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rapists. Going far beyond the limited vision of the police and the [FBI's] *Uniform Crime Reports*, or the idiosyncratic concerns of the Freudians, Amir fed his computer such variables as *modus operandi*, gang rape versus individual rape, economic class, prior relationships between victim and offender, and both racial and interracial factors. For the first time in history the sharp-edged profile of the typical rapist was allowed to emerge. It turned out that he was, for the most part, an unextraordinary, violence-prone fellow.

Marvin Wolfgang, Amir's mentor at the University of Pennsylvania's school of criminology, deserves credit for the theory of the 'sub-culture of violence', which he developed at length in his own work. An understanding of the subculture of violence is critical to an understanding of the forcible rapist. 'Social class', wrote Wolfgang, 'looms large in all studies of violent crime'. Wolfgang's theory, and I must oversimplify, is that within the dominant value system of our culture there exists a subculture formed of those from the lower classes, the poor, the disenfranchised, the black, whose values often run counter to those of the dominant culture, the people in charge. The dominant culture can operate within the laws of civility because it has little need to resort to violence to get what it wants. The subculture, thwarted, inarticulate and angry, is quick to resort to violence; indeed, violence and physical aggression become a common way of life. Particularly for young males.

Wolfgang's theory of crime, and unlike other theories his is soundly based on statistical analysis, may not appear to contain all the answers, particularly the kind of answers desired by liberals who want to excuse crimes of violence strictly on the basis of social inequities in the system, but Wolfgang would be the first to say that social injustice is one of the root causes of the subculture of violence. His theory also would not satisfy radical thinkers who prefer to interpret all violence as the product of the governmental hierarchy and its superstructure of repression.

But there is no getting around the fact that most of those who engage in antisocial, criminal violence (murder, assault, rape and robbery) come from the lower socio-economic classes; and that because of their historic oppression the majority of black people are contained within the lower socio-economic classes and contribute to crimes of violence in numbers disproportionate to their population ratio in the census figures *but not disproportionate* to their position on the economic ladder.

We are not talking about Jean Valjean, who stole a loaf of bread in *Les Miserables*, but about physical aggression as 'a demonstration of masculinity and toughness' – this phrase is Wolfgang's – the prime tenet of the subculture of violence. Or, to use a current phrase, the *machismo* factor. Allegiance or conformity to machismo, particularly in a group or gang, is the *sine qua non* of status, reputation and identity for lower-class male young. Sexual aggression, of course, is a major part of *machismo*.

The single most important contribution of Amir's Philadelphia study was to place the rapist squarely within the subculture of violence. The rapist, it was revealed, had no separate identifiable pathology aside from the individual quirks and personality disturbances that might characterise any single offender who commits any sort of crime.

The patterns of rape that Amir was able to trace were drawn from the central files of the Philadelphia police department for 1958 and 1960, a total of 646 cases

and 1,292 offenders.[102] One important fact that Amir' study revealed right off the bat was that in 43% of the Philadelphia cases, the rapists operated in pairs or groups, giving the lie to one of the more commonly held myths that the rapist is a secretive, solitary offender.

The median age of the Philadelphia rapist was twenty-three, but the age group most likely to commit rape was the fifteen to nineteen bracket. A preponderant number of the Philadelphia rapists were not married, a status attributable to their youthful age. Ninety per cent of the Philadelphia rapists 'belonged to the lower part of the occupational scale', in descending order 'from skilled workers to the unemployed'. Half of the Philadelphia rapists had a prior arrest record, and most of these had the usual run of offences, such as burglary, robbery, disorderly conduct and assault. Only 9% of those with prior records had been previously arrested for rape. In other words, rapists were in the mould of the typical youthful offender …

'Contrary to past impression', Amir wrote, 'analysis reveal that 71% of the rapes were planned'. This observation was another of Amir's most significant contributions to the study of rape. Far from being a spontaneous explosion by an individual with pent-up emotions and uncontrollable lusts, he discovered the act was usually planned in advance and elaborately arranged by a single rapist of a group of buddies. In some cases the lone rapist or the gang had a particular victim in mind and coolly took the necessary steps to lure her into an advantageous position. In other cases the decision to rape was made in advance by a gang, a pair of cohorts, or a lone-wolf rapist, but selection of the female was left to chance. Whoever happened by and could be seized, coerced or enticed to a favourable place became the victim. As might be expected, almost all group rapes in Philadelphia police files were found to have been planned. As a matter of fact, advance planning and coordination proved absolutely essential to the commission of gang rape. A 'secure' place had to located; precautions had to be taken to guarantee that the rape-in-progress would remain undetected by passers-by, police or neighbours; and selection of the victim had to be agreed upon by the group.

