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From Victim to Defendant: The Life Sentence of British Women

Susan S.M. Edwards

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I. INTRODUCTION

It is becoming increasingly impossible to understand domestic violence issues without an appreciation of the consequences faced by victims who, in an effort to defend and protect their lives and children, become "defendants" in the criminal justice process. Legal reformers in Europe, North America, and Australia have all sought to improve existing laws, the inadequacies of which are repeatedly demonstrated by failures in victim protection, ineffective sanctions imposed on violent abusers, and by incoherent treatment of victims who kill their abusers.[1] This Article examines these issues as they relate to the position of women under the laws of England and Wales. Section I outlines the nature and extent of domestic violence. Section II analyzes available legal remedies as they relate to the role of police, prosecutors, and the judiciary. Section III concludes with an examination of the treatment of battered women who kill their spouses.

In the months prior to the publication of this article, a series of high-level discussions on domestic violence has taken place in England and Wales. In 1992, the National Association of Victim Support Schemes published *Domestic Violence*, a report on the deliberations of a national inter-agency working party.[2] In that same year the Law Commission, as part of its review of family law, published a detailed report on civil law entitled Domestic Violence and Occupation of the Family Home.[3] In 1993 the Home Affairs Committee,[4] and the Metropolitan

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[*] Susan S.M. Edwards, B.A., M.A., Ph. D., L.L.M., is a Senior Lecturer in SocioLegal Studies, University of Buckingham, England. Professor Edwards has been researching and writing in the area of domestic violence and criminal justice for several years and is author of FEMALE SEXUALITY AND THE LAW (1981); WOMEN ON TRIAL (1984); POLICING "DOMESTIC" VIOLENCE (1989); and editor of GENDER SEX AND THE LAW (1985). She is currently researching the implementation of the Obscene Publications Act, 1959 (Eng.), with the Obscene Publications Squad of the Metropolitan Police in London.

[1] *See* B. Sharon Byrd, *Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women*, 1991 DUKE J. COMP. & INT'L L. 169.

[2] *See* NATIONAL ASSOCIATION OF VICTIM SUPPORT SCHEMES, DOMESTIC VIOLENCE: REPORT OF A NATIONAL INTER AGENCY WORKING PARTY (1992) [hereinafter DOMESTIC VIOLENCE].

[3] *See* LAW COMMISSION, FAMILY LAW, DOMESTIC VIOLENCE AND OCCUPATION OF THE

Police in London,[5] published their own reports on domestic violence. Despite the recency and seriousness of these discussions, there remains considerable reluctance in all legal agencies to afford women victims of domestic violence adequate protection.[6] It is the interpretation of historical legal principles which favors the "sanctity of marriage," the home, and privacy which prevents the adequate prosecution of men known for committing acts of violence against spouses. It is the silence and inertia of the state's legal apparatus which reaffirms the societal belief that domestic violence is less grave than other crimes — thereby symbolically legitimating this breed of male violence.[7] Where authorities are prepared to intervene to protect a battered spouse,[8] it is apparent that a woman's right to protection depends upon conformity to conventional models of femininity. Non-conformity too frequently results in *de facto* forfeiture of that right.

A. Domestic Violence Described

The form domestic violence takes is limited only by the human imagination. Women have been so frightened that they have lept to their deaths;[9] they have been subject to vicious attacks with hammers;[10] and

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FAMILY HOME (1992).

[4] *See* HOME AFFAIRS COMMITTEE, DOMESTIC VIOLENCE (1993).

[5] *See* METROPOLITAN POLICE SERVICE, WORKING PARTY ON DOMESTIC VIOLENCE REPORT AND RECOMMENDATIONS (1993).

[6] *See* David A. Ford & Mary Jean Regoli, *The Criminal Prosecution of Wife Assaulters: Process, Problems and Efforts, in* LEGAL RESPONSES TO WIFE ASSAULT 127-64 (Zoe N. Hilton ed., 1993). *See also* Susan S.M. Edwards, *Male Violence Against Women: Excusatory and Explanatory Ideologies in Law and Society, in* GENDER, SEX AND THE LAW 183-216 (Susan S.M. Edwards ed., 1985); K. McCann, *Battered Women and the Law: The Limits of the Legislation, in* WOMEN IN LAW 71-96 (C. Smart ed., 1985).

[7] *See* R. v. Owen, 14 J.P. Supp. 21 (1972), *reprinted in* Walter Greenwood, CASE & COMMENT, 1972 CRIM. L.R. 307, 324 (1972) (asserting that a woman who had failed to leave a violent marriage had willingly exposed herself to violence and was therefore partially to blame); R. v. Lavallee, 1 S.C.R. 852, 873 (Can. 1990) (stating that with respect to a victim of domestic violence, "[e]ither she was not as badly beaten as she claims or she would have left the man long ago. Or, if she was battered that severely, she must have stayed out of some masochistic enjoyment of it").

[8] The term "spouse" is used generally to include past or present cohabiting or legally married partners.

[9] *See* R. v. Cenci, 11 Crim. App. R. (S.) 199 (1989).

[10] *See* R. v. Di Palma, 11 Crim. App. R. (S.) 329 (1989) (relating to a woman who received an extensive compound fracture of her skull, brain damage, and loss of an eye from hammer blows inflicted by her husband). *See also* R. v. Davies, 8 Crim. App. R. (S.) 97 (1986) (relating to a woman struck on the back of her head with a hammer by her husband and suffering two further blows to the face fracturing the bridge of her nose and the upper part of the bony cavity; and finding that the defendant was "not a person from whom society has to be

they have been ignited[11] and strangled.[12] Where death threats have been alleged, the police and the courts have been hesitant to prosecute. The judiciary's attitude is typified by the decision in *R. v. Munroe*,[13] which is an example of how society has construed threats of violence against women as drama, rather than as an indicator of future conduct. In *Munroe*, a history of violence existed, including two occasions where the appellant had threatened to kill his wife.[14] The Appeals Court reduced the appellant's custodial sentence from three years to two, finding that the words, "I will never leave you alone, you know you can't get away from me . . . wherever you are I will find you," and "I will have you all . . . I will kill you all," to be frightening, but they were really no more than words.[15]

Further, homicide is too often the disastrous result of spousal assaults.[16] It may occur following incidents of extreme violence or patterns of less severe, but long-term abuse.[17] Homicide statistics for England and Wales reveal a disproportionately high level of spousal homi-

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protected" that "the act was out of character").

[11] *See* Personal Injuries: Quandrum of Damages, 143 NEW L.J. 187, 204 (1993) (discussing a case in which turpentine was poured over the victim's head and body and was ignited; the victim received extensive injuries including burns to the head, neck, arms, hands, back, and chest, covering forty-two percent of her body and suffered respiratory burns from inhaling fumes; the victim was awarded £162,043). *See also* R. v. Casseeram, 13 Crim. App. R. (S.) 384 (1987) (relating to a husband who attempted to strangle his wife, then poured gasoline over her, and set her afire resulting in burns over seventeen percent of her body); R. v. Bedford, 14 Crim. App. 336-337 (1992) (relating to a victim who was doused with gasoline and ignited because she refused to sleep with her husband. The husband excused himself by saying, "You know what its like; you know what women are like. I just snapped.").

[12] *See* R. v. Dearn, 12 Crim. App. R. (S.) 527 (1990) (relating to a woman who was strangled for five minutes by her husband with an electric flex cord. She suffered brain damage; her husband complained that she had been nagging him all day).

[13] *See* R. v. Munroe, 9 Crim. App. R. (S.) 408 (1987).

[14] *Id.* at 409

[15] *Id.*

[16] *See* Susan S.M. Edwards, *A Socio-Legal Evaluation of Gender Ideologies in Domestic Violence Assault and Spousal Homicides*, 10 VICTIMOLOGY: AN INT'L J. 186 (1985) (discussing the propensity of abused wives to kill their husbands); Susan S.M. Edwards, *Provoking Her Own Demise: From Common Assault to Homicide, in* WOMEN VIOLENCE AND SOCIAL CONTROL (Jalna Hanmer & Mary Maynard, eds., 1987) [hereinafter *Provoking Her Own Demise*].

[17] On August 9, 1989, Lawrence Lucien was convicted of manslaughter and sentenced to four-and-a-half years imprisonment. He stabbed his wife in the stomach following an argument about his wife's friend, Joe Murray. Police records showed that he had been assaulting her for eight years, and that police had refused to grant him bail when he assaulted his wife on another occasion earlier in the year. Yet, at the trial, Lucien made out a case of provocation. The magistrates took a different view and granted him bail; whereupon he returned to the marital home and killed his wife. *See* GAZETTE (ISLINGTON), Aug. 10, 1989. (Some details are derived from the author's examination of police records. Editor.)

cides with respect to the number of other homicides. In 1991, there were 108 female victims of spousal homicide, compared with fifteen male victims, from a total of 575 homicides — 18.8% and 2.6% respectively, of all homicides.[18] In 1992, there were a total of ninety-one female victims of spousal homicide compared with twenty male victims out of a total of 622 homicides — 14.6% and 3.2% respectively.[19] This statistical profile is consistent with earlier years.[20] During the 1980s approximately eighteen percent of all homicides were committed against female spouses.[21] While the homicide rate in the United States is much higher than in England and Wales,[22] the percentage of female victims of spousal homicide in the United States is only 6.5%.[23] In Canada the profile is more comparable to England and Wales, where figures for 1991 show that eighty-five women and twenty-five men were victims of spousal homicide,[24] constituting 14.17% and 4.17% of all homicides.[25]

The principal method of killing female spouses in England and Wales has been strangulation and asphyxiation — present in over one-third of all such homicides.[26] Indeed strangulation is the most common method of killing female victims regardless of the victim's relationship to the suspect.[27] Unfortunately, authorities in England and Wales have

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[18] Criminal Statistics England and Wales 1991, Cm. 2134 Table 4.4 at 75.

[19] Criminal Statistics England and Wales 1992, Cm. 2410, Table 4.4 at 78.

[20] Homicide statistics for England and Wales during 1972-1982 reveal that between 21% and 29% of all victims were acquainted as spouses, former spouses, cohabitees, or lovers. *See Provoking Her Own Demise*, *supra* note 16.

[21] *See* Susan S.M. Edwards, POLICING DOMESTIC VIOLENCE (1989) (This spousal figure excludes homicides between girlfriends and boyfriends which, if included, might significantly raise this figure.).

