

## Domestic Homicide, Gender and the Expert

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### Introduction

‘On matters in which the legal system is accused of being draconian..., it is often the case that the motivation is a fear of reckless precedent....There are women who kill their male partners in genuine terror for their lives; but courts are often hard on such cases because of the danger of encouraging murder as an alternative to divorce’ (Mark Lawson, ‘Topsy-turvey logic of the terminator’, *The Guardian*, 22 April 2000, 16)

For that journalist, the solution to an abused woman’s predicament is generally simple: divorce. And in many cases this is undoubtedly correct. However his views reflect a popular failure to appreciate the reality of the lives of those women driven by fear or despair to kill, a failure which extends, to some degree, also to the legal system. That domestic violence is gendered in nature and that the responses of victims of abuse too are gendered are factors to which the criminal law has remained largely impervious. Unless they fall within the narrow parameters of the defences of self-defence or provocation, the actions of these women can be categorised by the criminal law only as either bad or mad; they do not qualify as reasonable responses to unreasonable situations. Unless these women behave as the reasonable man would, by fighting back or by walking out, the law has shown itself unwilling to excuse or exonerate their behaviour. Their principal recourse has been to seek to show that they suffer from some abnormality of mind.

Part of the problem facing abused women who kill lies in the reluctance of the criminal law to take cognisance of the social context within which offences are committed: ‘the legal subject is constructed as a gender-less, race-less, class-less individual abstracted from its social situation’ (Lacey and Wells, 1998, p.32). As a result, embodied gender is rendered invisible. The embodied power of men who abuse women and the effects of the exercise of that power on victims disappear in the face of apparently commonsensical and neutrally applied legal rules. And the actions of women whose bodies are constantly threatened or attacked, who have learned that resistance or retaliation are fruitless or even dangerous, are judged as the acts of autonomous, freely choosing agents unconstrained by their circumstances.

Another, and more important, factor in relation to domestic homicide is the ‘implicit masculinity’ (*idem*) discernible in the law. Even where it does acknowledge the salience of context, as it seems to do in respect of the defences of provocation and self-defence, the law has tended to evaluate the actions of the defendant within that context against a standard that reflects typically male behaviour. Rendered ‘gender-less’, women who kill have been judged against an implicitly male template and many simply do not measure up; the reasonable person of law is embodied as male (O’Donovan 1993 p.428). Their difficulties have been compounded by the fact that it has not been easy to counter the adverse inferences drawn from the nature and timing of their actions; that some wait until their assailants are physically most vulnerable before striking condemns them.

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Gender-blind, the law has shown itself oblivious of the gendered power relations that characterise abusive relationships and the actions of abused women who kill have been scrutinised through the lens of common-sense. That stock of common-sense knowledge deployed by law does not encompass the growing body of knowledge about domestic violence emanating from research produced by the ‘psy’ professions and by social scientists. Moreover, such knowledge cannot, scholars assert, easily be brought to law’s attention; since courts are thought to need no help in understanding the ‘normal’ world, generalised expert evidence about domestic violence is hard to introduce (Lacey and Wells, 1998, p.591). It is suggested that it is only when women’s experiences of and responses to abuse are couched in medicalised terms suggesting abnormality, such as ‘battered woman syndrome’, that they have readily been admitted in the form of expert evidence (*idem*). In that event, battered women’s actions become explicable through science and excusable in law. But the price of this is the marginalisation of the women’s experiences and their designation as ‘mad’ (Lacey and Wells, 1998, p.591; Raitt and Zeedyk, 2000, ch4).

By locating the problem within the woman who kills rather than in the material conditions of their lives, the law has failed to address fully the relevance of the more intractable problem of domestic violence and the deficiencies in the services available to protect victims of it. By ignoring the available evidence of the nature and effects of abuse, the law has misinterpreted and so, arguably, has not judged fairly the actions of its victims. However recent developments point to the beginnings of change.

Increasingly, the issue of domestic violence has been attracting the attention of the media and increasingly it is being portrayed as a serious social problem. Government has clearly felt a need to demonstrate its concern and has announced the launch of initiatives to provide better protection and improved resources for victims (Home Office, 2000). The law too has responded to the greater visibility of the risks and the difficulties faced by abused women and their children. And although this response has hitherto been confined principally to the sphere of family law, there appears to be greater readiness within criminal law too to take cognisance of domestic violence. In particular, the recent decision of the House of Lords in *Smith*<sup>1</sup> is likely to prove a significant one for the law’s approach in future to domestic homicide in the context of abuse. First, the case extends the boundaries of the defence of provocation. Secondly, it demonstrates a receptiveness to expert evidence that belies the assumptions and expectations expressed in the legal literature.

This chapter will accordingly seek to argue that, despite the many criticisms made of expert evidence in relation to domestic homicide, it is, for the moment, with the experts that women’s best hope lies. In addition, it will be argued that not only might expert evidence, by exposing the real conditions of the lives of women subjected to domestic violence and their embodied experiences of it, open the way to a successful provocation defence, it has the potential to make a plea of self-defence more easily available to abused women who kill.

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<sup>1</sup>*R v Smith* [2000] 4 All ER 289

## Domestic Violence

Domestic violence is, overwhelmingly, violence directed by men at women's gendered/sexed bodies.<sup>2</sup> While many explanations have tended to centre on individual pathology, stress, alcohol<sup>3</sup> or 'family violence' suggesting mutual combat,<sup>4</sup> increasingly the phenomenon is being explained in terms of male power, control and possessiveness over women's bodies. Dobash and Dobash (1979, p.76) say that their findings show that abusive husbands demonstrate a sense of 'possessiveness, domination and "rightful" control' over their wives; arguments that led up to violent incidents tended to be associated with husbands' possessiveness, sexual jealousy or wives' perceived shortcomings in carrying out domestic duties (pp.95, 98). Campbell (1992) also focuses on men's proprietariness and dominance and Polk (1994, p.56), in his Australian study, found that this could take a lethal form; women were killed because of their suspected infidelity or pursuant to terminating the relationship.