Group rape may be defined as two or more men assaulting one women. As I have mentioned, Amir found that in 43% of his Philadelphia cases the female victim had two or more assailants. A Toronto survey came up with a figure of 50%. A Washington, DC, study reported 30%. In Toronto and Philadelphia, rapists who operated in groups accounted for 71% of the total number of offenders.

'Whatever may be the causal explanation, these results are amazing', wrote Amir, a man not given to hyperbole. The sociologist expressed this astonishment because psychiatric literature on rape had treated the phenomenon of group rape 'with silence'. Police departments, as a rule, do not tally group-rape statistics for public consumption and the FBI's *Uniform Crime Reports* do not analyse such information.

When men rape in pairs or in gang, the sheer physical advantage of their position is clear-cut and unquestionable. No simple conquest of man over

102 Amir's data was based on statistical information about all reported rapes that the police felt were founded'. Amir did not include cases of attempted rape, but he did include profiles of 'known' offenders who were never apprehended. The sociologist used 'known' to mean 'undeniably existing', not necessarily 'known to the police'. Of the 1,292 offenders that form the basis of Amir's study, only 845 men were actually arrested.

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women, group rape is the conquest of men over Woman. It is within the phenomenon of group rape, stripped of the possibility of equal combat, that the male ideology of rape is most strikingly evident. Numerical odds are proof of brutal intention. they are proof, too, of male bonding, to borrow a phrase made popular by Lionel Tiger, and proof of a desire to humiliate the victim beyond the act of rape through the process of anonymous mass assault …

... Amir deals with what he politely calls 'sexual humiliation' in his Philadelphia study. Ignoring such acts as urination, ejaculation into the victim's face and hair, and other defilements – perhaps they did not appear in the Philadelphia police reports – he does deal with the incidence of forced cunnilingus, fellatio and 'pederasty' or 'sodomy'. By these two last imprecise terms I think he was referring to anal penetration He concludes that 'these are not the acts of an "impotent", which the psychiatric school so emphatically suggests'.

Including repeated intercourse in his definition of 'sexual humiliation' Amir found that in more than one-quarter of his cases the victim was subjected to some form of extra insult beyond the simple rape. Sexual humiliation ran higher in group rapes than in individual rapes, and the most common form of extra insult in group rape was repeated intercourse. Amir remarked, 'Taking repeated turns is part of what group rape can "offer" to the participants'.

As the act of intercourse itself is deliberately perverted in rape by forcing it on an unwilling participant, so, too, the purpose of any sidebar activity is to further humiliate and degrade, and not to engage in sophisticated erotics. (The purpose is never to satisfy the victim). At best, fringe defilements can be in the nature of clinical experiments performed by initiates who are convinced that all sex is dirty and demeaning. Not surprisingly in Amir's study, when it came to oral sex, few rapists showed interest in cunnilingus. What they demanded was fellatio done on them. What these rapists were looking for was another avenue or orifice by which to invade and thus humiliate their victim's physical integrity, her private inner space …

… As … defined by the statistical profiles of the sociologists and the FBI, America's police-blotter rapists are dreary and banal. To those who know them, no magic, no mystery, no Robin Hood bravura, infuses their style. Rape is a dull, blunt, ugly act committed by punk kinds, their cousins and older brothers, not by charming, witty, unscrupulous, heroic, sensual rakes, or by timid souls deprived of a 'normal' sexual outlet, or by *super-menschen* possessed of uncontrollable lust. And yet, on the shoulders of these unthinking, predictable, insensitive, violence-prone young men there rests an age-old burden that amounts to an historic mission: the perpetuation of male domination over women by force.

The Greek warrior Achilles used a swarm of men descended from ants, the Myrmidons, to do his bidding as hired henchmen in battle. Loyal and unquestioning, the Myrmidons served their master well, functioning in anonymity as effective agents of terror. Police-blotter rapists in a very real sense perform a myrmidon function for all men in our society. Cloaked in myths that obscure their identity, they, too, function as anonymous agents of terror. Although they are the ones who do the dirty work, the actual *attentat*, to other men, their superiors in class and station, the lasting benefits of their simple-minded evil have always accrued.

