strong majority of seven to two justices was a disappointment, but given the balance of the judgment, hope still remained that future litigation would turn the tide their way.

Individual States reacted in a variety of ways to the decision of the Supreme Court: and whilst complying with the letter of the law, many imposed more or less stringent conditions and requirements which had to be met before abortion would become available. The issue of informed consent played a central role, as did the requirement for the consent of a minor's parent(s). In some States, a waiting period was imposed. In some States abortion could only be performed within a hospital licensed for that purpose, others required that abortions could only be performed by physicians. Some States prohibited the advertising of the availability of legal abortions. A majority of States introduced 'conscience clauses' permitting physicians to refuse to perform abortions on the basis of moral or religious objections to abortion.

At a national level, the abortion issue became overtly political, and became a central issue in the 1976 presidential election campaign and in subsequent gubernatorial campaigns across the country. The Roman Catholic Church entered into the political battle, and drew in its support the Moral Right: a coalition of conservative 'family-centred', 'pro-life' activists. The rights of women to liberty and privacy were set in political opposition to competing values: a position which remains dominant in the political debate on abortion in the United States.

In 1976, the Supreme Court affirmed its judgment in *Roe v Wade* in *Planned Parenthood v Danforth*,[106] and made it clear that not only was the woman's decision final in the first trimester, but also that no State law could give a right of veto over that decision either to the father of the foetus, or to the parents of an under-age minor. However, set-backs for women's rights were to follow. In *Beal v Doe*[107] and *Maher v Roe*,[108] the Court was to hold that States were not required to provide funds for elective abortions through Medicaid, and that the fact that State funding was available for child-bearing costs did not mean that such funding had to be provided for elective abortions: States could legitimately give preference to child-bearing over abortion. Moreover, even in relation to medically necessary abortions, in *Harris v McRae*,[109] the Court ruled that States had no obligation to provide financial assistance to meet their costs. Worse, the refusal of a State to fund programmes designed to counsel and advise on abortion, was upheld as constitutional in *Rust v Sullivan*,[110]

106 428 US 52 (1976).
107 432 US 438 (1977).
108 432 US 464 (1977).
109 448 US 297 (1980).
110 No 89–1391 (1991).

despite the argument that such a decision effectively controlled the doctor/patient relationship and infringed the constitutional guarantee of free speech.

Abortion laws returned to the Supreme Court for adjudication in 1982, and provided the opportunity to test the Court's willingness or otherwise to conform to its decision in *Roe v Wade.* In 1978, the city council of Akron, Ohio, drafted an Ordinance which comprised some 17 provisions which restricted access to abortions. These Ordinances were duly challenged in the courts, and reached the Supreme Court in 1982.[111] In *City of Akron v Akron Center for Reproductive Health, Planned Parenthood, Kansas City*; *Missouri v Ashcroft and Simpoulos v Virginia,* the Court reaffirmed the central principle decided in the 1973 case: namely that a woman in the first trimester of pregnancy had the right to choose. The Court also ruled that the requirements imposed by the city council of Akron represented excessive restrictions on that right. The Court, however, in this case, was now divided by six to three in its decision.

In 1985, the Supreme Court once again considered the law. In *Thornburgh v American College of Obstetricians*[112] and *Diamond v Charles,*[113] State laws of Pennsylvania and Illinois were under challenge. Both concerned restrictions on access to abortion and/or restrictive abortion procedures. The Supreme Court, by a majority of five to four, ruled six provisions of the Pennsylvania law unconstitutional, on the basis of imposing too restrictive a regime.

In 1989, however, came a landmark case for the anti-abortion lobby. In *William Webster*[114] *v Reproductive Health Services*,[115] the Court was once again asked to review its decision in *Roe v Wade.* Under challenge was the requirement under State law that a woman seeking an abortion, who was thought to be 20 weeks pregnant, should be required to undergo tests for foetal viability. The law also prohibited the performance of abortions in publicly funded institutions. The Supreme Court by that time had a change in its composition, with two new appointees to the Court. Four justices voted to uphold the regulations. Four other judges held that the right to choose abortion as stipulated in *Roe v Wade* should be upheld. The deciding vote was that of Justice O'Connor. Justice O'Connor held that a regulation would be unconstitutional if that regulation had the effect of imposing an 'undue burden' on a woman's decision. In her view, the requirements of the State law of Missouri did not place such an undue burden on the woman, and would therefore be upheld.

111 462 US 416 (1983).
112 106 S Ct 2169 (1986).
113 106 S Ct 1697 (1986).
114 Webster was Missouri's Attorney General.
115 109 S Ct 3040 (1989).

The reaction to *Webster* varied. Whilst some claimed that the original decision in *Roe v Wade* remained unaltered,[116] others were more sceptical. The decision left it open for State legislature to test the limits of regulation of abortion availability, whilst ostensibly upholding the constitutional right of women to choose. The tide appeared, for the first time since 1973, to have swung against that proclaimed 'absolute' right. In two subsequent cases that trend appeared to be confirmed. In *Hodgson v Minnesota,*[117] the Court upheld a State requirement that a minor must either obtain parental consent to the operation, or obtain the consent of a court. *Ohio v Akron Center for Reproductive Health*[118] upheld the requirement of State law, that the physician proposing to perform an abortion on a minor should notify her parents in advance.

In 1992, came another seminal Supreme Court case, which threw further doubt on a woman's right to choose. By this time, yet another change had taken place regarding the composition of the Court. While the majority of the bench ruled to uphold the principal thrust of *Roe v Wade,* four justices openly called for that decision to be overruled. In *Planned Parenthood of Southeastern Pennsylvania v Casey,*[119] the issue once again was the right of States to introduce regulatory requirements in relation to abortion. The Pennsylvania Abortion Control Act of 1982, as amended in 1988 and 1989, requires a woman seeking an abortion to give her informed consent, and requires that she be provided with information at least 24 hours before the operation is performed. In addition, in relation to minors, the Act requires the minor to seek either the consent of one or both of her parents, or alternatively, to seek judicial sanction for the operation. Further, in the case of a married woman, when seeking an abortion she must certify that her husband has been notified of her intention. The only exemption granted from these provisions relates to situations of medical emergency.

The Court ruled that the fundamental principle enshrined in *Roe v Wade* should be maintained. Much in evidence in the judgment is the Court's perception of its own authority and standing, and the importance of certainty in the law and compliance with the doctrine of *stare decisis,* at least in the absence of any other compelling force which demanded a departure from that doctrine. The Court reaffirmed the centrality of a woman's individual liberty, under the doctrine of the due process of law enshrined in the Fourteenth Amendment, to choose, within the first trimester of pregnancy, whether to terminate the pregnancy or not. Thereafter, the Court ruled, a woman who had not acted within the first trimester could be deemed to have recognised

116 See, eg, Dworkin, R, 'The future of abortion' (1989) New York Review of Books, 28 September.

117 497 US 417 (1990).

118 497 US 502 (1990).

119 112 S Ct 2791 (1992).

and acquiesced in the State's legitimate interest in the protection of unborn human life, which provided the rationale for a more restrictive approach to abortion.

Where the Court departed from its 1973 decision, however, was in the area of the trimester structure itself, which in *Casey* the Court ruled to be excessively rigid, and unnecessary in securing the objective of the woman's right to choose. The trimester structure, was not part of the 'essential holding of *Roe*' according to the Court. Further, the woman's right to choose a termination within the first trimester was not itself a principle which could preclude States from ensuring that her decision to abort was 'thoughtful and informed'. The State interest in protecting the life of the unborn, an interest which after the first trimester increases, legitimated State laws which were framed with the purpose of ensuring thoughtful and informed decision making. Moreover, such regulations did not, the Court ruled, offend against the central principle of *Roe.* In *Roe,* it had been recognised that there was a balance to be struck between the woman's right to choose and the State's increasing interest in potential human life. Accordingly, States could legitimately enact rules and regulations which:

> ... serve[s] a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it. Only where State regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.[120]

Thus, while in *Roe* the Court's principal concern had been to recognise and enunciate the existence and scope of a woman's right to choose, in 1992 with the decision of *Casey* is found a shift of emphasis towards an enunciation of the power and right of the State to regulate access to abortion even in the first trimester, provided that such regulation does not impose an 'undue burden'. The balance of the scales had now tilted towards the protection of unborn life through the imposition of restrictions designed to ensure full and informed rational decision making on the part of the woman. Where, however, the purpose of a State law is not to facilitate a woman's free choice, but to hinder it, that law would be invalid.

In relation to the Pennsylvania law under consideration, the Court ruled that a 24 hour waiting period, while it may be for some women (for example, those who had to travel long distances and for whom the explanation of a 24 hour absence could be difficult) 'particularly burdensome' as the court below held, that did not of itself establish that it placed an 'undue burden' on a particular woman within that group. Accordingly, the Court was not 'convinced that the 24 hour waiting period constitutes an undue burden ...'.

120 *Planned Parenthood of Southeastern Pennsylvania v Casey* 112 S Ct 2791 (1992).

As to the requirement that a married woman, save in a medical emergency, should provide a signed statement that she has notified her spouse that she intends to undergo an abortion, or alternatively certifying that it was not her husband who impregnated her, or that her husband could not be located, or that she had been the victim of spousal sexual assault which had been notified to the State, or that the woman believes that notifying her husband will lead to violent repercussions, the Court ruled that these provisions were inconsistent with the woman's right to choose, in imposing an undue burden on her, and were thus invalid.

In relation to the State law's requirement that minors under the age of 18 required the consent of one of her parents or the approval of the courts before undergoing an abortion, the Court held that the parental consent requirement was valid, provided that a 'judicial bypass' procedure was also in place.

Finally, with respect to the record keeping and reporting requirements of Pennsylvania, the Court ruled that all the provisions, save the requirement of spousal notice, were valid. Accordingly, State law is entitled to claim, in the interests of 'maternal health', that a report be filed identifying the physicians involved, the institution, the woman's age, any previous pregnancies or abortions, any pre-existing medical conditions which might affect pregnancy, any medical complications with the abortion, and the weight of the aborted foetus. Further, all institutions must file a quarterly report detailing the number of abortions performed, and details as to the trimester breakdowns. In all cases, the identity of the woman concerned remains confidential, although the records in relation to publicly funded institutions is a matter of public record.[121]

WOMEN'S REPRODUCTIVE RIGHTS IN INTERNATIONAL DIMENSION

The Report of the International Conference on Population and Development, 1994, states that:

> ... reproductive rights rest on 'the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so, and the right to attain the highest standard of sexual and reproductive health.
>
> ... the right to make decisions concerning reproduction free of discrimination, coercion and violence, as expressed in human right documents.[122]

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121 See, also, *NOW v Scheidler* 24 January 1994 (Supreme Court*); Madsen v Women's Health Centre* 30 June 1994 (Supreme Court*); Elizabeth Blackwell Health Center for Women v Knoll* 25 July 1995 (US Court of Appeals 3rd circuit).

122 Cairo, September 1994 (A/CONF 171/13), Chapter 1, Resolution 1, Annex, para 7.3.

The religious and cultural inheritance and influence

Historically, in many societies, abortion was viewed for centuries as a means of fertility control. Sex selection of children also plays a role in the availability of abortion in both China and India. While the birth of a son is desirable, the birth of a daughter may present serious financial and social problems for a family. The cost of a daughter's marriage, especially in light of the requirements of dowry, dominates the issue of a girl child's desirability. Boys, by contrast, are prized for their capacity to increase the family wealth through marriage. In India, in particular, given the practice of marrying young girls to older men and the unsurprising fact of early widowhood, widows represent a burden on the family and society, and are generally discriminated against and unwanted. The choice between *suttee*[123] and widowhood is a choice between relative fates.[124] The rise in consumerism and the State directed policy of smaller family units also contributes to the explanation of the undesirability of girl babies. Girl babies are, relative to boy babies, socially unwanted babies. Infanticide has long been a means of population control,[125] and represents an alternative to failed contraception or sex selection procedures.

Population control programmes[126]

Population law and policy raises a number of difficult issues. Until the Second World War, there was little concern with population control: a healthy birthrate was considered as right and natural. In the succeeding years, however, with improvements in health and increasing longevity and decreased infant mortality, population growth in many parts of the world came under scrutiny, both within individual States and by the increasingly influential international agencies of the United Nations. With awareness of the economic and social consequences of population growth and control, came increasing awareness of, and standard setting for, the realisation of individual human rights. While the structure and personnel of the United Nations and its agencies has been criticised as being traditionally male-dominated and male-orientated by feminist legal scholars,[127] there has been increasing awareness of those aspects of human rights which are unique to women. As stated in the

123 See, further, Chapter 2.

124 See, eg, the account of the fate of Indian widows, *The Sunday Times*, 21 June 1997.

125 For an account of the contemporary position in India, see Venkatachalam, R and Viji, S, *Female Infanticide*, 1993, New Delhi: Har-Anand.

126 See, for further details, *op cit*, Hartmann, fn 82.

127 See, eg, Charlesworth, H, Chinkin, C and Wright, S, 'Feminist approaches to international law' (1991) 85 AJIL 613.

United Nations Reports documents,[128] internationally, women suffer particular inequalities in the economic and social sphere; particularly high levels of domestic and other violence and health problems connected with fertility and childbirth. Thus, while much of the data in this chapter concerning, for example, the law relating to abortion and sterilisation, is drawn from Western jurisprudence, the broader picture of the particular difficulties facing women worldwide must also be considered.

