>74</sup> on an appeal against murder. Chapters four and five highlighted that two major barriers to provocation exist which tend to prevent women who kill their abusive partners successfully pleading the partial defence. These are a) the requirement of a sudden and temporary loss of self control and b) whether the battered woman syndrome should amount to a relevant characteristic when assessing whether a reasonable person would react in a similar manner. The key issue to be discussed here is the extent to which these two barriers caused difficulties in the cases which were heard by the Court of Appeal. As Mrs Rossiter was initially convicted of murder, this case will be analysed first, as it highlights the circumstances in which the appeal court recognises that the killing was actually provoked. Furthermore, this case is interesting

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<sup>73</sup> [2000] 3 WLR 654



as it is one of only two cases in which expert evidence relating to the mental health of the woman does not appear to have been relied upon.

Mrs Rossiter was convicted of murder after she stabbed and killed her husband during a verbal and physical fight. The marriage was described as 'turbulent' and, with regard to the night in question, she stated that she could 'see that he intended to kill me'.<sup>75</sup> At the trial she pleaded self defence, but was convicted of murder. The appeal was based on the ground that the judge failed to leave the defence of provocation to the jury. With reference to the cases of *Bullard v R*<sup>76</sup> and *R v Hopper*<sup>77</sup> the Court of Appeal highlighted that the judge has a duty to leave the issue of provocation to the jury in any case where there is evidence of provocation, however tenuous, even if the defence had not been advanced by the defendant's counsel. The Court of Appeal held that the conviction for murder was unsafe, and, on the basis of the evidence which they had heard, substituted the murder conviction for a conviction of manslaughter on the grounds of provocation. A sentence of six years imprisonment was imposed. As this equalled the length of time which she had already served in custody she was released.

In relation to the two perceived barriers to a successful plea of provocation, the judgment only discusses the issue of a subjective loss of self control. The Court of Appeal accepted that, although the appellant did not testify that she suffered a loss of

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<sup>74</sup> [1992] 95 Cr App R 326

<sup>75</sup> *Ibid.*, pp. 329-330

<sup>76</sup> [1957] 42 Cr App R 1

<sup>77</sup> [1915] Cr App R 136

self-control, there was sufficient evidence to indicate that Mrs Rossiter had killed whilst under great stress. She is described as 'going virtually berserk'.<sup>78</sup> It was submitted that her loss of self control could be inferred from '...the circumstances of the killing and the number of wounds that were inflicted.'<sup>79</sup> In this particular case, although the history of the violent relationship is mentioned, the case focuses specifically on the events immediately preceding the fatal stabbing. An outline of the violent incident, which commenced with an argument regarding money, is provided in the Court of Appeal judgment. After a number of violent altercations, during which both sustained injuries, including Mrs Rossiter jabbing Mr Rossiter with a knife, the fatal incident occurs after the deceased tried to attack her with a long handled paint brush, and then attempted to hit her in the face with a mitre block. Mrs Rossiter claimed that she was holding the knife at waist height and that the knife went into Mr Rossiter when he stumbled towards her. It is these circumstances of events which give rise to the inference of a sudden and temporary loss of self-control.

Provocation was also used successfully in the case of *Gardner*<sup>80</sup> without significant reliance being placed upon psychiatric or medical evidence. In this case, Janet Gardner stabbed and killed her partner, Peter Lies, after he had banged her head against a door frame. He was stabbed when he went towards her quickly, trying to grab her. Hence, the fatal act took place during an actual physical confrontation, and the judge commented that the appellant had been provoked '...in the full sense of that

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<sup>78</sup> *R v Rossiter* [1992] 95 Cr App R 326 p. 327 and p. 332

<sup>79</sup> *Ibid.*, p. 332

<sup>80</sup> [1993] 14 Cr App R (S) 364

phrase.’<sup>81</sup> Although in this case there was some evidence relating to Janet’s mental condition provided at the trial via a social enquiry report, which stated that Janet was an unassertive woman, who had suffered a terrible ordeal,<sup>82</sup> this appears to be a pre-sentence report, and hence called for after the conviction for manslaughter was passed.

The cases of *Rossiter*<sup>83</sup> and *Gardner*<sup>84</sup> can be contrasted with the case of *Howell*<sup>85</sup> in which provocation was a successful defence despite an apparent time lapse between the provocation and the fatal act. Patricia Howell shot and killed her husband, Richard Howell after suffering abuse for a number of years, in addition to being abused by her two former partners. The fight commenced in the bedroom, with Richard accusing Patricia of having an affair. He then hit her around the head a number of times. Patricia did not retaliate, but walked out of the bedroom and into the kitchen. She was eventually followed by Richard who dragged her onto the landing and then continued to punch her. After this assault he went into the bathroom, at which point Patricia saw the shot gun. Patricia claimed that she loaded the gun in order to frighten him as she considered that he could tell whether or not the gun was loaded. This was due to a past occasion when she had pointed the gun at him, when it was unloaded (on that occasion, as opposed to deterring Richard, her defensive actions led to a severe beating.) When Richard emerged from the bathroom he headed towards Patricia, indicating that the assault would continue. She then pulled the trigger.

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<sup>81</sup> *Ibid.*, p. 366

<sup>82</sup> *Ibid.*

<sup>83</sup> [1992] 95 Cr App R 326

<sup>84</sup> [1993] 14 Cr App R (S) 364

<sup>85</sup> [1998] 1 Cr App R (S) 229

When this case is compared to other provocation cases in which the defence was unsuccessful, such as Sarah Thornton who stabbed her partner after going into the kitchen to pick up a knife, it appears that the lapse in time could be sufficient to amount to evidence that Patricia had regained her self-control. The time lapse occurs when Richard goes in to the bathroom, during which time she picks up the gun. Indeed, this factor is noted by the trial judge. Brooke LJ in the Court of Appeal notes:

“He [the trial judge] added that there had been an opportunity in the course of a final quarrel for the appellant to avoid further confrontation but she had employed this interval by taking a gun, loading it, and waiting for her husband to reappear.”<sup>86</sup>

However, it could also be argued that as Richard approached Patricia when she was holding the gun this action could amount to a provocative act which causes a loss of self control. Nevertheless, Patricia’s loss of self control is explained through the application of the battered woman syndrome.

At the trial psychiatric evidence was received from Dr Nigel Eastman and Dr Jeanette Smith, both of whom stated that Patricia was suffering from the battered woman syndrome. Although they disagreed as to whether the battered woman syndrome amounted to an abnormality of the mind so as to diminish her responsibility, they both stated that Patricia was not suffering from a mental disorder, as defined by the Mental Health Act 1983. Such an approach can, however, be contrasted with the case of *Hobson*<sup>87</sup> in which it was emphasised that since 1994 the syndrome has been included in the British Classification of Mental Diseases, and seen as giving rise to diminished

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<sup>86</sup> Ibid., p. 230

<sup>87</sup> [1998] 1 Cr App R 31

responsibility. Hence it could be argued that the meaning of the syndrome is far from static, a point which is considered in further detail below.

In relation to the loss of self control, the psychiatrists acknowledged that the existence of the battered woman syndrome would have had impact on how Patricia responded to the deceased's provoking conduct. Elements of the syndrome, such as learned helplessness, low self-esteem, and 'inappropriate guilt', were considered to be 'mental characteristics' which would significantly increase the gravity of the verbal and physical abuse. Hence she was considered to be more vulnerable to the deceased's violence than one who had not suffered continuous abuse.<sup>88</sup> The Court of Appeal cited the opinion of Dr Smith:

“...the appellant's reaction to the provocation was coloured by the psychological characteristics which would have affected her judgment, volition and control, particularly when provoked by his unremitting and severe physical and emotional abuse.”<sup>89</sup>

Hence, as opposed to Mrs Rossiter, whose loss of self-control is inferred from the facts of the abuse she suffered and the manner in which she reacted, the subjective element of the provocation defence in Patricia's case can only be explained through the application of the battered woman syndrome. The syndrome is used to explain why she reacted with fatal force when there is a perceived escape route, or an interval of time in which to regain self-control. This corresponds with the arguments made above by Tarrant<sup>90</sup> that women are excluded from the creation of social and legal

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<sup>88</sup> *R v Howell* [1998] 1 Cr App R (S) 229 pp. 233-234

<sup>89</sup> *Ibid.*, p. 234

<sup>90</sup> Tarrant S “Something is Pushing Them to the Side of Their Own Lives: A Feminist Critique of Law and Laws”

meaning and thus their experiences can only be explained via expert testimony. A woman's loss of self-control outside the masculine time constraints, i.e. an immediate reaction to a perceived physical threat, needs to be explained via the application of the battered woman syndrome. The use of the syndrome to explain why she was still suffering a loss of self-control appears to be consistent with its uses in America and Canada,<sup>91</sup> and its application in relation to self-defence. Hence, the syndrome is clearly applicable to the subject strand of provocation.

Moreover, it can also be inferred from this case that, prior to the House of Lords judgment of *Smith*,<sup>92</sup> the syndrome was also considered to be applicable to the objective strand of the provocation defence. If it had been considered that the reasonable woman would have reacted in a similar manner then, arguably, it would not have been necessary to explain Patricia's actions via the syndrome. The use of the syndrome indicates that this is not how a 'reasonable' woman would have reacted, but how a woman who suffered from low-self esteem, learned helplessness and long term abuse would have reacted. The statements of the psychiatrists are testament to this. It stands to reason that, if Patricia's loss of self control could not be understood in the absence of the syndrome, than she would also fail the objective test (would a reasonable women react in such a manner) unless the reasonable woman was considered to be suffering from the battered woman syndrome. Following this line of argument, the syndrome also seems to be relevant to the level of self-control to be expected.

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<sup>91</sup> See chapter 5

It can, however, also be questioned whether the battered woman syndrome was strictly necessary in this case. If one adopts the approach adopted by Lord Millet in the case of *Smith*,<sup>93</sup> it is clear that Patricia's actions can be explained without recourse to psychiatric evidence. Lord Millet<sup>94</sup> argued that when assessing the provoked act the entire factual situation should be taken into account. Arguably, once the entire factual situation is taken into account Patricia's reactions can be seen to be understandable, her loss of self control does not need to be explained via medical evidence. She had suffered severe abuse not only at the hands of Richard, but also two other partners. The violence had increased over the past couple of days and on a previous occasion, when she had tried to protect herself with the gun, he had taken it off her subjected her to a severe beating. Moreover, the time lapse which occurred was really insignificant. As the judgment states: '[i]t took her as long to pick it [the gun] up, load it and return to the kitchen doorway as it did for her husband to urinate.'<sup>95</sup> Moreover, she shot him whilst he was approaching her in a threatening manner which, when placed in the entire factual situation is, arguably, sufficiently provoking to lead to a reasonable loss of self control. The use of the syndrome in this case prevents Patricia's actions as being constructed as a reasonable response to the abuse she suffered. This highlights a continued reluctance by the judiciary to accept that a homicide committed by a woman in the face of ongoing abuse is an understandable reaction.

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<sup>92</sup> [2000] 3 WLR 654

<sup>93</sup> *Ibid.*,

<sup>94</sup> *Ibid.*, pp. 715-717

<sup>95</sup> [1998] 1 Cr. App. R. (S) 229 p. 235

The case of Dawn Grainger<sup>96</sup> is also somewhat different to the cases discussed above. Although there are some similarities, in that she killed her husband after suffering abuse for a number of years by stabbing him, the circumstances of the fatal act are slightly different. Plus, whilst psychiatric evidence is used, it is only used in relation to the sentencing, despite the fact that the provocation does not appear to be as serious as in the *Howell*<sup>97</sup> case. Dawn stabbed and killed her husband, Paul, on an evening after they had both been drinking. The relationship is described as volatile and, on the night in question, a drunken argument erupted, during which Mr Grainger acted in what is describe as a 'bizarre manner', punching and head-butting the walls, and kicking the television and stereo. The deceased provoked the appellant by superficially stabbing himself with a knife, and then offered the knife to the appellant, saying 'Do it'. She stabbed him with a carving knife which she had brought from the kitchen to protect herself. In a police interview she stated that the deceased had 'goaded' her into stabbing him. Hence, the provocation is by words, as opposed to physical assault. In addition, Dawn told the police that she thought that Paul was either going to kill himself or kill her, and that she was merely trying to frighten him, as she herself was terrified.<sup>98</sup> Initially, the defence offered a guilty plea to involuntary manslaughter, thus inferring that she lacked the intention to kill or cause grievous bodily harm. This plea was rejected by the Crown. The prosecution, however, accepted a plea of manslaughter on the grounds of provocation after hearing the evidence of Paul Kendrick, who witnessed the incident.

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<sup>96</sup> *R v Grainger* [1997] 1 Cr App R (S) 369

<sup>97</sup> [1998] 1 Cr App R (S) 229

<sup>98</sup> *R v Grainger* [1997] 1 Cr App R (S) 369 p. 371



A number of reports, including a psychiatric report and a pre-sentence report, were put before the judge, however, these were considered in relation to sentencing, as opposed to evidence which indicated that Dawn had killed due to provocation. Thus psychiatric evidence does not appear crucial to the defence. However, it is important to note that there is another voice, indeed a male voice, whose narrative is sufficiently persuasive. It is the evidence of Paul Kendrick which leads the prosecution to accept a plea of manslaughter on the grounds of provocation. Hence, Dawn's voice alone is insufficient.

This overview of cases heard by the Court of Appeal disrupts some of the arguments previously made in relation to the defence of provocation and warns against forwarding any generalisations as to why and how women kill abusive partners, and how they are excluded from the defences to murder. The main argument in relation to provocation is that women tend to have a slow-burn anger, thus failing to fall within the law's requirement of a 'sudden and temporary loss of self-control'.<sup>99</sup> Whilst, undoubtedly some women, such as Kiranjit Ahluwalia, kill whilst their abuser is asleep or in a non-confrontation situation, the cases discussed here demonstrate that many women also kill during a fight, and in a manner which can be constructed as a sudden and temporary loss of self-control. Therefore undue reliance upon a female reaction or a female anger, whether this is considered to be biological or socially constructed, can work in a negative manner and exclude women who respond differently, such as Mrs Rossiter. The creation of a female slow burn anger can also

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<sup>99</sup> see for example Nicolson D and Sanghvi R "Battered Women and Provocation: The Implications of Ahluwalia" p. 730 Young A "Conjugal Homicide and Legal Violence: A Comparative Analysis" p. 771

be subjected to Young's critique of a logic of identity.<sup>100</sup> It sets up a standard against which women are judged, and those who fall outside risk being constructed as 'other'. Moreover, it tends to be drawn from the experiences of certain women, and therefore will also exclude other women. Heed needs to be taken of Butler's argument against 'idealiz[ing] certain expressions of gender.'<sup>101</sup> Such an approach could have the consequence of constructing certain expressions as natural and others as false. Potentially, the construction of a female slow burn anger may go beyond its original purpose and become a normative standard against which women are judged.

### **Expert Evidence**

Worrall illustrates how psychiatric discourse is afforded a 'privileged position' within the judicial process,<sup>102</sup> and this is especially true in cases of women who kill their abusive partners. The involvement of psychiatrists operates at both the pre-conviction and post-conviction stage. At the pre-conviction stage the reports are used to explain how the women were either suffering from diminished responsibility or, as in the case of *Howell*,<sup>103</sup> have lost their self-control. At the post-conviction stage, the reports are used in relation to how the women should be 'managed'.<sup>104</sup> Overwhelmingly, within cases involving women who kill their abusive partners, psychiatric evidence is used to argue that a non-custodial sentence is the more appropriate sentence.

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<sup>100</sup> Young I M *Justice and the Politics of Difference*. See chapter 3

<sup>101</sup> Butler J *Gender Trouble* p. viii see chapter 2

<sup>102</sup> Worrall A *Offending Women Female Law Breakers and the Criminal Justice System* [Routledge; London; 1997] p. 23

<sup>103</sup> [1998] 1 Cr App R (S) 229

<sup>104</sup> Worrall A *Offending Women Female Law Breakers and the Criminal Justice System* p. 23

The existence of fresh medical evidence was sufficient to render a conviction for murder unsafe in the cases of *Hobson*<sup>105</sup> and *Muscroft*.<sup>106</sup> The two women stabbed and killed their partners during a fight, both women had been drinking and Anita Muscroft was also under the influence of drugs. At the first trial they raised the defences of self-defence and provocation, but not diminished responsibility. Anita also claimed lack of intent. Nevertheless they were both convicted for murder.

In Anita's case, the incident occurred after the deceased had hit her around the head a number of times, attempted to stab her, and also hit her with a crowbar. In addition to this, evidence was also admitted to show that she had been sexually abused by the deceased. She had also been sexually abused by her father and been involved in relationships with a number of other violent men. However, this latter information did not surface until after her conviction. At the first trial, reports had been produced by three psychiatrists: Dr Rix, who had been consulted by the defence, Dr Collins, expert witness for the Crown, and Dr Soliman, whom Anita had been visiting as a psychiatric patient since 1987. All of the psychiatrists agreed that she suffered from a long-standing personality disorder. Nevertheless the defence of diminished responsibility was not raised. Dr Rix commented that it may be difficult to persuade the jury that Anita was suffering from diminished responsibility: an abnormality of the mind which substantially impaired her responsibility. The other two psychiatrists did not refer to diminished responsibility.

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<sup>105</sup> [1998] 1 Cr App R 31

The fresh evidence which was to be used to raise the defence of diminished responsibility was provided by two female consultant psychologists: Dr Blake and Dr Mason. The report by Dr Blake was actually prepared before the first trial but had failed to be considered, and the Court of Appeal held that this failure supported the appellant's appeal.<sup>107</sup> The report was produced by Dr Blake whilst she was a student working at Wakefield Prison, where Anita was in custody. The report contains allegations of abuse which Anita did not disclose to the three psychiatrists whose reports were received at the first trial. Significantly, the report contained detailed information about the extent of the abuse which Anita suffered at the hands of Peter, which included forced deviant sexual acts and forced prostitution.<sup>108</sup> The report explained that this failure to disclose this information to the other psychiatrists, who were all male, was due to Anita's unease with men. The report states that '...she did not react well to males, and indeed had anxieties as her whole legal team were male.'<sup>109</sup> Anita generally found it very difficult to discuss certain events which had occurred in her life, and this difficulty became insurmountable when the listener was male. Hence, the failure to disclose was due to the gender of the listener. This situation was explained by Dr Rix with reference to the battered woman syndrome. His report stated:

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<sup>106</sup> [2001] EWCA 604

<sup>107</sup> Under section 21 1(1) of the Criminal Appeals Act 1968 (as amended) the court may receive new evidence was not adduced at the trial if it is considered "necessary or expedient in the interests of justice". This ground of appeal was also relied upon, although unsuccessfully, in the case of Zoora Shah.

The issue of the admittance of fresh evidence will be considered in further detail in chapter 7.

<sup>108</sup> [2001] EWCA Crim 604 para 21

<sup>109</sup> *Ibid.*, para 20

“To the extent that she was not, at the time of the trial, as co-operative, full or frank as ideally she should have been, I can say that this is not uncommon in women who have suffered abusive relationships and especially if the interviewer is male. I have encountered this in women who can be identified as having what the courts recognise as ‘battered woman syndrome’....”.<sup>110</sup>

This conclusion was drawn by Dr Rix after reading the reports produced by Dr Blake and Dr Mason. With this new information Dr Rix concluded that Anita was, at the material time, suffering from diminished responsibility. What is noteworthy here, however, is that this change of opinion took place in the absence of interviewing Anita again. Indeed, his report goes so far as to admit that he does not ‘...specifically recall the appellant’.<sup>111</sup> Hence, despite not being able to recall Anita, he concludes that her behaviour was in line with the battered woman syndrome. Hence, the opinions of other psychiatrists render Anita an unnecessary source of information. Their speech overpowers her speech. Nevertheless, Dr Collins did conduct a further interview with Anita, and another report was submitted by two other psychiatrists. All the reports reached the same conclusion, that Anita was, at the time of the stabbing, suffering from an abnormality of mind which significantly impaired her responsibility. Due to the existence of this fresh evidence, the Court of Appeal held that the conviction was unsafe, and ordered a retrial. At the present time, the retrial has not yet been reported, however it is very likely that in such a situation Anita Muscroft will be found guilty of manslaughter on the grounds of diminished responsibility. Indeed that was the outcome in the retrial of Kathleen Hobson.<sup>112</sup>

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<sup>110</sup> Ibid., para 27

<sup>111</sup> Ibid.,

<sup>112</sup> *R v Hobson* [1998] 1 Cr App R 31

Similar to Anita Muscroft, the defence of diminished responsibility was not raised at Kathleen's trial, and she was convicted of murder. Kathleen stabbed and killed James McDonald, who is described as her 'abusive and alcoholic partner',<sup>113</sup> during an argument, which also involved an attempted rape. She stated that she had taken the knife from the kitchen in order to defend herself, and did not intend to kill the defendant. In addition to self-defence, the trial judge also left the issue of provocation to the jury. At the trial she gave evidence that she had suffered abuse and detailed a number of incidences which covered the eighteen months prior to his death. It was also shown that she had reported the deceased for violent behaviour on 30 occasions and made 4 formal complaints. She appealed against the conviction, arguing that due to the abusive relationship she was, at the time of the incident, suffering from the battered woman syndrome, which was not brought into evidence at the first trial. It was submitted that this syndrome was not only relevant to the characteristics of provocation's reasonable person, but could also lead to, and actually did in this case, diminished responsibility. The Court of Appeal upheld her appeal and ordered a retrial, as it was recognised that the conviction was unsafe, due to the fact that the battered woman syndrome had, since the first trial, been included in the British Classification of Medical Disease. At the retrial, the appellant was convicted of manslaughter on the grounds of diminished responsibility, and immediately released after serving six years in prison.<sup>114</sup>

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<sup>113</sup> Ibid., p.32

<sup>114</sup> "Killer Freed at Retrial as Law Change allows 'Battered Woman' Defence" *The Guardian* December 16 1997 p. 11

## **Custody or Probation?**

In addition to being used in appeals against murder convictions, many women who have been convicted at first instance of manslaughter on the grounds of diminished responsibility, provocation or lack of intent, have used the battered woman syndrome in order to appeal against a sentence set by the court. Evidence of either 'post-traumatic stress disorder' or the battered woman syndrome has been used successfully to reduce a custodial sentence to a probation order in a number of cases. Nine cases in total dealt with an appeal against sentence and the appeal was successful in five. In four of these five cases the custodial sentence was varied to a probation order, and in the case of Patricia Howell her six year custodial sentence was reduced to three and a half years.