A world without rapists would be a world in which women moved freely without fear of men. That *some* men rape provides a sufficient threat to keep all women in a constant state of intimidation, forever conscious of the knowledge that the biological tool must be held in awe, for it may turn to weapon with

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sudden swiftness born of harmful intent. Myrmidons to the cause of male dominance, police-blotter rapists have performed their duty well, so well in fact that the true meaning of their act has largely gone unnoticed. Rather than society's aberrants or 'spoilers of purity', men who commit rape have served in effect as front-line masculine shock troops, terrorist guerrillas in the longest sustained battle the world has ever known.

DOMESTIC VIOLENCE

While domestic violence may of course include rape, which has been considered above, in this section we examine the broader problem of occasional and/or systematic sustained physical or psychological violence within the home. As with other instances of domination and subordination between the sexes, the cultural, historical and now traditional explanations for such conduct must be borne in mind. Domestic violence – whether physical or psychological – manifests itself most frequently and regularly as violence against women. Domestic violence, whilst undoubtedly existing from time immemorial, became recognised by law as a problem to be addressed only in the 1970s, with the raising of women's consciousness and the movement for freedom from sexual, patriarchal, oppression. In large measure the work of Erin Pizzey, author and founder of the Chiswick Women's Refuge, was responsible for much of the legislative and other activity in the 1970s in England. Her book, *Scream Quietly or the Neighbours Will Hear*, represented a chilling account of the experiences of women in dealing with violent partners, and also revealed starkly the inadequacies of the avenues of legal redress and protection from such conduct.

Domestic violence is not, of course, confined to Western society – as a phenomenon it is as timeless and universal as patriarchy and society itself. The United Nations' 1990 Report, *The World's Women: Trends and Statistics*,[103] states that:

> Domestic violence, the dark side of family life, is inflicted on a family's weakest members – women, children, the very old and the disabled. It manifests itself in habitual physical abuse, psychological torture, deprivation of basic needs and sexual molestation. Secrecy, insufficient evidence and social and legal barriers continue to make it difficult to acquire accurate data on domestic violence against women, which many criminologists believe to be the most underreported crime. Most data on violence against women are compiled from small studies, giving only a glimpse of what is assumed to be a world-wide phenomenon. They can not be used to provide precise indicators on the extent of violence against women, but they do show that violence in the home is common and that women are most frequently the victims.
>
> Domestic violence against women exists in all regions, classes and cultures. the United Nations Secretariat's Division for the Advancement of Women compiled available information of domestic violence in 36 countries in the mid-1980s:
>
> - In Austria in 1985, domestic violence against the wife was cited as a contributing factor to the breakdown of the marriage in 59% of 1,500 divorce cases. Of those instances, 38% of working-class wives called the police in

103 HMSO, 1990. See also Chapter 12 for further statistics on the response of the United Nations towards gender-based violence.

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response to battering, while only 13% of middle-class women and 4% of upper-class women did.

- In Colombia during 1982 and 1983, the Forensic Institute of Bogota found that of 1,170 cases of bodily injuries, one of five was due to conjugal violence – and 94% of those hospitalised were battered women.
- India had 999 registered cases of dowry deaths in 1985, 1,319 in 1986 and 1,786 in 1987.[104]
- Of 153 Kuwaiti women asked if they had ever been assaulted, a third answered yes. Asked if they knew of friends or relatives who had been victims of such violence, 80% responded yes.
- In Thailand, 25% of the malnourished children at a Bangkok rehabilitation centre treated during the first half of 1985 were from families where the mother was regularly beaten by her spouse. More than 50% of married women studied from Bangkok's biggest slum and construction sites were beaten regularly by their husbands.
- In the United States of America in 1984, 2,928 people were killed by a family members. Of female homicide victims alone, nearly a third died at the hands of a husband or partner. Husbands were responsible for 20% of women killed in 1984, while boyfriends were the offenders in 10% of the cases.[105]

Susan Atkins and Brenda Hoggett explain the legal position regarding domestic violence in England:

WOMEN AND THE LAW[106]