The most notorious campaign of population control occurred during Indira Ghandi's Prime Ministership of India. In 1976, the Government introduced new laws and regulations requiring individual States to meet sterilisation quotas. If a couple refused sterilisation after the birth of three children, fines and imprisonment could follow. Government aid was also withheld from those who refused to comply with the sterilisation programme. Between July and December 1976, 6.5 million people were sterilised in India. Men were not exempt from the purge: it is recorded that in one village, all men of eligible age were rounded up and forcibly sterilised.[129] Nevertheless, the primary targets were, and remain, women. The conditions under which such operations were performed were often insanitary: increasing the dangers of operative and post-operative infections. Following the fall of the Ghandi Government in 1977, the number of sterilisations fell rapidly. Nevertheless, the programme continues, with the principal emphasis being on pressure and inducements. Women are reportedly paid $22 for submitting to sterilisation: men only $15. External pressure from international funding agencies places further pressure on the Government to control its population, with the United National Fund for Population Activities and the United States Agency for International Development increasing its contributions to the programme.

From a feminist perspective, the issue is not whether or not population control programmes are 'right' or 'wrong', moral or immoral, but rather the means by which such programmes are achieved. First, the principal targets for such programmes are for the most part women, rather than men. This despite the fact that vasectomies are surgically far more simple to perform than are sterilisations and/or hysterectomies. They are also far less costly to perform. Secondly, the side- and after-effects of vasectomies are also far less serious, actually and potentially, on the physical and psychological health of the patient. Thirdly, while sterilisation may be a welcome option for those women who have achieved their desired size of family, sterilisation – that most permanent form of contraception – which is performed by way of force, pressure or inducement, removes a woman's right to choose the future of her fertility and is thus indefensible, notwithstanding the desirability of population control. Fourthly, it is well documented that such programmes,

[128] See United Nations Report, *The World's Women 1970–90*, 1991, London: HMSO; United Nations Report, *The World's Women 1985: Trends and Statistics*, 1995, London: HMSO. (See *Sourcebook*, pp 3–19.)

[129] See 'Entire village sterilised' (1978) India Now, August.

whether the method employed is the encouragement of long-term contraception through the use of implants (Norplant) or injections (Depo-Prevura) or by means of abortifacients (RU486), or by sterilisation or hysterectomy, focus on the poorest women in the community who have the worst nutrition and are therefore more likely than women in better health to succumb to side- and after-effects. Fifthly, such programmes are regarded by governments and those international agencies which sponsor and encourage them, as the principal agent to achieve limits to population growth. This preference for the lasting efficacy of the means employed often precludes the alternative of education concerning fertility control, and the promotion of alternative means of contraception – barrier methods, withdrawal practices, 'safe' sexual intercourse only in non-fertile periods ('natural' contraception favoured by the Roman Catholic Church) – which carry none of the adverse medical or health risks.

Sterilisation as a means of voluntary infertility should be regarded – other than from a strict religious perspective – an incontrovertible right. It was so recognised in 1974 by the Symposium on Law and Population which recommended that:

> (1) with due regard to the legal and cultural traditions and mores, and the economic needs, of the respective countries, governments adopt such legislation as may be required to make voluntary sterilisation available for contraceptive purposes;
>
> (2) in adopting such legislation governments ensure freedom of choice based upon legally competent and fully informed consent, and subject to proper medical procedures and requirements ...[130]

It is not only in Africa, Asia and South America that non-voluntary sterilisations are performed in the name of population control. In Canada, the United States of America and the United Kingdom, there is evidence of sterilisations being performed in circumstances which do not amount to the free choice of the woman concerned. Again, several issues are involved. On the one hand, there is the question of the availability of sterilisation for those women who choose sterilisation as a permanent means of contraception. This in turn entails the right to sterilisation for social purposes, otherwise labelled non-therapeutic sterilisations, rather than for therapeutic reasons. It is this issue which caused particular judicial disquiet in Canada. On the other hand, there is the question of the use of sterilisation as a means of permanently preventing conception by mentally incompetent women and minors and furthermore, the use of sterilisation as a means of controlling the fertility of women from minority groups and impoverished families. This use of sterilisation is most closely associated with a sterilisation requirement being

130 The Symposium on Law and Population, June 1974 (Tunis). See Lee, L, 'Legal implications of the world population plan of action' (1974) 9 Journal of International Law and Economics 375.

attached to the availability of abortion. Within each of these scenarios lies the question of the right of a woman to choose and to control her own fertility, as opposed to the right of others to decide on her future fertility.

A note of caution should perhaps be entered here, namely that legal rights do not inevitably and invariably ensure real equality of power. As Hilary Charlesworth, Christine Chinkin and Shelley Wright have written:

> The formal acquisition of a right, such as the right to equal treatment, is often assumed to have solved an imbalance of power. In practice, however, the promise of rights is thwarted by the inequalities of power: the economic and social dependence of women on men may discourage the invocation of legal rights that are premised on an adversarial relationship between the rights holder and the infringer. More complex still are rights designed to apply to women only such as the right to reproductive freedom and to choose abortion.[131]

Balanced against a 'woman's right to choose', or a 'woman's right to refuse' must be posited the realities of economic and social power disparities between women and men; the role of the medical profession and the power of the courts to determine issues related to a woman's fertility. Nowhere is this dilemma more apparent than in the United States of America, with its constitutional 'guarantee' of a woman's right to choose, at least in the first trimester of pregnancy, which is then hedged in and severely restricted by other regulations and requirements which *de facto* deny women access to abortion advice, impose time restrictions in the form of waiting periods, the denial of State funding for abortion, whether elective or medically necessary, and restrictions imposed via the doctrine of informed consent.

NON-CONSENSUAL TREATMENT OF PATIENTS SUFFERING FROM ANOREXIA NERVOSA[132]

Each year, an estimated 6,000 new cases of anorexia nervosa are diagnosed in the United Kingdom, swelling the total of sufferers to 3.5 million.[133] The

131 *Op cit*, Charlesworth, Chinkin and Wright, fn 127. In this regard, the scepticism in relation to rights which forms the heart of the Critical Legal Studies school of thought discussed in Chapter 6, and opposed by many feminist scholars, especially those who have been traditionally denied rights, must be recalled. (See *Sourcebook*, pp 537–54.)

132 On anorexia nervosa see Palmer, R, *Anorexia Nervosa*, 2nd edn, 1988, London: Penguin; Wolf, N, *The Beauty Myth*, 1991, London: Vintage; Bordo, S, *Unbearable Weight: Feminism, Western Culture and the Body*, 1993 Berkeley, California: California UP; Orbach, S, *Fat is a Feminist Issue*, 1993, Harmondsworth: Penguin, and *Hunger Strike: The Anorexic's Struggle as a Metaphor for Our Age*, 1993, Harmondsworth: Penguin.

133 *Ibid*, Wolf, p 183.

increasing incidence of eating disorders, primarily among women and young girls,[134] has caused the issue of the appropriate treatment for the conditions to come before the courts. What is of interest about this matter, from a feminist perspective, is the manner in which the eating disorders of women have been conceptualised as not only medical matters, but matters in which the patient is classified as being psychologically disturbed, and thus brought within the mental health arena. Starting from the proposition that a medically competent adult is entitled to accept or refuse medical treatment, even where acceptance or refusal would cause harm to the patient, it is only by extending the concept of mental incompetence to cover those whose decisions do not agree with medical or judicial opinion about their welfare, that individuals can find their autonomy over such decisions restricted, if not eliminated.

That minors should not be accorded full autonomy over medical matters, especially where they lack the necessary intelligence and understanding, is relatively uncontroversial, although it becomes contentious where it is perceived that a mature minor has the necessary intelligence and understanding but her decision is overridden by the courts on the basis that the court's perception of her welfare is superior to her own.[135]

However, in relation to adult women, case law reveals the same sleight of hand in relation to the mental health legislation, as is evident in relation to court sanctioned Caesarean sections, of women whose competence to consent to treatment is overridden by interpreting permissible treatment without patient consent as encompassing treatment for disorders not directly related to the mental disorder for which the patient is hospitalised. An illustrative and seminal case is that of *B v Croydon Health Authority.*[136] B, a woman, was admitted to hospital under section 3 of the Mental Health Act 1983 for 'psychopathic disorder'.[137] The treatment prescribed was 'psychotherapeutic psychoanalysis'. B stopped eating. By the time the case came to court, B had started eating, but she and the Health Authority wanted the judgment of the court as to whether forcible feeding by nasogastric tube would have been lawful. Hoffmann LJ ruled that it would. Against the submission that the proposed treatment must be related to the mental disorder itself, Hoffmann LJ stated that medical treatment in the Act[138] was broadly defined to include 'nursing ... care, habilitation and rehabilitation under medical supervision'.

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134 On the increasing incidence of anorexia in young men, see Dresser, R, 'Feeding the hungry artist: legal issues in treating anorexia' (1984) 2 Wisconsin L Rev 297; Frost, N, 'Food for thought: Dresser on anorexia' (1984) 2 Wisconsin L Rev 375.

135 For the English case law, see, in particular, *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112; [1984] QB 581; *Re R* [1992] Fam 11; *Re W* [1993] Fam 64. See, also, Williams, G, 'The *Gillick* saga' (1985) 135 NLJ 1156 and 1179; Cretney, S, 'Gillick and the concept of legal capacity' (1989) 105 LQR 356.

136 [1995] 1 All ER 683.

137 Defined as borderline personality disorder coupled with post-traumatic stress disorder.

138 Mental Health Act 1983, s 145(1).

Accordingly, a range of ancillary acts to the principal treatment fell within the definition. Given that B was lawfully detained by virtue of a mental disorder, treatment which alleviated 'the consequences of the [mental] disorder' were capable of being ancillary 'to a treatment calculated to alleviate or prevent a deterioration of the psychopathic disorder'. The court endorsed the dicta of Ewbank J in *Re KB (Adult) (Mental Patient: Medical Treatment)*,[139] in which he declared that the test-tube feeding of an anorexic patient 'relieving symptoms is just as much a part of treatment as relieving the underlying cause'.[140]

Where mental health legislation is not, or cannot be, invoked to legitimise medical treatment, the courts lack jurisdiction to override an adult patient's refusal of consent to treatment. In *Secretary of State for Home Department v Robb*,[141] a 27 year old male prison inmate went on hunger strike. The Home Secretary sought a declaration from the court that it was lawful to abide by the prisoner's refusal to receive nutrition. Thorpe J ruled that the right of an adult of sound mind to self-determination prevailed over the interests of the State, and that there was no duty to prolong life. What distinguishes this case from cases concerning anorexic patients, and cases concerning Caesarean sections, is the court's acceptance of the mental competence of the adult male prisoner to decide to end his own life. With anorexia patients, the courts have accepted that the condition itself, which centres on the patients need to control the situation, impairs the patient's mental capacity to make decisions in her own best interests. As Lord Donaldson of Lymington MR stated in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)*,[142] 'one of the symptoms of anorexia nervosa is a desire by the sufferer to "be in control" and such a refusal [of medical treatment] would be an obvious way of demonstrating this'.[143]

Competence and the 'mature minor'

Section 8 of the The English Family Law Act 1969[144] provides that:

> (1) The consent of a minor who has attained the age of 16 years to any surgical, medical or dental treatment which, in the absence of consent, would constitute a trespass to his person, shall be as effective as it would be if he were of full age; and where a minor has by virtue of this section given an effective consent to any treatment it shall not be necessary to obtain any consent for it from his parent or guardian.

139 (1994) 19 BMLR 144, p 146.

140 See, also, *Riverside Health Trust v Fox* [1994] 1 FLR 614, in which the Court of Appeal set aside a declaration authorising the forcible feeding of a 37 year old anorexic patient, which was granted without the patient being heard.

141 [1995] 22 British Medical L Rev 43 (Family Division).

142 [1992] 3 WLR 758.

143 [1992] 3 WLR 762.

144 See *The Report of the Committee on the Age of Majority* (the Latey Report), Cmnd 3342, 1967, London: HMSO.

(2) In this section, 'surgical, medical or dental treatment' includes any procedure undertaken for the purposes of diagnosis, and this section applies to any procedure (including, in particular, the administration of an anaesthetic) which is ancillary to any treatment as it applies to that treatment.

(3) Nothing in this section shall be construed as making ineffective any consent which would have been effective if this section had not been enacted.

The position under common law was authoritatively reformulated in *Gillick v West Norfolk and Wisbech Area Health Authority*.[145] In *Gillick*, the issue for decision was whether a 'mature minor' had the right, under statute or common law, to seek and be given contraceptive and abortion advice and treatment, without the consent of her parent(s). The House of Lords ruled that she could. Notwithstanding Lord Brandon's reservations concerning the apparent 'encouragement' that this decision gave to under-age, and hence unlawful, sexual intercourse, the House of Lords ruled that where a girl, under the age of 16, showed sufficient maturity and understanding in relation to the particular matter in question – and that competence would vary according to the difficulty of the subject matter – the girl had the capacity to consent under common law, as preserved by section 8(3) of the Family Law Act 1969.[146] Further, where a mature minor has the competence to consent, that consent is determinative: she cannot be opposed by her parents. As Lord Scarman stated:

> The underlying principle of the law ... is that parental right yields to the child's right to make his own decisions when he reaches a sufficient understanding and intelligence to be capable of making up his own mind on the matter requiring decisions.

A number of issues were left open by the decision. It remained unclear, for example, whether the right to consent to treatment included the right to refuse treatment, and the position of parents and the courts in relation to consent and withholding of consent. Moreover, although *Gillick* was heralded as a 'landmark' decision for children's rights, it soon became apparent that the decision was not to have the widespread application of which it was capable. In no area is this clearer than in relation to a teenage girl's capacity to consent to, or refuse, medical treatment.