[22] The homicide rate in the United States is 9.4%, while in England and Wales it is 1.02%

[23] This percentage represented 20,045 victims in 1990. *See* U.S. DEPARTMENT OF JUSTICE SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 399 (1991).

[24] *See* Sean Fine, *In Anticipation of Violence*, THE GLOBE AND MAIL (TORONTO), Oct. 31 1992, at F2.

[25] *See* Martin Daly & Marge Wilson, HOMICIDE 219 (1988) (concluding that during 1974-83 among legally married, cohabiting spouses, men were almost four times more likely to kill their wives than their wives were to kill them (404 cases versus 107); among estranged couples, men were more than nine times as likely to kill their wives than they were to be killed by their wives (119 cases versus 13 cases)).

[26] Data provided to the author by the Home Office, London, revealed that during 1986, 38% of female spouses were killed by a sharp instrument, 11% by a blunt instrument, 2% by hitting or kicking, 34% by strangulation and asphyxiation, and 15% by shooting and other methods During 1987, 26% of female spouses were killed by a sharp instrument, 18% by a blunt instrument, 2% by hitting or kicking, 30% by strangulation and asphyxiation, 15% by shooting and 7% by other means.

[27] Of all victims killed in 1991, 25% of females and 7% of males were killed by strangulation. *See* Criminal Statistics England and Wales 1991, Cm. 2134 Table 4.3 at 74.

gained little from this knowledge. Notwithstanding the increasing bodycount, the police's traditional response to surviving victims' complaints has been to withhold charges without corroborative signs of physical injury. Ironically, and particularly troublesome, is the fact that such violence seldom produces sufficient forensic evidence to bring a charge.[28]

The extent of domestic violence remains largely unknown because women continue to suffer in silence and remain, as ever, moved to secrecy by economic dependency, guilt, shame, and fear of retaliation.[29] Domestic violence is not, as commentators once argued, merely the result of a family argument or dispute.[30]

In recent years, society and the courts have become aware that spousal violence manifests itself in many forms including physical violence, threats, intimidation, and various kinds of sexual assault. Sexual violence, as a variety of spousal abuse, has been hidden, until recently, by victims' reluctance to discuss this form of abuse.[31] Additionally, marriage laws have protected husbands from prosecution for sexual violence. This denial of protection has extended in practice to the rape of cohabitees, and to other forms of sexual assault including forced fellatio and sodomy, in which lack of consent is difficult to prove.[32] When lack of consent is proven in cases of sodomy, courts have taken a different view.[33] In *R. v. Krause*, the court stated:

> [H]e told her to put on a pair of stockings and take all the rest of her clothes off[.] [T]his requirement plainly had a sexual element . . . . All of what she permitted to be done to her was without any true consent

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[28] Signs of reddening are often all that is visible.

[29] ERIN PIZZEY, SCREAM QUIETLY OR THE NEIGHBORS WILL HEAR (1977).

[30] *See* generally Ruth S. Kempe & Henry C. Kempe, *Assessing Family Pathology, in* CHILD ABUSE AND NEGLECT: THE FAMILY AND THE COMMUNITY 115, 115-26 (Ray E. Helfer et al., eds., 1976); Richard J. Gelles, *Violence in the American Family, in* VIOLENCE IN THE FAMILY (J.P. Martin, ed., 1978); Murray Straus, *Sexual Inequality, Cultural Norms and Wife-Beating, in* VICTIMS AND SOCIETY (1976); DAVID FINKELHOR ET AL., THE DARK SIDE OF FAMILIES (1983); Stevi Jackson & Peter Rushton, *Victims and Villains: Images of Women in Accounts of Family Violence*, WOMEN'S STUD. INT'L F. 17-28 (1982).

[31] *See* SUSAN SCHECTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN'S MOVEMENT (1982).

[32] *See* R. v. Bush, 11 Crim. App. R. (S.) 295 (1989) (The appellant's sentence was reduced from nine months to three months because the court determined that consent was present despite the fact that the appellant, a former cohabitee, was admitted to the woman's house only after threatening to kick the door down. Acquitted on rape charge, the appellant was sentenced for sodomy with consent.).

[33] *See* R. v. Krause, 11 Crim. App. 360 (1989) (upholding a five-year sentence for sodomy of a woman without consent).

> on her part. She was frightened of what he might do to her . . . [and] no doubt the origin of this offence was because he had been drinking all day . . . . He came home violent and aggressive and he set about her. Not only did he treat her violently, he subjected her to the degradation of being [sodomized], and one only has to read her statement to see the distress which she must have suffered as a result.[34]

In cases of forced fellatio, the court has, on rare occasions, found such incidents to be evidence of indecent assault. As in marital rape cases, it has been difficult for victims to demonstrate lack of consent.[35]

In 1991, however, husbands' legal immunity for the rape of a wife ended.[36] The R v. R decision reversed Sir Matthew Hale's historic ruling that "[t]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."[37] The R v. R decision formally and legally recognizes that sexual assault is a significant aspect of domestic violence.[38]

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[34] *Id.* at 363. *See also* R. v. Stapleton, 11 Crim. App. R. (S.) 364 (1989). In *Stapleton*, the Court imposed a sentence of five years imprisonment for repeated sodomy of a woman without her consent. The court stated that

> [T]he first act of [sodomy] which you committed was committed at knife point and thereafter over a period of several months you frequently committed acts of [sodomy] against your partner and without her consent. She was in fear of you, and on many of those occasions you actually showed violence towards her or you threatened violence to her.

Id. at 365.

[35] *See* R. v. Caswell, Crim. L.R. 111 (1984) (holding that where a woman was attacked, kicked in the face and ribs, and forced to perform oral sex on her estranged husband; a divorce petition did not negate marital consent and the husband was immune from criminal liability). *Cf.* R. v. Kowalski, 86 Crim. App. R. (S.) 339 (1988) (holding that the legal presumption that, in marriage, intercourse does not require consent from the wife, cannot be extended to acts of fellatio).

[36] *See* R. v. R, 4 All E.R. 481 (1991) (holding that in modern times the supposed marital exemption in rape forms no part of the law of England). The House of Lords' decision affirmed a five-member division of the Court of Appeals which had held in a judgment delivered by Chief Justice Lord Lane that: "the husband's immunity . . . no longer exists. We take the view that the time has now arrived when the law should declare that a rapist remains a rapist subject to the criminal law, irrespective of his relationship with his victim." R. v. R., 2 All E.R. 265J-266A (1991). *See also* THE LAW COMMISSION, CRIMINAL LAW: RAPE WITHIN MARRIAGE, [1965] C.M.N.D. 205 at 1 (1965).

[37] SIR MATHEWS HALE, KNT., HISTORIA PLACITORUM CORONAE (THE HISTORY OF THE PLEAS OF THE CROWN) 628 (W.A. Stokes & E. Ingersoll eds., 1847), 1 LONDON PROF. BOOKS 629 (1971) (cited in the House of Lords judgment 4 All E.R. 483f (1991) (overruling 1 HALE P.C. 628 (1736))).

[38] *See* R. v. R., 4 All E.R. at 481. *See also* EVIDENCE TO THE SELECT COMMITTEE ON VIOLENCE IN MARRIAGE 22, 25 (1975) (Mrs Z. gave evidence describing an incident at the hands of a brutal husband, in which she was stripped and severely beaten with a wet towel by her hus-

II. CRIMINAL REMEDIES

Theoretically, a number of civil[39] and criminal remedies are available to battered women. However, remedies are only as effective as their implementation — which depends on the response of the police, the Crown Prosecution Service, the courts, and the sentencers. This Section examines these institutions and recent legal developments, in an attempt to establish what each has contributed to womens' efforts to protect themselves.

A. The Role of Police

As in the United States[40] and Canada,[41] significant advances have been made, especially since 1987, in improving the police handling of domestic violence in England and Wales. However, police response has been piecemeal, and only the Metropolitan Police in London have demonstrated a real commitment to change. In 1987, instructions were issued to officers following a June 1987 Force Order.[42] The order stated that an assault occurring in the home is as criminal as an assault occurring

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band and his friends. The committee asked her if she had ever been raped. She replied, "No, I had to give in to what they wanted because I was so scared.").

An earlier version of part of this Article was delivered to the Annual Conference of the National Association for the Development of Work with Sex Offenders, Sept. 6-8, 1992, at the University of Warwick, England. One of the participants approached me afterwards and explained that her former husband had beaten her for twenty years. He had on most occasions also put his hand over her mouth and tried to suffocate her. He had taken photographs of her in sexual poses to show to his workmates. She was forced to cooperate to avoid further beatings, to sleep, and to avoid disturbing her five children. Although she managed to leave him eleven years ago, she cried as she recalled having to go to the hospital to have her rectum sutured following his forced sodomy of her.

[39] The main type of civil remedy is injunctive relief. Injunctions are provided for in Domestic Violence and Matrimonial Proceedings Act, 1976, ch. 50 (Eng.); Domestic Proceedings and Magistrates' Courts Act, 1978, ch. 22 (Eng.); and Matrimonial Homes Act, 1983, ch. 19 (Eng.). *See* also Susan S.M. Edwards & Ann Halpern, *Protection for the Victim of Domestic Violence: Time for Radical Revision?*, J. SOC. WELFARE L. 94, 98 (1991).

[40] *See* Lawrence W. Sherman & Richard A. Bork, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261-72 (1984); PATRICIA A. LANAN & CHRISTOPHER A. INNES, PREVENTING DOMESTIC VIOLENCE AGAINST WOMEN (1986) (explaining that the effect of police arrests is to deter repeat offenses); Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minneapolis Domestic Violence Experiment*, 23 L. & SOC. 117 (1989); Kathleen J. Ferraro, *Policing Women Battering*, 36 SOC. PROB. 61 (1989).

[41] *See* Peter Jaffe et al., *The Impact of Police Laying Charges in Incidents of Wife Abuse*, J. FAM. VIOL. 37 (1986). *See also* N. Zoe Hilton, *Police Intervention and Public Opinion*, *in* LEGAL RESPONSES TO WIFE ASSAULT 37 (N. Zoe Hilton ed., 1993).