The Breadwinner's Lawful Authority

Where two people are one in the eyes of the law, whatever the degree of formal authority enjoyed by one over the other there can be no remedy between them should a husband abuse it. The secular courts began to allow a wife to 'swear the peace' against her husband early in the seventeenth century. Originally, as with child-beating today, there was an exception for *moderate castigation*, but towards the end of the century it was held that this meant not beating but only admonition and confinement in cases of extravagance.[107] It was still admitted that 'where a wife makes undue use of her liberty, either by squandering her husband's estate or going into lewd company, it is lawful for the husband to preserve his honour and estate to lay her under restraint.'[108] A similar view appears in Blackstone.[109] But the 1832 edition of Bacon's *Abridgement* was still quoting the earlier statements allowing moderate punishment, along with the right of restraint. It is scarcely surprising that courts and people alike were confused as to the extent to which husbands could enforce their commands.[110]

There was no doubt during most of the nineteenth century that a husband could use self-help to enforce his wife's primary obligations towards him. In *Re*

104 On which see further Chapter 2.

105 United Nations, *The World's Women*, pp 19–20.

106 Basil Blackwell, 1984.

107 *Lord Leigh's Case* (1674) 3 Keb 433.

108 *R v Lister* (1723) 1 Strange 478.

109 Sir W Blackstone *Commentaries on the Laws of England* (Clarendon Press, 1765), p 445.

110 M Ma, 'Violence in the Family: an Historical Perspective', in JP Martin (ed), *Violence and the Family* (Chichester: Wiley, 1978).

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Cochrane[111] a wife was refused *habeas corpus* to enable her to escape from a husband who trapped her in his apartment and confined her there in order to prevent her living separately from him. Courts had earlier refused to grant *habeas corpus* to two husbands who wished to force their wives to return, but in each case the wife had some excuse for her departure. One husband had agreed to her living apart in consideration of a large sum from her separate property.[112] Another had treated her with cruelty.[113] Not until *R v Leggatt ex parte Sandilands*[114] was *habeas corpus* refused to a husband on the clear ground that he had no right to the custody of his wife, so that even if she had no good cause for living apart, his remedy was in the ecclesiastical or matrimonial courts rather than at common law, and in *R v Jackson*[115] the court took away the husband's right of self-help and granted *habeas corpus* to release a wife whose husband had behaved in almost exactly the same way as had Mr Cochrane half a century earlier. Even then the court reserved the possibility that restraint might be lawful in extreme situations, as where she was just about to leave him for another man. The best part of another century elapsed before a husband who behaved as Mr Cochrane and Mr Jackson had done was convicted of the common law offence of kidnapping and sentenced to three years' imprisonment.[116] There are still circumstances in which a husband is entitled to use self-help to enforce the wife's duty to have sexual intercourse with him.[117]

Thus the husband's rights of coercion went hand in hand with his rights of possession. A striking feature of many of the reported cases in criminal and family law is the continuing desire of the husband to possess a wife who has made it quite clear that she wants nothing more to do with him. Where they were still together, Dobash and Dobash found that 44% of the arguments which preceded a violent attack were triggered by the husband's jealousy.[118]

Husband and wife remain under a mutual duty to live together unless released. Although the strict scheme of matrimonial rights and duties has now been abandoned, a wife's reasons for wanting to live apart from her husband will be relevant to the regulation of their rights to occupy the matrimonial home, to any claim for financial relief or personal protection and to the ground for divorce. Hence it is one thing to deny the husband the right to coerce his wife and another thing to grant her the right to escape from him. As Mill commented, 'it is contrary to reason and experience to suppose that there can be any real check to brutality, consistent with leaving the victim in the power of the executioner.'[119] Thus, although physical violence has long been a valid excuse for the wife to leave and a good ground for obtaining relief, the courts' approach to its interpretation may still be relevant.[120]

111 (1840) 8 Dowl PC 630.

112 *R v Mead* (1758) 1 Burr 542.

113 *R v A Brooke and Thomas Fladgate* (1766) 4 Burr 1991.

114 (1852) 18 QB 781.

115 [1891] 1 QB 671.

116 *R v Reid* [1973] QB 299.

117 But see now the revised position regarding rape within marriage, discussed above.

118 Dobash and Dobash, *Violence Against Wives*, p 245.

119 JS Mill *The Subjection of Women* (1869), p 251.

120 *Women and the Law*, pp 127–28.

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Female victims and the legal process

Consistent with the treatment of woman as the 'other', as 'different', 'unequal' and subordinated in society, the legal process itself reveals evidence of bias which is reflected in legal judgments; in defences which the law permits to be advanced for certain crimes, and in the sentencing of women. In this section the evidence is examined.