145 [1986] AC 112; [1985] 2 WLR 413; [1985] 1 All ER 533, CA; [1985] 3 All ER 402, HL.

146 On *Gillick*, see Bainham, A, 'The balance of power in family decisions' [1986] CLJ 262; Eekelaar, J, 'The emergence of children's rights' [1986] 6 OJLS 161.

In *Re R (A Minor) (Wardship: Medical Treatment)*,[147] Lord Donaldson MR was to rule that whereas a competent minor could consent to treatment, the minor could not determine whether or not she should receive treatment. Where the girl refused treatment – as opposed to consenting to it – both her parents, who retain power, and the court, could override that refusal. In *Re R* the issue was treatment for anorexia nervosa of a 15 year old girl. She was mentally competent for periods of time, but that competence wavered. The court held that such fluctuating competence did not suffice to fulfil the *Gillick* criteria. Furthermore, Lord Donaldson stated clearly that whereas a *Gillick* competent minor could consent to treatment, she could not refuse consent to treatment, and that her parents and the court retained the power to consent on her behalf. Lord Donaldson referred to the 'keyholders' to the issue of consent: the competent minor, her parents and the courts. Each had the power to unlock the door to consent.

The right to consent, and right to refuse to consent, returned to the courts in 1992 in *Re W (A Minor) (Medical Treatment: Court's Jurisdiction)*.[148] W, a 16 year old girl suffering from anorexia, was in the care of the local authority, having had an unsettled and unhappy childhood. She was being treated in an adolescent residential unit, but refused to eat solids and her weight had dropped to 5 stone 7 lb. Medical evidence suggested that 'within a week' her capacity to bear children later in life would be at risk, and that sooner rather than later her life would be at risk. W was not refusing all treatment, but doctors were uncertain whether she would continue to consent to treatment in the future. It was also considered desirable for her to be transferred to a specialist clinic in London: this W refused to consent to, wishing to stay in a known and supportive environment in her home area. On an application to the court to invoke its inherent jurisdiction and authorise W's transfer, the Court of First Instance held that W had sufficient understanding to make the decision, but notwithstanding that the court had jurisdiction to make the order sought. W appealed. The Court of Appeal dismissed her appeal. While the Family Law Act conferred a right to consent to treatment, it did not confer an absolute right, and in particular the decision of a 16 year old minor, or of a Gillick competent minor, could be overridden by the court where her best interests dictated it. Lord Donaldson MR ruled that one of the clinical manifestations of anorexia was 'a firm wish not to be cured, or at least not to be cured unless and until the sufferer wishes to cure herself. In this sense it is

147 [1992] Fam 11; [1991] 4 All ER 177. See Douglas, G, 'The retreat from Gillick' (1992) 55 MLR 569. For critique, see Bainham, A, 'The judge and the competent minor' (1992) 108 LQR 194; Thornton, R, 'Multiple keyholders – wardship and consent to medical treatment' [1992] CLJ 34; Brazier, M, *Medicine, Patients and the Law*, 2nd edn, 1992, Harmondsworth: Penguin, p 345.

148 [1992] 3 WLR 758.

an addictive illness ...'.[149] Accordingly, 'it is a feature of anorexia nervosa that it is capable of destroying the ability to make an informed choice. It creates a compulsion to refuse treatment or only to accept treatment which is likely to be ineffective'.[150] While the wishes of the anorexic minor were to be respected, they had a 'much reduced significance' as a result of the illness, and could not override a decision which was taken in her best interests. Lord Donaldson regretted his 'keyholder' analogy. Keys can lock as well as unlock, he recognised. What remains startling about his change in terminology, and of view, is that he moved directly from the issue of consent to the issue of the protection of the medical profession. What replaced the 'keyholder' was the 'flak jacket' – the device which protects the doctors from legal liability. As Lord Donaldson expressed it, '[A]nyone who gives him [the doctor] a flak jacket (that is, consent) may take it back, but the doctor only needs one and so long as he continues to have one he has the legal right to proceed.'[151] Once again the law reveals its alliance with and support for its fraternal profession, under which the interests, rights and freedoms on the individual are subsumed.

149 [1992] 3 WLR 758, p 761.
150 *Ibid*, p 769.
151 *Ibid*, p 767.

CHAPTER 11

WOMEN, VIOLENCE AND THE LEGAL SYSTEM

INTRODUCTION

In this chapter the physical (sexual or otherwise) and psychological violence against women and the reaction of the legal system to that violence, both in terms of the treatment of women victims of violence and that of women who react against violence with violence, is considered. As the data will reveal, violence against women is a universal, ahistorical, phenomenon. Gender-based violence – in all its many manifestations – occurs throughout the world, irrespective of culture or economic development. The universality of gender-based violence – violence which is predominantly violence inflicted by familial male members against women partners and female children – raises a number of questions.

The first issue to address is the definition of gender-based violence. The second question relates to the causes of such violence. Is domestic violence related to socio-economic deprivation? Is domestic violence explained through an analysis of gender power relationships? Is violence against women explained as a socially learned phenomenon, which gets 'handed down' from generation to generation? Why do some women continue to tolerate economic, physical, psychological and sexual violence? To what extent can the law provide appropriate remedies for victims of violence, either in the form of deterrence or punishment, or through civil law remedies which protect the victim? Given the universalism and a historical nature of gender-based violence, the role of law in this regard is both culturally and historically dependent, but also – given the culturally embedded nature of gender-based violence – destined to play a limited role in the eradication of such violence. Gender-based violence represents one of the greatest challenges to law, and reveals law's limitations in dealing with the extremes of human conduct.

Defining gender-based violence

The United Nations Declaration on the Elimination of Violence Against Women[1]

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

1 Adopted by the General Assembly on 20 December 1993, GA Res 48/104.

(a) 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;

(b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;

(c) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

Measuring gender-based violence

Any precise measurement of the incidence of violence in society is problematic. Under-reporting of violent crime – especially that committed within the family – has long been recognised. In addition, the failure to prosecute the offender distorts the criminal statistics. What is evident, however, is that violence against women is endemic in all societies, whether that violence be in the form of sexual harassment,[2] assault, sexual violence including rape, or murder. Further, as will be seen from the discussion which follows, not only are women subjected to violence by men, but they also suffer a form of subtle violence inflicted by the legal system itself, especially in prosecutions for a rape of which they were a victim, and for murder or manslaughter when, no longer able to cope with repeated assaults, women are provoked into killing their violent partners.

International data

On a global scale, the United Nations receives reports of violence against women from its Member States, but itself admits that the accuracy of the data is dubious. As the United Nations Report, 1990,[3] records, '... [s]ecrecy, 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'.[4] Nevertheless, significant data is provided by the report. In developed regions, a majority of reporting States record domestic violence, sexual assault, rape and sexual harassment. In less industrial societies, for example Kuwait, a third of all

2 Which may be conceptualised as a form of psychological violence and sexual discrimination.

3 United Nations Report, *The World's Women 1970–90*, 1991, London: HMSO.

4 *Ibid*, p 19. (See *Sourcebook*, pp 554–58.)

women participating in a survey reported assaults. In India, in 1985, there were 999 recorded cases of dowry deaths, in 1986, 1,319 and in 1987, 1,786. In the United Nations Report, 1995,[5] the United Nations records that gender-based violence against women 'crosses all cultural, religious and regional boundaries and is a major problem in every country in which it has been studied'.[6]

Globally, the most prevalent form of gender-based abuse is committed by a husband or other male partner. The United Nations reports that 'studies in 10 countries estimate that between 17 and 38 per cent of women have been physically assaulted by an intimate partner'.[7] Moreover, studies in Africa, Latin America and Asia report 'even higher rates of abuse', in some cases up to 60 per cent of the population studied.

Sexual abuse data reveals that in up to 60 per cent of all sexual cases, the victim is known to the perpetrator. Statistics on rape collated from surveys conducted among college aged women reveal that between eight per cent and 15 per cent of them have been raped, and that, if attempted rape is included, the figure rises to between 20 per cent and 27 per cent. Irrespective of region or culture, the United Nations reports that from 40 per cent to 60 per cent of known sexual assaults are committed against girls aged 15 or younger. In relation to child abuse, in the United States 78 per cent of substantiated child sexual abuse cases involved girls.[8] A South African study recorded that 92 per cent of child victims were girls, and all but one of the perpetrators were male, two-thirds of them being family members.

In addition, the United Nations records that the trafficking of women for prostitution continues despite international legislation. The report reveals that an estimated two million women, of whom roughly 400,000 are under 18 years of age, are engaged in prostitution in India.[9] In Nepal, some 5,000 to 7,000 young girls from Nepal are sold into brothels each year, and an estimated 20,000 Burmese women and girls work in brothels in Thailand.[10]

Trafficking in women is by no means confined to the Far East. The United Nations records that a 1992 report of the Netherlands Advisory Committee on Human Rights and Foreign Policy 'suggests traffic in thousands of women in the Netherlands alone for the purposes of prostitution'.[11] Moreover, an

5 United Nations Report, *The World's Women 1995: Trends and Statistics*, 1995, London: HMSO.

6 *Ibid*, p 158.

7 *Ibid*, p 158.

8 *Ibid*, p 181.

9 The Commission on Human Rights Working Group on Contemporary Forms of Slavery; see *ibid*, United Nations Report, 1995, p 162.

10 Asia Watch and the Women's Rights Group; see *ibid*, United Nations Report, 1995, p 162.

11 *Ibid*, p 162.

increase in trafficking has been recorded in Eastern European countries, and from Eastern Europe to Western Europe.[12]

In Australia, Canada, England, New Zealand and the United States, rape is regarded as one of the most (if not the most) underreported crime. In the United States, research in 1986 found that only 50 per cent of all rapes are reported to the police.[13]

In England, 5,039 rapes were reported to the police in 1994;[14] in the London Metropolitan Police Area, 1,199 rapes were reported in 1992–93.[15] The number of rapes which went to trial in 1994 was 936, or 18.6 per cent of all notifiable offences.[16] In 1996, however, whereas just under 6,000 rapes were reported to the police in England and Wales, the number of prosecutions and convictions had fallen sharply. Only 19 per cent of complaints led to a court case, and half of the defendants acquitted.[17]

Rape in wartime – with women being regarded as part of the 'spoils of war' – continues to be reported. Whilst acknowledging the difficulties in collecting accurate data in this particularly sensitive area, the United Nations nevertheless records estimates of 20,000 rapes in the war in former Yugoslavia. Physicians – using calculations based on pregnancies occurring after a single act of intercourse – estimated that 11,900 rapes had occurred during that conflict.

As the United Nation's evidence reveals, the problem of domestic violence, conceived as gender-based violence, is universal. As the United Nations Report, *Violence Against Women in the Family*,[18] reveals, 'women irrespective of nationality, colour, class, religion or culture are at significant risk of physical psychological and sexual violence in the home from male relatives, most frequently their husbands or partners'.[19] Irrespective of economic conditions, religious and cultural differences between societies, or questions of class, violence against women is a persisting universal phenomenon. In the United Nation's *Declaration on the Elimination of Violence Against Women*,[20] replicated above, gender-based violence is conceived as a general human rights issue and also as an issue of sexual discrimination.

12 Papers presented at the 1994 Utrecht Conference on Traffic in Persons; see *op cit*, United Nations Report, fn 5, 1995, p 162.

13 US Department of Justice, *Sourcebook of Criminal Justice Statistics*, 1988.

14 *Criminal Statistics 1994*, Cm 3020, London, HMSO, Table 2.16.

15 *Report of the Commissioner of Police of the Metropolis*, London: HMSO.

16 *Criminal Statistics England and Wales 1983–94, Criminal Statistics Supplementary Tables,* Vol 2, 1983–94, London: HMSO.

17 (1997) *The Times,* 18 September.

18 UN Centre for Social Development and Humanitarian Affairs, United Nations Report, *Violence Against Women in the Family*, 1989 (United Nations Sales No E.89.IV.5).

19 Connors, J, 'Violence against women' (see *Sourcebook* p 558). This paper was prepared for presentation at the 1995 United Nations Fourth World Conference on Women.

20 General Assembly Resolution 48/104, adopted in December 1993.

Violence against women in the United Kingdom

Given the difficulties in assessing statistical data on violence against women, and recalling that domestic violence remains the most highly underreported offence against women, recourse to the Judicial Statistics and Home Office data is helpful but by no means conclusive. Whether the law invoked is the criminal or civil law, recourse to law is often the last resort of many women. For a number of reasons – acceptance, condonation, fear, ignorance, shame, to name a few – women are remarkably reluctant to invoke the law in their own defence against violence. In 1994, 24,034 applications were made under the Domestic Violence and Matrimonial Proceedings Act 1976,[21] of which 3,946 sought exclusion orders, 24,566 non-molestation orders and 9,793 orders had a power of arrest attached.[22] Under the Domestic Proceedings and Magistrates' Courts Act 1978,[23] in 1984, 8,480 orders were granted. By 1988, the rate of applications had fallen to 5,510, and to 3,450 in 1991. In 1993, 1,642 orders were granted.[24, 25]

The criminal statistics for the year 1995 in England and Wales recorded a total of 30,274 sexual offences, of which 16,876 were indecent assaults of a female (compared to 3,150 on males); 4,986 rapes of women (compared with 150 rapes of men).[26] Sexual offences taken as a whole amounted to just under 10 per cent of the total recorded violent crimes in 1995. In terms of convictions, in 1995, 587 offenders were either found guilty or cautioned for rape of a woman; 3,321 offenders were found guilty or cautioned for indecent assault on women.[27]

In terms of the most extreme form of violence – 'spousal' murder – in 1990, of 43 per cent of female murders in the United Kingdom, the principal suspect was the women's partner, whereas the figures for 1983 reveal that in only five per cent of male murders the female partner was the principal suspect. In 1990 there were 226 female murder victims. Of these, 43 per cent were killed by

21 The statute which provided for non-molestation and exclusion orders to be granted by the county court and High Court for married spouses and cohabitees 'living together as husband and wife'. See now the Family Law 1996, Part IV.