[42] LONDON METROPOLITAN POLICE, DOMESTIC VIOLENCE FORCE ORDER, OG/11/86/243 (TO30) (1987) (unpublished internal document on file with the London Police Department).

elsewhere. In 1990, the Home Office asked all Chief Officers of Police, to ensure that "all police officers involved in the investigation of cases of domestic violence regard as their overriding priority the protection of the victim and the apprehension of the offender."[43] But whatever the proposals contained in policy guidelines, improvements made by the Metropolitan Police are not necessarily reflected by the practices of the other forty-two police forces in England and Wales.[44] The key deficiencies in police practice have been ineffective handling of cases at the scene,[45] a predilection towards reducing charges,[46] and the habitual practice of "no criming."[47] The pro-arrest guidelines contained in the 1987 Force Order for London and the National Circular of 60/1990 give considerable support to officers in executing arrests.[48] Research conducted in the London area has indicated that arrests have risen since the Force Order of 1987 and the 1990 Circular.[49]

1. Domestic Violence Units

Perhaps the most significant positive step has been the establishment of Domestic Violence Units (DVUs) at individual police stations.[50] The first DVU was established in Tottenham, North London, in 1987. The aim of the DVU is to give support to victims, refer victims to local agencies, provide a chaperon to court where necessary, keep victims apprised of the progress of the prosecution case, provide follow-up visits in all cases, and enhance the collation of information and intelligence on domestic violence. There has been much debate regarding the

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[43] HOME OFFICE LONDON, NATIONAL CIRCULAR 60/1990: DOMESTIC VIOLENCE (1990) [hereinafter CIRCULAR 60/90].

[44] As the Association of Chief Police Officers (A.C.P.O) conceded in their evidence to the Home Affairs Committee, "some forces have not made the progress achieved by others . . . ." A.C.P.O., Evidence to the Home Affairs Committee on Domestic Violence ix (1990).

[45] *See* ROBERT REINER, THE POLITICS OF THE POLICE BRIGHTON 121 (1985); Nan Oppenlander, *Coping or Copping Out*, 20 CRIM. 449 (1982); Daniel J. Bell, *The Police Response to Domestic Violence: An Exploratory Study*, 7 POLICE STUD. 23, 23-30 (1984).

[46] Susan S.M. Edwards, *Policing "Domestic Violence," in* GENDER, POWER & SEXUALITY 133, 151 (Pamela Abbott & Claire Wallace eds., 1991).

[47] *See Provoking Her Own Demise*, *supra* note 16.

[48] *See* CIRCULAR 60/90, *supra* note 43.

[49] *See* SUSAN S.M. EDWARDS, AN EVALUATION OF THE IMPACT OF POLICE POLICY ON POLICE RESPONSE TO DOMESTIC VIOLENCE CALLS, A FINAL REPORT FOR THE POLICE FOUNDATION (1989) [hereinafter THE IMPACT OF POLICE POLICY] (This document is on file with the author.). *See also* CHIEF SUPERINTENDENT IAN BUCHAN & SUSAN S.M. EDWARDS, ADULT CAUTIONING FOR DOMESTIC VIOLENCE (1991).

[50] *See* CIRCULAR 60/90, *supra* note 43 (voicing the Home Office's support for the establishment of DVUs).

costs of long-term commitment of police manpower to DVUs.[51] However, the Metropolitan Police remain committed to them, and there are now sixty-four units in the London Metropolitan area — one for almost every police division. The Metropolitan Police Service Working Party Report of 1993[52] endorsed the work of the units, and research indicates that the presence of a DVU within a police station has a positive effect on the level of reporting, the arrest rate, the collation and recording of statistics, and the reduction of "no criming."[53]

2. Crime Recording

The traditional police reluctance to record acts of domestic violence on a crime sheet, and enter them into the crime statistics for submission to the Home Office, arises from the commonly held belief that such acts are not "real crimes," and that such cases are unlikely to proceed to prosecution. The result is that a higher proportion of domestic violence cases — more so than any other crime — are given the "no crime" classification. This classification has been used routinely and illegitimately to write-off cases, thereby avoiding their inclusion in the official statistics.[54] Studies have found that a staggeringly high proportion of cases

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[51] In a number of divisions, Chief Superintendents have refused to set up such units. In Southall, West London, an area with a high immigrant population where relations between police and the community are strained, a DVU is desperately needed. Such matters are ultimately a matter for Chief Superintendents to resolve, their discretion in matters of the deployment of officers and the implementation of programs is enshrined in law. *See* R. v Metropolitan Police Commissioner, *Ex parte* Blackburn, 1 All E.R. 763 (C.A. 1968).

In *Blackburn*, Lord Justice Denning opined:

> I hold it to be the duty of the Commissioner of the Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace.
>
> He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought; but in all these things he is not a servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observations on this place or that; or that he must, or must not, prosecute this man or that one . . . . It must be for him to decide on the disposition of his force and the concentration of his resources on any particular crime or area.

Id. at 769.

[52] *See* DOMESTIC VIOLENCE, *supra* note 2.

[53] *Id.* at 9. This report refers to research which indicates increases of 95% in complainant reporting, 22% in arrest rates, 21% in cases reported to the Crown Prosecuting Service, and a 24% reduction in the no-crime rate. Stations with no DVU, however, reported the following figures, respectively, 65%, 14%, 13%, and 16%. For an explanation of the concept of "no criming," *see infra* notes 54, 84-87 and accompanying text.

[54] The "no crime" classification was created to erase crimes that have been recorded erro-

of domestic violence are "no crimed" in the London area.[55] For the period between 1982-1986, as many as eighty to ninety percent of domestic violence cases crimed by police were later "no crimed." In 1988, only sixty-five percent of domestic violence cases were "no crimed."[56] Studies have also indicated similar police use of "no criming" in rape cases.[57] In response to published research findings, and mounting criticism, the police have endeavored to reduce the "no crime" rate. In Streatham, South London, a 1989-1990 pilot scheme involving the cautioning of first-time domestic violence offenders was implemented. The "no criming" levels dropped dramatically to thirty percent of domestic violence crimes initially recorded.[58]

The result of this shift in police policy, especially in the Metropolitan Police District, perhaps explains the alarming rise in the national figures for violent and sexual crimes recorded by the police. All cases of violence against the person have increased: from 97,246 in 1980 to 184,655 in 1990, and to 190,339 in 1991.[59] Threat, and conspiracy to murder, included in these figures, has also increased: from 528 in 1980 to 4,162 in 1990, and to 4,172 in 1991.[60] The changes in the policing and recording of domestic violence by the Metropolitan Police in response to the Home Office circular may well have been the main contributor to this increase.[61] In 1985, in the Metropolitan Police District, 20,242 offenses of violence against the person were recorded. The numbers have since steadily increased.[62] The increase in these figures is

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neously. The borrowed bicycle, reported as stolen, is a perfect example of "no criming's" proper use. The "no crime" classification was never intended to write-off stab wounds, bruises, and broken limbs where the complainant withdraws her charge. The problem police have with this latter type of case is that such cases should be classified as "not cleared." Such an outcome is highly undesirable for a police officer because it adversely effects the "clear-up" rate upon which performance evaluation, and perhaps remuneration, are based.

[55] *See* EDWARDS, *supra* note 49; DOMESTIC VIOLENCE, *supra* note 2.

[56] *See* EDWARDS, *supra* note 49, at 205; Edwards, *supra* note 46, at 133-56.

[57] The use of the "no crime" classification was routinely used to dispose of troublesome cases considered unlikely to be prosecuted. *See* I. BLAIR, INVESTIGATING RAPE: A NEW APPROACH FOR POLICE (1985); LORA J.F. SMITH, DOMESTIC VIOLENCE; G. CHAMBERS & A. MILLAR, INVESTIGATING SEXUAL ASSAULT (1983).

[58] *See* BUCHAN & EDWARDS, *supra* note 49.

[59] *See* Criminal Statistics England and Wales 1991, Table 2.15 at 46.

[60] *Id.*

[61] *See* CIRCULAR 60/90, *supra* note 43.

[62] In 1987, 22,625 violent offenses were recorded. *See* COMMISSIONER OF THE LONDON METROPOLITAN POLICE, ANNUAL REPORT (1988). In 1988, 27,004 violent offenses were recorded. *See* COMMISSIONER OF THE LONDON METROPOLITAN POLICE, ANNUAL REPORT (1989). In 1989, 32,255 violent offenses were reported. *See* COMMISSIONER OF THE LONDON METROPOLITAN POLICE, ANNUAL REPORT (1990). In 1990, 35,521 violent offenses were reported. *See* COMMISSION-

largely the result of a change in police practice regarding the recording of all domestic violence — regardless of the likelihood of prosecution success — and of new instructions issued to officers requiring that all domestic violence, including common assault, be recorded as a crime.[63]

B. The Crown Prosecution Service: The Tail That Wags the Dog

Since 1985, with the introduction of the Prosecution of Offenses Act, the Crown Prosecution Service[64] (CPS) has taken over the prosecution of criminal offenses. Prior to 1985, the police were both investigators and prosecutors. This conflict of roles and responsibilities gave rise to a number of criticisms; particularly, police were said to lack independence, and too many cases before the courts resulted in judge-directed acquittals.[65] Such acquittals suggested that cases were poorly prepared and supported by insufficient evidence.

It is now the prosecutor alone who decides whether a case should proceed, what the charge should be, and which mode of trial should be chosen.[66] Prosecutors are guided in this task by the Code for Crown Prosecutors, which establishes two tests to help prosecutors determine whether to proceed.[67] The first test considers whether there is sufficient evidence to convict. The second test considers whether a prosecution is in the public interest.[68]

1. A *Prima Facie* Case

These tests generate a conflict between the police and the prosecutor, the former proceeding on the basis of establishing a *prima facie* case, the latter on the more subjective standard of what is necessary to secure a conviction. The Code for case prosecutors states that "the CPS does not support the proposal that a bare *prima facie* case is enough."[69]

ER OF THE LONDON METROPOLITAN POLICE, ANNUAL REPORT (1991). In 1991, 37,854 violent offenses were reported. *See* COMMISSIONER OF THE LONDON METROPOLITAN POLICE, ANNUAL REPORT (1992).

[63] LONDON METROPOLITAN POLICE, POLICE FORCE ORDER ON COMMON ASSAULT (1993).

[64] For a full discussion of the role of the CPS, see HOME AFFAIRS COMMITTEE, ANNUAL REPORT OF THE CROWN PROSECUTION SERVICE 21 (1992-93) [hereinafter CPS ANNUAL REPORT].

[65] *See* ROYAL COMMISSION ON CRIMINAL PROCEDURE, THE INVESTIGATION AND PROSECUTION OF CRIMINAL OFFENSES IN ENGLAND AND WALES: THE LAW AND PROCEDURE (1981).

[66] *See* Prosecution of Offenses Act, 1985, §§ 10, 23 (Eng.).

[67] *Id. See also* CPS ANNUAL REPORT, *supra* note 64, at 47.