Polk's study highlights the fact that for some women, ending the relationship does not free them of violence. According to Wilson and Daly (1992) the risk of being killed escalates when the woman leaves and Mahoney (1994 p.59) states that violence may be used as a means to re-assert control over a woman who seeks to go; it cannot be assumed that leaving is always possible or that to do so will bring safety.

Women who turn to the police for protection, may still, it seems, be disappointed. In spite of the creation of specialist domestic violence units and the existence of guidelines directing officers to arrest offenders and support victims, it appears that the police still do not treat domestic violence like other crimes. Stanko *et al* (1998, p.28), for instance, found that few recorded cases ended in arrest.<sup>5</sup> In any event, says Hoyle (2000), the law is too blunt an instrument for dealing with abuse. It has been argued, for example, that if the pro-arrest policies were to be translated from the realm of rhetoric into action, this could have the effect of further endangering victims; arrest could lead to reprisals from an angry partner (Morley

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<sup>2</sup>See Mirrlees-Black *et al* (1996); Kershaw *et al* (2000) pp.38, 58; Law Commission (1992) para 2.1(a). See also the discussion of Mirrlees-Black (1999) in Diduck and Kaganas (1999) p.316 fn9; Stanko (2000) fn 3.

<sup>3</sup>See eg. Borkowski *et al* (1983) ch 5.

<sup>4</sup>See eg Straus (1993). See, for a discussion of the research, Dobash and Dobash (1992) ch 8. These authors, amongst others, criticise the basis of the 'family violence' studies which tend to rely on the Conflict Tactics Scale (CTS). This method fails to explore the context in which acts of violence take place and does not distinguish between acts of aggression and self-defence. Nor does it discriminate between different acts or levels of violence. It ignores the severity or otherwise of injuries. Finally, it excludes acts of sexual violence which are almost invariably perpetrated against women. Mirrlees-Black (1999) reports that it is overwhelmingly women who suffer serious abuse, injury and sexual violence.

<sup>5</sup>See also, Stanko (2000); McColgan (2000, p.195).

and Mullender, 1992, pp.270-71). Morley and Mullender argue that what is needed is ‘a criminal justice response which is both internally co-ordinated (between police, prosecution and sentencing *and* integrated within a broader community response’ including support networks and housing (p.271).

Those integrated responses have not yet been forthcoming. Only a minority of perpetrators are charged, fewer are convicted and only a very small proportion are jailed.<sup>6</sup> Moreover, victims receive little support in negotiating the prosecution process and many drop charges.<sup>7</sup> Civil injunctions were found by Barron (1990, p.65)<sup>8</sup> to be largely ineffective and, in any event, courts remain reluctant to eject men from their homes, declaring that to do so is ‘Draconian’ and justifiable only in ‘exceptional circumstances’.<sup>9</sup> Victims may find it difficult to obtain alternative housing<sup>10</sup> and refuges are overstretched (Stanko, 2000).

For those women driven to kill their assailants, the killing may appear to them the only way to prevent their own deaths or at least serious injury to themselves or their children.<sup>11</sup> McColgan (1993, p.517) suggests that in the context of police ineffectiveness and the fact that women who are injured or killed are often those attempting to exit the relationship, ‘viewed from the woman’s perspective, her use of force might be the only way to escape an escalating spiral of violence which she believes will end with her death’. Certainly, in some of the reported cases, the defendants had either tried to leave<sup>12</sup> or had turned to the police and to the courts before resorting to killing.<sup>13</sup> That some women kill men who are drunk or asleep points not so much to revenge but rather to the level of their fear and their physical inability to defend themselves against attack. Yet the criminal law offers little acknowledgment of these gendered differences.

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<sup>6</sup> See McColgan (2000) p.195. See also Peacock (1998) p629; Cretney and Davis (1996) and (1997a).

<sup>7</sup>Cretney and Davis (1997b).

<sup>8</sup>See also McGee (2000) pp.178-81. It appears however that powers of arrest are being attached more frequently to injunctions as a result of the implementation of Part IV of the Family Law Act 1996 (Edwards, 2000).

<sup>9</sup>*Chalmers v Johns* [1999] 1 FLR 392, 397.

<sup>10</sup>See Diduck and Kaganas (1999) pp.408 -9.

<sup>11</sup>Home Office (1993) statistics report that 41% of homicides recorded in 1991 were killings of women perpetrated by their husbands or lovers. 8% of men killed were killed by wives or lovers.

<sup>12</sup>*Janet Susan Gardner* (1993) 14 Cr. App. R.(S.) 364, 367.

<sup>13</sup> *R v Thornton* [1992] 1 All ER 306, 309; *Kathleen Hobson* [1998] 1 Cr. App. R. 31, 33; *R v Ahluwalia* [1992] 4 All ER 889, 892.

## Defences to a Charge of Murder

A charge of murder in the context of domestic homicide can be met with the justificatory defence of self-defence, leading to an acquittal, or either of two mitigatory, partial defences which will reduce the conviction to one of manslaughter. The latter two defences, provocation and diminished responsibility, were developed to circumvent the rigidity of the law and, it is said, to avoid imposing the mandatory life sentence for murder.<sup>14</sup>

### Self-defence

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<sup>14</sup>See Lacey and Wells (1998) p.584.