Janet Gardner was sentenced for five years imprisonment, for her conviction for manslaughter on the grounds of provocation. In her appeal against this sentence psychiatric evidence was received by the court which described Janet as suffering from symptoms consistent with the battered woman syndrome: '...cumulative state of exhaustion, hopelessness, helplessness and depression.' This was stated to be due to the abuse she suffered at the hands of her victim. Hence, it can be seen that in this case her victim is blamed for her mental state, in addition to her provoked act, which seems to counter the argument noted above that women are always held blameworthy, whether they are the victim or the aggressor. In addition the report verified her version of events, and commented upon Janet's reaction. The doctor stated: '...the act itself was the result of severe provocation by her eventual victim which led to an explosion of pent-up rage and frustration which, up to that point, had been suppressed or denied.' Furthermore, opinion was also expressed on the provoking act, describing it

as ‘...a frenzied life-threatening assault by her eventual victim.’ These two quotations illustrate the powerful and privileged position of the psychiatric evidence. In addition to commenting upon Janet’s mental condition, constructing her as suffering from the battered woman syndrome, which is undoubtedly the role of such evidence, the report also substantiates Janet’s testimony that she suffered abuse and that the killing was a provoked act. It is in the light of this information that Janet’s sentence is reduced from five years imprisonment to a probation order, which is a significant amendment. Hence, as Worrall argues,<sup>115</sup> the psychiatrist passes a moral judgment as well as a medical judgment, and both of these are given exceptional weight by the court.

Probation orders were also considered by the Court of Appeal to be preferable in the cases of *Higgins*,<sup>116</sup> *Sangha*<sup>117</sup> and *Fell*.<sup>118</sup> In all these cases it was recognised that, whereas usually a custodial sentence would be appropriate in a case involving a loss of life, exceptional circumstances existed which suggested that a probation order was the more suitable method of disposal. In all cases the exceptional circumstances include suffering from clinical depression or the battered woman syndrome, and being subjected to prolonged violence. In addition, in the cases of *Higgins*<sup>119</sup> and *Sangha*,<sup>120</sup> emphasis is placed on the women’s previous good character and their role as mothers. These ‘exceptional circumstances’ rendered a probation order appropriate.

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<sup>115</sup> Worrall A *Offending Women Female Law Breakers and the Criminal Justice System*

<sup>116</sup> [1996] 1 Cr App R (S) 271

<sup>117</sup> [1997]1 Cr. App. R. (S) 202

<sup>118</sup> [2000] 2 Cr App R (S) 464

<sup>119</sup> [1996] 1 Cr App R (S) 271

<sup>120</sup> [1997]1 Cr. App. R. (S) 202



In three cases a custodial sentence was considered to be appropriate: *Howell*,<sup>121</sup> due to the use of firearms, and *Stubbs*<sup>122</sup> and *Anderson*.<sup>123</sup>

These exceptional circumstances will be scrutinised through the case of *Sangha*.<sup>124</sup> Bakhshish stabbed and killed her husband, Surjit, during a physical and verbal fight, which occurred when she discovered that he had been having an affair for approximately five years. Her plea of manslaughter on the grounds of diminished responsibility was accepted and she received an eighteen months custodial sentence. On appeal the Court of Appeal varied this to a probation order. Psychiatric evidence played a significant part in both the conviction for manslaughter and the sentence passed at both the trial and appeal court. The trial judge recognised the 'very strong' mitigating factors which were present in this case, but also stressed the seriousness of the offence. With this in mind he sentenced Bakhshish to '...the least period of imprisonment that I can possibly impose having regard to the seriousness of the crime which is committed.'<sup>125</sup> These strong mitigating circumstances were found to reside in the reports of three Doctors and a consultant anthropologist. Medical evidence was received from three doctors, all of whom supported the plea of diminished responsibility. In particular, the reports of Dr Bond and Dr Griffin commented upon the effect which the discovery of her husband's infidelity had upon her, considering this to be a pivotal factor in causing Bakhshish mental breakdown. Although the Court

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<sup>121</sup> [1998] 1 Cr App R (S) 229

<sup>122</sup> [1994] 15 Cr App R (S) 57

<sup>123</sup> Unreported Monday 27 November 2000, No. 200002064/X5

<sup>124</sup> [1997] 1 Cr. App. R. (S) 202

<sup>125</sup> *R v Sangha* [1997] 1 Cr. App. R. (S) 202 p. 204

of Appeal judgment does not explicitly state that the medical reports concluded that Bakhshish was suffering from the battered woman syndrome, the description offered is certainly reminiscent. Dr Griffin stated 'Upon discovering incontrovertible evidence of her husband's infidelity,..., the situation changed suddenly, and she became severely distressed, severely anxious, angry, depressed, and took an overdose of drugs....'.<sup>126</sup> In Dr Gahir's report she is described as suffering from '...persistent low mood, anxiety, disturbance of memory, tearfulness, feelings of hopelessness and helplessness....'.<sup>127</sup>

The court also called for the opinion of a consultant anthropologist, who gave evidence as to the effect which her culture and ethnicity would have had on her reaction to the situation. To quote the report:

"There is little doubt in my mind that within a Sikh conceptual framework [the deceased's] behaviour was both profoundly humiliating and deeply provocative as far as [the appellant] was concerned. She had been driven right to the end of her tether, and no resolution besides ending it all seemed to be available. Whilst killing cannot be condoned, the action which [the appellant] took in the circumstances is entirely comprehensible."<sup>128</sup>

Hence, once assessed against her cultural background, her reactions are considered to be 'entirely comprehensible', but nevertheless still require an explanation. This is quite a different opinion to that which was expressed by the Court of Appeal in the case of Zoora Shah, an issue which is examined in chapter seven.

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<sup>126</sup> Ibid., p. 206

<sup>127</sup> Ibid.

<sup>128</sup> Ibid.

In addition to this expert testimony, the Court of Appeal also chose to explain Bakhshish's state of mind via referring to the mental and physical abuse she had been subject to. She had suffered verbal, physical and sexual abuse throughout the marriage, including being beaten whilst she was pregnant, and mocking of her religious views. He had also physically abused his children, and this was considered to be very important by the Court of Appeal. In 1990 he was convicted of grievous bodily harm after he had beaten his daughters with a hockey stick. It was noted that, although the abuse towards Bakhshish ceased after 1990 he continued to beat his children. Her lawyers emphasised that 'the cumulative effect on her was very damaging',<sup>129</sup> and that she had on a number of occasions, attempted to take her own life. She is described as a '...desperate and depressed woman who, ..., could see no way out of her plight.'<sup>130</sup> She is also constructed by the defence as '...a woman of exemplary character, hard working and a devoted wife and mother who had worked all her life to provide for her family and raise her children.'<sup>131</sup> The Court of Appeal considered that in such a case the sentence imposed should be more concerned with rehabilitating Bakhshish, as opposed to punishing her. As she was constructed as a woman who needed rehabilitation, a probation order was substituted for the 18 months imprisonment.

In contrast to this, in the case of *Stubbs*<sup>132</sup> the appellant's appeal against a thirty months custodial sentence for a conviction of manslaughter on the grounds of

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<sup>129</sup> Ibid., p. 204

<sup>130</sup> Ibid.

<sup>131</sup> Ibid., p. 205

<sup>132</sup> [1994] 15 Cr App R (S) 57

provocation, was rejected by the Court of Appeal. The appellant killed her husband, after years of violent verbal, physical and degrading sexual abuse, she then buried him in the garden and did not confess to the murder until three years later. Although there was substantial evidence that the appellant was suffering from a depressive illness, ‘...due to the long suffering of physical and other abuse to which [she] had been exposed,’<sup>133</sup> the custodial sentence was deemed to be appropriate due to the ‘...degree of deliberation and a degree of retention of mental control unusual in this class of case.’<sup>134</sup> Hence, although some ‘exceptional circumstances’ did exist: evidence of depression and also the fact that she has children, these are considered to be overshadowed by the level of responsibility for her actions. Although it was recognised by the Court of Appeal that a sentence should only be concerned with what occurred at the time of the offence, and not what happens afterwards, the appellant’s actions of concealing her crime were considered to provide evidence of a degree of responsibility which was deserving of punishment.

A custodial sentence of four years was upheld in the case of Deborah Anderson, who stabbed and killed her partner Charles Dennis. She was convicted for manslaughter, and the Court of Appeal ventured the opinion that this was on the grounds of either a lack of intent or provocation. It was accepted by the court that Charles became verbally aggressive and abusive when he was drunk, and that both Deborah and Charles were alcoholics. Deborah claimed that the stabbing occurred accidentally during a struggle, after she had approached Charles with the knife. This explanation,

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<sup>133</sup> Ibid. p. 58

<sup>134</sup> Ibid., p. 59

however, was undermined by pathological evidence<sup>135</sup> and was rejected by the jury. Thus it is suggested that Deborah deliberately stabbed Charles during the course of an argument. In addition, she did not tell anybody about the killing until two days later, and even concealed his death from a debt collector. In upholding the sentence, the Court of Appeal also noted that physical abuse had not been ‘... a significant factor on the relevant days in question.’<sup>136</sup> The exceptional circumstance of suffering from the battered woman syndrome did exist in this case, however it was also recognised that this was superseded by the appellant’s drunkenness. Hence the exceptional circumstances were negated by the lack of physical abuse at the relevant time, the appellant’s drunkenness, and perhaps also her failure to confess to the crime immediately. Moreover, it was also recognised that Deborah was ‘...doing extremely well in prison’ and that she was not ready for ‘unfettered release upon the community.’<sup>137</sup> Hence, prison did not seem detrimental to her rehabilitation. This can be contrasted with the case of Tara Mary Fell, in which it was expressed that a custodial sentence could in fact not only end her rehabilitation, but could also potentially cause damage.<sup>138</sup> A custodial sentence was also upheld in the case of Dawn Grainger,<sup>139</sup> who was sentenced to three years after being found guilty of manslaughter on the grounds of provocation after she stabbed and killed her husband. Although the exceptional circumstances of having children and suffering from the battered woman syndrome were apparent in this case, she was distinguished from the

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<sup>135</sup> *R v Anderson*, Unreported Monday 27 November 2000, No. 200002064/X5 para 8

<sup>136</sup> *Ibid.*, para 18

<sup>137</sup> *Ibid.*, para 21

<sup>138</sup> *R v Fell* [2000] 2 Cr. App. R. (S) 464 p. 468

<sup>139</sup> *R v Grainger* [1997] 1 Cr. App. R (S) 369

case of Janet Gardner, as she was not considered to be mentally ill. In addition to this, Dawn is also constructed as a particularly aggressive woman, one of the psychiatric reports before the court stated: 'She is often described as being the aggressive one and other witnesses have described Mr Grainger as suffering physical injuries which he had apparently attributed to his wife.'<sup>140</sup> Thus her aggressive behaviour and the lack of a mental illness upon which to blame her aggressiveness rendered her unsuitable for a non-custodial sentence.

What these cases illustrate is that women are punished in different ways for a perceived failure to adhere to gendered scripts.<sup>141</sup> As there are seen to be socially accepted and regulated gendered scripts, any 'performance' which does not correspond to this script becomes problematic, as Butler states: 'those who fail to do

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<sup>140</sup> Ibid., p. 372

<sup>141</sup> The term gendered scripts relates to ideal path of the female (sex), femininity (gender), heterosexuality (sexual practice), male (object of sexual desire). This path creates certain gendered scripts which amount to intelligible genders. The specific gender scripts which this thesis explores can be seen to be related to Worrall's 'appropriate femininity'. This construction draws upon three elements: Domesticity: 'the extent of the woman's domestic responsibilities'; Sexuality: 'the extent to which her appearance, demeanour, and life-style accord with sexual 'normality''; and pathology: 'the extent to which her problems can be pathologized and 'treated'' Worrall *A Offending Women Female Law Breakers and the Criminal Justice System* p. 60. In addition this thesis also pays considerable attention to the passive/aggressive dichotomy, recognising that women are generally expected to be passive and non-aggressive. Moreover, the thesis argues that these gendered scripts are also racial, and emphasises that different gender scripts operate in cases involving black and Asian women. In particular, chapter 7 outlines how Asian women are expected to display a particular level of shame in order to be constructed as an intelligible gender.

their gender are regularly punished.’<sup>142</sup> Although it could be argued that all women who kill amount to an unintelligible gender as such fatal action appears to amount to a contravention of the feminine gender script, some contraventions are constructed to be more serious than others. There is a certain level of cultural intelligibility in a woman who kills due to mental illness, and thus still remains within the realm of intelligible genders. Thus, some women are dealt with via rehabilitation as their contravention is not sufficient to warrant a harsher punishment, they can be brought back within the appropriate ‘gendered script’. These are the women who fulfil what has been labelled by the courts ‘exceptional circumstances’. These exceptional circumstances invariably amount to suffering from some form of mental illness, whether the battered woman syndrome or depression and of suffering years of abuse. However, these exceptional circumstances appear to exist in nearly all cases of women who kill their abusive partners. All such women are capable of being constructed as ‘exceptional’. However, some women receive a harsher punishment for their transgressive behaviour, for failing to be sufficiently ‘exceptional’. Such transgressive behaviour can be seen to be being an alcoholic, not suffering from a sufficient mental illness and for being aggressive. In such situations the law has found a more subtle way in which to mark their unintelligibility. As opposed to the imposition of a murder conviction, such ‘unexceptional women’ receive a custodial sentence.

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<sup>142</sup> Butler J ‘Performative Acts and Gender Constitution: An exxay in Phenomenology and Feminist Theory” in Case S E ed *Performing Feminisms: Feminist Critical Theory and Theatre* [The John Hopkins University Press Ltd; London; 1990] 270-282 p. 273

## **The Battered Woman Syndrome – A Stable Identity Category?**

Although Lenore Walker's intention behind the creation of the battered woman syndrome may have been to explain the situation of women who suffer long term abuse, it can be argued that the impact of the syndrome has gone beyond its original purpose. No longer does it simply describe an identity, it also constitutes an identity. Butler argues that an identity category is never simply descriptive. Drawing upon the work of Zizeck, Butler argues:

“Political signifiers, especially those that designate subject positions, are not descriptive, that is they do not represent pre-given constituencies, but are empty signs which come to bear phantasmatic investments of various kinds.”<sup>143</sup>

Thus the battered woman syndrome does not simply reflect a pre-existing identity, it also creates identity and, more importantly, it will always fail to fully and completely represent that which it describes. Although an identity category holds out the promise of a true and unified representation, this is impossible, due to the exclusions upon which such a category is based. Butler states:

“When some set of descriptions is offered to fill out the content of an identity, the result is inevitably fractious. Such inclusionary descriptions produce inadvertent new sites of contest and a host of resistances, disclaimers, and refusals to identify with the terms.”<sup>144</sup>

The description will always be ‘illimitable’ or ‘limited by a preemptory act of foreclosure,’<sup>145</sup> ‘certain characteristics’ will be excluded, will be foreclosed by the category. Nevertheless, these exclusions will lead to resistance and the creation of new identities. In particular, this can be seen with the battered woman syndrome and the courts recognition of ‘exceptional circumstances’. As noted above, the exceptional

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<sup>143</sup> Butler J *Bodies that Matter* p. 191

<sup>144</sup> *Ibid.*, p. 221

<sup>145</sup> *Ibid.*



circumstance of suffering from the battered woman syndrome amounted to an identity which was consistent with a probation order. However, this category is based upon certain exclusions, certain other forms of identity which are deemed inconsistent with being a 'battered woman', and work to limit its exceptional status: being aggressive, or an alcoholic. These subject positions can thus be seen to fall outside the identity category of the battered woman syndrome.

Nevertheless, cases such as *Stubbs*,<sup>146</sup> *Anderson*<sup>147</sup> and *Grainger*<sup>148</sup> can be seen to offer resistance against the totalising tendencies of the battered woman syndrome. They illustrate how the term cannot provide a complete and unified description of women who kill their abusive partners, as they incorporate certain characteristics which are considered to frustrate the effect of the syndrome. However, the creation of different identity categories may spring from the syndrome's inability to provide a complete and unified representation. As Butler explains: '[t]he failures of such signifiers fully to describe the constituency they name...is what opens the signifier to new meanings and new possibilities for political resignification.'<sup>149</sup>

In the above cases the courts have only used the terms battered woman and battered woman syndrome in order to describe the identity of the woman, as opposed to outlining the abuse she suffered. This corresponds to the observations made by

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<sup>146</sup> [1994] 15 Cr App R (S) 57

<sup>147</sup> Unreported Monday 27 November 2000, No. 200002064/X5

<sup>148</sup> [1997] 1 Cr App R (S) 369

<sup>149</sup> Butler *J Bodies that Matter* p. 191

Schneider<sup>150</sup> in relation to cases in the United States. Whereas the theory of learned helplessness, or similar characteristics are readily discussed by the psychiatrists and the courts, little, if any, attention is paid to Walker's 'Cycle Theory of Violence'. The terms battered woman and battered woman syndrome are used as an identity category, as opposed to describing the abuse suffered. Similar to the 'slow burn anger', care must be taken to ensure that the battered woman syndrome does not become an 'idealized form of gender expression'. However, due to the courts continued insistent reliance upon the syndrome, or analogous medical evidence, it does appear that it has indeed been constructed as a natural and ideal expression. Despite this perceived idealisation, however, it can be argued that the syndrome is far from a stable identity category, and thus may be subject to a resignification. This may occur due to two facts. Firstly, if it is recognised that the battered woman syndrome amounts to a 'gendered script', its continued existence depends solely upon repetition. However, as no reiteration of a script is identical, this provides room for subversive performances, and here lies the possibility of transformation. Butler states:

“...the possibilities of gender transformation are to be found in the arbitrary relation between such acts (acts that perform gender) in the possibility of a different sort of repeating, in the breaking or subversive repetition of that style.”<sup>151</sup>

Secondly, the syndrome will always be haunted by its exclusions and by its inability to fully describe women who kill their abusive partners, and hence may be subject to scrutiny and resignification. Invariably, criticisms levelled against the battered

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<sup>150</sup> Schneider E “Describing and Changing: Women’s Self-Defense Work and the Problem of Expert Testimony on Battering”. See chapter 5

<sup>151</sup> Butler J “Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory” p. 271

woman syndrome have been premised upon the notion that the syndrome was either entirely descriptive, as opposed to constitutive, and/or completely fixed in its definitions and interpretation. As opposed to casting the syndrome as stable and fixed, and thus arguing that it should be completely rejected, I suggest that its instability and possibility of resignification should be explored.

### **Self-Defence and Mistaken Beliefs**

Self-defence was only successful in one case, the case of *Oatridge*.<sup>152</sup> Gaynor Oatridge was convicted of manslaughter on the grounds of provocation after killing her partner, Tony Williams, by stabbing him whilst he was grabbing her throat, and saying 'I'm going to kill you'. She appealed against the manslaughter conviction on the grounds that the judge failed to direct the jury on the issue of mistaken belief in self-defence. As discussed in chapter 4, provided that the defendant has a genuine belief in serious harm, it matters not whether that belief is mistaken, furthermore, it does not have to be a reasonable belief. However, the trial judge directed the jury thus:

“One of the matters you will have to consider is whether there was an attack such as the defendant describes. Whether there was really an attempt to strangle her, or whether the struggle was of a different nature.”<sup>153</sup>

On such a direction, the jury decided that she did not kill in self-defence, hence, rejecting Gaynor's narrative about the nature of the attack she suffered. The Court of Appeal allowed Gaynor's appeal and quashed her conviction due to the failure of the trial judge to expand this direction to include the situation where the defendant

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<sup>152</sup> [1992] 94 Cr App R 367

<sup>153</sup> *Ibid.*, p. 370

honestly believed themselves to be under attack, although in fact they were not.<sup>154</sup>

The appeal court held the opinion that Gaynor's belief that she was under a serious attack was not 'so fanciful' so as to exclude it from the case. No expert evidence was used to reach this conclusion.

This is a very interesting judgment. On the one hand it can be seen to be a triumph. A woman who killed her partner after years of abuse was acquitted, and without the aid of the battered woman syndrome. Her reaction was clearly considered to be a reasonable response to the violence she was suffering. On the other hand, it can be argued that Gaynor's narrative is significantly undermined by the courts. Although it is recognised that Gaynor killed in self-defence, her belief that he was going to kill her is considered to be mistaken. It is not believed that she was, in fact, in that much danger, despite Tony's threats to kill. The threats are constructed as empty threats. Whilst referring to the Gaynor's reaction to his violence and her belief in the threats Tony had made, the court includes the sentence – 'even if in fact this was not what he was going to do.'<sup>155</sup> His threats to kill are thus constructed as unreal, it is considered that Tony was not going to kill Gaynor, she was simply mistaken as to this fact. However, it cannot in truth be known whether or not he would have carried out his threat. The court's approach undermines Gaynor's narrative that she was facing a severe, life threatening assault. The court returns Gaynor's narrative and places a question mark over her actions. The judgment states that Gaynor was not facing a severe assault, she just thought she was. Tony was not actually going to kill her, even though he threatened to. Hence, although this case can be seen to be a 'just' result,

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<sup>154</sup> Ibid.

the narratives of the court still operate to undermine the position of battered women who kill.

The courts in a number of other cases have returned the narrative of the women in a similar manner, or simply refused to acknowledge their construction of events. In at least four cases self-defence was forwarded as a defence at the first trial, and in two other cases statements made by either the woman or the psychiatrist indicate they killed in self-defence. In *Stubbs*,<sup>156</sup> the appellant stated that she feared he would kill her, and in *Gardner*,<sup>157</sup> the psychiatrist recognised that she killed due to ‘a frenzied life-threatening assault by her eventual victim.’