[68] *See* CPS ANNUAL REPORT, *supra* note 64, at 49.

[69] *See* Code for Crown Prosecution Service, *reprinted in* CPS ANNUAL REPORT, *supra* note 64, at 47.

An additional problem is that little is known regarding how prosecutors apply the criteria. In assessing the evidentiary sufficiency test, the prosecutor in a domestic violence case will weigh the likelihood of the victim appearing to testify, the victim's likely testimony, the credibility of the victim, and the significance of a change in a complainant's attitude with respect to proceeding.

> In some cases it will be appropriate for the Crown prosecutor to have regard to the attitude of a complainant who notified the police but later expresses a wish that no action be taken. It may be that in such circumstances proceedings need not be pursued unless either there is a suspicion that the change of heart was actuated by fear or the offence was of some gravity.[70]

Domestic violence prosecutions are undoubtedly difficult when success depends on the appearances of witnesses and victims. The victim, who is susceptible to intimidation, must be protected — not by a prosecutorial decision to discontinue proceedings — but by supporting reluctant complainants throughout the trial process. Development of support mechanisms such as witness summons, witness chaperons, and supportive explanations of compellability are all necessary.

In response to criticism, the CPS introduced a new policy for dealing with domestic violence,[71] and designed to establish a procedure for handling domestic violence cases. However, this policy is unlikely to improve the current situation. The policy establishes a set procedure to allow a victim to withdraw a complaint.[72] All this policy insures is that

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[70] CPS ANNUAL REPORT, supra note 64, at 51.

[71] *See* CROWN PROSECUTION SERVICE POLICY GROUP, A STATEMENT OF PROSECUTION POLICY: DOMESTIC VIOLENCE (1993) [hereinafter STATEMENT OF PROSECUTION POLICY].

[72] The policy statement provides that:

> The following procedure should be adopted:
> a. A prosecutor of at least Principal Crown Prosecutor (PCP) level should be informed and thereafter supervise progress of the case;
> b. If information has originated from the defendant's legal representative, the prosecutor should request that it be confirmed in writing;
> c. It is important to establish the veracity of the original allegations. The police should be asked immediately to inquire whether the victim wishes to withdraw support for the prosecution, and if so, why . . . ;
> d. The officer in the case should be asked for a report containing an assessment of the case and the victim, as well as any other relevant information. Both the report and the victim's new statement should be forwarded to the prosecutor;
> e. If the victim's further statement is factually inconsistent with earlier statements, the police may wish to investigate to try to establish where the truth lies. If the earlier statement is found to be untrue and the complainant

a decision to discontinue will conform to procedural requirements; it does nothing to reduce the rate of discontinuance.

2. In the Public Interest

The public interest criteria requires, in part, consideration of the following factors: whether the sentence would be nominal, i.e., a small fine or a conditional discharge; whether the case is stale; whether the offender is young or old; and whether the complainant changes her attitude. In essence, the public interest at stake declines where the offense is minor and the cost is considered disproportionate to the crime. The public interest criteria however remains ambiguous and unclear.[73] In its policy statement, the CPS declared that there will be difficulties in finding this balance because it is recognized that while it is in the public interest to condemn personal violence in any form, it is also in the public interest to preserve the family unit wherever possible. The CPS policy statement also states that in some cases where the victim wishes to withdraw the complaint, the public interest will not require a prosecution. Factors likely to be relevant to this decision are the seriousness of the offense, the likelihood of recurrence, any continuing relationship with the accused, and the effect that pursuing the prosecution in opposi-

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to have acted in bad faith, consideration may be given to proceeding for an offence against public justice . . . . If that later statement is thought to be untrue, there is unlikely to be a realistic prospect of conviction without compelling independent evidence to support the original complaint.

f. If the victim confirms that the complaint is true but nonetheless wishes to withdraw support, the prosecutor should consider options for continuing with the prosecution before taking any other action. Such considerations would include:

i. is it necessary to call the victim in order to prove the case? If not, the case may still proceed to trial provided that the public interest requires a prosecution;
ii. should the victim be compelled to attend court to give evidence?
iii. could the victim's statement be admitted in evidence under section 23 Criminal Justice Act 1988?

g. Discontinuance of the proceedings on evidential grounds should only take place when all options have been considered and found to be inappropriate;

h. In cases which are discontinued as a result of the victim's withdrawal of support, it may be appropriate to require the victim to attend court to confirm on oath that the initial allegations are true, but the victim has voluntarily and without duress decided not to support the prosecution;

i. If there is suspicion of duress, the case should be adjourned pending police investigation.

Id. 2-3.

[73] *Id.* at 7.

tion the victim's wishes is likely to have on that relationship.[74]

Very little then has changed. There remains a reluctance to prosecute where women complainants withdraw, and prosecutors frequently try to predict whether a victim will proceed. Domestic violence remains perceived as a crime between the victim and the aggressor, rather than a crime between the aggressor and the state — this is, it seems, where the public interest lies.

3. Discontinuance

Cases are frequently terminated by the prosecutor.[75] This is obviously "in the interests of justice" where there is insufficient evidence because a prosecution would lead to a miscarriage of justice. However, the concern is that cases are being discontinued which should otherwise proceed. The power to withdraw or discontinue is rooted in section 23 of the Prosecution of Offenses Act 1985 and in the test case of *Cooke v D.P.P.*[76] In this case, the defendant, Cooke, was charged with a number of offenses. Before committal, section 47 assault charges[77] were substituted by the prosecutor with the section 51 offense of police assault.[78] Section 47 assault is "triable either way," that is, triable before a magistrate or before a jury at the Crown Court. Section 51 police assault is triable summarily only. The defendant elected for trial and at an adjourned hearing, the defendant's solicitor applied for the section 47 assault charges to be reinstated. On application for an order of *mandamus*, it was argued that by purporting to withdraw the section 47 charges in court, and failing to serve a notice of discontinuance, the CPS was in breach of the Prosecution of Offenses Act which gave the defendant the right, under section 23(6),(7), to insist that the case continue under section 47 and be tried by a jury. Defendant's counsel further argued that a prosecutor could dismiss a charge if there was no evidence. The CPS argued that section 23 was co-terminus with the pre-existing powers at common law to discontinue the proceedings. The court held in dismissing the application, that section 23 might allow the CPS the right to withdraw a charge and discontinue proceedings and offer no evidence.

During the past few years, more cases have been discontinued by

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[74] *Id.* at 6.

[75] Discontinuance is a performance indicator in the CPS Annual Report of 1991-92. It states that "[e]arlier decisions to discontinue cases will reduce unnecessary court appearances and monitoring the timing will identify our progress." *See* MIKE MCCONVILLE ET AL., THE CASE FOR THE PROSECUTION 20 (1991).

[76] *See* Cooke v. D.P.P., [1992] Crim. L.R. 746 (Q.B. Div'l Ct. 1992).

[77] *See* Offenses Against the Person Act, 1861, § 47 (Eng.).

[78] *See* Police Act, 1964, § 51 (Eng.).

prosecutors than ever before. Figures provided by the CPS show a national average discontinuance rate of 13.3%[79] with a considerable variation in discontinuance rates between the 31 CPS areas. As many as twenty percent of cases are being dropped in London, Essex, Devon, and Cornwall.[80] The concern relevant to this Article is that many of these cases may be cases with a perceived success problem because of the probable non-appearance of the prosecution witnesses. It is more expedient to drop cases at the outset than either support prosecution witnesses or consider the question of compellability. The problem of discontinuance is strongly resented by many victims. Mr. McDonald Anderson of the Home Affairs Committee, put this question to Barbara Mills, the Director of Public Prosecutions:

> I am a practicing member of the Bar but I ask this really as a result of experiences in surgeries. The resentment of victims at discontinuance and also of not being told after guilty pleas of matters which come on without knowledge, do you see any scope for some sort of intermediary body between the victim and the police? All too often individual police officers may so sympathize with the victim that they find it difficult to give an objective view of discontinuance.[81]

The CPS's solution to the problem of high discontinuance is to encourage police to refer cases to the CPS for advice and consultation prior to charging. The CPS in their Annual Report state that "pre-charge advice to the police, which has also increased over the last year, has a positive impact on discontinuance."[82] Pre-trial advice referrals rose from 57,000 in 1987 to 73,337 in 1991.[83] Is there something of the tail wagging the dog here?

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[79] These statistics are available from the CPS Press Office.

[80] *See* CRIMINAL STATISTICS ENGLAND & WALES, 1992, Table 2.15.

[81] HOME AFFAIRS COMMITTEE, ANNUAL REPORT OF THE CROWN PROSECUTION SERVICE: MINUTES OF EVIDENCE SESSION 21 (1992).

[82] *See* CPS ANNUAL REPORT, *supra* note 64.

[83] *See* Criminal Statistics, *supra* note 80.

4. Down Criming

Alternate charging, or "down criming," has been discussed widely.[84] In addition to discontinuing cases, the CPS routinely "down crimes" cases presented to them by police. The powers invested in the CPS to decide what charges to file is contained in section 10 of the Prosecution of Offenses Act. Recent case law has put their powers to the test. In R v. Sheffield, a common assault and battery charge under the Criminal Justice Act 1988, section 39, was substituted for the more serious offenses of section 47 assault.[85] The defendant claimed that this was an abuse of process and argued that it would prejudice him. The magistrates court acceded to this submission and stayed proceedings. The prosecutor applied for judicial review of the magistrate's decision. The High Court held that the charge was a matter for the discretion of the prosecutor and that the charge of common assault and battery was appropriate.

The guidelines for prosecution state that a domestic background is not regarded as a factor in reducing the seriousness of the charge. In making representations as to the most appropriate forum for trial, prosecutors must consider the National Mode of Trial Guidelines issued by the Lord Chief Justice in 1990, and recently amended in accordance with the Criminal Justice Act of 1991.[86] The guidelines note that "essentially offenses should be tried summarily unless they include one or more of the features set out in the guidelines and magistrates consider powers of sentencing to be insufficient."[87] However, it is well known that domestic violence is routinely "down crimed." First, it is cheaper for cases to be heard before a magistrates court. Second, "down criming" has been further facilitated by the introduction of section 39 of the Criminal Justice Act, 1988. Section 39 makes common assault a summary offence triable only before a magistrate. Down criming is likely to occur where a sentence of six months or less is considered the probable result. Therefore, prosecutorial assessment of likely sentencing

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[84] *See generally* D. STEER, ROYAL COMMISSION ON CRIMINAL RESEARCH STUDY, UNCOVERING CRIME: THE POLICE ROLE 7 (1980). Michael R. Chatterton, *Police Work and Assault Charges, in* CONTROL AND THE POLICE ORGANIZATION 194-220 (Maurice Punch ed., 1983); ROBERT REINER, CONTROL IN THE POLICE ORGANIZATION (1985). *See also* Andrew Sanders, *Personal Violence and Public Order: The Prosecution of Domestic Violence in England and Wales*, 16 INT'L J. SOC. L. 359, 359-82 (1988); Alan Bourlet, POLICE INTERVENTION IN MARITAL VIOLENCE 79 (1990).