This defence has proved to be largely unavailable to women who kill their abusers. To fall within the parameters of self-defence, a use of force must be reasonable, and this means that it must have been necessary and proportionate to the harm which defendant was attempting to prevent (Ashworth, 1975). A killing does not qualify as a reasonable use of force unless it is necessary to avert an imminent threat (Wilson, 1999, p.293). And while pre-emptive action is permitted,<sup>15</sup> the defendant must believe herself to be in imminent danger.<sup>16</sup>

McColgan (1993, pp.517-8; 2000, p.200) contends for a less rigid application of the proximity requirement. Examining the leading case of *Palmer*, she argues that it did not lay down 'inflexible rules about imminence' (1993, p.517); it established merely that the proximity of the anticipated harm is an indicator of whether the defendant was acting in self-defence, was simply being aggressive or was acting to settle an old score. Certainly, the court stated that where 'the attack is over and no sort of peril remains',<sup>17</sup> the requirement of necessity may not be satisfied. However, as McColgan points out, a victim of abuse may find herself in a position where she cannot escape or where escape would be dangerous and that this inability to escape may extend to a situation where a threat is less than immediate. 'The victim of ongoing violence' she says, 'may have to strike when the chance arises, rather than waiting until it is too late' (2000, p.200). It may thus be necessary to attack an abuser who is asleep or drunk, but who has threatened violence when he awakes (*idem*). In the same way that a hostage threatened with death, albeit not imminent death, should be justified in killing to avoid that fate before it became unavoidable, so too should the abused woman be justified if, should she wait, the harm will become unavoidable.<sup>18</sup> To expect her to remain passive until the next, potentially fatal, attack would, in the words of a judge in the Canadian case of *Lavallee*, 'be tantamount to sentencing her to "murder by installment"'.<sup>19</sup>

In addition to the requirement of necessity, there is a requirement that the degree of force used must be proportionate to the threat. It was held in *Williams*<sup>20</sup> and affirmed in *Owino*<sup>21</sup> that the test is: 'a person may use such force as is (objectively) reasonable in the circumstances as he (subjectively) believes them to be'. The degree of force used is taken as an indicator of the defendant's state of mind; increasingly, it has been said, the reasonableness of the force used is coming close to being treated as evidence of 'whether the accused was genuinely motivated by self-defence or whether he was acting with some other illegitimate motive' like angry retaliation (Blackstone, 2000, p.58).

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<sup>15</sup>*Beckford v R* [1988] AC 130, 144.

<sup>16</sup>See *Devlin v Armstrong* [1971] NI 13, 33.

<sup>17</sup>*Palmer v R* [1971] AC 814, 831.

<sup>18</sup>See McColgan (1993) p.519; McColgan (2000) p.205.

<sup>19</sup>*Lavallee v The Queen* (1990) 1 SCR 852, 883.

<sup>20</sup>[1987] 3 All ER 411

<sup>21</sup> [1995] Crim. L. R. 743, 744

The difficulty faced by women who kill, even if they believe their lives to be in danger, is that their use of force may be regarded as excessive. Normally, the courts require comparable degrees of force; an armed defence against an unarmed assailant may not be reasonable. This approach might be justifiable, says McColgan, when attacker and defender are comparable in strength. But it may be inappropriate where an abusing man and his victim are involved. In particular, it would operate unfairly where the woman 'knows from experience that unarmed resistance by her to an unarmed attack by him may result in an escalation of that attack' (1993, p.520).

It has been suggested that excessive force should, provided the defendant honestly believed the degree of force used to be reasonable in the circumstances, form the basis of a partial excuse. A successful plea of excessive self-defence should, its proponents say, result in a conviction for manslaughter instead of one for murder. The possibility of such a defence was discussed, but the point left open, in *Clegg*<sup>22</sup> but it has been recommended by scholars as a potentially useful innovation. However a defence of this kind, while appearing attractive on the face of it, may not benefit women who kill unless the court has a clear understanding of the nature of the threat to severely abused women and the risks they face in attempting to escape. Its availability, say Lacey and Wells, may lead courts to convict of manslaughter instead of accepting the complete defence of self-defence.<sup>23</sup>

### Provocation

Provocation was defined in 1949 as something that 'would cause in any reasonable person, and actually caused in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind'.<sup>24</sup> Section 3 of the Homicide Act 1957 has expanded the defence to cover provocative words as well as acts and it requires the jury to take into account, in determining whether the provocation was enough to make a reasonable person react as the accused did, 'everything both done and said according to the effect which ... it would have on a reasonable man'. Nevertheless the 1949 definition has remained basically intact. It is the loss of control that distinguishes a response to provocation from a considered act of revenge and it is important, therefore, to decide whether there was time 'for passion to cool and reason to regain dominion over the mind'.<sup>25</sup>

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<sup>22</sup>(1995) 2 WLR 80.

<sup>23</sup>See, for a brief discussion, Lacey and Wells (1998) p.600.

<sup>24</sup>*R v Duffy* [1949] 1 All ER 932.

<sup>25</sup>*Ibid* 932-3

The first question, then, is whether the defendant lost self-control as a result of the provocative conduct. There has to be a sudden and temporary loss of self-control in order for what has been termed the 'subjective' element of the defence to be satisfied; those who act out of illegitimate motives like revenge do not qualify. The second question, directed at establishing the 'objective' element, is whether the provocative act would have caused a reasonable person to lose her self-control and behave as the defendant has, taking into account all the circumstances. So, not only must the court decide whether the provocation would have caused a reasonable person to lose self-control, but also whether the reasonable person would have reacted in the way that the accused did.<sup>26</sup> In *Camplin*,<sup>27</sup> Lord Diplock said that a reasonable person 'means an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is'.<sup>28</sup> It is, therefore, not enough to claim to be quick tempered, for example, as this would fail to take sufficient account of the ordinary or reasonable man standard. The reasonable person can, however, be someone who shares 'such of the accused's characteristics as [the jury] think would affect the gravity of the provocation to him'.<sup>29</sup> There must be a connection between the provocation and the characteristic. For example a court can take into account a defendant's disability where the provocation took the form of a taunt alluding to it.<sup>30</sup> In addition, the courts appear willing to take into account circumstances affecting the gravity of the provocation that are not strictly speaking characteristics, such as the defendant's history.<sup>31</sup> Yet an examination of the reported cases dealing with domestic homicide reveals that provocation based on a history of abuse has tended to fail as a defence. Abused women who kill have been found wanting on both the subjective and the objective criteria.