Self defence was rejected by the jury in the cases of *Rossiter*,<sup>158</sup> *Hobson*,<sup>159</sup> *Muscroft*,<sup>160</sup> and *Howell*.<sup>161</sup> In particular, Kathleen Howell’s narrative of events is also arguably consistent with a plea of self-defence, especially when considered with the battered woman syndrome. Kathleen stated that on the night in question she was particularly frightened, as the violence had intensified over the past couple of days, thus feeling the need to take steps to defend herself. When Richard came out of the bathroom she stated that she was not angry ‘...but actually feared for her life’ and

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<sup>155</sup> *Ibid.*, p. 372

<sup>156</sup> [1994] 15 Cr App R (S) 57

<sup>157</sup> [1993] 14 Cr App R (S) 364

<sup>158</sup> [1992] 95 Cr App R 326

<sup>159</sup> [1998] 1 Cr App R 31

<sup>160</sup> [2001] EWCA 604

<sup>161</sup> [1998] 1 Cr App R (S) 229

believed that ‘...she would die at the hands of Richard and that her body could not take much more violence or pain.’<sup>162</sup> Such a situation does seem to be consistent with a pre-emptive strike. She believed that she would be killed by Richard, and shot him whilst he was approaching her, holding the belief that the abuse would continue. The biggest barrier to her plea of self-defence appears to be the perceived time lapse between the confrontation and the fatal shooting. Although in the judgment there are no explicit statements to this effect, the time lapse is clearly constructed by the court as providing the opportunity to leave the situation.<sup>163</sup> In addition to explaining the loss of self control, in connection to provocation, the syndrome is also used to explain the perceived failure to take advantage of the opportunity to escape. It is argued on Kathleen’s behalf, that the ‘...failure to withdraw was entirely consistent with the battered woman syndrome.’<sup>164</sup> Moreover, it was emphasised that, in reality, she neither had the time to escape, as she lived in a public house which was securely locked, and that there was nowhere for her to escape apart from the street.<sup>165</sup> However, this argument was not used in order to explain why her actions may have been in self-defence. The argument that she was not able to leave arguably also applies to the plea of self-defence as it explains why she felt under confrontation, why escape was not a possible solution. Thus, in contrast to the Canadian case of

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<sup>162</sup> Ibid., p. 232

<sup>163</sup> The Trial judge stated ‘...that there had been an opportunity in the course of a final quarrel for the appellant to avoid further confrontation but she had employed this interval by taking a gun, loading it, and waiting for her husband to reappear.’ [1998] 1 Cr. App. R. (S) 229 p. 230

<sup>164</sup> [1998] 1 Cr App R (S) 229 p. 235

<sup>165</sup> Ibid.

*Lavallee*,<sup>166</sup> when the syndrome was used to argue that a woman who shot her abusive partner whilst he was walking away from her was acting in self-defence, it fails to aid Kathleen in a similar manner. The narrative that she was acting in self-defence is not acknowledged by the court.

The rejection of a self-defence narrative is more apparent in the case of *Rossiter*.<sup>167</sup> The appeal court held that provocation was the appropriate defence, and quickly dismissed the defence of self-defence, stating that ‘...any realistic view of this case must necessarily dismiss self-defence as a viable proposition.’<sup>168</sup> Furthermore, the Court maintained that the injuries inflicted on the deceased, and the violence used, was entirely disproportionate to the abuse that Mrs Rossiter suffered at his hands.<sup>169</sup> This was decided with little acknowledgement of her fear, and also her statement that she did believe, at one point, that he intended to kill her.<sup>170</sup> This approach corresponds with the court’s view, pronounced earlier in the judgement, that ‘...[m]atrimonial disharmony does not in itself and cannot entirely justify, extreme violence’.<sup>171</sup> By describing the abuse she suffered as ‘matrimonial disharmony’ the Court effectively minimalises the abuse Mrs Rossiter suffered, thus ruling out a plea of self-defence. Hence, self-defence remains an elusive defence for women who kill their abusive partners.

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<sup>166</sup> [1990] 1 SCR 852

<sup>167</sup> [1992] 95 Cr App R 326

<sup>168</sup> *Ibid.*, p. 331

<sup>169</sup> *Ibid.*

<sup>170</sup> *Ibid.*, p. 330

<sup>171</sup> *Ibid.*, p. 327

The court's reluctance to recognise that such women are acting in self-defence can be explained by reference to the notion of performativity and gendered scripts. As argued above in relation to the sentencing, women who kill de facto contravene the existing domain of cultural intelligible performances of gender. Women who kill are not seen to be feminine, they contravene what is expected of women. However, these 'unintelligible performances' are rendered, to a certain extent, intelligible if the women are constructed as 'victims' as opposed to aggressors. However, as they are on the boundary of intelligible and unintelligible, their actions cannot be constructed as completely reasonable or justifiable. A successful plea of self-defence indicates that the reaction of the woman was the correct action to take, and thus suggests that her performance was culturally intelligible. As justificatory defences render prima facie unlawful behaviour, lawful, due to the surrounding circumstances, it could be argued that the law recognises that some culturally unintelligible behaviour has the ability to be intelligible depending on the surrounding circumstances. However, as the killing will invariably amount to a contravention of a gendered script, it cannot be constructed as the correct action to take as this would make the performance intelligible. This argument can also be applied to the case of Gaynor Oatridge, as it was a mistaken action, as opposed to a correct action. The reliance on mistaken belief constructs her actions as neither entirely intelligible nor completely unintelligible, but somewhere in the middle.

All women who kill their abusive partners appear to hover between intelligible and unintelligible and are subject to construction by the criminal justice system. The



categories of victim and aggressor are central to the creation of their identity and their cultural status and the next two chapters will examine this argument in detail.

## **Conclusion**

This chapter has drawn together the main existing criticisms of the law's treatment of women who kill their abusive partners and suggests how the analysis should be moved forward. Invariably, the existing arguments have focused upon the sameness/difference dilemma. Either the law should treat men and women the same, or it should, on the other hand, recognise the different experiences of women. Both of these arguments tend to construct man and woman as homogenous categories and pay scant attention to the differences which exist between women. Moreover, such arguments also fail to recognise adequately the law's role in constructing identity, a point which this thesis aims to rectify.

The second part of the chapter has focused upon twelve cases dealing with women who kill their abusive partners, and has highlighted that important differences between women fail to be recognised if women who kill are constructed as an homogenous category. Particular attention has been paid to the construction of a female slow burn anger and the battered woman syndrome, and how the syndrome is an unstable identity category which may be subject to a political resignification. The next two chapters will continue the investigation of unintelligible and intelligible genders and the existence of differences between women. Particular attention will be paid to racial and ethnic differences between women, and the extent to which 'racial scripts' also affect the women's intelligibility.

## ZOORA SHAH: AN 'UNUSUAL WOMAN'

### **Introduction**

This chapter will develop the analysis of how the construction of identity and intelligible genders are employed in cases of women who kill their abusive partners, via a close reading of the Zoora Shah<sup>1</sup> case. The case of Zoora Shah involved a Pakistani woman who lived in Bradford with her three children, Naseem, Amrez and Fozia. After being left by her husband for a younger woman she developed a relationship with Mohammed Salim Azam. On the 10<sup>th</sup> April 1992, she killed Azam by poisoning his food with arsenic, for which she was convicted of murder. In addition, Zoora was also convicted of forgery, soliciting murder and attempted murder. Her appeal against her convictions for murder and attempted murder rested upon the introduction of fresh evidence under section 23 of the Criminal Appeals Act 1968 (as amended). The Court of Appeal rejected her appeal and also refused to grant leave to appeal to the House of Lords. It is argued that the court's decision in this case was based upon their construction and judgment of Zoora's character or, more specifically, her ability (or inability) to conform to an approved 'gendered script', and her construction as an unintelligible gender. This close reading will draw specifically upon the work of Judith Butler and the concept of gender as performativity. In addition, the chapter will also examine the extent to which Zoora's race and ethnicity impact upon her perceived unintelligibility.

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<sup>1</sup> *R v Shah* [1998] EWCA Crim 1441 (30 April 1998)

## (Un)Intelligible Genders

As discussed in chapter two, the notion of unintelligible genders is advanced by Butler, specifically in *Gender Trouble*,<sup>2</sup> and *Bodies that Matter*,<sup>3</sup> and is linked to the concept of compulsory heterosexuality. Intelligible genders are those which support or sustain the matrix of heterosexuality. Specifically, Butler constructs these to be those genders which support the perceived ideal path of sex, gender, sexual practice and sexual desire.<sup>4</sup> Genders which conform to this are those such as: female (sex), femininity (gender), heterosexuality (sexual practice), male (object of sexual desire), are thus seen to be intelligible. Same sex desire, for example, is considered to distort this line of desire and leads Butler to argue that homosexuality amounts to a gender which cannot exist:

“The cultural matrix through which gender identity has become intelligible requires that certain kinds of “identities” cannot “exist” -that is, those in which gender does not follow from sex and those in which the practices of desire do not “follow” from either sex or gender.”<sup>5</sup>

It is through the concept of performativity that genders are ‘constituted as materially intelligible.’<sup>6</sup> Butler sees gender identity as a normative and regulatory ideal which one is compelled to perform under a threat of punishment. Performativity is therefore the citational repetition of norms, and these norms exist prior to the subject: Butler states:

“The act that one does, the act that one performs, is, in a sense, an act that has been going on before one arrived on the scene. Hence, gender is an act which has been rehearsed, much as a script survives the particular actors who make

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<sup>2</sup> Butler J *Gender Trouble: Feminism and the Subversion of Identity*

<sup>3</sup> Butler J *Bodies that Matter: On the Discursive Limits of Sex*

<sup>4</sup> Butler J *Gender Trouble* p. 23

<sup>5</sup> *Ibid.*,. 23-24

<sup>6</sup> Loizidou E “The Trouble with Rape” p. 281

use of it, but which requires individual actors in order to be actualized and reproduced as reality once again.”<sup>7</sup>

Therefore gender is seen as a script, a script that bodies perform, and it is through this performance that the subject is constituted, hence there is in Butler’s framework no ‘doer behind the deed’, there is no subject which decides on which script to perform.

As the regulatory norm of gender identity produces intelligible genders, it also produces genders which are excluded and abject: ‘...the exclusionary matrix by which subjects are formed thus requires the simultaneous production of a domain of abject beings.’<sup>8</sup> Just as some genders are intelligible, others, Butler argues, are unintelligible. However these abject identities are vital to the very existence of culturally intelligible subjects, as they form the underlying foundation. Hence the abject is ‘...inside the subject as its own founding repudiation.’<sup>9</sup> Identity categories are always constituted through exclusions, thus emphasising their contingent and unstable nature.

Butler, however, recognises that gender is not the only regulatory ideal which compels performance. In *Bodies that Matter* she questions:

“Given that normative heterosexuality is not the only regulatory regime operative in the production of bodily contours or setting the limits to bodily intelligibility, it makes sense to ask what other regimes of regulatory production contours the materiality of bodies.”<sup>10</sup>

In answer to this query, Butler identifies race as another regulatory regime. Hence, it could be argued that in addition to ‘gendered scripts’ which compel performance there

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<sup>7</sup> Butler J “Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory” p. 277

<sup>8</sup> Butler J *Bodies that Matter* p. 2

<sup>9</sup> Ibid., p. 3

<sup>10</sup> Ibid., p. 17

also exist certain racial and ethnic scripts. In her articulation of race, Butler adopts what may be labelled a post-colonial/post-modern perspective, in that race is not considered to be a natural 'pre-given' identity, but rather a product of history whose meanings are unstable and subject to change. However, this is not to assume that these gendered and racial scripts are separate 'axes of power', but rather vehicles for one another. Butler argues that the urge to think of such terms as separate 'categories' or 'positions' constructs them as unified categories which has the consequence of leading to a further 'enumerations' or '...a multiplication that produces an ever-expanding list that effectively separates that which it purports to connect...'.<sup>11</sup> Hence, care has to be taken when analysing the differences which exist between women who kill their abusive partners. Although women should not be presented as an homogenous group their differences must not be presented in such a way which may lead to further separation. Thus gender and race are not totally exclusive categories but are mutually constitutive. Gender is 'raced' and race is 'gendered'. What will be argued, however, is that race and gender are seen by both the courts and the lawyers as very discrete categories. To a significant extent this is arguably due to the failure to recognise white women as a racial category, whereas Asian women, such as Zoora Shah and Bahkshish Kaur Sangha,<sup>12</sup> are marked by their racial difference.

To summarise, the notion of intelligible genders concerns the citational performance of a regulatory ideal which maintains the matrix of compulsory heterosexuality. Any performance which fails to follow this path renders the gender culturally unintelligible. However this notion of unintelligible genders can be seen to extend

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<sup>11</sup> Ibid., pp. 116-117

<sup>12</sup> *R v Sangha* [1997] 1 Cr. App. R. (S) 202 see chapter 6

further than sexual desire and sexual practice. If gender is performed, then surely a performance which amounts to an unintelligible gender is wider than those performances which are related primarily to sexuality and sexual practices. Hence, when reading the Court of Appeal judgment of Zoora Shah, it has to be questioned whether she is (re)produced as an unintelligible gender, therefore becoming abject and hence providing a repudiated foundation for other subjects (other women who kill). The law, just as other discourses, produces its own foundations and subjects through exclusion and rejection, and it can be argued that cases such as Shah amount to an excluded foundation.

### **The Trial**

The Prosecution's case at first instance focused upon Zoora's attempts to purchase a certain property: 251 Legrams Lane. It was asserted by the Prosecution that there was a '...common thread though all counts of indictment: Zoora's desperate attempts to secure the title to 251 Legrams Lane'.<sup>13</sup> Although the main focus of the chapter will be the Court of Appeal's judgment, it is important to consider the impact which this statement, and the extent to which it is accepted by the court, has upon Zoora's case, and especially the type of woman she is perceived to be. At first instance it was believed that Zoora killed Azam in order to retain her title in number 251. Her motivation behind her actions were deemed to be materialistic and selfish, as opposed to being a victim fighting against her oppressive situation.

Azam had purchased the property in July 1983, however it was generally recognised that he merely lent his name to the transaction. Zoora advanced the £2000 deposit,

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<sup>13</sup> [1998] EWCA Crim 1441 para 3

which was borrowed from an Asian Community Organisation. In April 1984 Azam was sentenced (on appeal) to eight years imprisonment for drug related offences. During the time Azam was in prison Zoorah 'began an association' with Raghieb who is described as 'another married man'.<sup>14</sup> Thus far, within the first page of the Court of Appeal transcript, it is clear to see the 'type' of woman Zoorah is being constructed as: determined and materialistic - due to her 'desperate attempts to secure title' - and also as a wanton woman due to her 'associations' with married men. The combination of these two represent her as deceitful and conniving. Not only does she have affairs with two married men, but also, as the rest of the Prosecution case strives to represent, she uses both these men as a means to her own ends: obtaining and retaining a property title. Moreover, despite the obviously dubious character of both these men, little doubt is cast upon their representations although their bad characters form an underlying foundation for the construction of Zoorah Shah. She is necessarily implicated by her association with these two men, a 'good woman' would not become involved with such men, and moreover, nor would she lose her husband 'to a younger woman'.<sup>15</sup> Before the case really commences Zoorah is constructed as a woman who does not conform with those 'types of women' who receive a conviction for manslaughter as opposed to murder for killing abusive partners.

The Prosecution case at first instance outlines the number of times Zoorah attempted to secure the title to 251 Legrams Lane, generally with the assistance of Raghieb, who on one occasion, the prosecution contended, represented himself to be Azam. It was this action which resulted in Zoorah's conviction for forgery. It is not stated whether or not

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<sup>14</sup> Ibid., para 6

<sup>15</sup> Ibid., para 3

Raghib was also convicted for the same offence. In relation to the such incidents the defence argued that any attempts Zoorah made to sell the property to Raghib were in order to raise money for a trip to Pakistan. On the occasion for which Zoorah was convicted for forgery, the defence argued that at this time Azam did not dispute her claim to the title and that he was happy for the title to be transferred to her so that she could sell to Raghib. Zoorah maintained that she had no role in the forgery as during the two visits during which such action was considered to have taken place, she was looking after a child. Such assertions were supported by the evidence of Zoorah's daughter, Naseem, at the trial.

The prosecution also alleged that Zoorah approached an acquaintance named Bala, who is described as having 'a bad local reputation'<sup>16</sup> and asked him to kill Azam. The Prosecution maintained that, following on from her fraudulent actions to obtain title, Zoorah was afraid of Azam's reaction and therefore asked Bala to kill him. A tape was produced at trial which was used as the evidence upon which her conviction for soliciting murder was based. The prosecution alleged that Bala taped his negotiations with Zoorah, and then played the tape to Azam. Azam consequently contacted the police, which resulted in Zoorah's arrest. Despite expert evidence to the contrary, the defence argued that the tape was produced in an involuntary piecemeal manner, under the orders of Azam. Additionally, the defence pointed out that only parties to have a copy of the tape were the police and the expert witness. The defence stated that this alleged incident took place during a time when Zoorah complained to the police that Azam had threatened her and had broken the windows in the house. Zoorah also alleged that Bala had raped her and stolen some money and valuable bangles, the

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<sup>16</sup> Ibid., para 6



same goods which the Prosecution argued that Zoorah had used to pay Bala to kill Azam. The defence argued that incitement to murder arose due to the 'mischief making'<sup>17</sup> by Bala, as he was trying to interfere in her relationship with Azam.

The defence argued that the frictions between Zoorah and Azam in relation to the title of 251 Legrams Lane were not as central as suggested by the Prosecution. The Prosecution asserted that her attempt to kill Azam and his eventual death were due to Zoorah's fear that he would not halt civil proceedings which disputed her claim. In contrast to this, the defence deduced evidence that, when the attempted murder and actual murder occurred, Azam and Zoorah were on good terms, which seems to be born out by the fact that he visited her house on a number of occasions. On the night of his death, the Prosecution alleged that Zoorah had poisoned Azam by serving him some *gagrella* which was laced with arsenic. The defence, however, adduced evidence, mainly through the testimony of her daughter, Naseem, that Azam was not expected around that night and that Zoorah was unable to poison the food as the family was eating out of a communal dish. The defence argued that Azam was perhaps poisoned at home as opposed to Zoorah's house thus casting aspersions on to his wife, who was described by the defence as '...the only one to be unhappy because...' Azam '...was shaming her by flaunting his relationship with another woman in public.'<sup>18</sup> This to an extent highlights the defence's strategy, the deferment of blame from one woman to another. Azam's wife appears to be a suitable and believable suspect, a suspect who would have an understandable motive, acting in order to protect her honour, and also a suspect who would be in a position to poison his food.

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<sup>17</sup> Ibid., para 19

<sup>18</sup> Ibid., para 20

Although expert evidence was adduced to the effect that Zoorah suffered at times from a 'slight' depressive illness, it was considered by the experts and the court that she did not suffer from such an abnormality of mind which would have diminished her responsibility for the murder of Azam.<sup>19</sup> Thus, the defence of diminished responsibility was not raised at the first trial.

Overall, during the trial Zoorah's identity is constructed as a woman who is the antithesis of those battered and victimised women who kill their partners after suffering years of abuse. She is considered to be a wanton woman due to her relationship with Azam, Raghib and Bala. Furthermore, comments were also made by Dr Wood, the consultant psychiatrist, which cast aspersions on the troublesome relationship she claimed to have with her husband. The judgment states:

"She said that she had been beaten by her husband, but felt badly let down and disgraced by his leaving her. Dr Wood got the impression that she might well have had a succession of man friends thereafter, but she denied that."<sup>20</sup>

This clearly has an impact on her character, what kind of woman would have a 'succession' of men after such bad treatment? Again she is constructed as a woman who is not worthy of protection. In conjunction with the references made regarding Zoorah's attempts to secure the title for Legrams Lane, she is presented as a deceptive, materialistic and conniving woman. Although there is some recognition that she suffered at times from a mild depressive illness, she is constructed as mentally able and responsible. However, there is a contradiction which the court at first instance fails to recognise, (although the issue is dealt with at some length by the Court of

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<sup>19</sup> Ibid., para 29

<sup>20</sup> Ibid., para 25

Appeal). Whereas she is constructed as such a strong, deceptive and able woman, she was also a woman who felt unable to give evidence. She felt unable to let people hear her truth (albeit through an interpretator). In the trial, little is made of her lack of ability to speak English and her feeling of isolation in a country which is far removed from her cultural background. In contrast she is presented as almost a female gangster, who displays stereotypical masculine desires, especially in relation to the acquisition of property.

The Court of Appeal paid particular attention to the defence's arguments at trial, as they considered there to be 'nothing superficial about the case', and stated that it was '...a positive defence case...built upon evidence which was extracted from the appellant's family and other members of the Asian Community.'<sup>21</sup> The significance of this statement lies in the aspersion it casts upon the fresh evidence which the defence wished to be presented to the court. By constructing the defence at the first trial as substantial, the court implies that it could be taken as the a true version of events, and hence any subsequent evidence which tells an alternative account must be viewed with scepticism. Zoorah remains constantly silenced, her truth is only represented through the words of others. She is unable to speak.

### **The Appeal**

Zoorah's version of events were brought to life after she had been sentenced. This was due to a significant extent to the involvement of Southall Black Sisters who were in a position to provide Zoorah with a voice. A statement was prepared by Pragna Patel in which Zoorah admitted that she had lied constantly to the police and her solicitors. The

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<sup>21</sup> Ibid., para 22

statement also outlines the history of sexual abuse Zoora suffered at the hands of Azam, Bala and others, and highlights the fact that Azam was gradually turning his sexual attention towards her daughters, especially Naseem. Although she admitted to feeding the arsenic to Azam, Zoora stated that she did this in order to quell his sexual desires. She had obtained the arsenic (Neela) from a Holy man whilst in Pakistan who had informed her how to use it. This statement, in addition to new medical evidence, formed the ground of the appeal.

Under section 23 of the Criminal Appeal Act 1986 (as amended) the the Court of Appeal is entitled to accept new evidence. Section 23 states:

“(1) For the purposes of the Part of this Act the Court of Appeal may, if they think it necessary or expedient in the interests of justice -  
(c) receive any evidence which was not adduced in the proceedings from which the appeal lies.”