[85] *See* R. V. Sheffield, [1993] Crim. L.R. 136 (Q.B. Div'l Ct. 1993).

[86] *See* Criminal Justice Act, 1991 (Eng.), *amended by* Criminal Justice Act, 1993 (Eng.).

[87] Practice Note, National Mode of Trial Guidelines, 1 WLR 1439 (1990).

becomes the barometer of charge reduction. The consequence is that domestic violence assault, with its habitually minor sanctions, may be routinely reduced to section 39.

5. Evidentiary Matters

One of the main obstacles to prosecution of domestic violence cases lies in police and prosecutorial assessment of the likelihood that women will refuse to give evidence in court. While there is some evidence of this reluctance,[88] there is also evidence that prosecutors and police exaggerate it to justify for their own inaction. Since 1984, spouses have been legally compellable to give evidence against one another in criminal trials in accordance with section 80(3) of the Police and Criminal Evidence Act 1984, which reversed *Hoskyn v. Commissioner of the Police for the Metropolis.*[89]

In *Hoskyn*, the trial judge, and former Lord Chief Justice Lane, ruled that the victim was competent and compellable, and ordered her to give evidence against her husband.[90] The defendant was convicted and appealed, certifying as of general public importance, the issue of whether a wife is a compellable witness against her husband in a case of domestic violence.[91] The courts considered the only direct authority, *Lapworth*, in which the court of appeal held that a wife was compellable. The House of Lords, however, held that a spouse was not compellable and in the words of Lord Wilberforce, "to allow her to give evi-

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[88] *See* Frances Wasoff, *Legal Protection from Wife-Beating: The Processing of Domestic Assaults by Scottish Prosecutors*, 10 INT'L J. SOC. L. 184-204 (1982). *See also* Frances Wasoff, *Prosecutor's Discretion in Court Allocation in Domestic Violence Cases, paper presented at* BRIT. CRIM. CONF. (1987); Maureen McLeod, *Victim Noncooperation in the Prosecution of Domestic Assault*, 21 CRIMINOLOGY 395, 395-416 (1983).

[89] *See* Hoskyn v. Commissioner, 2 All E.R. 695 (1978) (Here the defendant had inflicted numerous personal injuries: two stab wounds to the victim's chest, which perforated the outer lining of each lung; a nine-centimeter cut extending from her temple to her right ear; smaller cuts to her right lip and chin; and a four-and-a-half centimeter cut to her left forearm. Ironically, the defendant and victim were married two days before trial.).

[90] The court stated that "[i]t must be born in mind that the court of trial in circumstances such as this where personal violence is concerned (and this case is a good example where wounding with a knife is concerned) is not dealing merely with a domestic dispute between husband and wife, but it is investigating a crime. It is in the interests of the State and members of the public that where that is the case evidence of that crime should be freely available to the court which is trying the crime. It may very well be that the wife of the husband, as the case may be, is the only person who can give evidence of that offense. In those circumstances it seems to us that there is no reason in this case for saying that we should in any way depart from the ruling . . . in Rex v. Lapworth [1931] 1 K.B. 117 . . . ." Hoskyn, [1979] App. Cases 474, 500.

[91] This appeal was brought in accordance with Criminal Appeal Act, 1968, § 33 (Eng.).

dence would give rise to discord and perjury and would be to ordinary people repugnant."[92] Lord Salmon declared, "[i]t seems . . . altogether inconsistent with the common law's attitude towards marriage that it should compel such a wife to give evidence against her husband and thereby probably destroy the marriage."[93] Lord Edmund Davies was the sole dissenting voice:

> Such cases are too grave to depend simply upon whether the injured spouse is, or is not, willing to testify against the attacker. Reluctance may spring from a variety of reasons and does not by any means necessarily denote that domestic harmony has been restored. A wife who has once been subjected to a "carve up" may well have more reasons than one for being an unwilling witness against her husband. In such circumstances, it may well prove a positive boon to her to be directed by the court that she has no alternative but to testify. But, be that as it may, such incidents ought not to be regarded as having no importance extending beyond the domestic hearth. Their investigation and, where sufficiently weighty, their prosecution is a duty which the agencies of law enforcement cannot dutifully neglect.[94]

Throughout the 1980s, several jurisdictions have taken the view that making a spouse a compellable witness and enforcing the compellability provision is an essential step towards protecting the victim. In *Moran v. Beyer*,[95] an Illinois case, spousal immunity was declared unconstitutional in a suit brought by a wife against her husband for injuries inflicted during the course of their marriage. In Canada, in *R v. McGinty*, the court held that "[a] rule which leaves the husband or wife the choice of testimony is more likely to be productive of family discord than to prevent it."[96] Witnesses may either give evidence relieved that the decision to do so has been taken out of their hands, or else deeply resent the enforcement and become a hostile witness.

Where the courts have enforced compellability, it has not been altogether wisely. The most notorious case, which became something of a *cause celebre*, was the case of Michelle Renshaw, who was imprisoned for contempt of court for refusing to give evidence.[97] Renshaw

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[92] *Hoskyn*, 2 All E.R. at 142.

[93] *See Hoskyn*, 2 All E.R. at 149.

[94] *See Hoskyn*, All E.R. at 159.

[95] Moran v. Beyer, 734 F.2d 1245 (7th Cir. 1984).

[96] *See* R. v. McGinty, 52 Crim. R. 3d 161 (1986).

[97] *See* R v. Renshaw, [1989] Crim. L.R. 811. *See also Judge's Interruptions Made Trial Unfair*, THE TIMES (London), June 23, 1989, at 34; J.C. Smith & D.J. Birch, *Case & Comment*, 1990 Crim. L. R. 44, 53 (1990) (citing R. V. Earnshaw, [1990] Crim. L.R. 53). In *Earnshaw*,

had sustained beatings from her boyfriend Michael Williams.[98] When the case came before the Court, Renshaw said she was too frightened to give evidence. She was imprisoned for a week for contempt of court. A public outcry followed calling for the resignation of the presiding judge, Judge Pickles. Judge Pickles explained his dilemma: "I took the view that this was not a private dispute between her and the defendant but a matter between the Crown and the defendant."[99] The sentence was subsequently overturned by the Court of Appeal on the ground that the trial judge had not governed the contempt proceedings in a fair manner and proper account was not taken of the fact that the appellant claimed to have been threatened by her boyfriend. Similar unwise decisions have been made in other jurisdictions faced with this dilemma. In Canada, for example, Karen Mitchell was sent to prison for three months in 1984 also for refusing to testify.[100] As the New South Wales Task Force on Domestic Violence remarked in 1981

> The placing of a choice in the hands of the woman herself is almost an act of legal cruelty, and it imposes upon her a tremendous burden which complainants in other cases do not face. It leads directly to the intimidation of the woman . . . . The temptation for him to "heavy" her, either directly or indirectly, is very often not resisted.[101]

6. Frightened Witnesses

One of the main obstacles to the prosecution of the domestic violence aggressor has been the victim's reluctance to proceed with a prosecution because of the fear of retaliation by her aggressor. A new piece of legislation, at least in theory, allows for prosecution witnesses to avoid appearing in court to give evidence — a positive aspect for the

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the same judge that presided over *Renshaw*, sentenced a wife batterer to eighteen months imprisonment. The appeal was brought on the basis of remarks the judge made to the media with respect to the contempt case. The court held that these remarks, although related to a different case than the one before the jury, might nevertheless have influenced them in the course of their deliberations. The conviction was subsequently quashed. *Judges Should Never Comment Publicly on Criminal Trials*, THE TIMES (London), Oct. 19, 1989, at 43. *See also* I.D. Brownlee, *Compellability and Contempt in Domestic Violence Cases*, J. SOC. WELFARE L. 107, 111 (1990).

[98] Unmarried partners are competent and compellable witnesses under Magistrates Courts Act, 1980, § 97 (Eng.).

[99] THE GUARDIAN (Manchester), Mar. 14, 1989.

[100] *See* POLICING DOMESTIC VIOLENCE, *supra* note 21, at 218. *See also* Anne McGillviray, *Battered Women: Definition, Models and Prosecutorial Policy*, 6 CDN. J. FAM. L. 37-45 (1987).

[101] REPORT OF NEW SOUTH WALES TASK FORCE ON DOMESTIC VIOLENCE 55 (1981). *See also* UNITED STATES DEPT. OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON FAMILY VIOLENCE (1984).

frightened witness. Section 23 of the Criminal Justice Act 1988 permits a documentary testimony to be admissible as evidence of any fact which would be admissible as direct oral evidence by the same defendant. Two criteria must be met: 1) the statement must have been made to a police officer or some other person charged with the duty of investigating offenses or charging offenders; and 2) the person who makes the statement does not give oral evidence through *fear* or because *she is kept out of the way.*[102]

Section 23 applies to all proceedings and is subject to the safeguard that no such written statement shall be admitted without leave of the court. Leave of the court is to be granted only in the interests of justice, after consideration of the following factors: the content of the statement, the risk of unfairness to the accused whose ability to contradict the adverse testimony will be hindered, and any other relevant circumstances.

The practical effect is that section 23 has only limited usefulness in domestic violence cases. The Divisional Court has considered section 23 in two recent judgments, *R v. Acton Justices Ex Parte McMullen and R v. Tower Bridge Magistrates Court, Ex Parte Lawlor.*[103] In both cases, the applicants proceeded with applications for judicial review against the magistrates' decision to admit written statements in place of oral evidence. In *McMullen*, the defendants were charged in committal proceedings with aggravated burglary, violent disorder, malicious wounding, and criminal damage; one of the witnesses refused to give evidence because of fear. In *Lawlor*, the defendant was charged with attempted murder; one of the prosecution witnesses, a young man of sixteen, refused to give evidence because of fear. The court held that the magistrates could exercise their discretion to admit under section 23 that the terms "fear" and "kept out of the way" could be treated disjunctively.[104] The court dismissed their applications.