*Thornton* was such a case. The Court of Appeal upheld a decision which designated the defendant's act as neither the product of a loss of control nor as reasonable. First, she had left the room and sharpened the knife with which she had then stabbed her husband. Secondly, said the trial judge, it would be difficult to describe as reasonable the act of stabbing the husband 'as he lay defenceless on that settee .... There are ... many unhappy, indeed miserable, husbands and wives.... But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs'.<sup>32</sup>

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<sup>26</sup>*Phillips v The Queen* [1969] 2 AC 130, 137.

<sup>27</sup>*DPP v Camplin* [1978] AC 705.

<sup>28</sup>*Camplin*, n.27, 717; *Thornton*, n.13, 310.

<sup>29</sup>*Camplin*, n.27, 718.

<sup>30</sup> *R v McGregor* [1962] NZLR 1069, 1081-2, cited with approval in *R v Humphreys* [1995] 4 All ER 1008, 1017-8.

<sup>31</sup> See *Reg v Morhall* [1995] 3 WLR 330, 336.

<sup>32</sup>*Thornton*, n.13, 312.



Some movement towards accommodating a less masculine response to provocative conduct or words occurred in *Ahluwalia*, where the court accepted, obiter, the possibility of a ‘slow-burn’ reaction to ongoing abuse rather than an instantaneous loss of control.<sup>33</sup> However, while the subjective element of provocation was not, said the court, negated as a matter of law by the fact that there was delay in reacting, it nevertheless had to be shown that there was a ‘sudden and temporary loss of control’ at the time of the killing; ‘the longer the delay and the stronger the evidence of deliberation’ the less likely it would be that the defence would succeed.<sup>34</sup> McColgan (1993, p.512) suggests that this interpretation of the sudden and temporary rule is useful for abused women in that it links the suddenness to the loss of control rather than demanding temporal proximity between the provocation and loss of control.

As regards the objective element, the appeal court in *Ahluwalia* was asked to consider the argument that the defendant suffered from ‘battered woman syndrome’ (BWS) leading to ‘learned helplessness’,<sup>35</sup> and that this was a characteristic that the judge should have taken into account. This argument was rejected because there was no evidence before the judge to suggest that the accused suffered from post-traumatic stress or BWS or any other condition that could amount to a characteristic in terms of Lord Diplock’s formulation in *Camplin*. There had been evidence of ‘grievous ill-treatment’ but nothing to suggest its effect was to make her different from the ordinary run of women.<sup>36</sup> Had such evidence been put to the trial judge, different considerations might have applied, the court said.

Even if there is evidence of BWS, this will not suffice on its own. As the court in *Thornton (No 2)*<sup>37</sup> indicated, it is still necessary to show a sudden and temporary loss of self-control. However, it said obiter, BWS might be relevant in two ways. First, a background of abuse might go to show a loss of control ‘on a “last-straw” basis’ despite the apparently minor significance of the immediate trigger to the killing.<sup>38</sup> Secondly, the syndrome might be shown to have affected the defendant’s personality so as to constitute a relevant characteristic.<sup>39</sup> BWS, like other characteristics such as anorexia, obsessiveness and mental disorder, might be thought to reduce or deprive one of the capacity for rational thought but is

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<sup>33</sup>*Ahluwalia*, n.13, 896.

<sup>34</sup>*Idem*.

<sup>35</sup>It is thought that repeated violence renders a woman likely to become immobilised, passive and to feel that she is trapped and unable to escape (See Lacey and Wells (1998) p. 591; Raitt and Zeedyk (2000) pp.66-7)

<sup>36</sup>*Ahluwalia*, n.13, 898.

<sup>37</sup>[1996] 2 All ER 1023.

<sup>38</sup>*Ibid*, 1030.

<sup>39</sup>*Idem*.

nevertheless consistent with the concept of the reasonable person.<sup>40</sup>

It appears, then, from these reported decisions, that evidence of BWS or some equally distinct and diagnosable condition might help to bring the defendant's conduct within the confines of the defence of provocation. However it seems that it may now be possible for battered women to raise the defence in circumstances that fall outside these narrow boundaries. Surprisingly, the case that has opened up this prospect involved neither domestic homicide nor domestic violence.

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<sup>40</sup>See the discussion in *Humphreys*, n.30, 119-122. However the court in *Gardner* (1993) 14 Cr. App. (S) 364, while it accepted evidence of BWS, stated that the case might be akin to one of diminished responsibility rather than one of provocation. The defendant stabbed the man who was coming at her after holding her by the neck and banging her head against a door frame. In the past, he had brutally assaulted and raped her. He pursued her whenever she tried to leave the relationship so that she came to feel it was 'futile' to hide (367). The night of the killing, he had mounted what the doctor called 'a frenzied life threatening assault' (368). Self-defence was not pleaded.

The House of Lords in *Smith*<sup>41</sup> was asked to decide whether the characteristics of an accused can be taken into account not only in determining the gravity of the provocation, namely how provocative something might be to a particular defendant, but also in setting the standard of self-control to be expected of him or her.<sup>42</sup> The majority of the Lords answered this question in the affirmative.

Lord Hoffmann, reviewing the *Camplin* case, confirmed that ‘for the purpose of considering the gravity of the provocation, the reasonable man should normally be assumed to share the relevant characteristics of the accused’.<sup>43</sup> Furthermore, he said, Lord Diplock’s judgment left the way open to taking personal characteristics into account also for the purposes of determining the level of self-control that could reasonably be expected of the accused. Indeed, said Lord Hoffmann, the question of the gravity of the provocation is difficult to separate from the question of the degree of self-control to be expected, and so the characteristics of the accused must be relevant to both.<sup>44</sup> He accordingly held that an abnormality of mind<sup>45</sup> in the form of depression, which affected the defendant’s powers of self-control, could be taken into consideration.