Hence the Court can receive new evidence if it appears to them that it is in the interests of justice to do so. What needs to be questioned here is what form of justice is the court appealing to? Nothing is said in the judgment about what justice means within this context. However, whilst deciding whether to accept the evidence, the Court, by virtue of subsection (2) must pay regard to the following matters:

“(a) whether the evidence appears to be capable of belief;  
(b) whether it appears to the Court that the evidence may afford any ground for allowing the appeal;  
(c) whether the evidence would have been admissible in the proceedings from which the appeal lies on an issue which is the subject of the appeal;  
(d) whether there is a reasonable explanation for the failure to adduce the evidence in those proceedings.”

Therefore, although the Court does have an unfettered discretion within section 1 of the Act, the question of whether or not the evidence should be received is to a large extent dealt with by reference to the issues laid down in subsections 2(a) to (d). In

Zoorah's case the court paid particular attention to subsections (a) and (d) and these two grounds go straight to the question of the defendant's character. In both cases the issue is whether or not the defendant can be believed.

The court accepted to a large extent that the evidence presented by professionals should be considered capable of belief. It was, however, the evidence presented on behalf of Zoorah Shah that was deemed unbelievable. Hence the court proceeded to silence Zoorah by constructing her as a liar, an identity which is undoubtedly in line with that put forward by the prosecution in the first trial. It is not surprising that one who is considered to be conniving, manipulative and deceptive is also held to be a liar. The Court of Appeal stated that she was '...a most unsatisfactory witness and her evidence to be not capable of belief.'<sup>22</sup> It is within this part of the judgment that we can further investigate the construction of Zoorah's identity. In particular, the following aspects will be considered: the construction of Zoorah as a bad mother; the perceived lack of physical evidence; her failure to disclose to anyone that she was being abused; and the court's judgment that Zoorah was an 'unusual woman'.

Zoorah's failure to prevent her daughters eating the poisoned samosa leads to the Court's construction of Zoorah as a bad mother. The judgment states: 'She professed, perhaps rightly, to care a great deal for her daughters, but ... she stood by on 29<sup>th</sup> February 1992 and watched both daughters eat part of the samosa which she knew to be poisoned.'<sup>23</sup> However, no consideration is given to the fact that she might have been afraid of the consequences if she had stopped her children from eating the

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<sup>22</sup> Ibid., para 59

<sup>23</sup> Ibid.

contaminated food, as this may have arisen his suspicion. Moreover, much is made of the fact that she would not admit that she 'got' Naseem (her eldest daughter) to lie for her.<sup>24</sup> The word got here is very important, implying that Naseem's actions were in no small part due to strong influence by Zoorah. The word also suggests that perhaps Naseem also acted, to an extent, against her will. The court accepted that Zoorah was a 'strong willed woman',<sup>25</sup> who was undoubtedly capable of tricking professional psychiatrists into accepting that she was mentally ill at the time at which she killed Azam. It is stated: 'If, as is now apparent to us, both doctors were misled, the question arises as to whether their opinions can survive',<sup>26</sup> (and indeed it was decided that they could not). Hence it is not untenable to suggest that the court believed that Naseem's statement was due to the manipulative effect of her mother. A contrast can be drawn here with the case of Bakhshish Kaur Sangha,<sup>27</sup> in which motherhood was seen as one of the 'exceptional circumstances' which supported her appeal against a custodial sentence. As noted in chapter 6 Bakhshish is said to be '...a hard working and a devoted wife and mother who had worked all her life to provide for her family and raise her children.'<sup>28</sup>

Whilst deciding whether or not Zoorah was capable of belief, the Court of Appeal paid particular attention to the perceived lack of physical evidence, a factor which, I suggest, is crucial in the construction of Zoorah as an unintelligible gender. The court considered it strange that 'No one had noted a single suspicious bruise (other than one

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<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid., para 61

<sup>27</sup> *R v Sangha* [1997] 1 Cr. App. R. (S) 202

<sup>28</sup> Ibid., p. 205

black eye).'<sup>29</sup> This observation raises a number of issues relating to seeing and the truth. The Court of Appeal appears to construct Zoora's body (bruising) as telling the truth of her situation. As no 'suspicious' bruising was noticed, then there could be no truth to her allegation of assault. As discussed by Fraser in "Classing Queer", the visible body is generally considered to tell the truth of a person's identity, '..the body is the site, or place, where 'truth' of an identity is revealed.'<sup>30</sup> Fraser examines how some identities are revealed upon the surface of the skin: such as race and gender; whereas the truth of other non-visible identities, such as sexuality, are only established 'by evidence over time'. Fraser argues that the truth status of the body is due to the traditional influence of the 'visual paradigm' in Western discourse which '...ensures that material bodies, encoded with the seeable signs of identity, are assumed to carry their 'truth', overtly and irrefutably, on the surface of the skin.'<sup>31</sup>

Although it could be argued that the body of a domestic assault victim will not tell the 'truth' of her situation at all times, it nevertheless tells the truth at certain times, and this is very significant. The importance of this is shown in recent police initiatives to take photographs of a domestic assault victim shortly after an assault has taken place. Such action is generally taken as part of an overall strategy both to reduce incidents of domestic violence and to increase the number of arrests made.<sup>32</sup> One example is the

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<sup>29</sup> [1998] EWCA Crim 1441 para 59

<sup>30</sup> Fraser M "Classing Queer: Politics in Competition" *Theory, Culture & Society* (1999) 16(2), 107-131 p. 109

<sup>31</sup> *Ibid.*, pp. 110-111

<sup>32</sup> see for example the report in CWN - News & Information for Coventry and Warwickshire 13 September 2000 [www.cwn.org.uk](http://www.cwn.org.uk)

use of cameras by the Essex police force, which are used in conjunction with advice booklets in order to take a 'double stand against domestic violence'. It is stated that:

“By carrying the cameras on board police vehicles, officers will be able to capture the initial scene of any domestic violence incident. As well as sending a positive message to victims that the police treat domestic violence seriously, the photos can eventually be used in court should a victim decide to take action.”<sup>33</sup>

Hence the resulting photographs will be produced as evidence if the case proceeds to court. What is interesting is the use of the word 'scene' in the above paragraph. Undoubtedly photographic evidence of the place where the abuse occurred may be of relevance in some cases where the aggressor has also damaged the house or household objects (as happened in the case of Diana Butler, see chapter 8), but the real scene of domestic violence can be said to be the abused woman's body. This is the site upon which the violence is inflicted. If the evidence of damage related solely to the actual physical location, than it would be an issue of criminal damage. Hence a woman's body tells the truth of her identity, and this visual image can be so powerful that some forces have considered using the evidence in court in the absence of the victim's participation.<sup>34</sup> What is significant here is that the presence of visible injuries speaks louder than the spoken evidence of the actual woman. Her body is that which speaks the truth, and without this her words are silenced, and thus Zoora's representation of events remains unheard.

However, when one reads the Court of Appeal judgment, it can be seen that there was some evidence of bruising, as the sentence notes the one black eye. The question

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<sup>33</sup> [www.essex.police.uk](http://www.essex.police.uk)

<sup>34</sup> This approach has been suggested in the draft (as at 3 October 2000) Merseyside Police Force Policy Statement on Domestic Violence.



remains: why is the existence of one black eye not considered to be sufficient evidence of the abuse Zoora suffered? If the body tells the truth of a person's identity, why was this 'one black eye' not speaking the truth? What can be argued here is that what one sees is always already mediated via discourses and narratives, what we see '...is not given and self-evident but rather intertwined with narratives.'<sup>35</sup> Hence, although the body is considered to tell the truth of a individual's identity, how the body is seen and how the identity is constructed depends on the discourses which mediate the sight of the body. In the narrative of the judgment the bruising is constructed as separate to the sexual abuse Zoora suffered via the use of parenthesis. By placing 'other than one black eye' in parenthesis, the bruise is separated from the main body of the paragraph, and, more notably, from the word suspicious, and hence it is not considered to be dubious. By separating the black eye from evidence which may perhaps been accepted, i.e. suspicious bruising, the brackets establish the black eye as an unrelated event, an event which should not be seen to be part of the story of the appeal. The black eye is thus constructed as a coincidental factor. It is not accepted to be part of Zoora's version of events. It is not part of the alleged abuse.

Hence Zoora was not considered to be a victim, in the opinion of the Court of Appeal she did not suffer abuse. Nobody saw a bruise which was acceptable evidence of any level of assault. This leads to an examination of those discourses of violence which can be seen to constitute a victim subjectivity. It is clear that terms such as domestic violence and battered wife/woman are identity categories which a woman must fall within in order for her to obtain that identity. Zoora falls outside the established

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<sup>35</sup> Fraser M "Classing Queer: Politics in Competition" p. 112 commenting on the work of Vikki Bell in 'Show and Tell: Passing and Narrative in Toni Morrison's *Jazz*' (1996) 2(2) *Social Identities* 221-236

discursive identity categories, and therefore the law can only construct her as a murderer. A case which can perhaps offer an insight here is that of Tara Mary Fell.<sup>36</sup> In contrast to Zoora's case, Tara was living with her abusive partner and there had been substantial evidence of abuse, and this is mentioned in the facts of the case. The judgment states: '...those who lived nearby frequently heard shouting and screaming and crying.'<sup>37</sup> 'She was ... found on the pavement complaining of being hit by him. She had swollen lips and areas of reddened skin.'<sup>38</sup> After she had been arrested for killing Tara was '...examined by a doctor who noted bruising to her upper arms, breasts, neck, back and legs.'<sup>39</sup> Hence there appears to be plenty of physical evidence which would construct Tara as a battered woman. What is interesting, however, is that within the case it is not this physical evidence which constructs Tara as an intelligible victim of domestic violence, it is, rather, her mental state. She is only identified as a 'battered wife (sic)'<sup>40</sup> when she is recognised as such by her psychological state as attested by a doctor. It is the medical categorisation which is needed for a woman to be recognised as a battered woman. The judgment states:

"Dr Reeves ...found a number of features of Battered Women's syndrome; chronic depressive illness; a feeling of hopelessness and helplessness and despair; inability to act effectively; inability to see any escape for the situation or any future; self blame for the violence inflicted upon her by her male partner; a failure to see that what was happening was abnormal because she was isolated from reality; shame and a poor sense of worth and submission as a form of self protection. Having considered these elements Dr Reeves concluded that the Appellant fell into the category of a battered wife."<sup>41</sup>

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<sup>36</sup> *R v Fell* [2000] 2 Cr. App. R. (S) 464

<sup>37</sup> *Ibid.*, p. 466

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

Evidence of actual physical assault, although essential, as the Shah case demonstrates, is not by itself sufficient. Women must possess both the requisite bruises as well as the subjective damage. Another view to adopt is that there are perhaps two identity categories: victim of abuse and battered woman. Whereas the latter is dependent on the existence of the former, and a woman who showed evidence of abuse would be constructed as a victim of domestic violence, she may still not be categorised as a 'battered wife'. What the *Fell*<sup>42</sup> case seems to suggest is that the actual physicality of being beaten will not suffice to place a woman in the category of 'battered wife'.

In addition to the lack of physical evidence, the court also questioned the fact that Zoorah did not speak to anyone about the abuse she was suffering. This statement is made in complete disregard to Zoorah's admission that she did at one point appeal to Sher Azam, Azam's brother, an elder in the community, who declined to offer any assistance. I argue that the approach the court adopts in relation to this issue operates discursively to colonise Zoorah. The court seemed to disregard completely the subjective effect of violence upon a woman and how this may lead to her silence. As MacCannell and MacCannell state:

"Independent of what happens to the body, the most violent acts are those resulting in long-term or permanent damage to the victim's subjective functioning,.... An assault is serious in the degree that it fragments subjectivity or constantly 'breaks in' on the inner dialogue of the victims and those who are victim-identified to the point that they can no longer conduct themselves in a way that can be termed 'normal'."<sup>43</sup>

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<sup>42</sup> [2000] 2 Cr. App. R. (S) 464

<sup>43</sup> MacCannell D & MacCannell JF in "Violence, Power and Pleasure A Revisionist Reading of Foucault from the Victim Perspective" p. 205 in Ramazanoglu C (ed) *Up Against Foucault: Explorations of Some Tensions Between Foucault and Feminism*. [London: Routledge; 1993] pp. 203-238

In contrast, when discussing her silence the court paid considerable attention to her ethnicity and cultural background. It is stated: 'We appreciate that for someone from her background it may not have been easy to unburden herself.'<sup>44</sup> The court from this statement onwards questions why she did not tell the many contacts she had, most of whom were Asian and some of whom shared her 'cultural background'. Hence it appears that, if most of her contacts had been non-Asian, her reluctance to speak may have been understood. However, as she had a number of people who the court deemed suitable to hear her voice, her silence becomes incomprehensible. Her inability to speak dissipates once there are other subalterns to hear her voice. At the very most the court states: 'Of course it would not be easy to say that she was being persistently sexually abused',<sup>45</sup> which is somewhat of an understatement. No recognition is given to other cases in which a woman remains silent due to the shame of being abused. (As indeed happened in the case of Diana Butler). What is needed here is the recognition that as both a Muslim woman, who cannot speak English, and also a sexually abused woman she is silenced in a number of ways. These two identities do not stand by themselves, but merge to help constitute Zoora's subjectivity.

The court continues to consider her silence under the issue of whether there was a reasonable explanation for the failure to adduce the evidence in the prior proceedings. In order for the new evidence to be admitted at a retrial, the defence has to provide a reasonable explanation as to why it was not produced at the first trial. It was recognised that, in some cases, the existence of a psychiatric illness may in it self

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<sup>44</sup> [1998] EWCA Crim 1441 para 59

<sup>45</sup> Ibid.

adequately explain the failure to adduce, but, however, stated that this did not apply here. The approach taken by the defence was to admit that the initial defence was 'a tissue of lies'<sup>46</sup> as Zoorah wished to '...protect herself and especially her family from further shame and the risk of violence.'<sup>47</sup> This is an interesting strategy adopted by the defence. In constructing her as a liar it could be argued that the defence is trying to undermine the court's initial construction of Zoorah as a liar as they attempt to forward a justification for her untruths. Thus, the defence admits she lied, but at the same time a justification is derived from her ethnicity and cultural background via the evidence given by Zoorah (through Southall Black Sisters) and Dr Lipsedge which stressed the '...importance of honour in the society from which the appellant springs, and as to the possibility of retaliatory violence.'<sup>48</sup> As with the approach taken by the Court of Appeal in relation to Zoorah's reluctance to tell anyone about the abuse she was suffering, it can be seen that the defence also discursively colonises Zoorah. In order to provide a reasonable explanation for her lying, the defence turn to her cultural background and this is the lens through which her actions are viewed. Once again, no explicit reference is made to the impact of the actual abuse on Zoorah, and how this may have contributed to her 'tissue of lies'. Thus it can be seen that both the Court of Appeal and the defence fail to recognise the complexity of Zoorah's subjectivity. She is viewed as either a victim of abuse, or as an Asian woman. These two identities are considered to be separate as opposed to intertwined.

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<sup>46</sup> Ibid., para 67

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

Although the Court of Appeal did accept the cultural explanation for Zoorah's lies, they did so 'only up to a point', as she was considered by the court to be 'an unusual woman' whose way of life, in their eyes, was such that '...there might not have been much left of her honour to salvage.'<sup>49</sup> Two important points raise themselves in relation to the categorisation of Zoorah as an 'unusual woman'. Firstly, this is perhaps one of the clearest parts of the judgment in which Zoorah is constructed by the court as an unintelligible gender and thus loses her subjectivity (in the sense of a subject who is able to stand before the law). Secondly, this labelling works to implicitly censor Zoorah and further her silence.

As noted above, the concepts of intelligibility and socially accepted scripts relate not simply to gender, but also to race and ethnicity. Race and ethnicity can also be seen as regulatory regimes through which subjectivity is performed and thus constituted. Hence there is also a compulsory racialised script, which is performed under a threat of punishment. Thus, it can be argued that Zoorah's unintelligibility relates not only to her failure to adhere to gendered scripts, but also to racialised scripts. Whilst categorising Zoorah as an 'unusual woman' the Court of Appeal emphasised a number of factors. Firstly that '...she was certainly capable of striking out on her own when she thought it advisable to do so, even if it might be thought to bring shame on her or to expose her to the risk of retaliation.'<sup>50</sup> Secondly, the fact that she had committed forgery and made allegations of rape and theft, which were considered to be false (these allegations were made in the first trial). And finally, that, again in the first trial,

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<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

her defence had made ‘...thinly veiled suggestion that the deceased’s own widow might have been responsible for his death.’<sup>51</sup>

In contrast to this, the Court of Appeal in the case of *Bakhshish Kaur Sangha*<sup>52</sup> accepted the discourses of shame which impacted upon the appellant and paid significant attention to the report of the consultant anthropologist, who stated that, due to Bakhshish’s ethnic and racial background, the abuse she suffered was ‘...both profoundly humiliating and deeply provocative.’<sup>53</sup> This emphasises that the abuse should be seen as more severe in Bakhshish’s case because she is an Asian Sikh woman. The abuse would not have been so profound had she been white. This recognition of the impact that domestic violence may have upon Asian women can, however, be seen as a double edged sword. Bakhshish’s actions of attempting suicide on five occasions clearly illustrated the profound humiliation and shame she felt due to Surjit Singh Sangha’s behaviour and thus was ‘rewarded’ with a probation order. The court in Zoora’s case, however, considered that her reactions indicated that she was a woman who acted without honour, who feels no profound shame. Zoora failed to react in manner consistent to the court’s expectation of an Asian woman. Hence she remains in custody. Being a ‘strong-willed’ Asian woman is much more of a contravention of the cultural scripts than being a ‘strong-willed’ white woman.

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<sup>51</sup> Ibid.

<sup>52</sup> *R v Sangha* [1997] 1 Cr. App. R. (S) 202

<sup>53</sup> Ibid., p. 206 It is important to recognise that Bakhshish is a Sikh, whereas Zoora is a Muslim, and such differences will also impact upon the perceived intelligibility of the women. Such an enquiry, however, is outside the scope of this work.

The significance of these racial scripts can also be seen in the well known case of Kiranjit Ahluwalia,<sup>54</sup> who killed her abusive partner by setting him on fire whilst he was asleep. Immediately similarities are apparent. Both Zoora and Kiranjit killed their partners in non-confrontational situations, a factor which has not been evident in the other cases discussed in this thesis. Both women are Asian. However Zoora is originally from Pakistan whereas Kiranjit is Indian. Importantly, other significant differences exist. Kiranjit is a highly educated woman, whereas Zoora is not; Kiranjit was married to the man she killed, Zoora was not. Similar to Bakhshish, Kiranjit had attempted suicide and showed desperate behaviour, evidencing a high level of shame. The following passage from a letter Kiranjit wrote to her husband was read out in court:

“Deepak, if you come back I promise you—I won’t touch black coffee again, I won’t go to town every week, I won’t eat green chilli, I’m ready to leave Chandikah and all my friends, I won’t go near Der Goodie Mohan’s house again, even I am not going to attend Bully’s wedding...I won’t laugh if you don’t like, I won’t dye my hair even, I don’t go to my neighbour’s house, I won’t ask you for any help.”<sup>55</sup>

The court also commented upon the fact that, despite discovering that her husband was having an affair, Kiranjit still wished to hold the marriage together, ‘...partly because of her sense of duty as a wife and partly for the sake of the children.’<sup>56</sup>

At the first trial, similar to Zoora, Kiranjit did not give evidence and medical evidence was not adduced. Kiranjit appealed against her conviction for murder on three grounds, two of which related to provocation, and have been discussed in chapter five. The third ground related to the defence of diminished responsibility, which, akin to

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<sup>54</sup> *R v Ahluwalia* [1993] 96 Cr. App. R. 133

<sup>55</sup> *Ibid.*, p.135

<sup>56</sup> *Ibid.*



the case of Zoora, was not raised at the first trial. It was on this third ground that Kiranjit's appeal was allowed. Despite the fact that medical evidence was not adduced at the first trial, the Court of Appeal considered it to be in the interests of justice to allow fresh evidence to be admitted. Thus, a report declaring that Kiranjit was suffering from 'a major depressive order', was admitted, therefore rendering the conviction unsafe and leading to an acquittal and a retrial. In contrast to Zoora, this report was actually produced for the first trial but was not adduced in court. A similar situation occurred in the case of Anita Muscroft,<sup>57</sup> as discussed in chapter 6. In both Kiranjit's and Anita's case the court considered it just to accept this evidence, but not in Zoora's case. It could be argued that this was due to the fact that no evidence of Zoora's depressed state existed at her first trial, however, it can be seen that this is not so. Evidence was admitted that Zoora suffered from depression. I argue that the Court of Appeal's decision not to admit the fresh evidence in Zoora's case was due to her status as an 'unintelligible gender', and this unintelligibility relates not only to her failure to adhere to 'gendered scripts' but also to 'racial scripts'. Whereas Kiranjit appears to have adhered to the gendered and racialised scripts, in that her behaviour arguably corresponds with culturally expected and accepted notions of Indian women, (i.e. feeling profound shame and humiliation due to the abuse, and the dedication to the marriage) and thus she amounts to an intelligible gender, Zoora's behaviour renders her unintelligible, as it fails to correspond to the regulatory scripts.