22 Judicial Statistics 1981–94.

23 The statute conferring jurisdiction on the lower courts to provide injunctive relief for married persons. The jurisdiction is more limited than that under the 1976 Act. Whereas under the latter Act, 'molestation' and psychological violence is covered, the 1978 Act requires actual physical violence or threats of violence.

24 *Domestic Proceedings: England and Wales,* 1983–92, Home Office Statistical Bulletin, London: HMSO.

25 The decrease in numbers is attributable in part to the complexity of the grounds to be established for an order, and in part for the increased preference of proceedings in the county court under the 1976 Act (the law is now reformed, see Part IV of the Family Law Act 1996).

26 Male rape, or forced buggery, was introduced as a specific offence in the Criminal Justice and Public Order Act 1994, s 142.

27 Source: *Criminal Statistics: England and Wales, 1995*, Cm 3421, 1996, London: The Stationery Office.

their partners and 19 per cent by other members of the family. Of 381 male murder victims, nine per cent were killed by their partners and 17 per cent by another member of the family.[28] 'Wife beating' is regarded as the most under-reported crime.

Explaining gender-based violence

Gender-based violence concerns traditional patriarchal attitudes – the notion of male ownership, control and dominance. Cultural and religious practices have a unique authority within society. 'Cultural violence' such as Hindu suttee, female circumcision, Chinese footbinding, and witchmurders, considered in Chapter 2, whilst very different phenomena, share common explanatory causal characteristics to those of sexual harassment, rape and domestic violence: namely traditional male authority and control. Such an explanation may be met with the charge of 'essentialism' and 'universalisation' of complex phenomena: however, as noted above, the international data reveals that gender-based violence is universal, ahistorical and crosses all cultural boundaries. It is thus a global problem.[29] Gender-based violence, whether it be physical, sexual, psychological or economic represents a form of control:

> Domestic violence is the systematic, ahistorical, acultural manifestation of male power. It is as immutable and enduring as patriarchy which supports and sustains it.[30]

A range of differing explanations is offered in relation to gender-based violence. Writing in the 1970s, English campaigner Erin Pizzey argued that the violent male is psychotic: mentally deranged and in need of incarceration to keep his victims safe.[31] Socio-economic conditions have also been blamed: unemployment, loss of self-esteem and poverty, all undoubtedly play a role in explaining violence. And yet, this explanation is unconvincing: if it is accepted that domestic and (other) sexual violence is primarily and predominantly a male crime, the question must be asked why is it that women in similarly poor socio-economic conditions (and women's economic situation has traditionally been worse than the male's) do not turn to gender-based violence. For others,[32] violent behaviour is learned early in life: violent children will become violent adults; children who have experienced violence in the home –

28 See Home Office, *Gender and the Criminal Justice System*, 1992, London: HMSO.

29 See Charlesworth, H and Chinkin, C, 'Violence against women: a global issue', in Stubbs, J (ed), *Women, Male Violence and the Law*, 1994, Sydney: Institute of Criminology, Monograph Series No 6, p 1.

30 Edwards, S, *Sex and Gender in the Legal Process*, 1996, London: Blackstone, p 180.

31 See Pizzey, E, *Scream Quietly or the Neighbours Will Hear*, 1974, London: Penguin.

32 Eg, Dobash, R and Dobash, R, below.

whether directly against them or against their mother – are most likely to grow into violent adults. In Dobash and Dobash's study of battered women,[33] women's responses revealed that in 45 per cent of cases, the violence was prompted by possessiveness or sexual jealousy; a further 16 per cent that the aggressor was seeking a confrontation revolving around the domestic sphere; in 15 per cent of cases, the last act of violence occurred in the woman's attempt to escape, of which seven per cent reported that this last violence was also the most violent. It is possessiveness – that concept which has dogged English family law in so many ways – which some psychiatrists point to in explaining male violence: and sexual possessiveness is the most fundamental aspect of this. For a woman to be unfaithful means that she is expressing independence; sexual relations are a source of possession and being possessed.[34]

From a radical feminist perspective, sexual and other domestic violence against women is symptomatic of unequal power relations within society, inherited from the past and upheld by those with power. For Catharine MacKinnon[35] sexual harassment and violence against women are explained best by recognising that the principal factor in gender-based abuse and violence is the traditional role of women as subordinates, men as dominators. Marxist theory tells us that inequality is the result of the relations of production and economic determinism which has resulted in capitalism which denies the worker the true value of his labour and subordinates him to the capitalist elite. For MacKinnon, by contrast, the fundamental and first source of inequality lies in sexuality and the oppression of women: what work is to Marxism, sexuality is to feminism.[36]

Historically, traditionally and conventionally women have been treated as second-class citizens and as sexual objects. Law and legal rules do not exist in a vacuum. They arise, as sociological explanations of the relationship between law and society tell us, out of the 'mores' of society.[37] The mores of society have traditionally placed women in an inferior, or subordinate, position to men, confined to the private sphere, under the dominion of men, to child-bearing and child-nurturing. Traditionally, the male is provider; the dominant figure in the family. The patriarch. The father figure; the husband with full powers of management over the family finances; the husband with full parental rights over any children of the marriage. The husband, as Aristotle

33 Dobash, R and Dobash, R, 'The nature and antecedents of violent events' (1984) 24 Br J Crim 269; see, also, Dobash, R and Dobash, R, *Violence Against Wives: A Case Against the Patriarchy*, 1979, New York: Free Press; *Women, Violence and Social Change*, 1992, New York: Routledge.

34 Tov-Ruach, L, 'Jealousy, attention and loss', in Rorty, A (ed), *Explaining Emotions*, 1980, Berkeley, California: California UP.

35 Professor of Law, University of Michigan.

36 See MacKinnon, C, *Toward a Feminist Theory of the State*, 1989, Cambridge, Mass: Harvard UP.

37 See, further, Chapter 2.

argued, is the master of the household: or as Sir William Blackstone tells us, the husband has power over the wife, under whose 'couveture' and 'protection' she exists. This conventional political, economic and physical power of men over women results in violence by the powerful against the powerless.

The problem of the liberal analysis of the 'public' and 'private' spheres of life

Liberalism, with its insistence on a private sphere of life, which is immune from legal control, contributes to the idea that somehow violence within the family is a domestic, private, family matter, which 'is not the law's business'. As Katherine O'Donovan has stated, '[H]ome is thought to be a private place, a refuge from society, where relationships can flourish untrammelled by public interference'.[38] The historical legacy which entailed a husband's absolute right to sexual access – irrespective of consent – to his wife's body; and his right to administer discipline (provided that the stick was 'no broader than his thumb') and constructed gender relations within the family as power relations – a feature which in domestic violence is represented in its most extreme form. The reluctance of the police to intervene in domestic disputes;[39] the reluctance of women victims to institute proceedings or to give evidence against their partners; and of the Crown Prosecution Service to prosecute[40] violent partners, the tendency of the courts to avoid custodial sentences, or to confer short custodial sentences, all lend weight to the notion that domestic violence is 'acceptable', 'inevitable' and as a result domestic violence appears trivialised by both the participants and the State. Conduct which the State would not tolerate between strangers in the public sphere, becomes conduct which is largely uncontrollable within the family context. The State, in failing adequately to protect victims of violence, privileges both the private sphere and male power, over protection for the victim, and thus perpetuates patriarchy within the family.

Thus, liberalism, the dominant political theory of the nineteenth and twentieth century, contributes to the problem which women face. By distinguishing between the public sphere of life which is legally regulated, and the private sphere of life which is largely legally unregulated, liberalism carves out a haven for domestic violence. The treatment of women – sexual

38 O'Donovan, K, *Sexual Divisions in Law*, 1985, London: Weidenfeld and Nicolson, p 107.

39 A Home Office Circular of 1990 emphasised that apprehension of the offender and the protection of the victim was the principal concern in the investigation of domestic violence cases. Domestic Violence Units have also been established in a number of police areas, which has resulted in increased numbers of cases reported, and increases in arrest rates: see *op cit*, Edwards, fn 30, pp 194–95.

40 On which, see *op cit*, Edwards, fn 30, pp 198–213.

harassment, sexual assaults and rapes – which takes place in the public sphere (outside the home) is a further manifestation of traditional patriarchal views about the role and status of women in society.[41] However, where gender-based violence occurs in the public sphere, and between strangers, the State response is more robust than that which occurs in relation to 'domestic' violence. Nevertheless, as will be seen below, even where the State reacts and brings the offender before the courts, there remain many problems for the victim when she enters the legal arena.

A woman's traditional 'place': the home

Marital rape

In the nineteenth century John Stuart Mill was to write that the sole remaining state of slavery existed within marriage.[42] Women had become confined to the home, denied the right to vote, denied the right to enter into universities and the professions and remaindered to the 'private sphere' of life, so beloved by liberalism, to be the chattel of her husband. The concept of woman as possessed and man as the possessor has a long history. In Sir William Blackstone's *Commentaries on the Laws of England 1765–69,*[43] Blackstone wrote of a husband's right to chastise his wife in the same manner as he could chastise his children.

The English criminal law's traditional attitude to women is also revealed in relation to marital rape. Until 1991, the eighteenth century *dictum* of Sir Matthew Hale held good, namely that:

> But ... the husband cannot be guilty of rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.[44]

The law left married men immune from prosecution for rape of their wives, and wives without a remedy for rape by their husbands.[45] The doctrine, which survived for 250 years, was based on the doctrine of 'one flesh' in marriage. Under this doctrine, propounded by Sir William Blackstone in his *Commentaries on the Laws of England 1765–69,* upon marriage a woman was placed under the protection and authority of her husband: they were, in law,

41 From this perspective, prostitution and pornography are but two further illustrations of women's subordinate status in society and the violence which this attracts.

42 See Mill, JS, *The Subjection of Women* (1869), 1989, Cambridge: CUP.

43 Blackstone, W, *Commentaries on the Laws of England 1765–69*, 1978, New York: Garland.

44 Hale, Sir M, *History of the Pleas of the Crown* (1736), 1971, London: London Professional Books; cited as the correct statement of the law in Archbold, JF, *Criminal Law Practice and Proceedings*, Richardson, PJ (ed), 1997, London: Sweet & Maxwell.

45 See, for the pre-1991 position, Atkins, A and Hoggett, B, *Women and the Law,* 1984, Oxford: Basil Blackwell. (See *Sourcebook,* pp 379–85.)

one flesh, and that flesh was male. Accordingly, a woman's consent to intercourse was implied. As Hawkins J expressed the matter in 1888:

> The intercourse which takes place between husband and wife after marriage is not by virtue of any special consent on her part, but is mere submission to an obligation imposed on her by law.[46]

The United Kingdom Parliament had been exceedingly slow in tackling the issue of marital rape.[47] In 1976, the matter was debated within the context of the Sexual Offences (Amendment) Bill.[48] However, a husband's immunity from the law relating to 'unlawful sexual intercourse' was reserved for the Criminal Law Revision Committee to examine. In 1984, the English Criminal Law Revision Committee's Policy Advisory Committee affirmed the right of husband to have intercourse with his wife, irrespective of consent, adopting the view that in the absence of 'overt injury', non-consensual intercourse was evidence of the 'failure of the marital relationship', not of rape.[49] It was to be 1990 before the Law Commission tackled the issue and recommended provisionally that the immunity be abolished,[50] a view subsequently endorsed by the Law Commission's *Final Report* published in 1992.[51]

It was the English courts rather than Parliament which ultimately resolved the issue. The fiction was finally laid to rest in 1991 in the case of *R v R*,[52] in which the Court of Appeal ruled, and the House of Lords affirmed, that such a fiction had 'become anachronistic and offensive and we consider that it is our duty having reached that conclusion to act upon it'.[53] On an application under the European Convention of Human Rights and Fundamental Freedoms alleging that English law had infringed Article 7 of the Convention which prohibits retrospectivity, the European Court of Human Rights endorsed the decision of the English courts, ruling that such a decision was foreseeable and in line with the principles of gender-equality protected by the Convention.[54, 55] Parliament finally endorsed the decisions of the Law

46 *R v Clarence* (1888), para 4.3. See also *R v Clarke* [1949] 2 All ER 448; *R v Miller* [1954] 2 All ER 529; *R v Reid* [1972] 2 All ER 1350; *R v O'Brien* [1974] 3 All ER 663; *R v Steele* [1976] 65 Cr App Rep 22; *R v Roberts* [1986] Crim LR 188.

47 The immunity from rape had long been abolished in other common law jurisdictions, eg, Canada, New Zealand, Victoria, New South Wales, Western Australia, Queensland, Tasmania, the Republic of Ireland, Israel and some jurisdictions in the United States of America.

48 Enacted as the Sexual Offences (Amendment) Act 1976.

49 *Sexual Offences*, Cmnd 9213, 1984, London: HMSO.

50 Law Commission Working Paper, No 116, 1990.

51 *Criminal Law: Rape Within Marriage*, Law Com No 205, 1992, London: HMSO.