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<sup>41</sup>n.1.

<sup>42</sup>See, for an explanation of these concepts, Ashworth (1976).

<sup>43</sup>n.1, 298.

<sup>44</sup>*Ibid*, 307.

<sup>45</sup>The judge found that the wording of s3 of the Homicide Act meant that the defences of diminished responsibility and provocation are not mutually exclusive.

This approach appears to go further than both *Ahluwalia* and *Thornton (No2)*. First, it is now clear that characteristics are relevant to both the gravity of the provocation and to the requisite degree of self-control.<sup>46</sup> Secondly, while Lord Taylor in *Ahluwalia* appears to have confined his remarks to characteristics in the form of an abnormal condition such as BWS or PTSD,<sup>47</sup> Lord Hoffmann did not restrict the defence in this way. He went on to observe, obiter, that mental characteristics short of some abnormality of mind would be relevant for the purposes of provocation and, turning specifically to the issue of domestic violence, said:

There are people (such as battered wives) who would reject any suggestion that they were ‘different from ordinary human beings’ but have undergone experiences which, without any fault or defect of character on their part, have affected their powers of self-control. In such cases the law now recognises that the emotions which may cause loss of self-control are not confined to anger but may include fear and despair.<sup>48</sup>

Lord Clyde in turn said:

I would not regard it as just for a plea of provocation made by a battered wife whose condition falls short of mental abnormality to be rejected on the ground that a reasonable person would not have reacted to the provocation as she did. The reasonable person in such a case should be one who is exercising a reasonable level of self control for someone with her history, her experience and her state of mind.<sup>49</sup>

These analyses may well release victims of domestic violence from the burden of presenting themselves to the court as suffering from a medicalised syndrome or disorder. Not only does medicalisation of the defendant’s state of mind have a stigmatising effect, it is a strategy that may well fail to reflect the reality of the experiences of many women who have been abused. In many cases it is terror and the knowledge that they are trapped, rather than mental abnormality, that leads to the loss of self-control. The House of Lords, in recognising this, and in entertaining the idea of the ordinariness or reasonableness of this response appears to have widened the scope of provocation as a defence.

However Lord Hoffmann made it clear that, although subjective characteristics should be taken into account in evaluating the degree of self-control demanded, this did not entail jettisoning all objective standards. He cautioned that not all mental characteristics should be treated as relevant to the issue of self-control; male possessiveness and jealousy for example do not qualify, he said. The purpose of the objective element in provocation ‘is to mark the

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<sup>46</sup>The jury in *Ahluwalia* were instructed to take into account the whole history of the marriage but only, it seems, in assessing the gravity of the provocation: ‘in order to decide whether the defendant may have been provoked’ (*idem*). See also *Thornton (No.2)* and *Humphreys*.

<sup>47</sup>n.13, 898.

<sup>48</sup>n.1, 308.

<sup>49</sup>*Ibid*, 316.

distinction between (partially) excusable and inexcusable loss of self control'.<sup>50</sup> If there are no limits, the fact that a person is liable to lose self- control would excuse loss of self-control. Nevertheless, domestic violence was clearly regarded by the judge as a potentially exculpatory factor.

It is the notion of excusable as opposed to inexcusable loss of self-control that lies at the heart of Lord Hoffmann's judgment. Rather than seeking to categorise characteristics according to their compatibility or incompatibility with the image of the reasonable person, he adopted a transparently normative approach. He explicitly rejected the notion of the reasonable man, with or without attribution of characteristics. Instead, he said, judges might find it more useful to explain the principles of the doctrine of provocation to the jury:

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<sup>50</sup>*Ibid*, 308.

First, it requires that the accused should have killed while he had lost self-control and that something should have caused him to lose self-control.... Secondly, the fact that something caused him to lose self-control is not enough. The law expects people to exercise control over their emotions..... The jury must think that the circumstances were such as to make the loss of self-control sufficiently *excusable* to reduce the gravity of the offence from murder to manslaughter. This is entirely a question for the jury. In deciding what should count as sufficient excuse they have to apply what they consider to be appropriate standards of behaviour; on the one hand making allowance for human nature and the power of the emotions but, on the other hand, not allowing someone to rely upon his own violent disposition. In applying these standards of behaviour, the jury represent the community and decide, as Lord Diplock said in *Camplin's* case..., what degree of self-control 'everyone is entitled to expect that his fellow citizens will exercise in society as it is today'.<sup>51</sup>

Lord Millett differed from the majority on some points of law, and in particular on whether characteristics affecting self-control could be relevant. But his (obiter) observations on the issue of domestic violence, like those of Lords Hoffmann and Clyde, appear to show a greater openness to entertaining a plea of provocation in such cases.

Accepting that abuse might erode the 'natural inhibitions' against resorting to violence in the same way that other forms of provocation might, he noted that the requirement of a 'sudden and immediate loss of self control' nevertheless posed an obstacle to provocation plea. He went on:

In many situations this is a useful test for the jury to have in mind.... But in the case of the battered wife the test is unhelpful. There is no legal requirement that the defendant's reaction must be triggered by an event immediately preceding his loss of self-control.....

The question for the jury is whether a woman with normal powers of self-control, subjected to the treatment which the accused received, would or might finally react as she did. This calls for an exercise of imagination rather than medical evidence, but it does not dispense with the objective element. It does not involve an inquiry whether the accused was capable of displaying the powers of self-control of an ordinary person, but whether a person with the power of self-control of an ordinary person would or might have reacted in the same way to the cumulative effect of the treatment which she endured. The more difficult question in such a case is likely to be whether she lost her self-control at all, or acted out of a pre-meditated desire for revenge. On this issue the jury may be assisted by expert evidence to the effect that ill-treatment can act as a disinhibitor, and that the defendant's outward calm and submissiveness may be deceptive; they may have masked inner turmoil and suppressed rage.<sup>52</sup>

For abused women, then, the possibility of successfully raising the defence of provocation

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<sup>51</sup>*Ibid*, 312.