Furthermore, the Court of Appeal fails to provide Zoora with the opportunity to explain her perceived 'unusual' behaviour. By constructing Zoora as an 'unusual woman' the court at the same time bars Zoora from explaining her 'unusual'

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<sup>57</sup> *R v Muscroft* [2001] EWCA 604

behaviour. Thus she is silence or implicitly censored. In this sense the phrase 'unusual woman' could be taken as a form of hate speech: a speech act which has the performative consequence of injuring the recipient.<sup>58</sup> Butler argues that, as the body is sustained through language, in the sense that it is brought into social existence by being named or interpellated, its existence can also be threatened by language.<sup>59</sup> By being named an 'unusual woman' Zoorah is injured in two different ways. Firstly, the address can be seen to injure Zoorah as it reinforces her subordinate position. The address is illocutionary in the sense that its utterance contributes to the social constitution of Zoorah, who is already in a socially subordinate position, and this naming reinforces this position. As Butler explains:

“...speech does not merely reflect a relation of social domination; speech enacts domination, becoming the vehicle through which that social structure is reinstated. According to this illocutionary model, hate speech constitutes its addressee at the moment of its utterance;...it is, in the very speaking of such speech, the performance of the injury itself, where the injury is understood as social subordination.”<sup>60</sup>

Although it could be argued that being interpellated as a 'woman' in itself places the addressee in an socially subordinated position, what is significant here is the use of the word 'unusual'. This part of the address does injury to Zoorah as it sets her aside from other women. She is not deemed as either 'mad' or 'bad', the general categorisation the courts apply to criminal women, nothing in her actions are seen to correspond to the 'accepted' notions of female criminality, thus in short she is seen as an 'unintelligible' woman, a woman who does not conform in any way to the notions of femininity which are recognised by the courts, either as a good Asian woman, or a

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<sup>58</sup> see Butler *J Excitable Speech: The Politics of the Performative* [Routledge; London/New York; 1997] p. 5

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 18

bad or mad female criminal, nor indeed notions of woman as passive victim. Not only does Zoora not fit the script of a good Asian woman, she also does not fit the accepted script of the (white) female criminal. Thus she is interpellated as an unintelligible gender.

The term 'unusual woman' also operates to implicitly censor Zoora's words as she is silenced in the sense that her representations cannot be heard by a jury. Hence, although her 'voice', via Southall Black Sisters, is heard by the Court of Appeal, she is not allowed to tell her story to a jury, to argue that she has a recognised defence for her actions. Butler explains how such an utterance operates to censor the addressee:

“When the subject through its derogatory remarks or representations, works to ‘censor’ another subject, that form of censoring is regarded as silencing’. In that form, the citizen addressed by such speech is effectively deprived of the power to respond, deauthorized by the derogatory speech act by which that citizen is ostensibly addressed. Silence is the performative effect of a certain kind of speech, where that speech is an address that has as its object the deauthorization of the speech of the one to whom the speech act is addressed.”<sup>61</sup>

Although Butler sees this as the power of the subject, as opposed to the State, in this case it can be seen to be a mixture of the two. Here, the subject (as in the Law Lords) interpellate Zoora as an unusual woman, and thus the law (the State) steps in to censor her story, as an unusual woman cannot be heard. The unusual woman (a gender which is culturally unintelligible) exists outside the domain of speakability, as she is not a subject, and her abject status is reconfirmed by her inability to speak as ‘...to move outside the domain of speakability is to risk one's status as a subject.’<sup>62</sup> Nevertheless, there is the paradoxical position that, by uttering the phrase 'unusual woman' the Court of Appeal also creates a subject position. Thus Zoora is both at

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<sup>61</sup> Ibid., p. 137

<sup>62</sup> Ibid., p. 133

once abject and subject. Thus it can be argued that the Court of Appeal constitutes a new subject position: that of the unusual woman. However, in this instance this naming works to maintain the silence of Zoorah as the court states: ‘...we find ourselves wholly unable to conclude that the appellant has put forward a reasonable explanation for what happened in the court below,’<sup>63</sup> and thus, on this ground, her fresh evidence cannot be admitted. One of the main reasons for this unacceptability is that she is viewed as an unusual woman.

### **Conclusion**

Zoorah Shah remains in prison as a convicted murderer. She is constructed by the Court of Appeal as an ‘unintelligible gender’, a gender who cannot exist, who cannot be heard. In particular, two aspects of the judgment work to construct Zoorah as an unintelligible gender a) the perceived lack of physical evidence and b) the label ‘unusual woman’. In addition, no exceptional circumstances exist in this case which allow her conviction to be quashed and a retrial ordered. Zoorah remains outside the recognised categories which generally lead to a conviction of manslaughter. Zoorah’s unintelligibility relates not only to her inability to adhere to gendered scripts, but also to racial scripts, in particular, this was illustrated via a comparison with the cases of *Sangha*<sup>64</sup> and *Ahluwalia*.<sup>65</sup> In both of these cases, the court noted their profound shame and humiliation, which was exacerbated by their culture, a situation which was not considered to occur in Zoorah’s case. Thus it can be seen how the (un)intelligibility of gendered scripts and the diversity of ‘femaleness’ are of

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<sup>63</sup> [1998] EWCA Crim 1441 para 67

<sup>64</sup> *R v Sangha* [1997] 1 Cr. App. R. (S) 202

<sup>65</sup> *R v Ahluwalia* [1993] 96 Cr. App. R. 133

considerable importance in cases involving women who kill, an issue which will be considered further in the next chapter.

**NARRATIVE AND RESIGNIFICATION**  
**IN THE RE-TRIAL OF DIANA BUTLER**

**Introduction**

This chapter provides a close reading of the case of Diana Butler in order to develop the examination of identity categories used by the courts in the cases of women who kill abusive partners. The last chapter, which scrutinised the Court of Appeal case of Zoorah Shah, argued that the court constructed Zoorah as an ‘unintelligible gender’, which in turn, arguably, substantiated her conviction for murder. This chapter aims to develop some of the key arguments made in the close reading of the Zoorah Shah case, especially how the court’s perception of the woman as an intelligible or unintelligible gender impacts on the interpretation of the offence for which the woman is convicted. In particular, this argument intends to highlight the different constructions used in the case of a conviction for murder versus a conviction for manslaughter. Such an approach has particular relevance to the case of Diana Butler as she was initially convicted for murder, and then on retrial received a conviction for manslaughter on the grounds of diminished responsibility. The identification of the court’s use and acceptance of different constructions of gender enables an evaluation of the form of justice achieved in such cases, especially those cases in which women are convicted for manslaughter. This chapter examines both the Court of Appeal judgment and the re-trial, and scrutinises how Diana Butler is given an identity, or placed within an identity category by the court; an identity which is negotiated by the defence and prosecution lawyers and the judge (but not the jury); an identity which is constructed for her which she must internalise in order to achieve some sense of justice.

On the 6<sup>th</sup> July 1996, Diana Butler stabbed Roger Carlin in the back with a kitchen knife, during a domestic incident. Roger later died of his injuries in hospital. The violence commenced once they had returned home, after an evening out, and consisted of Roger physically attacking Diana and also damaging the house. Diana stated to the police that he had ‘...gone ballistic, pulled her hair, hit her head off the wall.’ ‘...had thrown food out the house.’ and that ‘he was smashing the house and hitting me.’<sup>1</sup> When the police were called she initially stated (with Roger’s agreement) that he had slipped and fell on to some glass. Later in the evening she admitted that she had stabbed him. These were the facts presented at both the first trial and the retrial. However, at the first trial Diana is convicted of murder, whereas at the retrial the conviction is for manslaughter on the grounds of diminished responsibility. This chapter argues that this shift is due to the construction of Diana as an ‘intelligible gender’.

Initially the focus of the trial is upon the actual incident, the night of the stabbing. However, this focus can be seen to shift in the re-trial to encompass wider events, and this has a major impact on the construction of Diana’s identity. At the retrial, the defence produce fresh evidence detailing the violence and abuse Diana suffered at the hands of Roger. Furthermore evidence of Diana’s relationship with her first husband, John Butler, who was also violent, is adduced by both the prosecution<sup>2</sup> and the defence in the retrial. In contrast to the Court of Appeal’s disbelief of Zoora Shah, the trial court accepts Diana’s version of events. What is the reason behind this? One simple answer is that Diana fitted easily into the category of ‘battered woman’ or

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<sup>1</sup> *R v Butler* Unreported, July 1999, Durham Crown Court. Notes taken by author at the trial.

'domestic violence victim'. There is plenty of evidence that Diana suffered physical abuse and unlike Zoorah Shah she is seen to have the physical injuries, and this allows her to fall into the judicially accepted categories which operate within these cases. On another level, however, it can be seen that Diana only fitted into these categories after her evidence was accepted. What needs to be examined in this case is the three way negotiation which occurs between the defence, prosecution and judge in order to construct the defendant, and how the judge, through his authoritative speech, has the power to interpellate the defendant. This interpellation<sup>3</sup> is both powerful and determining, as it constructs the identity of the defendant from the outside, which is then internalised and, for a period of time, fixed by the defendant.

A number of theoretical arguments will be used in order to provide a detailed analysis of the case and the construction of Diana's identity. These are: narrative, resignification, materialisation of norms and the formation of the psyche. After these terms have been explained, the chapter will then continue to apply this theoretical framework to both the Court of Appeal judgment and the retrial. The discussion will highlight how the different narratives which are evident in both the appeal and the retrial go some way to construct Diana's identity, and how narrative can also be

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<sup>2</sup> The prosecution also tried, unsuccessfully, to adduce this evidence in the first trial.

<sup>3</sup> The term 'interpellation' is taken to mean the method in which an individual is brought into social existence. As developed by Althusser and then used by Judith Butler, (see Butler J *The Psychic Life of Power: Theories in Subjection* [Stanford University Press; California; 1997]) a naming or a calling provides an individual with a subjectivity and a social identity. It is argued in this chapter that the naming – the interpellation – which is provided by the judge is very powerful as it a) determines the appropriate offence and b) in cases in which some form of plea-bargaining occurs, has to be internalised by the accused in order to be convicted for the less serious offence.



subject to a powerful resignification, a resignification which impacts upon the construction of Diana's identity to such an extent that she is eventually convicted for manslaughter on the grounds of diminished responsibility.

## Narrative

The notion of narrative as identity is considered by Lois McNay in *Gender and Agency*<sup>4</sup> McNay notes how poststructural notions of identity and subjectivity have deconstructed the notion of self '...revealing it be an illusory effect emerging from the uneasy suturing of incommensurable discursive positions.'<sup>5</sup> She considers that the problem with this approach is that subjectivity becomes completely 'free-floating' and 'lacks historical depth'.<sup>6</sup> This concept of subjectivity, she argues, fails to account for the reality that '...some types of identity are more durable than others'. Hence, whilst McNay is not arguing that subjectivity is essential and eternally fixed, she is suggesting that some forms of identity persist over time and are invested in by individuals. She states: '[g]ender identities are not free-floating: they involve deep-rooted investments on the part of individuals and historically sedimented practices which severely limit their transferability and transformability.'<sup>7</sup> Recognising that some identities are resilient suggests that a coherent sense of self is not completely an illusion, '...but fundamental to the way in which the subject interprets itself in time.'<sup>8</sup>

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<sup>4</sup> McNay L *Gender and Agency; Reconfiguring the Subject in Feminist and Social Theory* [Polity Press; Cambridge; 2000]

<sup>5</sup> *Ibid.*, p. 17

<sup>6</sup> *Ibid.*

<sup>7</sup> *Ibid.*, p. 18

<sup>8</sup> *Ibid.*

Hence, McNay moves away from a notion of a completely unstable subjectivity which is constantly changing and recognises that identity can be durable and lead to a coherent sense of self which is not a complete illusion, as it informs how the subject sees itself and it is integral to the individual's construction of identity. Moreover, the standpoint adopted by McNay also interrogates how the individual plays an active role in constructing their own identity. In order to explain this position, McNay draws upon the Paul Ricoeur's theory of narrative, which specifies that individual and 'meta - narratives' are fundamental to a coherent sense of self. This notion of identity as narrative helps to deconstruct some of the boundaries which have remained intact through the poststructural notion of subjectivity as exclusion, such as '...dispersion versus unity; contingency versus fixate and determinism versus voluntarism.'<sup>9</sup> A narrative notion of identity recognises that subjectivity is subject to radical change over time. However, it also argues that the self, through certain narratives, temporally fixes its own identity: '...the notion of narrative indicates that constraints are imposed from without and are also self-imposed. Individuals act in certain ways because it would violate their sense of being to do otherwise.'<sup>10</sup>

Ricoeur theorises that an individual acquires a sense of self, a sense of a coherent identity, through the narration of their experiences:

“The structure of narrativity demonstrates that it is by trying to put order to our past, by retelling and recounting what has been, that we acquire an identity.”<sup>11</sup>

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<sup>9</sup> Ibid., p. 80

<sup>10</sup> Ibid.

<sup>11</sup> Ricoeur P in Kearney R *Dialogues with Contemporary Continental Thinkers: The Phenomenological Heritage* [Manchester University Press; 1986] p. 21

“The narrative constructs the identity of the character, what can be called his or her narrative identity, in constructing that of the story told. It is the identity of the story that makes the identity of the character.”<sup>12</sup>

This is not to suggest, however, that narration here relates to the notion of narrative as used by standpoint feminists, which suggest that women's experiences can reveal the ‘truth’ of (gendered) social relations. Ricoeur's theory recognises that individuals cannot speak of their experiences directly, they can only be talked about through the indirect discourse of narration. Hence, all experience is expressed through narration, and experience can only be narrated because it has symbolic meaning. The notions of self as idem (sameness) and self as ipse (selfhood) are central to Ricoeur's theory of identity as narrative, and it is through the overlapping of these two senses of self that identity is formed. Whereas idem identity ‘...implies permanence in times in terms of sameness’, ipse relates to a notion of the self as ‘...constancy through and within change’.<sup>13</sup> And it is through narration that the self mediates these two forms of identity. Hence, it is through the narration of events that the self maintains a coherent sense of self through time and change. ‘Narrative is the mode through which individuals attempt to integrate the non-synchronous and often conflictual elements of their lives and experiences.’<sup>14</sup> Thus the self has unity ‘...but it is the dynamic unity of narrative which attempts to integrate permanence in time with its contrary, namely diversity, variability, discontinuity and instability.’<sup>15</sup>

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<sup>12</sup> Ricoeur P *Oneself as Another* [University of Chicago Press; Chicago IL; 1992] pp. 147-8; cited in Hughes C “Reconstructing the Subject of Human Rights” *Philosophy and Social Criticism* (1999) 25(2) 47-60 p. 52

<sup>13</sup> McNay L *Gender and Agency; Reconfiguring the Subject in Feminist and Social Theory* pp. 87-88

<sup>14</sup> *Ibid.*, p. 133

<sup>15</sup> *Ibid.*, p. 89

McNay recognises that there are both personal narratives and ideological or meta-narratives. Personal narratives relate to an individual retelling of experiences or past events, and recognises that the telling of the 'story' works to construct an individual's identity. Hence, whilst examining the Court of Appeal judgment and the evidence provided at the re-trial, the personal narratives of Diana and other witnesses will be analysed to interrogate the construction of Diana's identity. In this sense, it can be seen that Diana does have some role to play in the construction of her identity, as she narrates her story. However, what she is permitted to re-tell, and the meaning which is attached to the events can be seen to be somewhat outside her control. In addition to the rules of evidence which limit certain forms of testimony, the negotiation which takes place between the defence and the prosecution also works to constrain and reconstruct Diana's narrative of events.

Meta-narratives are those narratives which are 'culturally sanctioned' and 'form the parameters of self-understanding'.<sup>16</sup> McNay offers the example of heterosexual norms, which are '...expressed through the narrative of romantic love, marriage, reproduction and fidelity.'<sup>17</sup> These meta-narratives can be seen to have a certain durability, a 'historical embeddedness',<sup>18</sup> as they persist even though practices of men and women have altered over the years, as evidenced by divorce rates. These meta-narratives still have an impact on an individual, they still work to form the

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<sup>16</sup> Ibid., p. 93

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

'parameters of self-understanding.'<sup>19</sup> Moreover, these 'culturally sanctioned narratives' create hegemonic identities. In this sense, the notion of meta-narratives and culturally sanctioned narratives can be related to Butler's notion of intelligible genders as outlined more fully in chapters 2 and 7. Intelligible genders are those which support the ideal path of sex, gender, sexual practice and sexual desire. Thus the female, femininity, heterosexuality, male, nexus generates certain narratives of heterosexual desire and appropriate behaviour, which then work to circumscribe an individual's sense of identity. Those unintelligible genders/identities are those which interrupt the nexus; those which do not relate to the 'meta-narrative', but at the same time create new narratives of identity. When considering Diana's case, meta-narratives, or culturally sanctioned narratives operate to give her experience meaning, to construct her own narrative of events. Such narratives include the battered woman syndrome and narratives surrounding victim behaviour.

### **Resignification**

Another issue which will be addressed is how the meaning of a personal narrative, or the meaning of an historical event, can be open-ended and subject to change. Butler's consideration of the excitability of discourse argues that, as meanings of words and actions are not essential or fixed, they can be used in a way which exceeds their original purpose. This 'resignification' of a word is generally explained through recourse to hate speech. In particular, Butler<sup>20</sup> employs the word 'queer' to expound her argument. She states:

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<sup>19</sup> Ibid., p. 94

<sup>20</sup> In order to distinguish between Judith Butler and Diana Butler, Judith Butler will be referred to as Butler, and Diana Butler will be referred to as Diana.

“The revaluation of terms such as queer suggest that speech can be “returned” to its speaker in a different form, that it can be cited against its original purposes, and perform a reversal of effects. More generally, then, this suggests that the changeable power of such terms marks a discursive performativity that is not a discrete series of speech acts, but a ritual chain of resignification whose origin and end remain unfixed and unfixable.”<sup>21</sup>

Butler argues that this resignification is possible due to the ‘gap that separates the speech act from its future effects.’<sup>22</sup> Whereas physical abuse can cause instant injury, the violence of speech, through being interpellated by a name for example, is not as immediate, as there is always an interval between the utterance and the effect. The existence of this interval provides room for the word to be resignified, for it to adopt a different meaning, which in time may result in the word having auspicious, as opposed to injurious, effects:

“The interval between utterances not only makes the repetition and resignification of the utterance possible, but shows how words might, through time, become disjoined from their power to injure and recontextualised in more affirmative modes.”<sup>23</sup>

As the narratives within the court case are provided through spoken testimony they are unstable and open to resignification. This in turn enables the events that occurred to take on different meanings. Their effects can be changed from injurious to auspicious. The meaning of a historical event, told through the narratives of the witnesses, can be returned to its speaker in a different form and its effects can go beyond those which were intended. In particular, the notion of resignification will be used in relation to an incident which occurred between Diana and her ex-husband, John Butler.

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<sup>21</sup> Butler *J Excitable Speech* p. 14

<sup>22</sup> *Ibid.*, p. 15

<sup>23</sup> *Ibid.*, p. 15

## Materialisation and the Formation of the Psyche

The theories of narrative and resignification explain how a person's narrative can construct their identity and how such narratives can be open to a radical change in meaning. The notion of materialisation enables an understanding of how culturally hegemonic norms and meta-narratives act in a performative manner on the body of individuals, to form the contours of the body and the behaviour of the individual. Butler develops the notion of materialization in *Bodies that Matter*<sup>24</sup> and also in *Excitable Speech*.<sup>25</sup> As outlined in chapters 2 and 7, for Butler gender is a performance which is enforced by regulatory norms. We perform gender through the compulsory repetition of acts and it is through this repetition that sex is materialized on the body of an individual:

“...the regulatory norms of sex work in a performative fashion to constitute the materiality of bodies and, more specifically, to materialise the body's sex, to materialize sexual difference in the service of the consolidation of the heterosexual imperative.”<sup>26</sup>

Butler puts forward this idea of materialization as an alternative to the idea prominent in some gender theories which appears to assume that culture imprints on a passive surface.<sup>27</sup> In Butler's construction, the notion of matter relates to ‘...a process of materialization that stabilized over time to produce the effect of boundary fixity and surface we call matter...’<sup>28</sup> as opposed to a ‘site or surface’. However, materialization is never fully accomplished, but always in process, always incomplete and instable. Thus it is through the compulsory repetition of regulatory norms that the body

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<sup>24</sup> Butler J *Bodies that Matter*

<sup>25</sup> Butler J *Excitable Speech*

<sup>26</sup> Butler J *Bodies that Matter* p. 2

<sup>27</sup> See *Ibid.*, p. 4

materialises and also rematerializes, as no two repetitions are the same. In relation to this case, the notion of materialization will be used to examine how Diana's personal narrative, her dialogues with Roger, and the culturally hegemonic narratives used by the courts are internalised by Diana and materialize her body and her actions. Not only is Diana's body regulated by these narratives, it is also formed by them. Hence, her body is not imprinted upon by these narratives, which a 'constructionist' approach may assume, but it is rather formed by them.

The internalisation of norms is explained by reference to the psyche, and how the subject is formed through the operation of power. Butler argues that, whereas common notions of power see it as an external force that imposes upon a subject who, weakened through its force, internalises its terms, power is also formative, in that a subject is only formed through this process of subjection. It is only through a submission to power that the subject is formed:

“Subjection signifies the process of becoming subordinated by power as well as the process of becoming a subject. Whether by interpellation, or by discursive productivity, the subject is initiated through a primary submission to power.”<sup>29</sup>

Hence, it is only via submission to regulatory social norms, or responding to a name, that the subject is formed, that a subject has social existence. What Butler's analysis of the psyche also recognises, however, is that there is the possibility of misrecognition, of the power working in a different way: ‘...when and where the

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<sup>28</sup> Ibid., p. 9

<sup>29</sup> Butler J *The Psychic Life of Power, Theories in Subjection* p. 2



discourse through which one is constituted fails to hit its mark.’<sup>30</sup> In this sense, when Diana is being constructed through discourse or interpellation, there is always the possibility of a misrecognition, of the power operating in a manner divergent to which it was intended. Hence, the creation of an identity is always unstable and open to resignification.

Whilst tracing the construction of Diana’s identity two particularly important aspects of her case need to be emphasised. Firstly, the admittance of evidence in the re-trial which was not only deemed to be prejudicial by the Court of Appeal but which Diana’s lawyers in the first trial and the appeal strove to exclude. Secondly, the significance of Diana’s testimony and how this, in addition to evidence of physical assault, enabled the psychiatrists to consider Diana to be suffering from post-traumatic stress disorder.