52 [1991] 2 WLR 1065; [1991] 2 All ER 257, CA; [1991] 3 WLR 767, HL.

53 Lord Lane CJ, *R v R* [1991] 2 WLR 1065, p 1074, CA (Criminal Division). The Australian High Court followed this landmark decision in *R v L* (1991) 103 ALR 577.

54 *CR v United Kingdom* (48/1994/495/577), judgment 22 November 1995.

55 See *R v R* [1991] 3 WLR 767. See Laird, V, 'Reflections on *R v R*' (1991) 55 MLR 386; Naffine, N, 'Possession: erotic love in the law of rape' (1994) 57 MLR 10.

Commission and the House of Lords in the Criminal Justice and Public Order Act 1994.[56]

Evolution of the English law relating to domestic violence[57]

> ... all studies that exist indicate that wife abuse is a common and pervasive problem and that men from practically all countries, cultures, classes and income groups indulge in their behaviour. The issue has serious implications from both a short-term and long-term perspective and from an individual and societal perspective. Many victims suffer serious physical and psychological injury, sometimes even death, while the economic and social costs to the community are enormous and the implications for future generations impossible to estimate.[58]

Domestic violence, and also child abuse, was to remain 'undiscovered' by the law until the 1970s. Writer and former activist Erin Pizzey did much to raise the profile of battered women. In *Scream Quietly or the Neighbours Will Hear*,[59] Erin Pizzey detailed the violent physical and sexual abuse suffered by women and the inadequacy of legal remedies to deal with the matter.

The criminal law

The criminal law which applies equally to violence within the home and violence outside of it, has proven inadequate in its application. While the law relating to assault through to murder would be vigorously applied in relation to strangers, the same did not apply to family members. Police traditionally, in the United Kingdom and elsewhere, have shown a marked reluctance to intervene in 'domestic' matters. Moreover, even where a victim of domestic violence is prepared to take action and co-operate in a prosecution, too often the woman later refuses to give evidence against her violent partner. To pursue criminal proceedings is also ineffective in so far as the majority of defendants in domestic violence cases are given non-custodial sentences only to return to their partners and inflict more violence in revenge for being taken to court. Where custodial sentences are passed, these are often of short

56 Section 142 provides a substitute s 1 of the Sexual Offences Act 1956, and provides, in part, that it is an offence for a man to rape a woman or another man, and that rape is committed if a man has sexual intercourse with a person (whether vaginal or anal) who at the time of the intercourse does not consent to it.

57 On the prevalence of domestic violence and the attitude of the police, see Morley, R and Mullender, A (1992) 6 International Journal of Law and the Family 265; Stanki, B 'Book review: *Women, Violence and Social Change*' (1993) Br J Crim 449.

58 *Op cit*, United Nations Report, fn 18, p 7.

59 *Op cit*, Pizzey, fn 31.

duration and have the consequence of further damaging the economic base of the family.

The civil law has also proved inadequate. As Erin Pizzey stated, a pot of black pepper in the pocket is of more use than an injunction when faced with a violent partner.[60] Pizzey was responsible for opening the first women's refuge, in Chiswick. As the refuge filled up, the local authority took her to court for overcrowding. Nor were women safe there: for partners would locate the refuge and attempt to attack their partners: but at least there was some safety in numbers, however overcrowded the accommodation. Pizzey's campaign led to the House of Commons Select Committee Inquiry into domestic violence.[61] The legislative consequence was the passage of the 1976 Domestic Violence and Matrimonial Proceedings Act, and, in 1978, to enable magistrates' courts to grant relief in cases of physical abuse, the Domestic Proceedings and Magistrates' Courts Act. The differing jurisdictional bases and differing remedies provided by differing courts led to substantial complexities in the law. Following detailed Law Commission scrutiny, and its recommendations for reform of the law, the Family Homes and Domestic Violence Bill was introduced into Parliament in 1994. That Bill was lost in 1995, following acrimonious parliamentary debates. The current law is now found in Part IV of the Family Law Act 1996.[62]

The Family Law Act 1996 now provides a unified jurisdiction and unified remedies of the High, county and magistrates' courts. However, while the threshold criteria for a non-molestation order is relatively low, that order may be insufficient to secure the safety of victims of violence. The English Law Commission, in illustrating the English threshold criteria for legal intervention in domestic violence – molestation – defines molestation as encompassing a range of relatively minor incidents which, when their effect on the victim is considered, justify legal action:

> ... [conduct which] extends to abuse beyond the more typical instances of physical assault to include any form of physical, sexual or psychological molestation or harassments which has a serious detrimental effect upon the health and well-being of the victim ... Examples of such 'non-violent' harassment or molestation cover a wide range of behaviour. Common instances include persistent pestering and intimidation through shouting, denigration, threats or argument, nuisance telephone calls, damaging property, following the applicant about and repeatedly calling at her home or place of work. Installing a mistress into the matrimonial home with a wife and

60 *Op cit*, Pizzey, fn 31.

61 See HC 553 (1974–75).

62 For analysis of the former law, see Cretney, S and Masson, J, *Principles of Family Law,* 5th edn, 1990, London: Sweet & Maxwell; for analysis of the current English law, see Cretney, S and Masson, J, *Principles of Family Law,* 6th edn, 1997, London: Sweet & Maxwell, Chapter 10.

> three children, filling car locks with superglue, writing anonymous letters and pressing one's face against a window whilst brandishing papers ...[63]

Where an order requires one partner to vacate the family home, in order to provide a safe environment for victims of violence and their children, the threshold criteria is more stringent, and reveals a tension in the law between protecting the physical integrity of victims of violence, and the property rights of the abuser. This tension is more marked when considering the differing manner in which the law applies to married spouses and unmarried cohabitants, privileging the former over the latter. Also privileged by law are those spouses or cohabitants who have either 'matrimonial home rights' and/or a legal or equitable interest in the property in question. The tension between personal protection and property rights is one which has long been evident in English law, and which emphasises the priority which property rights are accorded. Under the reformed law, exclusion orders against married partners may be 'for a specified period, until the occurrence of a specified event or until further order',[64] where the married applicant or cohabitee has a legal entitlement to occupy. However, in the case of cohabitees or former cohabitees, applicants who have no occupation entitlement in law, may be granted an order which – irrespective of the nature or duration of the relationship – may last no longer than 12 months. The emphasis on the protection of property rights is perhaps unsurprising, given the historical antecedents of a married woman's incapacity to own and manage property,[65] and more generally, the various legal discriminations against women which survived until the latter half of this century.[66] However, given the 'discovery' of the extensive and pervasive fact of domestic violence, in which women and children are most commonly the victims, the enduring privileging of property rights by law, over personal protection of victims of violence, is one factor which suggests that legislators do not regard domestic violence with the seriousness that the phenomenon demands.

Reconceptualising 'domestic' violence

The term 'domestic violence' undermines the significance of the suffering inflicted on the victim. The word domestic implies privacy – that it is a personal matter for the individuals concerned – and non-State responsibility for the actions within the private sphere. Yet domestic violence which ensures the continued dominance of men – physically, economically and

63 *Report on Domestic Violence and Occupation of the Family Home,* Law Com No 107, 1992, para 2.3.

64 Family Law Act 1996, s 33(10).

65 Corrected in 1882 by the Married Woman's Property Act.

66 See, further, Chapter 2.

psychologically – over women, denies women the right to equality and equal respect as human being. Domestic violence reconceptualised as a violation of human rights, *women's rights,* resonates with more force than does domestic violence. Nor is this reconceptualisation a matter of regrettable essentialism which has so bedevilled recent feminist theory. Gender-based violence is specifically and predominantly violence against women. That this violence takes many forms, and may be culturally specific, does not reduce the force of the argument, supported by much international data, that gender-based violence is violence against women by men.

It is in the international arena that feminist international lawyers have made and continue to make progress in reconceptualising violence against women as a violation of human rights and sexual discrimination.[67] In addition, feminist international law scholars are advancing the case for the imposition of State responsibility for violence against women. Under international law, States have responsibility for both unlawful actions and for failure to provide remedies for unlawful actions. By failing to provide adequate protection of women's human rights, the State, it is argued, assumes responsibility for the violations of human rights experienced by women in the home.[68]

Female victims and the legal system

The legal system has much to answer for in regard to the treatment of female victims of violence and in relation to women who kill their partners. Whether the inquiry is into the personnel of the legal profession, or attitudes towards female victims of crime or defendants in the criminal process, the legal system reveals itself as steeped in tradition.

As seen in Chapter 2, the broad picture of the legal professions in (for example) Australia, Canada and the United Kingdom is one of a primarily male, white, middle-class institution. In England, constructive – if belated – attempts are being made to redress the imbalance between gender and race. The Policy Studies Institute undertook research in 1995 on behalf of the Law Society's research and policy planning unit. The latest research confirms that sexual and racial discrimination remains rife. In 1995, of 63,628 practising solicitors in England and Wales, a mere 18,417 were women, and only 70

67 See, generally, Cook, R (ed), *Human Rights of Women: National and International Perspectives,* 1994, Pennsylvania: Pennsylvania UP.

68 See, in particular, Charlesworth, H, 'What are "women's international rights"?'; Romany, C, 'State responsibility goes private: a feminist critique of the public/private distinction in international human rights law'; Copelon, R, 'Intimate terror: understanding domestic violence as torture'; Cook, R, 'State accountability under the Convention on the Elimination of All Forms of Discrimination Against Women'; Roth, K, 'Domestic violence as an international human rights issue', in Cook, *ibid*.

practising solicitors were from ethnic minorities. When figures for partnerships are examined, the Young Women Lawyers group have found that only 25 per cent of new partners in 1995 were women; a drop from 1985 when 44 per cent of new partnerships were granted to women. At the Bar, the Bar Council has endorsed a new 'equality code' which is aimed at tackling discrimination within the profession.[69]

The absence of a profession which is balanced on gender and racial lines has inevitable consequences for women who find themselves dealing with law. The continued dominance of the profession by middle-class, middle-aged, white males – the majority of whom it may reasonably be assumed are conservative in outlook (if not political party) ensures a continuance of the traditional stereotypical attitudes to women. With this background in mind, attention can now be turned to the manner in which the legal system is imbued with patriarchal attitudes.

Consistent with the treatment of women as the 'other', as 'different', 'unequal' and subordinated in patriarchal society, the legal process itself reveals evidence of biases being reflected in legal judgments; in defences which the law permits to be advanced for certain crimes, and in the sentencing of women.

The failure of traditional defences to a charge of murder for women victims of violence

Lack of guilt, the failure to prove either the *actus reus* or *mens rea* for murder; provocation and self-defence represent the traditionally accepted defences to a charge of murder which will result in an acquittal. Self-defence, however, is rarely, if ever, successful in relation to women who kill their violent partners. Under English law, self-defence can succeed only if, in response to an imminent danger, the attacker responds with force of a degree which has 'reasonable proportionality' to the perceived danger. Thus, women victims of prolonged violence who wait until there is a 'safe' moment in which to attack – often when the partner is asleep or in a drunken stupor – cannot fit the test of imminent danger. In addition, the partial defences of provocation or diminished responsibility are available to reduce the charge from murder to manslaughter and thus relieve, under English law, the automatic life sentence. The failure of self-defence as a defence to murder for battered women goes some way to explain the significance of provocation or diminished responsibility.[70]

69 (1995) *The Times*, 14 November.

70 Self-defence succeeded in the Canadian case of *R v Lavallee* [1990] 1 SCR 852, discussed further below.

However, from a feminist perspective, these defences have also proved inadequate, and have resulted in women being found guilty of the crime of murder in circumstances where, were the criminal justice system inclusive of and sensitive to women's particular situations, especially in relation to circumstances of domestic violence, a different result would have been achieved.

Provocation

A plea of provocation or diminished responsibility, where successful, reduces the charge against the defendant from one of murder, which carries an automatic life sentence under English law,[71] to one of manslaughter, for which the sentence lies in the judge's discretion.[72] In order successfully to plead provocation[73] as a defence, the defendant must prove that she or he suffered a 'temporary and sudden loss of self-control so that he or she was no longer "master of her or his own mind"'. In *R v Duffy*,[74] however, a woman killed her husband, whilst he was asleep, having previously had a violent quarrel and endured years of violence from him. Devlin J, having defined provocation, went on to rule that where a woman waited until the opportunity arose, rather than reacting immediately, this amounted to a killing for revenge – not provocation. Where provocation pertains, the defendant has the right to have the issue put to the jury.[75] However, whether that matter is put to the jury in turn depends on whether the trial judge accepts that there is evidence of provocation in the facts before the courts.

A build-up of tension resulting in a delayed reaction to the violence suffered (cumulative provocation) is not considered a defence under English law. However, in Jeremy Hordern's analysis, the law as expressed in *R v Duffy* represented a restriction of the law of provocation, which previously could have accommodated 'slow-burn' cases. Hordern writes:

71 A House of Lords Select Committee on Murder and Life Imprisonment in 1989 recommended that the mandatory life sentence for murder be abolished. That recommendation has been supported by two Lord Chief Justices, Lord Lane and Lord Taylor.

72 Subject to the requirements of s 1 of the Murder (Abolition of Death Penalty) Act 1965.

73 Homicide Act 1957, s 3, provides that: 'Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.' The burden of proof is on the prosecution to prove beyond all reasonable doubt that the case is not one of provocation.

74 [1949] 1 All ER 932.

75 *R v Ballard* [1957] AC 635.