In the case of a man on trial for alleged murder of a woman, the conduct, lifestyle and personality of the woman are central to the question of the guilt or innocence of the man. However, when women are on trial for the alleged murder of their male partner, the same consideration apply in relation to the women, but not to the male victim. Two, now seminal cases, will be considered here in order to reveal the difficulties under which female defendants labour in establishing a defence to murder of their male partners. In the case of *R v Ahluwalia* the defendant had suffered years of violent abuse at the hands of her husband. Rather than striking back when attacked, however, she bided her time and only when he was asleep did she attack and kill him.[121] In the later case of *R v Thornton*[122] a similar factual situation existed. Sara Thornton had again endured years of violence at the hands of her husband. When ultimately her ability to cope with the sustained abuse snapped, Sara Thornton waited until her husband had fallen asleep and then stabbed him to death. She was convicted of murder and sentenced to life imprisonment, the court ruling that the defence of provocation was unavailable by virtue of the fact that Sara Thornton had not reacted instantly to the provocation of her husband. 'Cumulative provocation' under English law, unlike Australian law, has not yet been recognised.

The deficiency of English criminal law in relation to victims of domestic violence is all too apparent from the cases of Kimaljit Ahluwalia and Sara Thornton. The refusal of the law to recognise the physical and psychological inability for an immediate provoked response to violence, led, in these and other cases, to the victim being cast into jail for murder. In both cases, the victims were ultimately released. In *Ahluwalia*'s case, Kimaljit Ahluwalia's conviction was reduced to manslaughter and she was released, having served at adequate period of imprisonment. In *Sara Thornton*'s case, however, events have taken a different course, which may possibly have a constructive outcome for the victims of domestic violence. The Secretary of State for the Home Department referred the matter to the Court of Appeal. The Court of Appeal quashed Thornton's conviction for murder and has ordered a retrial, on the basis that in the absence of full medical evidence as to Thornton's 'personality disorder' and suffering caused by 'battered women's syndrome',[123] the decision of the jury could not be regarded as 'safe and satisfactory'.

If the legal system has hitherto been either blind or unsympathetic to the problems of women trapped into violent and ultimately fatal relationships, the

121 In May 1989.

122 1990.

123 On which see below.

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system demonstrates an unremitting harshness when the issue of liability for rape and violence is considered. As with victims of 'ordinary', 'domestic' violence, rape victims are themselves on trial in the courtroom. Moreover, judicial reactions to rape victims has included breathtaking illustrations of traditional patriarchal attitudes, which indicate that the male personnel of the legal system are far from the required rational objectivity required of the judiciary where sexual offences are concerned. Helena Kennedy QC has examined such attitudes.[124] the author cites Sir Melford Stevenson being lenient in sentencing a rapist on the basis that the victim, a sixteen year old, had been hitch-hiking; Mr Justice Jupp in 1990 passing a suspended sentence on a husband who had twice raped his wife on the basis of some (curious) distinction between rape within the home and rape by a stranger; Mr Justice Leonard passing a reduced sentence on the perpetrators of a violent multiple rape on the basis that the victim had made a 'remarkable recovery'.[125] Perhaps most notorious of all are the words of Judge Wile, in his directions to a jury in 1982:

> Women who say no do not always mean no. It is not just a question of how she says it, how she shows and makes it clear. If she doesn't want it she only has to keep her legs shut and she would not get it without force and then there would be the marks of force being used.[126]

In the case of a man on trial for alleged murder of a woman, the conduct, lifestyle and personality of the woman are central to the question of guilt or innocence of the man, as the extract above demonstrates. However, when women are on trial for the alleged murder of their male partner, the same considerations apply in relation to the woman, but not to the male victim.

In the article which follows, which was written before Sarah Thornton's successful appeal, Susan Edwards analyses the traditional attitude of the English courts to battered women's syndrome.

BATTERED WOMAN SYNDROME[127]

Susan Edwards

On Friday, September 25, 1992, Kiranjit Ahluwalia, a battered wife serving life for murder, was freed after the prosecution accepted her plea to diminished responsibility following new evidence. The judge, Mr Justice Hobbouse, imposed a prison sentence of three years and four months, exactly the length of time she had already served. This new evidence detailed the effects of long term battering, a condition known and accepted in legal circles in the USA, Canada and Australia as the battered woman syndrome. The syndrome is something akin to a state of fear, trauma and shock, characterised by anxiety and depression, a perception that death is likely, a total inability to escape and a feeling of helplessness.