### **Court of Appeal**<sup>31</sup>

Diana’s appeal against her murder conviction consisted of five different grounds. First, counsel for the appellant argued that evidence of Diana’s previous alleged acts of violence towards Roger were wrongly admitted; second, that the character direction given by the judge to the jury was unsatisfactory; third, that Roger’s statement to the

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<sup>30</sup> Butler J in Bell V “On Speech, Race and Melancholia: an Interview with Judith Butler” *Theory, Culture and Society* (1999) 16(2), 163-174 p. 164

<sup>31</sup> An appeal is usually concerned with issue of new evidence or the conduct of the trial, as opposed to disputing the facts on the case. In the instant case, the appellant was arguing against the conduct of the first trial. Therefore, the Court of Appeal is concerned with whether the conviction is unsafe, as opposed to whether or not she was actually guilty on the facts presented.

nurses: “Why did she stab me? Am I going to die?” should not have been admitted as a dying declaration;<sup>32</sup> the fourth ground argued that the judge provided an inadequate summing up of the defence of provocation; and finally that the judge misdirected the jury as to the meaning of grievous bodily harm. The appeal was allowed on the combination of the first two grounds.

Grounds one and two were considered together by the Court of Appeal, as they were considered to be inter-related. At the appeal, Diana’s counsel argued that the admission of evidence which indicated that Diana was, on a number of occasions, violent towards Roger should not have been allowed. This evidence was provided, overwhelmingly, by the testimony of Roger’s brother, Nigel Carlin, and was sought by the prosecution in order to counter a defence of provocation, as the evidence potentially indicated that it was Diana, as opposed to Roger, who was the aggressive party. Nigel Carlin gave evidence to the effect that in the summer of 1993 Diana had hit Roger three or four times around the head one night whilst they were out in a night club. Additionally, Nigel also stated that during December 1994 Diana had attacked Roger after an argument concerning a necklace, and consequently he received a number of ‘major’ injuries: ‘Busted lip, gouges, swollen eye and redness around his face.’<sup>33</sup> Moreover, Nigel painted Roger to be an unaggressive passive person, who was ‘meek, mild’ and continued to state that he ‘...wouldn't hurt a fly and I [Nigel]

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<sup>32</sup> A dying declaration is what is known as ‘Hearsay’: ‘An assertion other than one made by a person while giving oral evidence in the proceedings and tendered as evidence of the facts asserted.’ Keane A *The Modern Law of Evidence* [Butterworths; London; 5ed 2000] p. 246. Generally hearsay is inadmissible, however, dying declarations can amount to an exception.

<sup>33</sup> *R v Butler* 98/8567/Y4 unreported Tuesday 8 December 1998 para 15

should know.’<sup>34</sup> The trial judge admitted this evidence, in order to counter a ‘false impression’ of Diana as a passive woman who was ‘...seeking to persuade an irascible man to calm down; irascible and sometimes violent man to calm down.’<sup>35</sup> The Court of Appeal held that such evidence should not have been admitted.

In addition, the Court of Appeal also noted that the Diana’s counsel did not call for ‘...substantial evidence as to aggressive conduct by the deceased for fear of admitting evidence of the alleged attack with a knife on Mr Butler.’<sup>36</sup> Mr John Butler was Diana’s first husband. In the first trial the prosecution attempted to adduce evidence of Diana’s aggressive behaviour towards John Butler, which would substantiate the construction of Diana as an aggressive woman. This evidence related to an incident in which Diana threatened John with a knife, and then stabbed the knife into a cushion which John was holding against his chest. However, the evidence was not adduced.

This ground of appeal was considered in conjunction with the second: the unsatisfactory nature of the character direction provided by the judge to the jury. The Court of Appeal judgment illustrates that the trial judge qualified the conventional direction to the effect that, if the jury were to accept Nigel Carlin’s evidence of Diana’s past alleged acts of violence, ‘[they] may feel it would not be right..to treat her [Diana] as a person of good character.’<sup>37</sup> The trial judge also stated: ‘If you [the jury] think that her character has been somewhat tarnished in the past, then of course

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<sup>34</sup> Ibid., para 16

<sup>35</sup> Ibid., para 13

<sup>36</sup> Ibid., para 18

<sup>37</sup> Ibid., para 19

you cannot give weight to good character, because you do not really think that she has one...'.<sup>38</sup> The Court of Appeal, however stated: 'Even if [Nigel] Carlin's allegations of domestic assaults are true, we are very doubtful whether in the context of this case they disentitled this 30 year old woman from having an unqualified good character direction.'<sup>39</sup>

Whilst resolving the character direction issue, Lord Justice Pill also considered whether or not it was relevant to direct the jury to consider the history between Diana and Roger. The Court of Appeal expressed concern that such an approach may divert the jury's attention away from the actual incident Lord Justice Pill cited the case of *R v Pettman*<sup>40</sup> in which the Court of Appeal acknowledged that the history of the relationship between the defendant and the deceased gains relevance, in a murder trial, when it presents the jury with a clear and coherent picture of the incident in question. Moreover, the evidence would not be barred simply because it uncovered the commission of another crime, for example, an assault. In *Pettman* Lord Justice Purchas stated:

"Where it is necessary to place before the jury evidence of part of a continual background of history relevant to the offence charged in the indictment and without the totality of which the account placed before the jury is incomplete or incomprehensible, then the fact that the whole account involves putting evidence establishing the commission of an offence with which the accused is not charged is not itself a ground for excluding the evidence."<sup>41</sup>

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<sup>38</sup> Ibid.,

<sup>39</sup> Ibid., para 20

<sup>40</sup> Unreported 2 May 1985

<sup>41</sup> Ibid., see *R v Butler* 98/8567/Y4 unreported Tuesday 8 December 1998 para 21

Hence, in relation to the case in question, evidence of the history of violence between Roger and Diana will not be rendered inadmissible simply because it illustrated that Diana did commit a number of other offences, if the jury would be left with a partial and incomplete account in its absence.

The Court of Appeal judgment highlights that the police, initially, concentrated on the recent history, that is those events which occurred in the year of the incident, 1996. In the first police interview Diana is asked about any problems she might have had with Roger from January 1996, and is also questioned as to whether, in the same time period, they had injured one another. In contrast to this, as noted above, the prosecution in the first trial had, via the evidence of Nigel Carlin, adduced two examples of physical and violent conduct on behalf of Diana, one which occurred eighteen months before the incident, and the other which occurred 3 years prior. In the opinion of the Court of Appeal, such evidence could not be regarded as falling within ‘...the background of history relevant to the offence charged.’<sup>42</sup> This provided Lord Justice Pill with another reason to consider the additional character direction to be inappropriate. Lord Justice Pill considered these historical events to be ‘...at best of only doubtful relevance.’<sup>43</sup> Thus, far from providing the jury with a ‘complete and comprehensible’ account of Diana’s actions, such evidence was considered to distract the jury’s attention in an inappropriate manner from the significant events, that is, the night in question. Additionally, the Court of Appeal ruled that evidence of two other occasions which had been adduced had little significance to the main issues of the

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<sup>42</sup> *R v Butler* 98/8567/Y4 unreported Tuesday 8 December 1998 para 22

<sup>43</sup> *Ibid.*, para 20

case and 'could only be prejudicial to the defendant',<sup>44</sup> and hence should not have been admitted. Therefore, in the opinion of the Court of Appeal, the focus of the trial should remain on the night in question. Evidence of Diana's aggressive behaviour towards Roger, and her alleged attack against John Butler, are considered to be prejudicial and irrelevant, an outcome which is clearly sought after by the defence.

These two grounds of appeal reveal interesting presumptions relating to issues of female aggression and passivity. The defence's fear of Diana being constructed as an aggressive and violent female led them to exclude evidence of the abuse she suffered at the hands of Roger. This exclusion suggests that she could not be perceived as a legitimate victim if she at any time acted in an aggressive manner towards her abuser. This is, to an extent, legitimised by the trial judge's suggestion that if indeed Diana was at any point in the past aggressive, the jury would be right to consider that she was not of 'good character'. This invokes a binary dichotomy of victim/aggressor, a binary which is left intact by the defence at the trial. Such a binary, however, may be deconstructed. If victim subjectivity<sup>45</sup> is exposed to be a performance, this recognises that there is no natural or innate victim behaviour, thus allowing space for different patterns of behaviour to be recognised and, perhaps, accepted. This allows a woman to be both at once aggressive and passive, and still be a female victim of domestic violence. A legitimate victim need not be a woman who is always passive. Once this

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<sup>44</sup> Ibid., para 22

<sup>45</sup> Victim subjectivity is considered here to be an extension of gender as performativity. This is because part of the acceptable notions of intelligible gender, within a murder trial, encompasses a female defendant acting in a manner which is considered to be intelligible in the sense that it corresponds to accepted scripts of victim behaviour.

is accepted a defence lawyer would not need to suppress evidence of a woman's aggressive or violent behaviour, allowing a different 'truth' of women's response to domestic violence to emerge.

To an extent, the Court of Appeal deconstructs the victim/aggressor binary, as it is recognised that even if the allegations of Diana's aggressive behaviour were true, they should not have disintitiled her from '...having an unqualified good character direction.'<sup>46</sup> Hence, even if Diana did assault Roger Carlin she could still be considered to be of a good character, thus going some way to accepting that a woman can be both an aggressor and a victim at the same time. However, the progress made by this section of the judgment seems to be somewhat negated by the next comment which exposes a different reason for dismissing the trial judge's character direction. Lord Justice Pill in the Court of Appeal considered that a good character direction was necessary in order to enable the jury to decide between the two different versions of events: Diana's and Nigel's. Despite the judge's statement that '...the jury should not in this case have been asked to decide, as in effect they were, a sub-issue whose resolution in her favour was made a pre-condition of her being treated as a woman of good character. ...',<sup>47</sup> it can be argued that the connection made between a good character direction and the decision as to which version of the story to believe, indicates that, if the jury decided that Diana was of good character they would also believe her narrative of the events as opposed to Nigel's. However, the contrary is also true. Thus if Nigel's 'truth' is to be believed, this then casts doubts upon Diana's character and once again the aggressor/victim binary is invoked. Hence, whereas Lord

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<sup>46</sup> R v Butler 98/8567/Y4 unreported Tuesday 8 December 1998 para 20

Justice Pill appears to deconstruct the aggressor/victim binary at one moment, in the next moment the binary is resurrected.

This overview of the issue of the character direction and corresponding evidence of aggressive behaviour on Diana's part illustrates how the court room is an important place of negotiation and a site of struggle for the construction of identity, and how it may be that a defendant may have little influence on how she is constructed and perceived by the jury and the outside world. What is occurring in this negotiation is a struggle over the narration of the events, a struggle over which incidents will be seen to be relevant when constructing Diana's identity. However, in this situation, the courts and the lawyers are the ones who negotiate the parameters of the narration, and thus her identity, as opposed to Diana. Hence Diana plays only a very small role in the construction of her own identity.

At the first trial, however, the defence seemed to do little to negotiate the narrative of events which in turn bore upon the construction of Diana. The prosecution clearly sought to present a picture of Diana as an aggressive, violent woman who had a predilection for stabbing. Due to the fear of the prosecution adducing certain prejudicial evidence about Diana, the defence chose not to highlight the abuse she had suffered at the hands of Roger Carlin. The fear of Diana being constructed as an aggressive woman, led the defence (in the first trial) to play a somewhat small role in the construction of the narration of events. The situation is changed, however, at the appeal stage, where the defence enters the arena and argues that certain events should

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<sup>47</sup> Ibid.



not be considered to be part of Diana's 'trial identity'. Her past violent acts should not be considered as relevant when constructing the narrative of the fatal incident, they are not part of either the night in question nor of Diana's identity. The Court of Appeal agrees with this approach, stating that the main focus should be the night in question, the other incidents just serve to distort the relevant issues. After quashing her conviction for murder, the Court of Appeal orders a re-trial, and the remaining discussion will examine the testimony and legal arguments presented in the re-trial.

What is interesting is the shift which occurs in the strategy adopted by the defence in the retrial, and how this results in constructing a 'different' Diana, a Diana able to avoid a murder conviction. As opposed to limiting the case to the 'immediate history', the defence actually widens the time frame to include evidence of Diana's relationship with John Butler. It is argued below that the defence concede to this evidence being adduced in order to construct Diana as a victim. The change in direction has the effect of changing the construction of Diana's identity. Furthermore, this change in time focus, or event focus, is accompanied with a change in the meaning of certain events. This indicates that, in addition to words and discourse being open to resignification, events or, more accurately, the narration of historical events, are also vulnerable to resignification, which in the context of a trial, could result in either a positive or negative outcome.

## **The Re-Trial** <sup>48</sup>

The re-trial concerning the murder of Roger Carlin commenced on 19 July 1999 at Durham Crown Court. From the outset the negotiation and construction of Diana and the narrative of events commences. The counsel for the prosecution, in their opening statement, compare the amount of alcohol consumed by Diana, as compared to Roger. It is noted that Roger had drunk 6 pints of lager, whereas Diana had also consumed 6 pints plus one white wine and soda. This immediately constructs Diana as somewhat masculine in nature as, not only does she drink pints, her intake more than equals that of her male partner. Such an approach can be seen to be attacking her level of femininity, and thus relates to notion of intelligible genders and performativity. As with Zoorah Shah's dealings with property and fraud, Diana's drinking is used in a manner to question her performance as a 'woman' due to her masculine behaviour. This in turn affects the likelihood of Diana being constructed as an 'intelligible victim', as the two can be seen to be linked. As considered above in relation to the Court of Appeal judgment (in relation to aggression) and the Zoorah Shah case, characteristics which can be classed as masculine distort the continuum of cultural intelligibility thus: sex, gender, sexual practice and sexual desire,<sup>49</sup> or: female, femininity, heterosexuality, male. As victim performativity can be seen as an element of gender performativity, it follows that behaviour which falls outside judicially accepted female characteristics restricts the construction of a particular woman as an appropriate victim. The performance as a woman impacts on the perceived performance as a victim. To be perceived as a culturally intelligible victim of domestic violence, a woman must also be a specific type of woman. Moreover, the

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<sup>48</sup> To clarify, the order of events are thus: first trial, appeal, re-trial

reference to Diana's drinking and the resulting negative construction is also compounded with the references which were made with regards her aggressive behaviour. This clearly enhances the construction of Diana as masculine, as an inappropriate woman.

Additionally, the opening statement also emphasised that the amount of alcohol consumed by Diana was relevant to the defence of provocation. The prosecution outlined for the jury the requirements of provocation, emphasising that a) there must be a loss of self control on behalf of Diana, and that b) a reasonable and sober person [of the same age and sex] must also have lost their self control in those circumstances and reacted in a similar manner. With regards to the former requirement, the prosecution stated that she had not mentioned losing her self control. In relation to the latter requirement, the construction of Diana's actions as those of a drunken individual also operate to restrict the likelihood of the jury accepting a defence of provocation. Hence, the prosecution's opening statement begins to construct the narrative of the historical events and thus Diana's identity. Thus far they have constructed Diana as a woman who displayed characteristics incompatible with notions of intelligible gender and as a person who perhaps could not fall within the defence of provocation. Such notions of Diana are continued throughout the prosecution's case, and set the stage for the beginning of the negotiation of her narrative identity.

The Prosecution's case precedes with evidence from the night in question, which draws upon the testimony of a number of friends and paramedics, to establish the

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<sup>49</sup> Butler J *Gender Trouble* p. 23

development of events and the nature of the relationship between Diana and Roger. All of the witnesses called stated that they had heard shouting from both Diana and Roger and banging from their house; and that certain items of food and drink had been thrown out of the house. Additionally, a number of witnesses stated the two often had arguments and that on the night of the incident Diana was crying and hysterical.

Throughout the testimony, a number of the witnesses repeated statements uttered by both Diana and Roger during the course of the evening. In particular, one of the witnesses testified that Roger had said to Diana that she was 'nothing but a slag'<sup>50</sup>. Here it is useful to look at the work of Lora Lempert in "The Line in the Sand: Definitional Dialogues in Abusive Relationships"<sup>51</sup> to explore further the ways in which abusive language impacts upon the abused woman's perceptions of herself. Lempert, in her study of abused women, argues that the dialogues which occurred between the abuser and the abused formed part of the narrative through which the abused women told their stories and constructed their identity. She argues that the women '...constructed new meanings for their experiences and transformed their perceptions of self.'<sup>52</sup> Lempert recognises that, initially, the women did try to resist the names which they are called, which resulted in an ambiguity within the women, as they are unsure whether such definitions are correct. This then worked to deconstruct

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<sup>50</sup> John Johnson *R v Butler* Unreported, 19-23 July 1999, Durham Crown Court. Notes taken by author at the trial.

<sup>51</sup>Lempert L "The Line in the Sand: Definitional Dialogues in Abusive Relationships" in Anselm and Corbin (eds) *Grounded Theory in Practice* [ Sage; London; 1997] pp. 147-170

<sup>52</sup> Ibid., p. 149. The concept of definitional dialogues can be related to the notion of narrative as developed by Ricoeur and considered by McNay L *Gender and Agency*.

the women's sense of self. Nevertheless, the terms of abuse ‘...began to constitute the definitional frames of their worlds...’<sup>53</sup> which in turn had an impact on how the women behaved, as they would alter their actions or behaviour in order to challenge the definitions they were given. Moreover, Lempert notes how the terms of address used by the men tended to relate to the woman's perceived inability to perform certain stereotypical gender roles, she states:

“[t]hese accusations were specific gender reductions that impacted negatively on the women's own perceptions of their competency in enacting social roles. They were attempts to nullify the women's definitions of self as women, deconstructing their senses of self and reality,...”.<sup>54</sup>

Lempert argues that abusive male partner's definitions of both the woman and their relationship become hegemonic, because ‘[m]en generally have more power than women and can frequently enforce their definitions.’<sup>55</sup> Such a situation is clearly compounded in an abusive relationship and thus ‘[i]n violent relationships, men's views can (and do) become hegemonic.’<sup>56</sup> As those perceptions and definitions forwarded by the abusive male become hegemonic, they can also be seen to become a norm; a norm within that relationship. Once considered to be a norm, these hegemonic views thus materialise on the body of the abused woman and therefore have a real impact on her behaviour. Such an approach can be seen to be linked to a victim performativity. It is arguable that society and the judiciary expect to see a certain materialisation of these norms, a certain performance. However, such an expectation fails to recognise (or does not wish to accept?) the uncertainty inherent in

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<sup>53</sup> Lempert L “The Line in the Sand: Definitional Dialogues in Abusive Relationships” p. 154

<sup>54</sup> Ibid., p. 155

<sup>55</sup> Ibid., p. 149

<sup>56</sup> Ibid.

the materialisation of norms, how these norms may materialise in an unexpected and unrecognised manner. As recognised by Butler, it is at this moment that agency is founded.<sup>57</sup>

In relation to the case in question, although it could be argued that a singular incident of name calling ('nothing but a slag') could be insufficient to amount to a dialogue which impacts on Diana's construction of herself, what is clear from Diana's testimony is that name calling was part of the abuse Roger inflicted upon her. She stated that he would call her names such as 'useless', 'fat', and 'ugly', and regularly accused her of being unfaithful, stating that she was a 'slag' and a 'whore' and that no one would want her.<sup>58</sup> On another occasion, after she had suffered a miscarriage, Roger also stated that '...the only thing [she] could breed is little bastards...'<sup>59</sup> which appears to be a reference to her son, Tony, from the previous marriage. It is this latter dialogue in particular which can be seen to have had an impact on Diana's definition of herself. During her testimony Diana stated that she thought that the miscarriage was her fault, that he '...probably was right, I couldn't get anything right.'<sup>60</sup> This clearly illustrates how Roger's definition of Diana has a significant impact on her construction of herself, and her ability to be a good or perhaps able woman, a woman who is able to bear children.

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<sup>57</sup> See Butler J "Contingent Foundations: Feminism and the Question of "Postmodernism""

<sup>58</sup> *R v Butler* Unreported, 19-23 July 1999, Durham Crown Court. Notes taken by author at the trial.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*

Lempert also figures the abused woman's reluctance or inability to report the situation to either friends or family as another aspect of these dialogues. Through the definitional dialogues which the woman has with the abusive partner and the internal dialogues she has with herself to deal with the name calling and the abuse, the woman starts to blame herself for the situation and feels a strong sense of shame. Lempert argues that '[I]mplicit in not telling is an interpretation of the violence as a violation of conventional social intercourse.'<sup>61</sup> She suggests that the women involved had, in addition to being susceptible to the offensive terms used by their partner, '...accepted without question the cultural ideologies of love and family that constructed the wife as responsible for well being in the private sphere of the home,'<sup>62</sup> thus the women blamed themselves for the abusive relationship, as they perceive themselves to be unable adequately to maintain a peaceful family life. Moreover, they also expected other people to blame them for the abusive relationship, and hence decided not to tell anyone. Lempert illustrates this with the following quote:

"...I felt that I was hiding. I felt like I was kind of hiding in a sense from those guys [her friends]. I didn't want to call them and tell them how horrible everything was. And what was really going on. I think I was ashamed of my staying in it and ashamed that it was going on in my life. This is something that doesn't happen. Happens to other people. And those people are people you never associate with of course because they are drug addicts and the total down and out losers."<sup>63</sup>

A major issue in the retrial was the new evidence which was presented by the defence, generally through Diana's testimony. Although it is clear from certain statements made by her counsel in the Court of Appeal that there was evidence to the effect that

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<sup>61</sup> Ibid., p. 160

<sup>62</sup> Ibid.,

<sup>63</sup> Ibid. (Respondent 23)

Roger had been aggressive and violent towards Diana, her testimony in the retrial went much further, outlining in detail the verbal, physical and sexual abuse she had suffered. Such details were not disclosed at the first trial. As with Zoora Shah, the full extent of the abuse she suffered did not transpire until after she was convicted for murder. Whilst in prison for the murder of Roger, Diana sent her psychiatric nurse a letter detailing the abuse she suffered. The letter commenced:

“Enclosed are the dark secrets that have haunted me for so long. Please help me to come to terms with them, if possible help me to talk about them and realise why I allowed it all to go on for so long... Please help. PS: Please show them to no one.”<sup>64</sup>

Additionally she stated that she felt ‘...weak, worthless, solid material, no man will want me again.’<sup>65</sup> This indicates a feeling of shame, and suggests that she also blamed herself for the abuse. This is further accentuated by statements in her testimony. After outlining an incident after she had been raped by Roger, Diana stated that she felt that it ‘...must have been [her] fault.’<sup>66</sup> She felt that no one would believe her if she told them the truth, believing that everyone would see her as she saw herself and blame her for ‘allowing’ him to treat her in such a manner. Furthermore she stated that ‘[e]veryone saw him [Roger] as a gentle man.’<sup>67</sup> This clearly corresponds with the feelings of the abused women in Lempert's study. Hence, it can be seen that the dialogues which take place between the abuser and his victim and her internal dialogues operate to have the effect of silencing the woman, due to her feelings of shame and self blame. As a report in *The Independent* remarked: ‘Diana

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<sup>64</sup> As reported in *The Independent* October 3 1999 p. 7

<sup>65</sup> Ibid.