With respect to domestic violence, the first real test case was *R. v. Ashford Magistrates Court, Ex Parte Hilden,*[105] which came before the Divisional Court. Hilden was charged with causing grievous bodily harm with intent, and false imprisonment of his girlfriend. At the committal proceedings, the girlfriend went into the witness box, but refused to give evidence because of fear. The magistrate granted the prosecution's application for her written statement to be admitted in evidence pursuant to

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[102] *See* Criminal Justice Act, 1988, § 23(3)(a)(b) (Eng.).

[103] 92 Crim. App. 98; 154 J.P. 901 (1991).

[104] *See* Criminal Justice Act, *supra* note 102.

[105] R. v. Ashford Magistrates Court, *Ex Parte* Hilden, 2 All E.R. 154, 96 Crim. App. R. 92 (1993).

section 23.

The applicant applied for judicial review of the magistrate's decision, contending that all the necessary conditions for application of section 23 were not met: 1) the written statement was only admissible under section 23 if the witness did not give any oral evidence; 2) the witness actually stated that she was not giving evidence because of fear; and 3) the magistrate actually read the statement before admitting it.[106] The court held against the applicant on all three issues and the application for judicial review was refused.[107]

When the case against Hilden was committed for trial, the defendant was charged under section 18 of the Offenses Against the Person Act 1861, and with false imprisonment contrary to common law[108] to which he pleaded "not guilty." The statement was read to the victim, but she made no reply. The judge responded, warning her that she was lying and was wasting court time. The CPS, notwithstanding section 23(3)(b), withdrew the charges against Hilden and the prosecution declined to offer any evidence. A "not guilty" verdict was entered. These cases establish that the prosecution must prove the fear or restraint required by section 23 according to the criminal standard. Evidence of fear need not come from the witness — testimony from a police officer or from other witnesses is sufficient.[109] However, the decision in *Hilden* demonstrated an unwillingness to admit a written statement under section 23, even where evidence of assault was so serious,[110] indicated that this section is unlikely to have any prospect of assisting victims of lesser violence.

What remains clear is that the victim of domestic violence is still misunderstood and unprotected. The sentiments still adhered to in the treatment of these cases resonate with the same misunderstanding of

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[106] The magistrate had not read the written statement but deposed that she would have reached the same conclusion even if its contents had been put before her.

[107] *See* R v. Ashford Magistrates Court, *Ex parte* Hilden, 2 All E.R. 154j-i, 155a-b (1993). (holding that: 1) refusal to give evidence meant refusal to give evidence of significance; 2) fear did not have to be explicitly stated by the witness — it could be determined by the court; and 3) the court was not required to have seen or read the witness statement before making a decision to accept it).

[108] For further reference to the offense of false imprisonment, see BLACKSTONE'S CRIMINAL PRACTICE B2.62, 156 (1993).

[109] This has been supported by the author's personal communications with police officers dealing with these cases.

[110] The violence inflicted on Donna Terrace included severe laceration to her legs, a broken nose and broken teeth, and multiple wounds to the face and head. She had been kidnapped and beaten severely; the degree of violence inflicted, said one of the officers, amounted to attempted murder.

Lord Salmon: "if she does not want to avail herself of the law's protection, there is, in my view, no ground for holding that the common law forces it upon her."[111]

7. Sentencing

At the time of sentencing, many victims of domestic violence feel that the law has failed them. Sentences in the domestic violence context have tended to be minor in comparison with sentences meeted out for violence in the non-domestic context. The symbolic message this conveys to the public is that domestic violence does not really count.[112] On rare occasions, however, the court has taken the view that domestic violence should be treated the same as any other crime.[113] In *R v. Buchanan*, the court held that "where wounding was with intent the courts must impose sentences appropriate to the gravity of the offense despite the domestic background,"[114] and upheld a two-year sentence.

In *R v. Giboin*, the Court held that:

> an assault by a man on his wife should not be brushed aside as due to emotional upsets or jealously; wives are vulnerable at the hands of violent husbands, and there is no reason why a man should not be punished in the same way for assaulting his wife as he would for assaulting any other person.[115]

This sentiment was echoed in *R v. Cutts*.[116] The victim and the appellant were married, but living apart when he visited her in a drunken state. The victim was struck across the head, knocked to the floor, given a cut that required several stitches, kicked, punched in the jaw, and given a broken nose. The victim was then forced to have sexual intercourse, during the course of which she blacked out. When she regained

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[111] *Hoskyn*, All E.R. at 150.

[112] The numerous arguments relating to the brutalizing effects of prisons, and their rehabilitative ineffectiveness, are beyond the scope of this article.

[113] *See* R. v. Buchanan, 2 Crim. App. R. (S.) 13 (holding that "the courts cannot regrettably be deflected from their duty of imposing sentences appropriate to the gravity of the offense when crimes of violence of this nature are committed against a domestic background"); R. v. Giboin, 2 Crim. App. R. (S.) 99 (holding that "there is no reason why a man should not be punished in the same way for assaulting his wife as he would be for assaulting any other person").

[114] *Buchanan*, 2 Crim. App. 13 (1980).

[115] *Giboin*, 2 Crim. App. R. (S.) 99 (1980). A husband asked his wife to continue their marriage and, while kissing her, stabbed her in the back.

[116] *See* R. v. Cutts, [1987] Fam. L. 311. *See also Domestic Violence is No Mitigation*, THE TIMES (London), Dec. 3, 1986, at 38.

consciousness, she tasted semen in her mouth. According to the victim, her husband asked to shake hands with her and told her to forget about it, stating that she deserved a good hiding each time she refused sex.

Court stated:

> In the view of this court it is high time that the message was understood in clear terms by courts, by police forces, by probation officers and above all by husbands and boyfriends of women, that the fact that a serious assault occurs in a domestic scene is no mitigation whatsoever and no reason for proceedings not being taken and condign punishment following in a proper case.[117]

In yet another case, where a former husband had been found guilty of a knife attack on his wife, the court considered the sentence of two years unduly lenient and increased it to three.[118]

Notwithstanding the sentences levied in the above cases, it is more often the case that victims of domestic violence who successfully negotiate all of the hurdles between the violent act(s) and prosecution are disappointed by the sentencer, who imposes only the most paltry of sentences. Little research has been conducted on the enforcement of the law with respect to sentencing. A 1990 study of sentencing in London[119] found that in cases of domestic assault, the most typical sentence was a fine. Even where grievous bodily harm was caused, very few offenders were sent to prison.[120]

The reality of sentencing in the appeals court, even in the more serious cases, is that the domestic violence offender finds his sentence reduced on the grounds that he is otherwise a respectable man, that the offense is out of character, or that the defendant is not a threat to the public. In sentencing negotiations, counsel for domestic violence defendants frequently rely on gender role ideologies which promulgate a divide between domestic violence and other crimes of violence in order to minimalize the criminality and dangerousness of their client.

In *R. v. Reilly*, where the appellant attacked his wife with an axe,

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[117] *Cutts*, [1987] Fam. L. at 311.

[118] *See* Attorney General's Reference No. 13, 12 Crim. App. 578 (1990). The defendant had slashed his wife's face, requiring 40 sutures. She had refused to return to live with him, and he formed the view that if "he couldn't have her, no one else would see her beauty." He said "I took the knife from her to cut her face." Attorney General's Reference No 13, 12 Crim. App. R. 485 (1990) (The Attorney General found a sentence of two years "unduly lenient" where a man had been found guilty of slashing his ex-wife's face, causing a wound which required 40 sutures to close. The sentence was increased to three years.).

[119] *See* DOMESTIC VIOLENCE, *supra* note 2.

[120] *Id.*

Lord Justice May said the appellant: "was not a man addicted to violence at all[,] . . . was not a threat to the public," and that "the offence was out of character."[121] The sentence was reduced to six years. Similarly, in *R. v. Beaumont*,[122] a sentence of ten years for the attempted murder of a girlfriend was reduced to five.[123]

The Criminal Justice Act of 1991 invokes a similar divide between offenders considered a threat to the public, and those who are only a threat to persons in the private domain. Under the act, a court shall only pass a custodial sentence on an offender "where the offense is a violent or sexual offense, [and] that only such a sentence would be adequate to protect the public from serious harm from him." This provision, in the absence of guidance on statutory interpretation to the contrary, may well provide an official blessing to treating violence in the home differently from violence in the street.

a. Negotiated Sentencing for Whom?

What are commonly called "victim/witness impact statements" in the United States are having some impact in England and Wales in the context of domestic violence — resulting in the development of split personality disorder in the criminal justice system. On the one hand, there is finally an awareness that women who express a desire not to proceed with a prosecution are likely influenced by fear of retaliation and are thus manipulated by the defendant. On the other hand, the effect of victim impact statements is often to ignore this element of duress where the victim of domestic violence expresses a desire for leniency in the sentencing of their aggressor. The rationale is that the prototypical battered woman has been denied choice all of her life (and that) the justice system must allow her some control and power over the course of the prosecution. However, this view gives too little credence to the likelihood that the battered woman's choices are made under a kind of duress akin to that of Plato's Happy Slave, who is unable to decide what is truly in her own interest. The victim impact statement's effect has been to deemphasize the view that domestic violence is between the aggressor and the state, and that the decision to prosecute, to give evidence, and to sentence is a matter for the criminal justice system. It is, therefore, illogical that at the sentencing stage, courts have been willing

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[121] R. v. Reilly, 4 Crim. App. R. (S.) 288 (1982).

[122] R. v. Beaumont, 9 Crim. App. R. (S.) 270 (1991).

[123] In *Beaumont*, the defendant's girlfriend had wished to end their relationship. He stabbed her in the neck, chest, and back and in doing so, used more than one knife. However, the court took into consideration that he was of "good character." *See* R v. Beaumont, 9 Crim. App. R. (S.) at 270.

to entertain the "apparent" wishes of the "forgiving" victim.