<sup>52</sup>*Ibid*, 350.

depends first, on whether the jury accept that there has been a loss of self-control in fact and, secondly, on whether they accept that the sustained violence endured by the defendant renders the killing partially excusable. In relation to both these issues, juries will continue to impose murder convictions unless they are made aware of the dynamics, the severity and the effects of domestic violence.

### Diminished Responsibility

It is apparent from the case law that there are difficulties in establishing either self-defence or provocation, particularly where a killing is preceded by any deliberation or planning. A killing becomes more easily comprehensible to law and, in some sense, reasonable or excusable if the abuse has engendered in the woman a state of, at least partial, unreason. And indeed, it is diminished responsibility that has thus far proved to be most successful as a defence for battered women who kill.

Diminished responsibility is defined in terms of s2(1) of the Homicide Act 1957 as ‘such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his [the defendant’s] mental responsibility...’.

Despite the court’s obiter dicta relaxing the requirements for provocation, it was the defence of diminished responsibility that ultimately succeeded in *Ahluwalia*. A medical report showing that the defendant had been suffering from endogenous depression had been overlooked at the trial. At her retrial in 1992, she was found guilty of manslaughter on the grounds of diminished responsibility. (ROW, 1993, p.9) The court in *Hobson*, quashing a murder conviction and ordering a retrial, appeared to accept that BWS could also support a finding of diminished responsibility.<sup>53</sup>

As Wilson (1999, p.250) points out, cases like *Ahluwalia*’s do not fit comfortably within the framework of diminished responsibility. Her ‘abnormality was symptomatic rather than systemic. It disappeared when her husband disappeared’. McColgan (1993, p.513) observes that the Homicide Act requires that the diminished responsibility must stem from some abnormality of mind rather than emotional upset. This does not, she says, on the face of it apply to battered women who kill because they can see no escape except through violence. The prosecution, she cautions, might not always accept such a flawed version of a plea of diminished responsibility. Nevertheless, it remains the case that thus far, the defences that have succeeded in the reported cases dealing directly with domestic homicide have relied on the abnormality of the accused, and this is usually couched in terms of BWS.

### BWS

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<sup>53</sup>n.13. BWS was also relevant to provocation (at 33).

While it was initially thought that evidence of BWS would operate to normalise the defendant's behaviour (Raitt and Zeedyk, 2000, p.76), the syndrome has since been classified as a sub-category of PTSD (Raitt and Zeedyk, 2000, p.67) and has had the effect in court of pathologising it. In addition to its stigmatising effect, the use of evidence of BWS has been criticised as being inappropriate. It is questionable whether BWS affects many women who are abused. Dobash and Dobash (1992, p.230) suggest that rather than exhibiting learned helplessness, women in their study tried actively to negotiate safety and frequently attempted to leave. And as one Canadian judge observed, it is possible that women who do not match the stereotype of passive, helpless victimhood may find themselves unable to rely on the defence.<sup>54</sup> In addition, Nicolson and Sanghvi (1993, p.734) point out, reliance on learned helplessness involves a logical inconsistency: if battered women are helpless, how do they come to kill?'

This raises the question of the relative success of BWS in establishing a defence. For Wilson (1999, p.252), diminished responsibility is a way of circumventing the 'moral holes' left uncovered by other defences. Norrie, too, argues that psychiatric discourse can be seen as an aid to rescue the law from the 'embarrassing consequences of its harsh narrowness' (1993, p.188). At the same time, he says, the individualising power of psychology combines with that of law to avoid focusing on the social conditions that led to the crime in question. In this way, psychology helps to maintain law's legitimacy (p.188).

Norrie's argument stems from his analysis of the way in which law constructs the legal subject. 'Legal individualism', he maintains, 'affixes a badge to our clothing or a mask to our face which has nothing to do with what we really are or resemble' (1993, p.13). He goes on: 'Legal justice is limited and partial because it deals with individuals in a particular abstract fashion. It picks out certain aspects of individuality, but excludes others' (p.16). In particular, he says, with the possible exceptions of duress and necessity, the law precludes consideration of context or motive (pp.39, 165, 170).

Yet it is not only duress and necessity that introduce context and motive into the law. It is surely the case that, albeit to a limited degree, the defences of provocation and self-defence do likewise. The defendant's motive is, for instance, read off from context in the shape of the method used and the timing of the act. The problem for women is, that to the extent that context and motive are taken into account, they are generally examined from a point of view that best reflects typical male experiences. The obstacles to reliance on provocation and self-defence for abused women lie in the 'inherent masculinity' of the law's understanding of context and the male model of conduct from which motive is read off. Women who kill instead of leaving their abusers and women who attack a sleeping victim are taken to be acting out of vengeance or other similar motives, unless they can show some mental abnormality. In short, women's actions and responses frequently do not conform to those of the reasonable man.

### The reasonable man

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<sup>54</sup>*Malott v The Queen* [1998] 121 C.C.C. (3d) 456, 471.



The concept of reasonableness, say Lacey and Wells, is one 'which is apparently gender-neutral but in reality discriminates against women (1998, p.590). Indeed, O'Donovan (1993, p.428) says, the reasonable person of law is 'in his physical ability, in action and response... embodied as a male'. For instance, as the Canadian court in *Lavallee*<sup>55</sup> observed, the paradigm of the law of self-defence is a 'one-time barroom brawl between two men of equal size and strength'. It appears to fit more easily into a scenario involving public violence than into one involving sustained private violence deployed by men in order to keep women, who are generally physically weaker, often trapped, isolated and terrified, under control.<sup>56</sup> Battered women tend not to react with instant force to taunts of violence in the way that men do (Dobash and Dobash, 1984, p.278-9) but delay may make the use of force unreasonable.