> The root of the trouble and misunderstanding has been the recent failure to recognise that the law's conception of anger has never always been loss of self-control alone, but has historically included outrage.[76]

Accordingly, the 'person who boils up when her long-term violent abuser is asleep in his chair may well be acting out of provoked outrage, despite the absence of any immediate provocation. Such a person's anger would always historically have fallen within the scope of the defence'. Thus, what is needed, Hordern argues, is a reinstatement of the former legal pre-*Duffy* position, with the substitution 'of references to provoked angry retaliation in place of references to provoked loss of self-control in the Homicide Act 1957, section 3'.[77]

Cumulative provocation – or slow-burn, or provoked angry retaliation – has been defined by Martin Wasik as involving:

> ... a course of cruel or violent conduct by the deceased, often in a violent setting, lasting over a substantial period of time, which culminates in the victim of that conduct ... intentionally killing the tormentor.[78]

Accordingly, when women victims wait until the moment is safe before reacting to their ordeals, the provocation they have suffered – over months or years – cannot be deemed to be within the English legal definition of provocation.[79] In *Ibrams and Gregory*,[80] for example, a time lapse of seven days between the act of provocation and the woman's attack, resulted in the judge withdrawing the issue of provocation from the jury.[81] What is revealed in an analysis of the law of provocation is that the law is constructed according to male criteria – the law excludes the particular circumstances in which women victims may kill, namely an accumulation of fear and hatred which is reacted to, not 'in the heat of the moment' following a particular violent incident, but when the woman victim feels it is safe to react to her treatment. This the law does not recognise – for the law is gendered, and accordingly defines provocation in relation to male standards of equal physical strength and fails to recognise that domestic violence – sexual or otherwise – consistently perpetrated, can result in a 'slow-burn' reaction which will only be given

76 Hordern, J, *Provocation and Responsibility*, 1992, Oxford: Clarendon, p 190.

77 *Ibid*.

78 Wasik, M, 'Cumulative provocation and domestic killing' [1982] Crim LR 29.

79 The position in Australia differs in the significant respect that 'cumulative provocation' may be considered as sufficient provocation to murder. See, generally, Kennedy, H, *Eve Was Framed*, 1992, London: Vintage.

80 (1982) 74 Cr App R 154.

81 A fresh approach was evident in *R v Ahluwalia* [1992] 4 All ER 889, discussed further below.

physical expression when the victim of that violence is confident of her own physical safety.[82] The criminal law has been fashioned, in relation to self-defence to murder, on the paradigm which relies on violent confrontation, generally spontaneous, between two equally physically strong males. It does not, conventionally, encompass situations in which a woman – after the sustained physical and psychological pressure of violence within the home – finally snaps and, from a position of relative safety (typically when he is asleep), kills her violent partner.[83]

In Jeremy Hordern's analysis, the law of provocation should be abolished. From a feminist perspective, he argues that the mitigating effect of a successful plea of provocation, 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 ...'.[84] The role which provocation should play in law lies, for Hordern, not in its role as a defence, but as a mitigating factor to be considered in sentencing, provided only that English law would finally be reformed to abolish the automatic life sentence for murder.

Diminished responsibility

A person shall not be found guilty of murder where a plea of diminished responsibility is successful.[85] Whereas a defence of provocation requires that the defendant justify her action and meet the masculine standard of 'reasonableness', and 'immediacy', a defence of diminished responsibility

82 A relatively early reform of the law relating to provocation occurred in New South Wales, Australia. Fuelled by feminist activism following the prosecution of women for the murder of their violent husbands, the Crimes Act 1900 (NSW) was amended, in 1982, to provide that:
For the purpose of determining whether an act or omission causing death was an act done or omitted under provocation ... there is no rule of law that provocation is negatived if:
(a) there was not a reasonable proportion between the act or omission causing death and the conduct of the deceased that induced the act or omission;
(b) the act of omission causing death was not an act done or omitted suddenly; or
(c) the act or omission causing death was an act done or omitted with any intent to take life or inflict grievous bodily harm.

83 For analysis of the case law, see Hordern, J, 'Sex violence and sentencing in provocation cases' [1989] Crim LR 546; *op cit*, Hordern, fn 76, Chapter 9; Edwards, S, 'Battered women who kill' (1990) 5 NLJ 1380; *op cit*, Edwards, fn 30, Chapters 6, 8, 9.

84 *Op cit*, Hordern, fn 76, p 194.

85 Homicide Act 1957, s 2(1), provides that: '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 an 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 acts and omissions in doing or being a party to the killing.' The burden of proof lies with the defence, and the standard of proof is the balance of probability.

involves the court accepting that the defendant's mental state was such that she was not responsible for her actions, and hence there is no issue of justification before the court.[86] The issue before the court becomes whether, at the time of the 'crime', the defendant's mental state was impaired. In determining this, the court considers not just mental illness or insanity, but the whole personality of the defendant, including her 'perception, understanding, judgment and will'.[87] Accordingly, expert psychiatric evidence will be adduced in order to determine the defendant's mental state, and this evidence may include the defendant's depression induced by domestic violence.[88] Susan Edwards, citing research findings,[89] states that 'pleas of diminished responsibility are accepted by the prosecution in about 80 per cent of cases'.[90] Where the prosecution and defence differ over the plea, the matter must be established by the court. Where this occurs, according to research, the jury rejected the defence evidence and convicted on a charge of murder in 64 per cent of cases.[91]

Whether women should be encouraged to have recourse to diminished responsibility is a difficult question. On the one hand, pleading diminished responsibility has led to a number of successful defences, resulting in acquittal or lesser sentencing, and it is thus understandable that legal advisers should encourage women to plead diminished responsibility, especially given the relative lack of success in relation to self-defence or provocation. On the other hand, pleading diminished responsibility – in cases in which the woman's mental state has been induced by the violence of her partner – places the emphasis not on the wrongdoing of the violent partner, but on the woman's weakness and fragility. Diminished responsibility represents an *excuse* for a killing, but not exoneration for that killing as in the case of self-defence or provocation. Diminished responsibility also, at a conceptual level, reinforces the construction of woman as irrational, as the 'Other'.

86 Battered woman syndrome, on which see below, is now recognised as being within the British classification of mental diseases which enable the defendant to claim diminished responsibility: see *R v Hobson* (1997) *The Times*, 25 June, in which a murder conviction was quashed and a retrial ordered in light of fresh psychiatric evidence which suggested that the defendant was suffering from battered woman syndrome at the time of the murder, which occurred before the recognition of battered woman syndrome.

87 *Op cit*, Edwards, fn 30, p 386.

88 See *R v Irons* (1995) 16 Cr App R (S) 46, cited in Edwards, *op cit*, fn 30.

89 Conducted by S Dell: see Dell, S, *Murder Into Manslaughter,* 1984, Institute of Psychiatry, Maudsley Monographs, Oxford: OUP.

90 *Op cit*, Edwards, fn 30, p 387.

91 According to Susan Edwards, where the jury rejects unanimous medical evidence, the Court of Appeal may substitute a verdict of diminished responsibility: see *op cit*, Edwards, fn 30, p 389.

Recognising the impact of domestic violence

Law's failure in relation to women who kill their violent abusing partners, is a failure to give adequate weight to the social and political background to domestic violence, and to continue to develop the law in a gendered fashion, determined by male experience.[92] By ignoring the context in which the violence took place, and the disparity in the power relations between the partners, judges can continue to rely on gendered reasoning. Thus, questions which arise, and which are used against women defendants, are typified by questions such as 'why didn't she leave?', 'Why did she not seek a non-molestation or exclusion order?', 'Why did she not involve the police and invoke the criminal law to have her partner prosecuted?'. In other words, the questions raised all presuppose that women in constantly violent situations, at constant risk of violent sexual or other physical and psychological violence, retain the same capacity for autonomy as do men, and the same rationality and power which would enable them to escape from the situation. What has not been adequately understood and accommodated by the law, is the reality of the woman victim's circumstances. The victim may not have the means to leave. Alternative accommodation may not be available. In any event, it has been well documented for many years that women who leave are often pursued and subjected to further recriminatory violence, as are women who seek to escape by invoking the criminal justice system against their violent spouses.[93] Furthermore, the reasonableness of expecting a woman to escape from a violent relationship is negatived by evidence which supports the view that women who have sustained persistent violent abuse becomes passive, the victim has 'learned helplessness' and exists in a state of persistent chronic fear. Thus, notwithstanding the physical possibility of her escape, psychologically the victim of spousal abuse is frequently unable to act to protect herself by removing herself from her physical proximity to the abuser: she is suffering from 'battered woman syndrome'. Battered woman syndrome has been developed not as a discrete defence to a charge of murder, but in support for the traditional defences of self-defence, provocation and diminished responsibility.

Battered woman syndrome

Battered woman syndrome, a concept developed by American clinical psychologist Lenore Walker, explains the psychological effects of persistent long-term violence on women. The syndrome characteristically has three

92 It is instructive to note that the judgment in the landmark Canadian case of *R v Lavallee,* below, was drafted by a female judge.

93 See Wilson, M and Daly, M, 'Spousal homicide' (1994) 148 Juristat Service Bulletin, Canadian Centre for Justice Statistics.

phases: '(1) tension building, (2) the acute battering incident, and (3) loving contrition'.[94] Being forgiven, the violence recommences. By now, the woman's loss of self-esteem, depression and sense of helplessness have trapped her into a situation from which she is psychologically and hence physically unable to escape. As Lenore Walker records, over time 'the first phase of tension building becomes more common, and loving contrition, or the third phase, declines'.[95]

In Lenore Walker's study of 435 battered women, half of the women reported having been punched, two-thirds had suffered pushing, slapping, hitting and arm twisting, and a third of these reported having been choked or strangled. Others had been burned or attacked with knives or guns. Fifty-nine per cent had been forced into 'unusual sexual acts', and 75 per cent had been raped. A high proportion of the victims were also controlled through having no access to cash or bank accounts. Each of the victims had suffered what Amnesty International has labelled 'psychological torture': social isolation; exhaustion from deprivation of food and sleep; obsessive or possessive behaviour; threats; humiliation; administration of drugs and alcohol; induction of altered states of consciousness and 'indulgences' which 'maintained the woman's hope that the abuse would cease'.[96] The psychological consequence of the treatment received results in the victim's 'learned helplessness' – feelings of despair – and an inability to leave their abusing partners or seek other redress. Women who kill are women who finally react against the violence, not in the heat of the moment as a response to a triggering specific event, but in a violent action caused by the long term suffering of abuse and a final attempt to escape from their abuser. In Walker's research study, more than one-third of the victims had attempted to commit suicide, and a proportion of these had suddenly killed their abusing partners while in the very process of attempting suicide.

Learned helplessness, according to its author Martin Seligman, involves:

> [O]rganisms, when exposed to uncontrollable events, learn that responding is futile. Such learning undermines the incentive to respond, and so it produces a profound interference with the motivation of instrumental behaviour. It also proactively interferes with learning that responding works when events become controllable, and so produces cognitive distortions.[97]

In Charles P Ewing's analysis, battered women who kill, do so in 'psychological self-defence'. Ewing notes that:

94 Walker, L, *The Battered Woman Syndrome,* 1984, New York: Springer, p 95.

95 *Ibid*, p 101.

96 Ewing, C, *Battered Women Who Kill: Psychological Self-defence as Legal Justification,* 1987, Lexington Books, DC Heath, pp 8–9.

97 Seligman, M, *Helplessness: On Depression, Development and Death,* 1975, cited in Ewing, *ibid*, p 20.

> ... almost all battered women who kill claim to have done so to protect themselves from imminent death or serious bodily injury at the hand of their batterers.[98]

Thus, from a battered woman's perspective, the issue of killing her partner is not so much an issue of provocation, or diminished responsibility, but pure self-defence. It was this explanation on which Kuranjit Ahluwalia relied – she had not intended to kill her husband, or even inflict really serious harm on him – she wanted to stop him 'running after her'.

R v Ahluwalia, R v Thornton[99]

In England, two, now seminal, cases provided the catalyst for feminist demands for reform of the law of homicide. Those cases reveal the difficulties under which female defendants labour in establishing a defence to murder of their male partners under English law. In the case of *R v Ahluwalia,*[100] the defendant had suffered years of violent abuse at the hands of her husband, and under threat of a further attack, set fire to his bedding and killed him. Ahluwalia was convicted of murder in 1989. The defence of provocation failed. The court, however, having admitted psychiatric evidence[101] relating to battered woman syndrome, ordered a retrial. When the matter went on appeal to the Court of Appeal, on the basis that the trial judge had ignored the effect of battered woman syndrome, the Court of Appeal quashed the conviction for murder and substituted one of manslaughter. Evidence of battered woman syndrome was adduced, not under a plea of provocation, but under the plea of diminished responsibility.[102]

In the later case of *R v Thornton,*[103] a similar factual situation existed. Sara Thornton had also endured years of violence at the hands of her husband. When her partner threatened to kill her when she was asleep, Thornton went to the kitchen, selected and sharpened a knife, and attacked him. 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 by her husband.

98 *Op cit*, Ewing, fn 96, p 61.

99 [1992] 4 All ER 889; [1992] 1 All ER 306 and *(No 2)* (1995) NLJ 1888; (1995) *The Times,* 14 December; see, also, *R v Humphries* (1995) NLJ 1032.

100 [1992] 4 All ER 889.

101 For a feminist critique of expert evidence, see O'Donovan, K, 'Law's knowledge: the judge, the expert, the battered woman, and her syndrome' (1993) 20 JLS 427.

102 Ahluwalia was released, having served her prison term whilst awaiting appeal.

103 (1995) *The Times*, 14 December; (1995) 145 NLJ 1888.