In *Krause*, the court clearly stated that it gave weight to the forgiveness of the wife:

> What does make this case perhaps rather out of the ordinary is this. Not only had the couple been living together on terms of affection previous to the incident, but it seems that this degree of affection had continued thereafter. So far from being repelled by this man as a result of what he had done and wishing, because of what he had done, to have no more to do with him, she had, up to the moment when he came to be sentenced, corresponded with him on terms of real affection. Since his sentence was imposed and he has found himself in prison, the affectionate correspondence has continued. We have had the opportunity of seeing the letters. They are touching, and they do express what we believe to be genuine feeling for this man and a genuine longing to put together again the life of the couple and of the children upon release . . . . We accept that in the present case, the genuine affection between the couple is to be taken into account.[124]

While the language used by the court does indicate sensitivity to the weakness of relying on victim impact statements, the result is a tacit rejection of the notion of domestic violence being a crime against society. In *R. v. Houlahan*, the victim withdrew her allegations because of fear.[125] The prosecution proceeded, but the defendant pleaded not guilty — alleging that his wife's injuries were self-inflicted. The offender was convicted and sentenced to a six-month term of imprisonment. On appeal, the Court of Appeals reduced the sentence to a suspended term and the defendant was set free, having served only two months of his sentence. According to Appeals Court Judge, Tucker, the victim was "a wonderfully forgiving wife."[126] In *R. v. Carr*,[127] a man who tried to strangle his wife when she told him she was leaving, was placed on probation. The judge said: "[y]our wife has written to me begging me not to send you to prison." And in *R. v. Plater*, sentence was reduced from seven years to five for attempted murder in response to the victim writing to the Court: "[h]e has lost his home, me and the kids and that

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[124] *See Krause*, 11 Crim. App. at 363. *See also* R. v. Ball, 4 Crim. App. 351 (1982) (giving considerable weight to the victim's forgiveness).

[125] *See* Susan S. M. Edwards, *What Shall We Do With a Reluctant Witness?*, NEW L. J. 1740 (1989) (discussing a case where a husband threw his wife to the floor, punched her in the face, head, and body, and threatened to make a mess of her with a Stanley knife. He then barricaded their home and kept her prisoner overnight. In photographs presented to the court, the victim's face was unrecognizable.).

[126] *Id.*

[127] This case, before the Court in 1990, was unreported.

is enough for any man."[128] The role of victims in the sentencing process in domestic violence is a most disturbing trend. Women are "got at" by defendants' relatives, their lawyers, and by the men themselves, and they are encouraged to believe that if they say something to the court it will make a difference. Women never get out of the cycle of duress at any stage, and they feel that they are to blame for seeking protection in the first place.

b. Mediation

The trend toward mediation in North America, England, and Wales also poses several questions as it remains uncertain how much it will benefit victims of domestic violence. It represents a movement away from placing responsibility for violence on the male perpetrator, and is therefore a backwards step in the wake of other, more progressive efforts.[129] Bootlegged from the divorce arena, mediation is an athema to everything practitioners have sought to accomplish in the law of domestic violence. There can be no mediation between unequals. That there could be is particularly ridiculous where one party has a history of abusing the other. Domestic violence is not about a difference of ideas or of approaches — it is about the abuse of one vulnerable person by another. The dangers of this trend should be obvious. The case of Vandana and Janti Patel is illustrative. On April 29, 1991, in the domestic violence unit at Stoke Newington Police Station, in London, the police provided a meeting place for the couple following a request made by a case worker from the local womens' refuge. The meeting between Janti Patel and his wife, Vandana, took place as arranged. The couple were left alone to discuss their situation, with the intervening door open. After a period of twenty-five minutes a brief check was made by the police. They appeared to be getting along well. They were then left for a further twenty minutes when a scream was heard. The police discovered Janti Patel holding a knife, and his wife lying on the floor, murdered.[130]

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[128] *See* THE GUARDIAN (London), Jan. 7, 1992 (The defendant had tried to throttle his victim with a belt, and stabbed her in the shoulder when she told him she was leaving him.).

[129] Zoe Hilton is clearly alarmed by the trend towards mediation in the area of domestic violence. *See* Zoe N. Hilton, *Mediating Wife Assault: Battered Women and the "New Family,"* 9 CDN. J. FAM. L. 29 (1991). *See also* D. Ellis, *Family Courts, Marital Conflict Mediation, and Wife Assault, in* LEGAL RESPONSES TO WIFE ASSAULT 165-87 (Zoe N. Hilton, ed. 1993).

[130] *See* LONDON METROPOLITAN POLICE, THE VANDANA PATEL ENQUIRY (Internal Report 1991). *See also* Susan S.M. Edwards, *When Cruel Death Doth Them Part*, THE GUARDIAN (Manchester), Mar. 11, 1992, at 21.

IV. THE VICTIM TURNS DEFENDANT: A LIFE SENTENCE

It is the inadequacy of police response, the law, the courts, and in essence, the failure of state protection from domestic violence, which has caused women in many jurisdictions, including England and Wales, to defend themselves from violent aggressors.[131] When they do so, they find that the law fails them again. While access to the law and its defenses claims impartiality, entrenched within the nature and content of the law itself is the partiality of a gendered vision of what constitutes homicide and what passes for manslaughter. The proponents of the argument that there are visceral gender politics inherent within homicide law, has centered its case largely around the issue of provocation within the Homicide Act of 1957. Women who kill violent spouses face four possible outcomes: 1) a conviction for murder under section 1 of the Act; 2) a conviction for voluntary manslaughter, with provocation, under section 3; 3) a conviction for voluntary manslaughter, with diminished responsibility, under section 2; or 4) a complete acquittal on the grounds of self-defense, under section 4 of the Criminal Justice Act of 1967.

In practice however, women who kill are usually convicted of murder or manslaughter, with diminished responsibility.[132] There are currently eighty-two women serving life sentences in British prisons for murder — the majority of whom killed their partners.[133] The view that there are gender politics of homicide is centered around the argument that women have a difficult time satisfying a provocation defense —

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[131] *See generally* Susan S.M. Edwards, *Battered Women Who Kill*, New L. J. 1380, 1381, 1392 (1990); Susan S.M. Edwards, *Battered Woman Syndrome*, NEW L. J. 1350 (1992); LENORE E. WALKER, TERRIFYING LOVE (1989); Lenore E. Walker, *Battered Women as Defendants*, *in* LEGAL RESPONSES, *supra* note 132, at 233-57; J. BLACKMAN, INTIMATE VIOLENCE 167-83 (1989); A. BROWNE, WHEN BATTERED WOMEN KILL (1987); P. Easteal, *Sentencing Those Who Kill Their Sexual Intimates: An Australian Study*, 21 INT'L J. SOC. L. 189-218 (1993); Katherine O'Donovan, *Defenses for Battered Women Who Kill*, 18 J. L. & SOC'Y 219-40 (1991).

[132] I do not propose to provide a detailed response to the Home Office figures, released in 1991, showing that women were more likely to receive murder or diminished responsibility convictions than men. The Home Office figures showed that, number for number, women were not treated unfavorably. However, the figures were released without analysis and did a great disservice to women of this country and particularly to battered women. Analysis of the figures showed that women were more likely than men to receive a conviction of provocation, and less likely than men to receive a conviction for murder. However, the nature of the provocation suffered by men and women is typically so different that a "more likely than not" standard is meaningless. For equal treatment under the law to be attained, the law must take into consideration the nature of the provocation. The result would most likely be that 90% of women defendants would receive provocation convictions — certainly not what the Home Office figures revealed.

[133] This was revealed to the author through personal communication with the Prison Department of the Home Office in London.

particularly battered women. This is principally because of the "immediacy" requirement. Because immediate retaliation would undoubtedly result in her further victimization or death, the battered woman typically cannot fight back in the heat of the moment, despite the fact that she was provoked to do so. Slavish adherence to the immediacy requirement and past precedent[134] has led the bench to exclude past histories of violence as being irrelevant and instead prioritize the immediate provocation. The law is thus bound by a monocausal, deterministic construction of human anger and passion, and loss of self control. This is very much a nineteenth century model of reflexive action, akin to what criminologists would recognize as positivism.

Beyond the inherent nature of the law and statutory construction, the paradigm of the "reasonable man" presents another hurdle for the killer of a battering husband. Jurors, as triers of fact, must determine whether the "things said or things done or both," amount to provocation based on their perception of how they think the reasonable man would have reacted. This is arrived at by taking into account all the relevant circumstances including the accused's nature and personality and, in limited circumstances, how the 'reasonable man' is embodied with certain "notional characteristics."[135]

There has been no place within the "reasonable man" to accommodate a women's perspective. The reasonable man's level of tolerance, and his exonerable breaking point is culture bound. So that the man who kills the adulterous wife, the nagging wife, the domineering wife, walks free; while the woman who kills the adulterous husband, the nagging husband, the domineering husband, the violent husband, does not. The reasonable man concept, interprets any time between the last act of provocation and the killing as a "cooling off" period — a concept not generally applicable to a victim of domestic violence. In addition, while juries have sympathy for the female spouse, they are culture bound in their expectations of her, *inter alia*, that she should put up with his adultery, his affairs, and his violence as her wifely duty.

The English and Welsh debate has developed through the argument that being battered affects women, and results in a response which may be disproportionate to the last single act of provocation. It is now recognized that battered women may experience fear and trauma in a way specific to their life experience, and that jurors should be acquainted

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[134] *See, e.g.*, R. v. Duffy, 1 All E.R. 932 (Crim. App. 1949).

[135] *See* Dir. of Pub. Prosecutions v. Camplin, App. Cases 705 (1978) (holding that the reasonable man should be invested with the accused's characteristics, usual or unusual, which would affect the gravity of the provocation). *See also* R. v. Newell, 71 Crim. App. R. 331, 334 (Eng. C.A. 1980); R. v. Raven, Crim. L. R. 51 (Cent. Crim. Ct. 1982).

with that experience so that they understand the psychology of the victim-turned-defendant's fear of imminent death. The courts in England and Wales have failed to adduce such evidence, termed "battered woman syndrome," under the rubric of provocation, as a notional characteristic of the accused. However as the case of *R. v. Aluwahlia* indicates, it has been successfully introduced as evidence of diminished responsibility.[136]

In the United States[137] and Canada,[138] the battered-woman-syndrome defense has been well-established for several years and is beginning to be used ever more creatively. In the United States, such evidence has been admitted in self-defense pleadings, manslaughter pleadings, and duress defenses. Battered woman syndrome is used to show self-defense by establishing that the defendant had a reasonable perception of imminent danger, given her experience of prior battering, and was therefore justified in using lethal force.[139] In manslaughter defenses, United States courts admit evidence of battered woman's syndrome as evidence of provocation, and in some states, diminished capacity.[140] A duress defense establishes that the battered woman defendant committed the act in the protection of her children. In Canada, battered woman syndrome has been introduced in cases of aggravated assault[141] as well as murder.[142]

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[136] *See* R. v. Aluwahlia, 4 All E.R. 889, 897-98 (1992).