<sup>66</sup> *R v Butler* Unreported, 19-23 July 1999, Durham Crown Court. Notes taken by author at the trial.

<sup>67</sup> Ibid.



Butler: so ashamed of the sexual violence that she had suffered at the hand of her partner that she failed to mount a credible defence at her trial for murder.’<sup>68</sup>

The unfortunate issue is the level of mistrust which tends to be levelled towards women who choose not to tell anyone about the abuse they suffered. This is very clearly evidenced in the Zoorah Shah trial, as the Court of Appeal had so little faith in her version of events they refused to let her adduce the new evidence. Again, as with the Zoorah Shah case, a campaigning group became involved with Diana’s case after she had been convicted for murder. Justice for Women, who work on a number of domestic abuse homicide cases, helped to publicise the plight of Diana, and also helped her to come to terms with the abuse she suffered. The defence at the trial were very careful to emphasise that Justice for Women had merely offered support, and had not in any way had an effect on what she said. The role of support and campaigning groups in such cases can be seen to be vital. Through helping the woman to come to terms with the abuse suffered, they also enable her to speak out about the violent relationship. In this sense, it can be seen that they form an important part of the abused woman’s construction of her narrative. Through the support received from Justice for Women and her psychiatrist, Diana was able to provide an account of what happened to her. Diana’s account amounts to a significant narrative as it, potentially, can effect the conviction she is likely to receive. Hence, when we are considering the narrative of the historical events, and the construction of Diana’s identity, it is important to recognise the role played by groups outside the judicial process. Their involvement can be seen to be an important part of the construction process, as in this

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<sup>68</sup> *The Independent* October 3 1999 p. 7

case they enabled Diana to provide a redress to the narrative constructed by the Prosecution in the first trial and supplied the basis for the defence's negotiation of her identity.

What needs to be examined, however, is why, in contrast to Zoorah's case, Diana's new version of events were so readily accepted by the court and the psychiatrists. What transpired throughout the re-trial was the abundance of evidence of abuse suffered by Diana. This was witnessed by her friend Susan Willey who had seen, prior to the night in question, bruises and marks on Diana, including marks around her neck. Lyn Whitehurst had also seen Diana with her arm in plaster shortly after she had confided in her that Roger was having an affair. Diana's sister also testified that Roger had been very jealous and possessive and that he had dominated Diana. Evidence of abuse on the night in question was provided by a Doctor who testified that she had a number of injuries, including bruising on the face and body, and a sore and tender patch at the back of her head, all of which were consistent with indiscriminate hitting and kicking, consistent with Diana's version of events. Additionally, there was also evidence provided in the police interviews that Diana was on anti-depressants whilst she was with Roger, and that on one occasion she had taken an overdose and had had to have her stomach pumped. Thus, in contrast with Zoorah's case, there was plenty of evidence of abuse and evidence of depression which suggests that Diana amounts to a 'battered woman' or an 'intelligible victim'.

When comparing Diana's and Zoorah's cases, the existence of evidence of both physical abuse and psychological problems are just two of the issues which need to be highlighted. Additionally, the issues of race, ethnicity and culture need to be

considered in order to examine their impact on the notion of an intelligible victim. In Zoorah Shah's case the Court of Appeal considered that there was no suspicious bruising which amounted to evidence of abuse. In this situation, I argued that the court considered the body of the woman to tell the truth of her situation. In Diana's case there was clearly plenty of evidence suggesting that she was a victim of abuse. Furthermore, it can be seen that some of this evidence was provided by a professional, a doctor, which is undoubtedly considered to be a powerful and acceptable source of evidence. However, as argued in the last chapter by reference to the case of Tara Mary Fell,<sup>69</sup> evidence of physical abuse is, by itself, insufficient to categorise the woman as a 'battered woman'. What is necessary is the evidence of psychological injury. In Diana's case, evidence of psychological injury is provided by her statement to the police and by her court testimony. Furthermore, a psychiatrist for the defence was also to testify that she was suffering diminished responsibility when she committed the act. The case was, however, concluded before this evidence was heard. These two factors clearly construct Diana as both a battered woman and an intelligible victim.

One issue which is not addressed in any detail in Diana's trial, however, is the fact that, like Zoorah, Diana did not reveal the 'truth' of her situation until after the trial. Diana did not tell anybody about the full extent of the abuse she suffered at the hands of both John Butler and Roger Carlin, until she was convicted for murder. In Zoorah's case, the Court of Appeal were quick to raise the issue of race and ethnicity when considering Zoorah's silence, in contrast, no question of race, ethnicity or culture is

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<sup>69</sup> *R v Fell* [2000] 2 Cr. App. R. (S) 464

raised in Diana's case. Although it is without doubt that Zoora's ethnicity had an impact on how she reacted to the abuse, it is clear that the Court of Appeal actually used her culture in a negative manner when constructing Zoora as an 'unintelligible gender'. The Court of Appeal uses Zoora's ethnicity as another standard or norm against which her behaviour is judged. In Diana's case, however, no question of how a white woman would have reacted is raised. The different approaches adopted in the two cases clearly illustrates that differences between women make a real difference in their cases and how they are judged. Although it could be argued that race, ethnicity or culture was not an issue in Diana's trial, this is to wrongly assume that how she reacted was not affected by such factors. As Butler recognises, when examining intelligible genders, gender and race and ethnicity should not be considered as individual and separate elements of subjectivity. All gender is raced/ethnic and indeed all race and ethnicity is gendered. Butler argues that these 'identifications' are '...invariably imbricated in one another, the vehicle for one another.'<sup>70</sup> Gender is always raced, there is no 'neutral gender', as it were, there is no gender which is not also constructed through scripts of race, ethnicity and culture.

However, whilst Diana is only looked upon as a 'woman', Zoora is only ever seen as an 'Asian woman', her difference becomes her identity. This argument does not lead to the conclusion that Zoora's ethnicity should, therefore, be disregarded, as this is as harmful as the approach adopted by the Court of Appeal. Indeed the different hurdles faced by an Asian woman need to be recognised. A problem arises, however, when these differences are used against women, as opposed to aiding an understanding of

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<sup>70</sup> Butler *J Bodies that Matter* p. 116

their predicament. In Zoora's case her race, ethnicity and culture appear to amount to another set of standards or norms to which she must adhere. Zoora's unintelligibility relates not only to her inability to conform to 'gender norms' but also to ethnic and racial norms. Such a position is not adopted by the court in Diana's case. Once there is evidence that Diana was physically abused and was mentally unstable, she amounts to an 'intelligible gender'. In Zoora's case, however, the Court of Appeal fail to recognise that an 'intelligible victim' is always a racial and an ethnic category.

To summarise, the narrative of the historical events relevant to the trial shifts from the first trial to the re-trial, as evidence of the verbal, physical and sexual abuse she suffered at the hands of Roger Carlin is presented. Her relationship with Roger provided moments of 'definitional dialogues' through which her conception of herself and her identity shifted. These dialogues also operated in such a way so as to prevent Diana from bringing such narratives into the first trial. However, through the involvement of other actors, other definitional dialogues can be seen to be at work, which enable Diana to reconstruct her sense of self and identity to such an extent that she is able to speak about the abuse suffered. Hence her 'true' narrative of events transpires, and this is then developed during the trial by the defence lawyers, during their negotiations with the prosecution.

### **Victim/Aggressor or Both?**

As discussed above, part of the appeal was against evidence adduced by the prosecution which outlined Diana's acts of violence towards Roger. Such incidents

were also adduced at the re-trial<sup>71</sup> and Diana admitted to two incidents when she was violent towards Roger. Firstly, she admitted hitting Roger in an incident over a chain which an ex-girlfriend had given him, and secondly she admitted to throwing an ashtray at Roger during an argument which had knocked him unconscious. Additionally, in the first trial, the prosecution sought to adduce evidence of an incidence which took place between Diana and her former husband, John Butler. In fear of this, the defence at the first trial failed to introduce certain violent incidents committed by Roger. The defence, and the Court of Appeal, clearly held the opinion that such incidents were not in anyway relevant to the case, but would, on the contrary, distract the jury from the important issues.<sup>72</sup> Alternatively, it is clear that such evidence could also persuade the jury that Diana was a violent woman who was capable of murder, thus, understandably, the defence wished to exclude it. What occurs at the retrial, however, is an entire reversal. The testimony of both the prosecution and defence witnesses describes a number of incidents in which Diana was violent towards Roger. Furthermore, John Butler is also called as a prosecution witness. Hence, the retrial appears to include that evidence which the appeal wished to exclude. This evidence clearly has the potential to construct Diana as an 'unintelligible victim'. She was clearly not a passive participant in the abuse and was at times rather aggressive. What needs to be examined here is how the defence deals with this evidence, and how the defence negotiate these events in order to change their meaning. It can be seen that the events undergo a resignification which present a different narrative, a narrative which reverses their prejudicial nature and enables Diana to be presented as an intelligible victim.

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<sup>71</sup> *R v Butler* Unreported, 19-23 July 1999, Durham Crown Court.

The relationship between Diana and John Butler is first mentioned in the defence's cross examination of Susan Willey.<sup>73</sup> Willey provided details of two incidents which she had witnessed. Firstly, she remarked that, one night after they had been out drinking, John had dragged Diana by her hair: 'He [John] had gone home and then he came back to our house wearing only his underpants. He dragged her by the hair saying: "it's time for home."' <sup>74</sup> The second alleged assault involved John throwing Diana down the stairs, an incident which the witness overheard. Additionally, the witness commented that after the event Diana was covered in bruises, bruises she tried to hide. One could consider such this to be a strange move on behalf of the defence. By questioning the witness on these events, this opens the door to the 'knife' incident which the defence were so careful to avoid in the first trial.

After this evidence has been received, both the prosecution and the defence make representations before the judge (but in the jury's absence) as to whether or not the evidence of John Butler should be admitted. Such evidence includes the 'knife incident'. The Crown argues that it is relevant on four grounds: similar fact;<sup>75</sup> provocation; lack of intent; and diminished responsibility, (the latter three are the defences forwarded on behalf of Diana). Significantly, the prosecution state that they

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<sup>72</sup> *R v Butler* 98/8567/Y4 unreported Tuesday 8 December 1998 para 20

<sup>73</sup> *R v Butler* Unreported, 19-23 July 1999, Durham Crown Court.

<sup>74</sup> *Ibid.*, Notes taken by author at the trial.

<sup>75</sup> Similar fact evidence could be defined as '...evidence of disposition to behave in a particular way...'

See Keane A, *The Modern Law of Evidence* p. 459. It amounts to evidence which indicates that the accused had previously acted in a manner similar to that alleged on another occasion.

will use it to argue against the defence that when she stabbed Roger she was suffering from diminished responsibility, suggesting that it was an habitual response, not a consequence of depression. In contrast, the defence proceed along the lines similar to their approach in the Court of Appeal, that the evidence is prejudicial and that: ‘...it will take the jury away from the central issue in this case.’<sup>76</sup> However, as noted by the prosecution, it was the defence’s decision to examine the relationship between Diana and John Butler. Following the Judge’s comment that ‘...it would be artificial to exclude it’,<sup>77</sup> the defence state: ‘We are torn in our position. We can gain by its introduction but there is much we could lose. That is the balance.’<sup>78</sup> The judge proceeds to admit the evidence, concluding that, although it may possibly be prejudicial, ‘...it must have been a striking experience in her life. It must have some effect psychologically,’ and thus that ‘it is no impairment to the defence.’<sup>79</sup>

Hence, in contrast to the opinion of the Court of Appeal, such evidence is considered by the re-trial judge to be part of the relevant narrative. Such an approach was clearly precipitated by the defence, as they chose to introduce evidence of Diana’s relationship with John, which seems to amount a reversal of the arguments presented to the Court of Appeal. The evidence which they sought to exclude in the Court of Appeal is exactly that which they now wish to rely upon. This appears to be a strange strategy. However, a sentence uttered by the judge offers some explanation: ‘...it

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<sup>76</sup> *R v Butler* 98/8567/Y4 unreported Tuesday 8 December 1998 para 20

<sup>77</sup> *R v Butler* Unreported, 19-23 July 1999, Durham Crown Court. Notes taken by Author at the trial.

<sup>78</sup> *Ibid.*

<sup>79</sup> *Ibid.*



must have some effect psychologically.’<sup>80</sup> In the first trial, the defence did not forward a defence of diminished responsibility. Although there are no statements to this effect, it appears that this was due to the absence of evidence which suggested that Diana suffered long term abuse. Now such events are to be detailed, the defence is able to construct a different narrative of events, present a different picture of Diana. The focus moves from the night in question, to the entire relationship. Moreover, the jury will not only hear of Diana’s violent conduct, but also of the abuse she suffered at the hands of Roger. In order for a defence of diminished responsibility to succeed, Diana had to be, at the relevant time, suffering under an defect of reason, or depression. As will be illustrated below, the defence use the relationship with John to strengthen their argument that she was, when she stabbed Roger, suffering from diminished responsibility. The meaning of the incidents which occurred between John and Diana no longer operate to construct her as a woman who has a predilection for stabbing men, but as a woman who was depressed. The narrative meaning of her relationship with John undergoes a resignification. Hence, it is here that we see a negotiation between the defence and the prosecution which alters the narrative of events, which consequently alters Diana's identity. The negotiation took place through the legal arguments presented to the judge, who was placed to decide whether or not such evidence should be presented. Hence, the narrative of events is, eventually, decided by the judge, a decision which Diana has to accept. In such a manner, her identity is constructed by the court, through the negotiation between the defence and the prosecution. Diana does have a role to play in the construction of her identity, however, as it is through her testimony that the relationship between herself

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<sup>80</sup> Ibid.

and John is resignified. The speech of the prosecution through John's testimony is returned with a different meaning. Here we can see how the 'excitability of discourse' also applies to narrative statements. The prosecution had one purpose for John's testimony: to present Diana as a woman who is capable of stabbing men. The purpose of the narrative goes beyond its original purpose, and returns in a different form. Its resignification undermines and subverts its original aim.

As intended by the Prosecution, John Butler<sup>81</sup> testifies that his relationship with Diana was violent, emphasising that Diana was on many occasions the aggressor. He provides an outline of the knife incident, but states that he cannot remember the events leading up to the stabbing. His memory also lets him down when questioned by the defence as to a number of alleged incidents when he inflicted violence upon Diana. Overall, he constructs the relationship as violent and stormy, but locates Diana as the main aggressor.

The relationship between John and Diana is further analysed by the defence through the testimony of Diana, who outlined a number of violent incidents which occurred between herself and John. These incidents included being punched in the stomach whilst pregnant with his child; raped; and hit around the head with a chair. In relation to the 'knife incident,' she stated that this occurred after he had dragged her out of Susan Willis' house by the hair (as mentioned in Susan Willis' testimony). When they arrived home she stated that he had tried to strangle her, firstly with his hands,

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<sup>81</sup> Ibid.

and then with a broom handle over her throat. During this incident John also stated words to the effect that she would only leave him 'feet first.'<sup>82</sup>

By introducing this evidence, Diana widens the narrative of the events, especially her use of the knife towards John Butler. This evidence is then utilised by the defence lawyers to explain her actions towards Roger. The evidence is used to construct a different identity for Diana. By drawing upon similarities between her relationship with John and her relationship with Roger, in particular the abuse she suffered, they construct her as a woman who 'has been a battered woman for nine years.'<sup>83</sup> Through changing the focus of the trial, by focusing on her previous relationship and the whole of the relationship with Roger, the defence are able to resignify a number of narratives surrounding her actions towards both John and Roger. The events are recontextualized and are given very different meanings.

The likelihood of achieving a successful defence of diminished responsibility is undoubtedly increased by constructing Diana as a battered woman. As noted by the judge, the incident with John must have had a psychological impact on Diana. The defence have used this incident to argue that, due to the abuse she suffered at the hands of John, she became depressed when her relationship turned violent with Roger, especially as she considered him to be her 'knight in shining armour',<sup>84</sup> the one who had saved her from John. The fact that the relationship with John was used to help the defence is especially illustrated by the final questions put to Diana by the defence:

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<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid.

'Did John Butler physically and sexually abuse you? Yes; Did Roger Carlin do the same? Yes.'<sup>85</sup> Such an approach was given credence by Diana's interview with the police, during which she stated: 'I did not mean to do it, he kept smashing the house up and hitting me. I have been through this before and did not want to go through it again.'<sup>86</sup> This enabled Diana's aggressive behaviour to be explained: she was at times violent towards Roger but this was because she had suffered similar abuse at the hands of John. She was only ever aggressive because she was a battered woman who suffered psychological problems. Although this may appear to deconstruct the victim/aggressor binary, I would argue that on the contrary it leaves it very much intact. This is because a woman's aggressive or violent behaviour can only be understood if it is part of her mental instability.<sup>87</sup> Without the evidence which demonstrated that Diana was a 'battered woman for nine years', suffering from the post traumatic stress disorder, her violent behaviour would, arguably, have been used to construct Diana as an 'unintelligible gender'.

Hence, it can be seen that the evidence upon which the defence relies is, to an extent, the same evidence which formed the basis of their appeal and which the Court of Appeal agreed should not be submitted as it would have the consequence of distracting the jury. In the retrial, however, after negotiating with the prosecution as to the relevance of such evidence, the defence use this evidence in a manner which repudiates the meaning which it is given by the prosecution. It is recontextualized and

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<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> However, as noted in chapter 6, if she is too aggressive she may amount to an 'unexceptional woman'.

resignified to such an extent that it supports the defence. The extent to which such an approach is successful is illustrated by the opinion of the judge and the crown's psychiatrist after hearing Diana's evidence.

After hearing the evidence, the crown psychiatrist altered their opinion and agreed that she was, at the material time, suffering from diminished responsibility. Furthermore, the Judge called both the prosecution and the defence into his chambers and suggested to the prosecution that they would not be able to attain a murder conviction.<sup>88</sup> Consequently, the prosecution agreed to accept a plea of manslaughter on the grounds of diminished responsibility; an outcome which the judge considered to be in the public interest. The plea was then put to the jury, who found Diana guilty of manslaughter. Hence it can be seen that the word of the judge provides a powerful end to the trial. He suggests (compels?) the prosecution to accept a plea of manslaughter on the grounds of diminished responsibility. His utterance ends the negotiation and presents both the defence and the prosecution with an identity for Diana, an identity which, in order to avoid a murder conviction Diana has to internalise. Moreover, this identity has to be fixed for a certain amount of time, as the sentencing is postponed until October of that year. In the interval time, it is ordered that Diana will have to visit a consultant psychiatrist and the prosecution suggest that, for the protection of the public, when deciding the sentence the Judge should take into consideration the views of the psychiatrists. Hence, it can be seen that Diana is constructed as a battered woman during the trial, a woman who is suffering from psychological problems. Furthermore, it can be seen that another 'trial' occurs during

the time interval between the trial and the sentence: a trial which involves an inquiry into Diana's identity. Before an appropriate sentence is passed Diana has to remain in this identity for a number of months, her identity has to be fixed. This can be related to the notion of narrative as it suggests a kind of promise on behalf of Diana. As Ricoeur states:

“Keeping one's word expresses self-constancy that, far from implying temporal changelessness, meets the challenge of variation of beliefs and feelings.”<sup>89</sup>

“Self-constancy is for each person that manner of conducting himself or herself so that others can count on that person.”<sup>90</sup>

She promises that, although other aspects of her identity may change over the intervening time, she can be relied upon still to be a 'battered woman'. She can be counted on to be this identity, and thus invests in this identity, and it brings meaning to her future actions. Adopting this approach indicates that Diana's identity becomes temporally fixed. Although it is not completely fluid and unstable, it is not permanently fixed and unchanging. It could be questioned here whether the psychological effects of being a battered woman are temporary or permanently fixed. As recognised by Ricoeur, the individual's identity is constructed through a combination of idem (sameness) and ipse (selfhood). What is clear is that Diana must remain a 'battered woman' for at least a number of months, until she is sentenced.

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<sup>88</sup> This information was given to the author during a conversation with the defence barrister and Justice for Women.

<sup>89</sup> Ricoeur P “Self as Ipse” in Johnson B ed *Freedom and Interpretation: The Oxford Amnesty Lectures 1992* [Basic Books; New York; 1993] p. 106 cited in Hughes C “Reconstructing the Subject of Human Rights” pp. 51-52

<sup>90</sup> Ricoeur P *Oneself as Another* p. 118; cited in Hughes C “Reconstructing the Subject of Human Rights” p. 52

More importantly, she must remain what the court recognises to be a battered woman until she is sentenced. However, it is not possible to state with any degree of certainty whether the psychological effects she suffered will remain a constant feature of her identity or just have a temporary effect. It could be argued that, as Diana moves away from this time in her life, and develops new relationships, different definitional dialogues will operate in order to change her sense of identity, and she will no longer see herself as a 'battered woman'.