On appeal, the Court of Appeal ruled, for the first time, that battered woman syndrome could be a relevant characteristic for the jury's consideration of a plea of provocation.[104]

The deficiency of English criminal law in relation to victims of domestic violence is all too apparent from the cases of Kuranjit Ahluwalia and Sara Thornton. The former 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 Sara Thornton's case, the Secretary of State for the Home Department referred the matter back to the Court of Appeal for retrial.

To date, notwithstanding the above cases, the English courts have been more cautious about admitting evidence in relation to battered woman syndrome than their Australian, Canadian or United States counterparts. Space precludes a substantial analysis of the case law in each jurisdiction, nevertheless an outline of the major case law is instructive.

Battered woman syndrome in Australia and Canada

R v Lavallee:[105] *success for self-defence and battered woman syndrome*

Angelique Lavallee killed her partner by shooting him in the back of the head. Having endured persistent violence, her partner had threatened to kill her once guests at a party had left. Rather than wait for the inevitable attack, Lavallee killed him. On the basis of existing precedent, self-defence would not succeed, given that the threatened attack was neither imminent nor in the process of being inflicted. The Supreme Court, having admitted expert psychiatric evidence on Lavallee's state of mind, ruled that the defendant's actual state of mind – and not that of the 'reasonable man' – must be considered and given weight to. By broadening the concept of reasonableness to include the actual psychological state of the victim of violence whose control finally broke, the Court was able to depart from strict precedent and to rule that battered woman syndrome was capable of inducing a mental state in which the action of the woman was reasonable *within the context of the violence suffered by her*.[106] The Supreme Court bench comprised seven judges, including three women, of whom Madam Justice Bertha Wilson gave the leading judgment of the Court. Wilson J made it clear that battered woman syndrome had to be recognised in order to correct the gender bias in the

104 *Op cit*, *R v Thornton (No 2)* , fn 99.

105 *Op cit*, *R v Lavallee*, fn 70.

106 See Young, A, 'Conjugal homicide and legal violence: a comparative analysis' (1993) 31 Osgoode Hall LJ 761.

criminal law, and that battered woman syndrome enabled the standard of reasonableness required by law to be expanded to include women's experiences. Furthermore Wilson J stated that recognition of battered woman syndrome highlighted the fact of domestic violence, highlighting which was necessary to counteract the impression given by application of the gendered defences to murder that domestic violence was acceptable. In Elizabeth Sheehy's analysis of 10 reported cases between 1991 and 1993, following *R v Lavallee,* in which battered woman syndrome was relied on in defence, in eight cases the evidence was used to support a plea in mitigation of sentence; in one evidence of battered woman syndrome was adduced which negatived the accused's *mens rea;* in the tenth case the plea failed on the basis that the defendant could have called for third party help and did not have to rely on self-help.[107]

Following *Lavallee,* battered woman syndrome has been recognised extensively by the Australian courts.[108] However, as Julie Stubbs and Julia Tolmie demonstrate in their careful analysis of the case law, there have been revealed a number of difficulties with the application of battered woman syndrome to traditional defences to murder.[109] In the authors' analysis, these may be summarised as follows. First, battered woman syndrome overemphasises the psychology of the defendant, and as a result underemphasises the violent context in which the attack took place. Secondly, the syndrome reinforces 'notions of women's irrationality or emotional instability', thereby introducing 'the danger of developing a new stereotype by which the battered woman is to be measured in such cases' and reinforcing 'the notion that battered women as a group share certain psychological characteristics'.[110] The danger of essentialising battered women's psychological states is, in the authors' analysis, particularly dangerous when a battered woman is stereotyped in a manner which ignores racial and cultural factors. In relation to Aboriginal and Torres Straight Island women, for example, Stubbs and Tolmie explain, Aboriginal women – contrary to popular mythology – are frequently the heads of households, and responsible for the economic well being of the family. Accordingly, as the case law demonstrates, Aboriginal women are often assertive, able to seek help and to take positive steps to enlist, albeit often unsuccessfully, the aid of State agencies for their protection. Where the battered woman has taken such positive, protective

107 See Sheehy, E, 'Battered woman syndrome: developments in Canadian law after *R v Lavalee*', in Stubbs, *op cit*, fn 29, p 175.

108 In South Australia, New South Wales, Tasmania, Queensland, the Australian Capital Territory, Western Australia and the Northern Territory. The first case to admit battered woman syndrome evidence was *Runjanjic and Kontinnen* (1991) 53 A Crim R 362.

109 Stubbs, J and Tolmie, J, 'Battered woman syndrome in Australia: a challenge to gender bias in the law?', in Stubbs, *op cit*, fn 29, Chapter 9.

110 *Op cit*, Stubbs, fn 29, p 199.

steps, it is the more difficult for that woman to be characterised as in a psychological state of helplessness. Furthermore, it is demonstrated that Aboriginal women suffer from particular forms of discrimination in society, for example lower educational and employment opportunities. However, as the case of *Hickey*[111] demonstrates, battered woman syndrome was admitted in evidence, with her low educational level and unemployment being cited in support of her 'personal inadequacy', without those factors being placed within the wider context of circumstances shared by a large proportion of Aboriginal women. Moreover, although IQ tests are used in the psychological assessment of the defendant, these tests are themselves culturally specific, and thus not necessarily reliable guides in relation to Aboriginal or Torres Straight Islander women.

Women on trial: rape

As has been well documented by feminist legal scholars, although the victim of the crime of rape is the woman, the victim of the legal system in any prosecution for rape is the victim herself.[112] While rape is clearly an aspect of gender-based violence, rape – representing that most intimate and destructive form of violence – has formed a specific site of inquiry for feminist scholarship. Rape, as with all gender-orientated violence, is a manifestation of power. Rape controls women. The social fact of rape not only subordinates its victims, but also controls all women through the instillation of fear in women, irrespective of age, race or class. As Susan Brownmiller expresses it:

> ... the incidence of actual rape combined with the looming spectre of the rapist in the mind's eye ... must be understood as a control mechanism against the freedom, mobility and aspirations of all women, white and black.[113]

Furthermore:

> 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 sudden swiftness born of harmful intent.[114]

In the case of a man on trial for alleged murder or rape of a woman, the conduct, lifestyle and personality of the woman are central to the question of guilt or innocence of the man. If the English legal system has hitherto been

111 Unreported, Supreme Court New South Wales, 14 April 1992, discussed in Stubbs and Tolmie, *op cit*, fn 109.

112 See, eg, Duncan, S, 'The mirror tells its tale: constructions of gender in criminal law', in Bottomley, A (ed), *Feminist Perspectives on the Foundational Subjects of Law*, 1996, London: Cavendish Publishing.

113 Brownmiller, S, *Against Our Will: Men, Women and Rape*, 1975, New York: Simon & Schuster, p 255. (See *Sourcebook*, pp 398–404.)

114 *Ibid*, Brownmiller, p 209.

either blind or unsympathetic to the problems of women trapped into violent and ultimately fatal relationships, the system demonstrates an unremitting harshness when the issue of liability for rape is considered. As with victims of 'ordinary', 'domestic' violence, rape victims are themselves on trial in the courtroom. The issue is not whether intercourse took place against a woman's will, but whether the woman did, or did not, consent to sexual intercourse. Thus, the woman's mental attitude, the issue of consent, not the sexual intercourse forced on her by the defendant, lies at the heart of rape trials. As students of English criminal law will know, in rape prosecutions the crucial, determining factor is the issue of whether or not the victim consented to sexual intercourse. Where consent lies, no conviction may follow. Accordingly, notwithstanding the prosecution's belief that there is a case to answer, it is not so much the mind of the accused which is at issue, but rather the mind of the victim. However, as will become clear, in operation the English criminal justice system, in evaluating the question of the woman's consent, focuses on whether or not the defendant held an 'honest belief' as to the woman's consent or non-consent. This test reduces the centrality of the issue of the victim's true consent, and elevates the issue of the man's belief, thereby underemphasising the experience of the victim. The criminal justice system once again victimises the injured party. This point is reinforced by the occasional (but too frequent) dicta of judges which suggests that in some way the woman victim has acted (or dressed) in a manner which suggests an element of 'contribution' to the offence.[115]

Traditionally under English common law, lack of consent could only be proven where the woman had sustained physical injury, or by evidence of resistance, fraud or fear. In *R v Camplin,*[116] for example, the victim alleged that she had been drugged with alcohol: the court ruled that the relevant legal test for liability was not whether or not the intercourse took place 'against her will', but rather 'without her consent'. The issue of fraud negativing consent was considered in *R v Linekar,*[117] in which it was emphasised that it was the absence of consent, not the issue of the fraudulent acquisition of consent, which prevailed.

Two principal questions fall for answer in rape trials: first, did the woman consent; secondly, did the defendant believe that she was consenting. The current law on consent derives from *R v Morgan,* decided ultimately by the House of Lords.[118] Under English law, the alleged rapist does not have to establish that he *reasonably believed* that the woman was consenting, rather the

115 Consider, eg, Sir Melford Stevenson's comment that the victim, who had been hitch-hiking, had been 'asking for it', and the rapist received a suspended sentence. See *op cit,* Kennedy, fn 79, p 120.

116 (1845) 1 Den 89; ER 169.

117 [1995] Crim LR 320.

118 [1976] AC 182.

legal test is, did the defendant have an *honest belief, irrespective of its reasonableness,* that the woman was consenting. In *Morgan,* the husband had returned home with three other men, with the intention that each would have sexual intercourse with his wife.[119] The other men had been told that his wife would be a 'willing partner', but that they could expect her to resist sexual intercourse. The House of Lords, abandoning law's usually tenacious hold on the concept of reasonableness as the central criterion for liability, ruled that provided the belief in consent was honest, there was no liability in law for rape, *even where* the woman was not consenting.[120]

In Sheila Duncan's analysis, the criminal law of rape denies women subjectivity and privileges the man as the subject of law, to the exclusion of the woman:

> This is the literal and symbolic construction of the female as other and the man as desiring subject. Mrs Morgan was not consenting, the jury and both appeal courts accepted that, but the defendants were allowed to legitimately construct consent on the word of her husband and there was *nothing* she could do to undermine this.[121]

Moreover, as Sheila Duncan discusses, the law relating to consent to rape is very different from that applying to consent to other sexual acts. In *R v Brown,*[122] the House of Lords ruled that consent to participate in sexual activities – in this case sado-masochism – could not be given where such activities cause physical harm. One cannot consent to being assaulted, even where one may wish so to be, unless the harm caused is 'transient or trifling'.[123] In Duncan's analysis:

> In respect of visible violence outside of that very limited space [ie 'manly sports', 'innocent horseplay'] a male subject will not be allowed to consent, just as in the very considerable space for heterosexual male sexual violence, the law does not in its construction of rape allow the female other not to consent.[124]

The 1994 amendment to the Sexual Offences Act 1956[125] defines rape in gender-neutral terms for the first time.[127] Notwithstanding revised definitions, rape remains a gender-dependent offence. First, there is the

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119 Morgan was charged with aiding and abetting rape, since before 1991 a husband could not be prosecuted for the rape of his wife.

120 For a full analysis of *Morgan*, see Duncan, S, 'Law as literature: deconstructing the legal text' (1994) 5.1 Law and Critique; see, also, *op cit*, Duncan, S, fn 112. (See *Sourcebook*, p 186.)

121 *Op cit*, Duncan, fn 112, p 183.

122 [1994] 1 AC 212.

123 *R v Donovan* [1934] 2 KB 498.

124 *Op cit,* Duncan, fn 113, p 187. See, also, Duncan, S, 'Law's sexual discipline: visibility, violence and consent' (1995) 22.3 JLS 326.

125 Criminal Justice and Public Order Act 1994, s 142.

126 Canada and some jurisdictions in the United States have also adopted gender-neutral definitions of rape.

concentration on whether or not the woman did, or did not, consent – rather than concentration on the man's *actus reus* and *mens rea.* Secondly, while section 2 of the Sexual Offences (Amendment) Act 1976, as amended, prohibits questions being posed as to the victim's past moral character and sexual behaviour, section 2(2) undermines this prohibition by permitting a judge to waive the rule on an application made, in the absence of the jury, to him by the defence, on the basis that it would be 'unfair to the defendant to refuse to allow the evidence to be adduced or the question to be asked'. It has been established in one study that of 45 rape trials, an application was made in 40 per cent of cases.[127] So relaxed has the judicial attitude been to application under sub-section 2, that Jennifer Temkin has commented that in rape cases it 'appears all too often to have given defence counsel a free rein'.[128] Whereas the issue of a woman's past 'moral character' may have some relevance to the question of the plausibility of the man's assertion that the woman consented and as to whether the woman can plausibly be believed – the 'credit' of her story – it can have no bearing whatsoever on whether or not the woman did in fact consent to the alleged offence. The blurring of the lines between 'credit' and the main issue has, however, been demonstrated time and time again by the English Court of Appeal.[129] It is for reasons such as these that Lisa Longstaff and Anne Neale call for 'a change in priorities at every stage of the criminal justice system', including the removal of the right to raise the victim's past sexual history, in order to emphasise 'that in rape cases, consent is the issue'.[130]

The right of the defendant to cross-examine his accuser has been regarded as an important constitutional right. The exercise of that right, however, entails considerable costs, emotional and psychological costs for the victim of rape, and represents her further humiliation, heaping trauma caused by legal procedure on to the trauma of rape. In one instance in 1996, the alleged rapist cross-examined his victim in court for six days, wearing the same clothes as he had in the attack. In November 1997, another defendant forced the victims of a double rape attack to relive their experience.[131] The 1991 Criminal Justice Act provided for the protection of victims of child abuse by removing the right of suspects to cross-examine their victims: the Home Secretary is now considering how similar protection could be given to victims of rape.