[137] *See* Ibn Tamas v. United States, 407 A.2d 626 (D.C. App. 1979); State v. Wanrow 559 P.2d 548 (Wash. 1977); Moran v. Ohio, 469 U.S. 948 (1984) (Brennan, J., Marshall, J., dissenting). For cases excluding the testimony of battered women. *See also* Fennell v. Ann Goolsby, 630 F. Supp. 451 (E.D. Pa. 1985); and U.S. v. Gregory, 1988 WL 93949 (N.D. Ill. Sept. 2, 1988).

[138] *See* Lavelle v. R., 1 S.C.R. 852 (1990). *See also* R v. Ryan, 80 C.C.C. 3d 514 (1993); R. v. Dieffenbaugh, 80 C.C.C. 3d 97 (1993).

[139] *See* People v. Torres, 11 Fam. L.R. 1332 (1985); People v. Aris, 215 Cal. App. 3d 1178 (1989); People v. Day, 2 Cal. App. 4th 405 (1992).

[140] *See* NEW YORK L.J., Oct. 26, 1993, (considering whether a defendant who seeks to present testimony on the battered woman's syndrome is assumed to be a normal person whose actions can be explained by the syndrome or a psychologically dysfunctional or mentally defective person).

[141] As in Ribeiro, where a woman cut off her husband's penis, following years of his physical and mental abuse. *See* Fine, *supra* note 24.

The infamous Bobbitt case, in Manassas, Virginia, involved a wife-defendant who, after years of domestic violence and rape, cut off her husband's penis. The husband, John Wayne Bobbitt was acquitted of rape in November 1993. Ms. Bobbitt explained in her trial, that she "just wanted to get rid of it." *See* Jonathan Freedland, *Wife Cannot Recall Cutting Off Penis*, THE GUARDIAN (Manchester), Jan. 15, 1994, at 12.

[142] In Lavelle v. R., 1 S.C.R. 852 (1990), the Supreme Court used an expert to explain to the judge and jury the experiences of battered women. *See* D. Martin & M. MacCrimmon et al., *A Forum on Lavelle v R.: Women and Self Defence*, 25 U.B.C. L. Rev. 23 (1991). *See also* K.

In the United States,[143] the child of a middle-class lawyer's lover died as a result of physical abuse. The jury learned that the mother had also been physically abused, was so much under the defendant's will, and lived in such fear of him, that she was rendered incapable of independent action. Evidence of battered woman syndrome has also been admitted to support a defendant's claim that she committed robbery under the duress of her batterer.[144] Evidence of battered woman syndrome has also been used in a sex offense trial in aiding the jury to determine the credibility of the victim-witness who had been raped and had recanted her original testimony.[145] In contrast, English and Welsh courts are extremely reluctant to entertain evidence of self-defense[146] and particularly where that evidence relates to battered woman syndrome. Even in *Aluwahlia*, where evidence of battered woman syndrome was admitted, the court stated that it was not convinced of the cogency of the evidence and ordered a retrial.[147]

A. *Battered Woman Syndrome: Evidence of Diminished Responsibility — A Case Study*

Kiranjit Aluwahlia was convicted of murder at Lewes Crown Court on December 7, 1989. Mrs. Aluwahlia had been subjected to several years of violent abuse by her husband, Deepak. To prevent him from hurting her again, she "set fire to the bedding . . . I didn't intend to kill him or cause him really serious injury." A provocation defense failed, and she was convicted of murder. In the eyes of the court she had delayed her action. This ruling was informed by the Devlin ruling in *Duffy*, which holds that the farther away a provocative action is from

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O'Donovan, *Law's Knowledge: The Judge, The Expert, The Battered Woman, and Her Syndrome*, 20 J. L. and Soc. 427-37 (1993).

[143] *See also* SUSAN BROWNMILLER, WAVERLY PLACE (1989).

[144] 61 U.S.L.W. 2321 Dec. 1, 1992. In re Romero, Cal. App. 2d Dist., No B068893, 11/2/92. Debra Romero and the man with whom she lived, Terence Romero, were both charged with robbery and attempted robbery. Debra Romero's defence was duress. She claimed she was terrified that Terence Romero would kill her if she did not do what he ordered. Her lawyer failed to adduce expert testimony on battered woman syndrome. She petitioned for a writ of *habeas corpus*.

[145] Acoren v. U.S., Ca. 8 No. 90 5277 SD, 4/8/91. This was the first Federal appellate case to consider the admissibility under Rule 702 of evidence relating to the battered woman syndrome, a number of state courts have held that such evidence is admissible to support a claim that a battered woman killed her husband or partner in self-defence.

[146] There have been very few cases. Janet Gardner was being strangled when she grabbed a knife from the kitchen wall and stabbed her partner. She was convicted of manslaughter without provocation and not under the Criminal Law Act 1967 section 3(1). *See* THE INDEPENDENT (London), Oct. 30, 1992.

[147] *See* R. v. Aluwahlia, 4 All E.R. 889 (1992).

the retaliatory action, the less likely that a provocation defence will succeed.[148] On appeal, her counsel argued that the *Duffy* rule was incorrect because it did not take into account the impact of section 3 of the Homicide Act. Lord Diplock, in *DPP v Camplin*,[149] held that section 3 had abolished "all previous rules of what can or cannot amount to provocation." Counsel argued that women who have frequently been subjected to violent treatment may react to a final act or word in a "slow burn," rather than in an immediate loss of self-control. Counsel also argued that because the appellant's status as a battered woman was material, this should have been considered a "notional characteristic." The trial judge's direction to the jury had stated that "[t]he only characteristics of the defendant about which you know specifically that might be relevant are that she is an Asian woman, married, incidentally to an Asian man, the deceased, living in this country."[150] This direction ignored the evidence of battering as a notional characteristic, and thus failed to consider battered woman syndrome in the context of Lord Diplock's formulation in *Camplin*.

The Court of Appeals quashed the murder conviction and substituted one of manslaughter/diminished responsibility. The Court held that provocation was a sudden and temporary loss of self-control, and that provocation contained a subjective element that would not be negated by a delayed reaction — provided that at the time of the killing, there was a sudden and temporary loss of self-control. However, the longer the delay, the more likely provocation could be negated. The Court also held that characteristics relating to the mental state or personality of the individual could be considered provided that they had the necessary degree of permanence.

The decision in *Aluwahlia* was hailed as a watershed. It was the first time that a British Court had admitted evidence of battered woman syndrome in an appeal against a murder conviction. The result was to focus on the defendant's state of mind, rather than her partner's violence.[151]

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[148] *See* R. v. Duffy, 1 All E.R. 932 (1949).

[149] *See* Dir. of Public Prosecutions v. Camplin, [1978] App. Cases 705.

[150] *See generally* R. v. Aluwahlia, 4 All E.R. 889 (1992).

[151] *See* Susan S.M. Edwards, *Battered Woman Syndrome*, New. L.J. 1350 (1992); Susan S.M. Edwards, *Battered Women Who Kill*, New. L.J. 1380 (1990).

B. *From Victim to Defendant: A Life Sentence — An Alternative Case*[152]

Sarah Thornton was not as fortunate and is serving a life sentence for killing a brutal husband. According to Sarah, she sharpened a kitchen knife, pointed it at her violent husband expecting him to knock it away, and accidentally stabbed and killed him. The sharpening of the knife was not treated as drama, as she had intended, but was construed as indicative of her intention to kill him. Her remark (to a friend) some months prior to the act, "I am going to kill him," was not treated as mere surplusage, or an expression of exasperation, but as another indication of intent. However, Thornton stated, "I didn't walk in there with the intention of stabbing him. I just wanted to show him how far he had driven me."

Dorothy Smith in her seminal paper *K is Mentally Ill*, illustrates how a person can be erroneously defined as mentally ill through a retrospective construction of events.[153] The retrospective construction of Sarah Thornton's utterances and dramatics were defined as indicators of a real intent, in a manner reminiscent of Dorothy Smith's analysis. Through the process of retrospective construction, some versions of events were discarded, while others become authorized. The bizarre calm of her 999 call to the emergency services is indicative of her shock and trauma.

> Operator: Ambulance emergency.
> Sara: Hello, Good Afternoon. I've just killed my husband. I have stuck a six-inch carving knife in his belly on the left-hand side.
> Operator: Where are you, love?
> Sara: Bring an ambulance and the police round straight away.
> Operator: Where are you?
> Sara: I'm at 73 Church Walk, Atherstone, Warwickshire. My name is Mrs. Sara Thornton, my husband is called Mr. Malcolm Thornton, and I think he's dead.
> Operator: Yes, darling, your name is Mrs. Thornton?
> Sara: Thornton. Shall I pull the knife out or leave it in?
> Operator: Leave it where it is, darling.
> Sara: Leave the knife in?
> Operator: That's right.

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[152] *See* R. v. Thornton, 1 All E.R. 306-17 (1992) (Malcolm Thornton had been charged with criminal assault and was waiting to appear in court.).

[153] Dorothy E. Smith, *K is Mentally Ill: The Anatomy of a Factual Account*, 12 SOC. 23-53 (1978).

Sara: Thank you. Goodnight.

Thornton was charged with murder, and at her trial, her counsel offered a diminished responsibility defense. However, the provocative remarks that the deceased made required the trial judge to leave the defense of 'manslaughter on the grounds of provocation' to the jury as an alternative verdict. The judge gave a standard provocation direction. The Appeals Court held that the judge had not misdirected the jury, and that the decision of the appellant's legal advisers to concentrate her defense on diminished responsibility did not raise any "lurking doubt" that she had suffered injustice or that the conviction was unsafe and unsatisfactory.[154] Although Thornton's appeal failed, it should be recognized that the Court took into consideration concepts of cumulative provocation and long histories of violence.[155] In stark contrast, stands the appeal in *R. v. Palmer*.[156] In the course of an argument with his wife, the appellant fetched a knife from the kitchen to frighten her. He stabbed her and claimed it was an accident. Unlike Thornton, he was charged with manslaughter, not murder. The Appeal Court reduced his sentence from seven years to five. Thornton, meanwhile, continues to serve her life sentence.

From arrest to sentencing, from application to the construction of defenses, the law excuses male violence, and condemns females who defend themselves. The State's claim that it provides equal protection under the law, and protection from domestic violence, remains a hollow one indeed.

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[154] Sarah Thornton's application to the Home Secretary to have the case referred back to the Court of Appeal in accordance with his powers provided in section 17 Criminal Appeal Act 1968, was refused in June 1993.

[155] *See Thornton*, 1 All E.R. at 896.

[156] R. v. Palmer, 12 Crim. App. R. (S.) 585 (1990).