This recognition by the Court of Appeal of such a state of mind in women who have been subject to battering will have three consequences. First, in future cases

124 See Helena Kennedy, *Eve Was Framed* (Vintage, 1993).

125 See *ibid*, pp 120–21.

126 *Ibid*, p 110.

127 (1992) *New Law Journal*, 1350.

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coming before the courts, expert testimony on the long term psychological effects of battering will now be admissible, and as a result such 'offenders' will pursue a defence of diminished responsibility rather than attempting to advance a defence under provocation.

Secondly, in future cases the defence may wish to pursue a defence of diminished responsibility and provocation together given that the presence of the battered woman syndrome may well influence her response to the last act of provocation, however slight.

Thirdly, the acceptance of this new evidence will now make it essential that battered women currently serving prison sentences who have killed, such as Sara Thornton, be allowed the same opportunity to have expert opinion on the battered woman syndrome put before the court in assessing whether their responsibility was diminished in this same way. Under s 17 of the Criminal Appeal Act 1968, referrals via the Home Secretary back to the Court of Appeal on the grounds of fresh evidence must now be inevitable in such cases. During the last few months none of the appeals on behalf of battered women convicted of the murder have challenged the very bedrock of the common law on provocation in the way Lord Gifford and Geoffrey Robertson in *Thornton* and *Ahluwalia* in the appeal court succeeded in doing. In these cases, counsel sought to interpret the definition of provocation beyond the immediacy principle, introducing under certain circumstances the concept of the 'slow burn'. In *Ahluwalia*, counsel proposed that experience of battering so characterised the accused that it should be adduced as a 'notional characteristic'.

In *Thornton*,[128] Lord Gifford QC was unable to persuade the Court of Appeal of the slow burn and the earlier failure to convince the trial jury of evidence of diminished responsibility meant that a conviction for murder was upheld. Lord Gifford raised three grounds of appeal. He contended that the judge had misdirected the jury on the issue of provocation. On this point Gifford sought to argue that the court had interpreted her delay in reacting as a 'cooling off' period when it should have regarded this apparent delay as one of 'chronic boiling over'. The defence of provocation he said:

> '… is apt to describe the sudden rage of a male, but not the slow burning emotion suffered by a woman driven to the end of her tether.'

He went on to argue that the Homicide Act s 3, when read together with the judgment in *DPP v Camplin*,[129] *per* Lord Morris, meant that Devlin's interpretation in *Duffy*[130] did not have to be slavishly followed (at 313 g). Secondly, Gifford contended that the trial judge had misdirected the jury on diminished responsibility. Thirdly, that the conviction of the appellant was unsafe and unsatisfactory because counsel at the trial failed to advance the defence of provocation as an alternative to, or in addition to, the defence of diminished responsibility.[131]

Beldam LJ delivering the judgment of the court did not accede to this argument on provocation.[132]

128 *R v Thornton* [1992] 1 All ER 306–317, 29 July 1991.

129 [1978] 2 All ER at 721.

130 [1949].

131 At p 308 f–g.

132 At 313 j.

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However, the court held that domestic violence '... might be considered by the jury as part of the context or background against which the accused's reaction to provocative conduct had to be judged'.[133] Accordingly, the judge had not misdirected the jury and the decision of her legal advisers to concentrate on diminished responsibility did not raise a lurking doubt.

Some saw *Thornton* as a setback since the court dug its heels in and was determined not to retreat from the immediacy principle in *Duffy*. But there was some small progress made nonetheless. The interpretation of provocation brought from the background into the foreground the history of battering, and where such a history of battering was present – when taken together with other similar provocative acts over a period of time – would allow from thenceforward a defence of provocation, however slight the last provocative act, and therefore had consequences for reasonableness. But it was the case of Kiranjit Ahluwalia, convicted of murder on December 7, 1989 which was to become a legal landmark in the evolution of principles relating to provocation and diminished responsibility.