Moreover, judicial reactions to rape victims have included breathtaking illustrations of traditional patriarchal attitudes, which indicate that the male

127 Adler, Z, *Rape on Trial*, 1987, London: Routledge, p 73.

128 Temkin, J, 'Sexual history evidence – the ravishment of section 2' [1993] Crim LR 3.

129 See, eg, *R v Redguard* [1991] Crim LR 213; *R v Barnes* [1994] Crim LR 691; *R v SMS* [1992] Crim LR 310; *R v Said* [1992] Crim LR 433.

130 Longstaff, L and Neale, A, 'The convicted rapist feels unlucky – rarely guilty' (1997) *The Times,* 18 November.

131 He was sentenced to a total of 21 years' imprisonment.

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.[132] She cites Sir Melford Stevenson being lenient in sentencing a rapist on the basis that the victim, a 16 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 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'.[133, 134] Moreover, judicial ambivalence towards the issue of consent was apparent in the direction to the jury by Judge Wild 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.[135]

What is revealed by such judicial comments is the extent of prejudice against women on the part of the judiciary – as if sex, consensual or not – is, in their minds, 'what women are for'. Such remarks evidence the fact that women are not regarded as equal citizens with equal rights and entitlements to privacy, security and respect under the law. This point is also borne out when considering the position of married women in relation to rape by their husbands.[136]

In the next chapter, feminist analyses of pornography and prostitution are considered. While pornography has been the major focus for feminist debate, prostitution also raises a number of difficult issues. Both pornography and prostitution raise their own particular problems for feminist analysis. Both, however, share a common identity – involving potentially or actually physical and sexual violence against women, and conceptualising women as products for male consumption.

132 See *op cit*, Kennedy, fn 79.

133 See *op cit*, Kennedy, fn 79, pp 120–21.

134 More recently, a judge apologised for a remark made 'bad taste', when he likened a victim's ordeal of forced oral sex to being in the dentist's chair. Another judge rebuked a 14 year old victim of rape for 'sulking' when she had difficulty in giving evidence. However, Lord Justice Henry, who heads the training of the judiciary, has defended the work of judges in handling rape cases, pointing out that judges receive considerable training in dealing with such sensitive cases: (1997) *The Times,* 9 December 1997.

135 *Op cit*, Kennedy, fn 79, p 111.

136 However, the case for allowing cross-examination by the accused is supported by civil liberties lawyers: John Wadham, Director of Liberty, the civil rights group, has stated that '... there is a fundamental right of trial in the open where the defendant can confront his or her accuser. That should not be given away lightly' (1997) *The Times,* 18 September 1997.

CHAPTER 12

PORNOGRAPHY AND PROSTITUTION

INTRODUCTION

Pornography and prostitution raise a number of similar issues for feminist jurisprudence. In this chapter, the differing interpretations of pornography and prostitution are considered. While the major focus of the discussion is pornography, the arguments concerning prostitution are also introduced.

PORNOGRAPHY

Few issues have engaged such a wide range of feminist scholars in debate as pornography, which has proven a difficult and contentious issue on which little consensus has been reached. For radical anti-pornography feminists, pornography is the graphic representation of woman's inferior status, and thus needs to be exposed for what it is: not sexual imagery for pleasure, but a political statement on woman's equality. For others, pornography – with its difficulties of definition, its different interpretations, the problems of evaluating its impact, and the dangers of feminist theorising against pornography, make pornography an inappropriate and damaging site of inquiry in the pursuit of a society free from sexual discrimination. The complexity inherent in the pornography debate reflects differing political persuasions and philosophies, some of which intersect and interact with (differing) feminist approaches, others which stand opposed to the feminist quest for freedom from the adverse effects of pornography. Conservatism, liberalism and feminism are uneasy protagonists in the debate. In the discussion which follows, the differing approaches are examined.

The evolution of the pornography industry

Explicit depictions of sexuality – pornographic or not – have existed for as long as the human race has had the ability to create lasting images, whether in stone carvings or artefacts. Research demonstrates that, from as early as the sixth to the fourth centuries BC, sexually explicit materials were being produced in Athens and Attica.[1] In the sixteenth century, Italian artist Pietro

1 See Richlin, A (ed), *Pornography and Representation in Ancient Rome*, 1992, New York: OUP.

Aretino produced sexually explicit sonnets illustrated with engravings.[2] It was, however, with the development of technologies for the reproduction of the printed word and images in the late eighteenth century that the production of pornographic representations exploded. The Marquis de Sade, 1740–1814, has been attributed with the dishonour of being the 'world's foremost pornographer': 'His life and writing were of a piece, a whole cloth soaked in the blood of women imagined and real.'[3] The development of photographic techniques in the nineteenth century, the evolution of videos in the 1970s and, in the 1990s, CD-Rom and the Internet, are all media through which pornography circulates.

In 1979, the United Kingdom's *Report of the Committee on Obscenity and Film Censorship*[4] recorded that the circulation figures in the United Kingdom and Eire[5] (defined as retail sales) for five monthly magazines surveyed[6] amounted to 913,848 copies.[7] The readership was deemed to be some five per cent of the adult population, with men from all social classes accounting for 80 to 90 per cent of the 'readership'.[8] In the United States of America in 1981, an estimated $7 billion profit – or three per cent of all corporate profits – were attributable to sales of pornographic 'literature'.[9] In 1990, estimates for sales of monthly pornography magazines (and excluding the video market) were 2.25 million copies, although since some publishers do not release figures this figure may well be an underrepresentation.[10]

Defining pornography

Literally defined, pornography has been argued to mean 'writing about whores, prostitutes or female captives'. Derived from Greek, *porno* means whores; *graphos* means writing.[11] Pornography is thus distinguishable from both erotica (deriving from the Greek *eros* meaning passionate love), images

2 See Hunt, L, *The Invention of Pornography*, 1993, New York: Zone.

3 See Dworkin, A, *Pornography: Men Possessing Women*, 1981, London: The Women's Press, Chapter 3, p 70. (See *Sourcebook*, pp 443–50.)

4 The Williams Committee, *Report of the Committee on Obscenity and Film Censorship*, Cmnd 7772, 1979, London: HMSO.

5 Club International, Mayfair, Men Only.

6 Club International, Mayfair, Men Only, Penthouse, Playboy.

7 See Appendix 6 of the *Report*, *ibid*, fn 4.

8 See the *Report*, *ibid*, fn 4, Appendix 6, paras 18–52.

9 See Russo, A, 'Conflicts and contradictions among feminists over issues of pornography and sexual freedom' (1987) 102 Women's Studies International 103.

10 Cohen, N, 'Reaping rich rewards from the profits of pornography' (1989) *The Independent*, 19 December, cited in Itzin, C (ed), *Pornography: Women, Violence and Civil Liberties: A Radical New View*, 1992, Oxford: OUP, p 39.

11 See Steinem, G, 'Erotica and pornography: a clear and present difference' (1978) MS Magazine, repr in Dwyer, S, *The Problem of Pornography*, 1995, Belmont, California: Wadsworth; *ibid*, Dworkin, fn 3, pp 199–200.

and materials concerned with ideas of 'positive choice, free will, the yearning for a particular person'[12] and obscenity, the legal umbrella term under which pornography is regulated, which may be far broader in scope than pornography. After all, articles may be 'obscene' without necessarily depicting women as 'whores or female captives'.[13]

Legal definitions

Under English law, as in the United States and Canada, legal regulation is concerned neither with 'erotica', nor with pornography, *per se*, but rather with *obscene* materials. An article[14] is 'obscene' if:

> ... its effect ... is ... such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.[15]

As defined by the Williams Committee on Pornography and Obscenity, pornography is a representation which:

> ... combines two features: it has a certain function or intention, to arouse its audience sexually, and also a certain content, explicit representations of sexual material (organs, postures, activity, etc). A work has to have both this function and this content to be a piece of pornography.[16]

Alternatively, as defined by section 163(8) of the Canadian Criminal Code:

> For the purposes of this Act, any publication a dominant characteristic of which is the undue exploitation of sex, or of sex and any one or more of the following subjects, namely, crime, horror, cruelty and violence, shall be deemed to be obscene.[17]

Or, according to the United States' Supreme Court in *Roth v United States:*[18] 'material which deals with sex in a manner appealing to prurient interest', where the prurient interest refers to 'having a tendency to excite lustful thoughts ... [or] as '[a] shameful and morbid interest in sex' which is 'utterly without redeeming social importance'.

A central feature of pornography, as opposed to erotica, is that it exists in the largely hidden, subverted and inaccessible world. Pornography, as traditionally conceived, is the expression of that which should not be

12 *Op cit*, Steinem, fn 11.

13 As in the case of *Handyside v United Kingdom,* concerning a publication encouraging sexual relations amongst school aged children, *The Little Red Schoolbook*.

14 Which covers books, pictures, films, records and video cassettes.

15 Obscene Publications Act 1959, s 1(1).

16 *Op cit*, *Report*, fn 4, para 8.2.

17 See 'Legal appendix' in Dwyer, *op cit*, fn 11, p 240.

18 354 US 476 (1973).

expressed: the realm of shameful fantasised sexual imaginings. While the erotic may fall within the category of art, pornography does not.

Defining pornography is central to an understanding of the political and legal approaches to pornography. Definition is thus an ideological tool, with definitions framed in such a manner which suggests the appropriate response to pornography. Thus, from the liberal perspective, pornography is a form of representation of sex, which, without proof of substantive harm to an identifiable subject, should remain legally unregulated in the interests of individual liberty to engage with whatever images the individual chooses. From a radical feminist standpoint, however, pornography is defined in terms of the damage it does to the imagery and equality of women. As Catharine MacKinnon argues, the liberal tradition conceptualises pornography '... as not about women as such at all, but about sex, hence about morality, and as not about acts or practices, but about ideas'. Reconceptualised from a radical feminist perspective, however, '[P]ornography contributes causally to attitudes and behaviours of violence and discrimination which define the treatment and status of half the population'. The legal definitions, cast in the language of obscenity, reflect the liberal position of pornography as a moral issue. Radical feminism, on the other hand, views pornography as a political practice 'that is predicated on power and powerlessness'.[19]

Differing constitutional contexts

Before briefly considering the legal regulation of pornography, it is necessary to recall the differing constitutional arrangements between the United Kingdom and, for example, Australia, Canada and the United States of America. In the United Kingdom, having no formally drafted 'written' constitution and lacking a domestic Bill of Rights, legal regulation of obscenity and pornography is by way of Acts of Parliament which are immune from challenge from the domestic courts of law.[20] In Australia, having a written constitution, but no overriding Bill of Rights, the legal regulation of pornography is largely a matter for State regulation.[21] Conversely, in the United States, with a written constitution enshrining an inviolate and overriding Bill of Rights, legislation purporting to regulate such materials may

19 MacKinnon, C, *Toward a Feminist Theory of State*, 1989, Cambridge, Mass: Harvard UP, p 196.

20 It is to be noted that the Human Rights Act 1998 incorporates the European Convention on Human Rights. Incorporation, however, will not enable judges to question the validity of Acts of Parliament. See Barnett, H, *Constitutional & Administrative Law*, 2nd edn, 1998, London: Cavendish Publishing, Chapter 22.

21 Federal law regulates customs and excise restrictions on pornographic imports, and in some instances films and computer games.

be challenged against the constitutional guarantees of the right to free speech. The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Accordingly, the validity of attempted legal regulation of pornography is a constitutional matter, ultimately for the judges of the Supreme Court to determine. In Canada, whilst freedom of 'thought, belief, opinion and expression, including freedom of the press and other media of communication' is protected under section 2 of the Canadian Charter of Rights and Freedoms, these rights may be restricted under section 1 of the Charter of Rights and Freedoms which provides that:

> The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject to reasonable limits prescribed by law and can be demonstrably justified in a free and democratic society.

As will be seen below, these differing constitutional arrangements have had an important impact on the manner in which courts in the differing jurisdictions have treated the 'pornography problem'.

Under the constitutions of Australia and the United Kingdom, citizens do not have 'rights' – only 'freedoms' to do what the law does not prohibit. Notwithstanding that legal fact, there is the presumption that the individual should have maximum freedom – compatible with the freedom of others – in society. This doctrine holds particularly strongly in areas of personal morality. The legal approach in Canada and the United States may be contrasted with that of Australia and the United Kingdom. As noted above, freedom of speech has an absolutist quality under the United States' Constitution (First Amendment), a position which is not reflected in the Canadian Charter of Fundamental Rights and Freedoms, which while guaranteeing constitutional protection for freedom of speech, provides through section 1 of the Charter for such guaranteed rights to be restricted in order to protect other rights and freedoms, for example the right to equality.

The United States has adopted the same terminology as the United Kingdom in relation to pornography, namely 'obscenity'.[22] In 1842, the first federal statute was enacted to regulate obscenity.[23] In *United States v Bennett* (1879),[24] the federal courts adopted the test previously laid down by the English courts in *R v Hicklin* (1868), namely that:

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22 For analysis of the United States case law, see Sunstein, C, 'Pornography, sex discrimination and free speech', in Gostin, L (ed), *Civil Liberties in Conflict,* 1988, London: Routledge, p 152.

23 Act of 30 August 1842, ch 270, s 28, 5 Stat 548 (1842).

24 24 F Cas 1093 (No 14, 571) (CCSDNY 1879).