While it might be said that *Smith* has abandoned the reasonable man, it is nevertheless the case that neither the concept of reasonableness nor its male character have disappeared altogether. Self-defence relies on the concept of the reasonable person. Even Lord Hoffmann's formulation of provocation in terms of social norms or Lord Millett's reference to an exercise of the imagination can be interpreted as importing notions of reasonableness; it is still open to the jury to assess the excusability of a response to provocative conduct in terms of its reasonableness, taking into account the defendant's circumstances. The question, then, is how the court and the jury can be made aware of the context of a defendant's act in terms that better reflect her experiences, provide clearer insight into her state of mind or reasons for acting as she did and so lead to a less masculine conception of reasonableness.

#### Law and expertise

Domestic violence has come to be constructed as a serious social problem and the law has increasingly been expected to be seen to be doing something about it.<sup>57</sup> Moreover, revelations that some women who kill do so in response to violence have presented a potential challenge to law's legitimacy; a legal system that ignores the victimisation of the perpetrator in allocating blame for the killing may be seen as unjust. Indeed the campaigns that took place in relation to cases such as those of *Ahluwalia* and *Humphreys* indicate that the convictions did evoke a sense of outrage. In order to soothe the anxiety manifested by at least some sectors of the public and to maintain its legitimacy, law has had to take cognisance of the issue of domestic violence and to explore the relationship between the experiences of women who kill and legal responsibility for their actions.

This need to respond to anxiety produces problems for law. Law's established categories of excusable and inexcusable behaviour are disrupted if domestic violence is taken into account.

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<sup>55</sup>n.19, 876.

<sup>56</sup>This is not to postulate an essentialist view. Rather it refers to the likely effects of serious domestic violence as well as the view that norms and practice coalesce to entrench sexual difference (Butler 1993).

<sup>57</sup>See Dobash and Dobash (1992); Diduck and Kaganas (1999) pp.320-4.

And the way the new boundaries are drawn depends on the way in which domestic violence is perceived and understood. The law is faced with a large and complex body of knowledge about domestic violence. In order to simplify complexity and so to process knowledge and apply it, the law has to turn to experts. In addition, passing difficult decisions to experts also invests law's decisions with the legitimacy offered by science (Nelken, 1998). However, law also has to keep 'science and expertise within proper bounds' (*ibid*, p.24). So, while '[e]xpertise is called for where legal competence or lay common sense is not deemed sufficient', (*ibid*, p.20) certain aspects of human behaviour are assumed to be within the judge's or jury's competence.

In *R v Turner*<sup>58</sup> the Court of Appeal stated:

An expert's opinion is admissible to furnish the court with scientific information which is likely to be outside the experience or knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of the expert is unnecessary.

'Jurors' said Lawton LJ., 'do not need psychiatrists to tell them how ordinary folk who are not suffering from mental illness are likely to react to the stresses and strains of life.'<sup>59</sup>

In contrast to the position of the English courts at the time, the Canadian court in *Lavallee*<sup>60</sup> adopted a more receptive attitude; it allowed expert evidence to highlight the falsity of the 'myths' on which the jury might rely:

The need for expert evidence in these areas can... be obfuscated by the belief that judges and juries are thoroughly knowledgeable about 'human nature' and that no more is needed....Expert evidence on the psychological effect of battering on wives and common law partners must, it seems to me, be both relevant and necessary in the context of the present case. How can the mental state of the appellant be appreciated without it? The average member of the public (or of the jury) can be forgiven for asking: Why would a woman put up with this type of treatment? Why should she continue to live with such a man?....Such is the reaction of the average person confronted with the so-called 'battered wife syndrome'. We need help to understand it and help is available from trained professionals.

This attempt, albeit within the context of BWS, to make visible what research suggests are the typical dynamics of domestic violence stands in stark contrast to the, presumably 'common- sense' assumption in *Thornton* that she had the simple option of walking out. Yet, according to Nelken, there is little scope for the deployment of expertise to dispel myths; the use of expert evidence to correct the misconceptions held by lay people would, he said, make

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<sup>58</sup>[1975] 1 QB 834, 841.

<sup>59</sup>*Idem*.

<sup>60</sup>n.19, 871-2.

the task of science ‘unending, given that its mandate is precisely to show that “lay” understanding and reasoning rests on corrigible misconception and error’ (1998, pp.13-14).

Nelken, and other scholars, saw the role of the expert in English law as being confined to ‘interpreting the abnormal’ (1998, p.20). Raitt observed that the ‘average juror is assumed to be at ease with all aspects of normal human behaviour’(1998, p.167). And McColgan, reviewing the case law in 1993, predicted that, ‘Short of claiming that the experience of battering has produced psychiatric abnormality sufficient to amount to diminished responsibility..., it is unlikely that defence counsel could persuade the courts that expert evidence of the effect of such abuse has anything to add to juror’s understanding of a woman’s perceptions of danger and the reasonableness of her response to it’ (1993, pp.523-4).

Given the prevailing view that expert testimony could be deemed helpful only when it attested to abnormality, it is not surprising that criminal law’s knowledge of abused women’s experiences has, in the past, been largely confined to psychiatric accounts of BWS. Apart from this ‘syndrome’, the body of research revealing the experiences and responses of abused women has remained outside criminal law’s remit. Instead, common-sense conceptions of ‘normal’ human behaviour have prevailed in the reported cases. It has, apparently, been easier for law to accommodate a new, discrete category of abnormal people than for it to re-think its construct of the ordinary, reasonable person.

Law has addressed the problem of domestic violence in the context of murder trials by selectively invoking science, while excluding any evidence that might disrupt its own hegemony over the normal world. Such an approach simplifies the complexity of the knowledge law has to confront and enables it to maintain the use of ‘conduct rules’ which ensure that decisions do not need to become too individualised and concerned with subjective experiences (Nelken, 1998, p.24). It also curtails the proliferation of expert witnesses, with the attendant costs in terms of time and money (*idem*).