Subjected to years of abuse by her husband Deepak, she 'set fire to the bedding', so that he could not run after her and hurt her again. She said, 'I didn't intend to kill him or cause him really serious injury'. She was convicted of murder; a defence of provocation having failed. At the appeal hearing Geoffrey Robertson QC raised three grounds, The first two related to the trial judge's direction to the jury on provocation. Mr Robertson, like Lord Gifford in *Thornton*, argued that the *Duffy* direction is wrongly based upon a failure to understand and comprehend the true meaning and impact of s 3 as explained by the House of Lords in *DPP v Camplin*,[134] where Lord Diplock referred to that section as abolishing'... all previous rules of what can or cannot amount to provocation'.

Relying on expert evidence not before the trial judge, it was argued that women who have been subjected over a long period to violent treatment may react to the final act or words by a 'slow burn' reaction (cumulative provocation) rather than by an immediate loss of self control (NLJ p 1159). The second ground of appeal raised the question of the treatment of the appellant's characteristics, that is the 'notional characteristic'.

The judge's direction to the jury contained this passage:

> '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.'

This ground of appeal turned on the very characteristic the judge ignored, that is, the evidence of battering in the battered woman syndrome as a 'notional characteristic. within the meaning of Lord Diplock's formulation. The third ground of appeal related to diminished responsibility and new, evidence based on psychiatric reports and expert evidence. The Court rejected the first two grounds although the third ground was considered sufficient to order a retrial, an unprecedented step since there have been no retrials in the years 1987–1990.[135] At the Old Bailey before Mr Justice Hobhouse, the prosecution

133 At 307 c.

134 [1978] 2 All ER 168.

135 Criminal Statistics, Supplementary Tables Vol 4.

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accepted the plea to diminished responsibility on the grounds of the presence of the battered woman syndrome. What makes this case a landmark?

For the first time, in a case where a battered woman kills her husband the court has taken on board as of legal relevance evidence of the psychological effects on her state of mind of living in a battering relationship. This is not the first time, however, that evidence of battered woman syndrome has been put before the court. It has always been difficult for jurors and for the court to understand how a woman can apparently stand by whilst the child in her care is being physically or sexually abused by her partner or by the child's father.

There has been a catalogue of such cases from Kimberley Carlisle onwards. In January 1992, Sally Emery stood trial with her boyfriend for the ill treatment of her child, who died as a result. Helena Kennedy QC, counsel for Emery in her defence introduced expert testimony evidence of battered woman syndrome to assist the court in comprehending her incapacity to act and paralysis in the protection of her own daughter. She was sentenced to four years for failure to protect.

Similarly, in the USA the trial of *People v Steinberg*[136] where a middle class lawyer physically abused his lover's child resulting in her death left the public and the jury horrified by the mother's incapacity to prevent her own child from harm. The jury were to learn that the mother was horrifically physically abused and totally under his will to such a degree that she was incapable of independent action.

Whilst the decision in *Ahluwalia* is a landmark and a personal triumph, there are problems in setting up a battered woman's defence along these lines. For women in similar circumstances can it really be said that they are suffering from diminished responsibility within the meaning of the Homicide Act? Alternatively, as Geoffrey Robertson tried to argue, is evidence of battering over a long period a 'notional characteristic' within a defence of provocation?

Either way, the effects of battering do not fit squarely in either legal camp. And, if we listen to the vocabulary of motives and justifications of battered women who kill, they talk in language of self defence, not cumulative provocation and not of mental impairment. Sara Thornton clearly perceived imminent danger. Thornton: 'Do you know what he has done to me in the past?', Investigator: 'Did he beat you up tonight?' Thornton: 'No'. Investigator: 'Did he threaten to?' Thornton: 'He would have'. And later in the interview, Thornton: 'I'll kill you before you ever get a chance to kill me'. Helena Kennedy QC in *Eve Was Framed*[137] writes,

> Women invoke self defence or provocation defences infrequently, and the reason is that the legal standards were constructed from a male perspective and with men in mind … women have a problem fulfilling the criteria.

The acknowledgement by the courts of the battered woman syndrome is one thing, but the direction of the step taken by the Court of Appeal is another. But there is no doubt that the 'syndrome' will continue in some shape or form to influence the development of legal principles in such cases.

In the Canadian case of *Lavallee v R*,[138] heard before the Supreme Court in Canada, the accused was tried for second degree murder of her common law

136 1989.

137 1992.

138 [1990] SCR 852, reversing (1988) 52 ManR (2d) 274, 44 CCC (3d) 113, 65 CR (3d) 387 (CA) (expert opinion).

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