The assertion that the Judge has the 'power' to end the negotiation of Diana's identity, and present this identity to Diana as her only option for social existence, is not, however, to state that he is the sovereign originator of this power. On the contrary, the judge is created by the power he appears to wield. Additionally, the Judge only has power through the force of repetition. He is not the owner of that power, as Butler explains: '[a]s one who efficaciously speaks in the name of the law, the judge does not originate the law or its authority; rather he 'cites' the law, consults and reinvokes the law, and, in that reinvocation, reconstitutes the law.'<sup>91</sup> Moreover, as recognised above, the assumption of a norm or the internalisation of an identity which creates the psyche, is always unstable, subject to a different operation or a misrecognition. Thus, whereas an identity is presented to Diana which she seems compelled to assume, there always remains the possibility that the identity may shift; may be subject to alteration. The importance of this point is to recognise that there is the possibility of creating different, more auspicious identities which, although they may come to light in the court room, they are to a certain extent created outside the legal arena, as they are

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<sup>91</sup> Butler *J Bodies that Matter*

formed by a different repetition. It is not the law that creates this identity, but the women who internalise a given identity and repeat it in a slightly different way.

## **Conclusion**

The chapter provides a detailed account of the role of identity in the case of Diana Butler. The construction of Diana's identity is traced through the three different stages of her judicial encounter: the first trial, the appeal and the retrial. In particular, attention was paid to manner in which her identity was negotiated by the prosecution, the defence and the judge. In order to examine how Diana's identity was negotiated and constructed a number of theoretical arguments were examined and applied: narrative, resignification, materialisation and the formation of the psyche. The notion of narrative was adopted in order to explain how personal and 'meta-narratives' work to construct an individual's identity. The extent to which such narratives can undergo an auspicious change in their meaning and impact, was examined via the concept of resignification. The concepts of materialisation and the formation of the psyche illustrated how narratives and norms operate in a performative manner on the body and how identity becomes internalised.

During the three way negotiation, narratives work to give Diana a sense of self, and these narratives are constructed by her own testimony and the testimony of others. Furthermore, these narratives are also subject to resignification, a resignification which is vital to the defence as it works to constitute Diana as an 'intelligible victim'. However, although Diana internalises the identity constructed via the judicial process, and is also required to remain in that identity until sentencing, it is here that the possibility of new identities emerge. As the power which forms the subject can at



times 'miss its mark', there is always the possibility of generating new, more auspicious identities. Although the identity constructed via the judicial process represents Diana as an 'intelligible gender', this is not to say that this is also an auspicious identity, or an identity which can be considered to be socially just. In particular, one has to query why it was necessary for the defence to have to rely upon and resignify Diana's relationship with her ex-husband John in order for her to be considered to be an intelligible victim.

In relation to the thesis, this chapter develops the argument by illustrating the overwhelming importance of the construction of identity, and how an abused woman's identity is by no means completely fixed before the trial commences. Throughout a trial, a woman will undergo a number of interpellations and resignifications, and find that she has little, if any role, to play in how she is constructed. At the most, her own testimony will amount to a narrative which aids the construction of her identity. However this is still strategically negotiated by the prosecution, the defence and the judge.

The cases of Zoora Shah and Diana Butler illustrate how identity is constructed through the judicial process and how culturally hegemonic norms operate to develop intelligible and unintelligible identities. These two cases take the focus away from a male/female comparative approach: where a woman who kills is compared to a man who kills his wife, and allows differences between women to be fully recognised and dealt with. Furthermore, this approach also enables those cases in which women receive a manslaughter conviction to be scrutinised and compared with those cases in which a murder conviction is passed. The notion of intelligible gender/victim was

used in order to theorise the differences between a murder and a manslaughter conviction.

## CONCLUSIONS

“Sometimes we reach the right outcome in law, but for the wrong reasons. A defendant and her lawyer may not care how they obtain an acquittal, but we in the academy should care.”<sup>1</sup>

This statement is made by Joshua Dressler in relation to the perceived increase in the number of women in America and Canada who are acquitted on the grounds of self defence when they have killed their abusive partners in non-confrontational circumstances. The success of self-defence in such situations has, he argues, invariably been due to the application of the battered woman syndrome. Dressler cautions that this approach may lead to ‘...a coarsening of our attitudes about human life, and perhaps even the promotion or condonation of homicidal vengeance.’<sup>2</sup> The sentiment of his concern regarding the manner in which an outcome is achieved, however, relates to one of the main arguments of this thesis. Whilst analysing cases of women who kill their abusive partners I argue that attention needs to be paid to the reasons behind the outcome of a case. I have argued that this is permitted by moving away from a concern with a form of ‘legal justice’, which tends to be primarily concerned with the outcome, to a concern with ‘social justice’, a model of justice which enables the construction of a woman’s identity in the cases to be evaluated. Hence, an outcome may be just, in that a conviction for manslaughter is achieved, but it may be achieved by injudicious reasons: not because the woman responded to a life-threatening situation, but because she corresponded to the prevailing gendered regulatory scripts and was thus constructed as an intelligible gender, which may have

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<sup>1</sup> Dressler J “Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters” in Shute S & Simester A.P *Criminal Law Theory: Doctrines of the General Part* [Oxford University Press; Oxford; 2002] pp 259-282 p. 262

<sup>2</sup> *Ibid.*, p. 262

negative connotations, for example being a passive victim who suffers some form of mental disorder. Moreover, the thesis also drew particular attention to the importance of differences which exist between women and examined how they impact upon the perceived intelligibility of a woman. In order to investigate this hypothesis, this thesis has examined cases of women who kill their abusive partners through a new theoretical framework developed from Judith Butler's queer theory<sup>3</sup> and Iris Marion Young's concept of social justice.<sup>4</sup> Such an approach enables the construction of identity within the law to be subjected to scrutiny and also emphasises that differences between women need to be recognised. In particular, the thesis has focused upon racial and ethnic differences via a close reading of the Zoora Shah case.<sup>5</sup>

The thesis has argued that work which has previously considered the plight of women who kill their abusive partners has overwhelmingly tended to adopt a comparative approach, in that a comparison is drawn with the legal treatment of men who have killed their partners.<sup>6</sup> This comparative approach tends to argue that women receive different treatment to men by the criminal justice system, and that women are much more likely to be convicted for murder than a man. Additionally, I argue that a comparative approach draws upon a notion of legal justice, which is concerned with equal outcomes, treating like cases alike.<sup>7</sup> Undoubtedly, such an approach has been significant and effective in highlighting the legal treatment of women who kill. However, it fails to adequately scrutinise why certain women are convicted of

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<sup>3</sup> Butler J *Gender Trouble*; Butler J *Bodies that Matter*; as discussed in chapter 2

<sup>4</sup> Young I M *Justice and the Politics of Difference*; as discussed in chapter 3

<sup>5</sup> Chapter 7

<sup>6</sup> See Chapter 1

<sup>7</sup> See Chapter 3

manslaughter, whilst others are convicted of murder. Moreover, it has a tendency to assume that the categories man and woman are internally homogeneous, and therefore pays little, if any, attention to other differences which may have had a significant impact on the outcome of the case.

This interest in the differences which exist between women, and the importance of how an outcome is achieved, led to the adoption of a theoretical framework which is developed from the theories of Judith Butler and Iris Marion Young. Chapter 2 traced the development of queer theory, emphasising the dangers involved in uncritically using the category woman. The existence of important differences between women has led to a deconstruction of the category woman, and an interest in how this category is constructed. In particular, this thesis has drawn upon Butler's notions of gender as performativity and of intelligible genders. These concepts are based upon the premise that gender is discursively constructed. For Butler, gender identity is constituted via repeated performances and, in order to be considered as culturally intelligible, these performances must adhere to socially regulated scripts. The performance of the script creates the identity. The other significant element of Butler's work relates to her argument that identity categories are never purely descriptive, but rather produce the identity which is named. Moreover, such identity categories are always based upon exclusions. The category always fails to represent all those it purports to represent. Hence the term 'woman' is a normative regulatory ideal which creates identity. In particular, these concepts have been invoked in chapters 6, 7 and 8. These chapters provide a detailed examination of the construction of identity in a number of cases involving women who kill their abusive partners.

In addition to the concepts of intelligible genders and gender as performativity, the thesis also draws upon Young's concept of social justice, which is discussed in chapter 3. I have argued that the adoption of Young's social justice not only encourages a move away from a solely comparative approach, thus recognising the existence of differences between women, but also permits an evaluation of the manner in which a manslaughter conviction is achieved, and the court's construction of a woman's identity. Chapter 3 also recognised the tension which potentially exists between adopting a deconstructive, queer theory approach to identity, which appears to argue against the use of identity categories such as 'woman' and 'battered woman', and the application of Young's social justice which promotes the role of social groups in creating their own positive identity. Such an approach appears to clash with Butler's argument that identity categories are always fractious and based upon exclusions. Moreover, that they also amount to normative regulatory ideals which tend to have unforeseen effects. Nevertheless, as stated in Chapter 3, Butler has recognised that the use of identity categories may actually be politically efficacious, and hence could still be used despite their negative connotations. However, Butler cautions that such identity categories should be subjected to constant scrutiny.<sup>8</sup>

The element of Young's theory which holds significance for this thesis, and can also be, I argue, reconciled with Butler's theoretical positions, is her notion of cultural imperialism. As noted in chapter 3, Young's theory of social justice precedes from the premise that the notion of justice as equality, (which is, within this work, taken to represent legal justice) is based upon a logic of impartiality which denies difference. This denial of difference has the effect of othering those within society who fail to

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<sup>8</sup> Butler J *Bodies that Matter* pp. 221-222

correspond with the impartial ideal. Young develops a model of social justice which recognises five faces of oppression and aims to allow differences to be positively recognised. Cultural imperialism is identified as one of the faces of oppression, and corresponds to the ideal of impartiality, as it is concerned with how the identity of dominated social groups is represented as universal. The dominant group present their own characteristics as universal and superior and thus denigrates the different identity of diverse social groups. Moreover, inferior social groups tend to find that they are provided with an identity by the dominant group and are frequently rendered invisible by this construction. Overall, the thesis maintains the necessity of appealing to a certain norm, Young's social justice, in order to enhance the work of Judith Butler and to provide some framework within which the construction of a particular identity can be both scrutinised and limited. Significantly, Young's conception of a social group, and the recognition that a particular group should be able to construct their own identity, provides a space for the voices of marginalised groups, whose experiences may have otherwise been ignored. Moreover, it can also be argued that the certain conditions of social justice are a necessary precondition in order for legal justice to be obtained. Legal justice, in the sense of treating like cases alike, can not be achieved when the identity of some defendants is constructed in a manner which can be considered to be socially unjust, and when certain socially unjust circumstances exist which render cases 'unlike'.

This issue of identity construction is of central importance to the thesis. The thesis commences from a postmodern perspective that the law is a gendering practice, in that it creates subjectivity and identity, as opposed to merely reflecting existing identity categories. Cultural imperialism occurs when a women is defined from the outside by

a dominant group. I argue that cultural imperialism and intelligible genders are related, as the notion of intelligible genders relates to the existence of social/gendered scripts which must be adhered to in order for an individual to be recognised as a subject. Within the cases of women who kill, cultural imperialism takes place when the judiciary construct a woman's identity in accordance with the existing gendered (and racial) scripts. The women are constructed from outside, provided with an identity. In particular, this was emphasised in chapter 8, which considered the case of Diana Butler. I argued that her identity was constructed via a three-way negotiation which occurred between the defence, prosecution and the judge. Diana herself played an very minor role in constructing her own identity in this legal setting. By adopting this perspective it can be seen that the law both at once achieves a just result and also perpetuates an injustice, due to the culturally imperialistic manner in which her identity is constructed.

The analysis of the law's construction of identity is contained within chapters 6, 7 and 8. In addition to drawing together the main arguments which have be made in relation to the law's treatment of women who kill their abusive partners, chapter 6 provides an examination of twelve Court of Appeal cases which were a mixture of appeals against convictions (generally murder convictions) and appeals against sentence where the women were convicted of manslaughter. The overview of these cases highlighted a number of issues. Firstly, that judges and juries are increasingly willing to convict women of manslaughter, whether this be on the grounds of provocation or diminished responsibility, the latter appearing to be slightly preferable. Secondly, there still remains a continued reliance upon medical evidence and expert testimony. In the



majority of the cases such evidence was used to argue either in favour of a manslaughter conviction, or a reduced sentence.

One of the main concerns of the chapter was to examine the application of Butler's notions of performativity and culturally intelligible genders to a number of Court of Appeal cases. I argued that the notions of a female slow burn anger and the battered woman syndrome potentially amount to 'idealized expressions of gender',<sup>9</sup> and thus can amount to normative regulatory ideals against which women are judged. This is due to the recognition that identity categories are never purely descriptive, but also constitutive, and thus produce that which they name. Butler cautions that against those 'regimes of truth that stipulate[] that certain kinds of gendered expressions were found to be false or derivative, and others true and original.'<sup>10</sup> Hence, both the court's construction of womanhood and those constructions which have been forwarded in order to assist the plight of women who kill their abusive partners can be seen as culturally imperialistic, as they have the potential to represent some identities as 'true'. And any such identity may problematic reinforce the matrix of compulsory heterosexuality. However, the chapter also noted that the battered woman syndrome is not a stable identity category. In particular, this argument was made in relation to those cases which were dealing with an appeal against a custodial sentence. I argued that any woman who kills her male partner potentially amounts to an unintelligible gender, as such actions contravene existing gendered scripts. However, the law has developed to recognise that some women who kill are not unintelligible, provided certain 'exceptional circumstances' exist. Generally, such exceptional circumstances

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<sup>9</sup> Butler *J Gender Trouble* p. viii

<sup>10</sup> *Ibid.*

amount to suffering from some form of mental illness or displaying certain aspects of the battered woman syndrome. Nevertheless, it was recognised that mental illness or the battered woman syndrome did appear in the majority of the cases before the Court of Appeal, however, not all of the appeals against sentence were allowed. I argued that this was due to the fact that certain women were not 'sufficiently exceptional' due to the existence of other characteristics or circumstances which could not be reconciled with the battered woman syndrome, as they fell outside the exclusive definition. Such 'exceptional circumstances' - in particular being too aggressive or drinking too much - can be seen to be the exclusionary foundations upon which the battered woman syndrome is based. However, instead of seeing this as calling for the end of using the battered woman syndrome, I argue that it can be seen in a more positive light. As the syndrome will always amount to a partial description, whose existence depends upon a repetition, these 'unexceptional circumstances' may lead to the development of different, and perhaps more auspicious, identity categories. As the syndrome continues to fail to provide a 'complete and unified representation' such 'subversive performances' present an opportunity for transformation. As argued by Butler, the possibility of 'new meanings' and 'political resignification' stems from the failure of an identity category to '...fully describe the constituency they name...'.<sup>11</sup> As some women will fall outside the battered woman syndrome category, this provides the possibility for new meanings to be developed. In particular, the chapter drew attention to the women whom were deemed to be too aggressive and/or alcoholic. Such women, however, also displayed elements of the battered woman syndrome, and thus threaten the stability of the syndrome, and open up the possibility of different identity categories. Moreover, as the syndrome only exists via repeated

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<sup>11</sup> Butler *J Bodies that Matter* p. 191

performances, new identities may be created outside the court room, when the syndrome is repeated in different ways. These developments will, undoubtedly, not happen instantaneously. However, as the law continues to deal with such cases opportunities will arise. Indeed, this can perhaps be seen in the treatment of such 'unexceptional women'. The law does not construct them as murderers, but instead marks their contravention in a more subtle manner, by passing a custodial sentence.

The consideration of the law's demarcation of intelligible and unintelligible genders is further analysed in chapter 7 which provides a close reading of the Zoorah Shah case. Moreover, the chapter also pays particular attention to other regulatory ideals which affect the cultural intelligibility of a woman who kills her abusive partner. In particular, the chapter focuses upon the regulatory scripts of race and culture, and argues that these should not be seen as separate scripts which run alongside the script of gender, but in contrast be seen as 'vehicles' for one another. Gender is always raced and race is always gendered. Such an approach is not, however, recognised by either the Court of Appeal nor the defence team. In contrast gender and race are perceived as completely discrete identity categories. In arguing that the Court of Appeal construct Zoorah as an unintelligible gender, and thus she remains convicted of murder, I focused in particular upon three issues a) the perceived lack of physical evidence, b) the court's construction of Zoorah as an 'unusual woman' and c) her perceived inability to conform to racial as well as gendered scripts. This last point was illustrated via a comparison with the cases of *Sangha*<sup>12</sup> and *Ahluwalia*.<sup>13</sup> The chapter also argued that the use court's use of the phrase 'unusual woman' could be

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<sup>12</sup> [1997] 1 Cr App R (S) 202

<sup>13</sup> [1993] 96 Cr App R 133

seen as a form of hate speech, as it amounted to an important interpellation which served to silence Zoora and reinforce her subordinate position.

Zoora's case is also considered in chapter 8 which draws attention to the differences which exist between Diana Butler and Zoora Shah in order to account for the law's acceptance of Diana's new version of events, which, similar to Zoora, were not revealed until after the conviction for murder, and the rejection of Zoora's. Such an analysis is based upon the existence of racial and ethnic differences, and illustrates how such differences have a major impact on the law's treatment of such women. As opposed to Zoora, Diana was not questioned as to why she failed to tell anybody about the abuse she had suffered until after she was convicted for murder, whereas in Zoora's case significant emphasis was placed upon the fact that Zoora was surrounded by other Asian woman, other subalterns, and hence her silence became incomprehensible. Such an issue had no place within Diana's trial.

Overall, chapter 7 serves to illustrate how the demarcation between intelligible and unintelligible genders and the range of differences between women are of undeniable importance when analysing the law's treatment of women who kill their abusive partners.

Chapter 8 further develops the examination of the construction of identity and turns to a number of theories through which to analyse the issue of intelligible genders and the law's treatment of Diana Butler. In particular, the chapter draws upon the notion of identity as narrative, as developed by Lois McNay,<sup>14</sup> and Butler's ideas relating to

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<sup>14</sup> McNay L *Gender Agency: Reconfiguring the Subject in Feminist Social Theory*

resignification, materialisation and the formation of the psyche. Diana Butler was, at first instance, convicted of murder. The Court of Appeal quashed her conviction for murder and on retrial she was convicted of manslaughter on the grounds of diminished responsibility. Both the Court of Appeal judgment and the retrial is scrutinised in order to uncover the constructions which succeeded in Diana being convicted of manslaughter at the retrial, as opposed to murder. I argue that Diana, at the end of the trial is subjected to a very powerful interpellation, the internalisation of which leads to a manslaughter conviction and that her identity is constructed via a three way negotiation between the judge, defence and prosecution. Diana herself only play a very small role in the construction of her identity.

In relation to the concept of identity as narrative, I argue that Diana's identity is created through the retelling of her experience, via her spoken testimony, and this experience is given meaning by existing 'meta-narratives'. These 'meta-narratives' can be seen to be 'culturally sanctioned narratives' which create hegemonic identities and intelligible genders or victims. Such existing narratives can be seen to be the battered woman syndrome and discourses surrounding victims of domestic violence. It is through such narratives that Diana is given a role in creating her own identity. However, what Diana is permitted to tell is not only constrained by the rules of evidence, but also by the negotiation between the judge, defence and prosecution. Plus, I argue that Diana has little control over the meanings which are attached to her testimony.

One of the vital issues considered in the chapter relates to the resignification of testimony in order to illustrate how the defence succeed in constructing Diana as a

victim, after she was arguably constructed as an aggressor. Indeed, I suggest that a great deal of the defence's efforts relate to placing Diana on the victim side of the victim/aggressor binary. Particular attention is paid to the approach of the defence and how, in the retrial, Diana is constructed as a victim via using evidence which they paradoxically tried to keep outside the legal arena in both the first trial and the Court of Appeal. This evidence related to a violent incident which occurred between Diana and her first husband, John Butler. I argue that this incident is given an entirely different meaning in the retrial and suggest that this can be seen to be due to the excitability of discourse, and how the speech (testimony) can be returned to its speaker in an entirely different form, thus opening up possibilities for transformation.

To conclude, chapter 8 shows the demarcation between intelligible and unintelligible genders or victims, and how cases remain trapped inside the victim/aggressor binary despite the fact that some women, such as Diana Butler, could be more accurately constructed as being both a victim and an aggressor. The chapter also illustrates how the identity of the battered woman is constructed by the law and how the court room is a site of struggle over the meaning of her identity. I argue that Diana is subjected to a powerful interpellation, which must be internalised in order for a 'legal justice' to be achieved. However, I argue that this 'just' outcome is caught up within cultural imperialism, as she is defined from the outside in accordance with hegemonic norms relating to battered women and victim behaviour. Although in this case the resignification operated in order to bring Diana in line with existing cultural regulatory scripts, it nevertheless illustrates how resignification may work in other cases and how testimony is unstable and subject to change.

Overall, this thesis has argued that the murder/manslaughter and the custody/probation distinction in cases involving battered women can be seen to be significantly based upon the unintelligible/intelligible gender distinction, and how a construction as an intelligible gender in these cases relates to Young's notion of cultural imperialism, thus highlighting how a seemingly just outcome can also be unjust. Moreover, the thesis has argued that social and cultural factors in addition to gender are exceptionally significant when considering the construction of a woman's identity. In addition to 'gendered scripts' there are also, for example, racial and ethnic regulatory ideals which impact upon the perceived intelligibility of a woman. I have argued that the battered woman syndrome has become an 'idealized gendered expression', with little attention paid to differences amongst women, but noted that, as opposed to abandoning the concept entirely, thought needs to be given as to how the identity category could be subversively transformed.

On a wider point, the thesis has emphasised that the law plays an important role in the construction of identity, and has argued that there is some political necessity for retaining certain identity categories. However, there are three significant limitations which need to be recognised. Firstly, the identities created will always be partial and based on exclusions, and hence will never be able to accurately represent those it purports to represent; secondly the identities created are never simply descriptive, but normative and thus form regulatory scripts; and thirdly, the identity may have unforeseen effects. It is therefore, important that the creation and use of any identity category is subjected to a constant deconstruction and for the law to be self-reflective, and to recognise its own limitations. As discussed in chapter two, this approach draws upon Butler's notion of 'double movement', which allows the use of an identity

category, but at the same time sees it as '...a site of permanent political contest. ...'  
and recommends '...perpetually...interrogat[ing] the exclusions by which it  
proceeds.'<sup>15</sup>

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<sup>15</sup> Butler J *Bodies that Matter* pp. 221-2



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