However, if an expert is someone who knows more than the jury, and is there to fill in gaps in knowledge, it can surely be argued, particularly in the light of the long-term invisibility of the nature of domestic violence, that juries are not cognisant with the experiences of normal battered women. Law’s internal rationale for the use of experts supports their use in this situation, despite the unfortunate consequence of increased costs. And it seems that the courts have already come to adopt an approach to expertise that goes beyond the evidence of mental illness referred to in *Turner*.

Courts are now admitting evidence in the form of expert evidence or in the form of testimony by an intervenor to attest, not simply to the abnormality of a particular person, but to the typical responses of people or classes of people to certain situations. For example, in family proceedings the Court of Appeal<sup>61</sup> has allowed an expert psychiatric report<sup>62</sup> detailing, in

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<sup>61</sup>*Re L (Contact: Domestic Violence); Re V (Contact: Domestic Violence); Re M (Contact: Domestic Violence); Re H Contact (Domestic Violence)* [2000] 2 FLR 334.

<sup>62</sup>See C Sturge and D Glaser ‘Contact and Domestic Violence - The Experts’ Court

general terms rather than in terms specific to the children in question, the advantages and the risks of contact between children and absent parents. This report, which included discussion of the possible effects on children of domestic violence, was described by the judge as setting out ‘the psychiatric principles of contact between the child and the non-resident parent’.<sup>63</sup> Those ‘principles’ were founded in large part on the experts’ knowledge of ‘normal’ or typical experiences and behaviours.

Even more significant was the willingness of the House of Lords in *Smith* to permit intervention by Justice for Women, Southall Black Sisters and Liberty in order to explain the typical effects of domestic violence on victims. The joint petition of these three organisations sought to de-pathologise BWS and to bring the responses of battered women who kill within the range of reasonableness demanded by the defence of provocation: ‘by definition, battered woman syndrome is a condition which many women, in the same situation, would develop. It is a reasonable woman’s reaction to an abusive relationship’.<sup>64</sup> The petitioners argued that BWS should not be seen as a special characteristic setting the defendant aside from the ordinary person. Rather, it should be seen as ‘a complex of responses to be expected from a reasonable woman who has been subjected to cumulative provocation’ and should be treated by the jury as one of the circumstances to be considered in judging the conduct of the defendant.<sup>65</sup> In support of their contention, the petitioners presented the House inter alia with a psychiatric report showing ‘a consistent pattern of psychological and emotional effects arising out of the abuse’ (para 1.11(a)) and a literature review of ‘research on the impact on and coping strategies of victims of domestic violence’ (para 1.11(c)). While the petition in *Smith* did employ the term BWS, it sought to remove it from the realms of medicalised and abnormal conditions and to identify it as a term referring to a set of typical and normal responses. That the House took heed of the petitioners’ evidence is apparent from the obiter dicta accepting the possibility that the ordinary or reasonable<sup>66</sup> woman might lose control and kill her abuser and that this act might be excusable.

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Report’ [2000] Fam Law 615.

<sup>63</sup>n.61, 336.

<sup>64</sup> Petition for Leave to Intervene, *R v Morgan James Smith*, 3 January 2000, para 1.4.

<sup>65</sup>*Ibid*, para 1.8.

<sup>66</sup>This approach seems to suggest that, contrary to the view of Raitt and Zeedyk (2000) p.81, BWS is compatible with reasonable conduct.

It appears, then, that expert evidence may be adduced to attest to the normality of the extreme act of killing in the context of extreme circumstances. Moreover, the dicta in *Smith* offer the hope of a move away from relying on syndrome evidence and towards a consideration of typical as well as individual responses to violence. That this is a real possibility seems to be supported by the fact that the evidence that can be adduced is not limited to psychiatric or psychological testimony; the courts now admit social science research findings under the rubric of expert evidence.<sup>67</sup> The signs are that such evidence may assist women in raising a defence of provocation. Moreover, there seems no reason that expert evidence should not be deployed in support of a plea of self-defence.

### Expert Evidence and Reasonableness

It is surely possible, for the purposes of establishing self-defence, to adduce expert evidence to the effect that the normal woman's perceptions of danger are affected by abuse and her levels of fear heightened when faced with violence or the threat of violence emanating from an abusive partner. However, just as the excusability of the defendant's conduct in response to provocation is not a matter for the experts, nor is the reasonableness of the defendant's response for the purposes of self-defence; the normative judgment is one for the jury alone. Nevertheless, since that judgment has to be made in the light of all the circumstances, in the case of provocation, experiences of violence and typical responses to violence will be relevant; evidence such as that offered in *Smith* highlighting the severity of the abuse and its impact would inevitably colour the way in which the moral judgment is made. Similarly, in relation to self-defence, the reasonableness of the defendant's actions must surely be judged in the context of her experiences and history. Expert evidence as to the relationship between abuse and woman killing, as to separation violence and as to typical as well as individual levels of fear will go to establishing the defendant's perception of danger and so influence the assessment of reasonableness.

This is not to argue for a 'reasonable woman' standard, a possibility that has been mooted in relation to tort law. It is to argue for an expanded, context-sensitive version of the reasonable person. It is true that not all agree on the wisdom of going down this route. Conaghan, for example, rejects the possibility of a 'context-based standard' as too vague and as potentially making it impossible to articulate any normative standard at all (1996b 65). However, it is not being suggested here that all normative standards be abandoned in favour of a subjective test. It is already the case, in relation to provocation and self-defence, that the law contextualises the act of killing. What is being suggested is that, unless the context brought to the law's attention reflects the material conditions of the lives of many abused women, there can be no understanding of the defendant's predicament. Accordingly the assessment of the moral significance of her act cannot be an informed one.

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<sup>67</sup>The literature review compiled by Dr Liz Kelly and submitted to the court in *Smith* was a review of social science research. Dr Kelly has also written a number of expert reports based on social science knowledge of domestic violence in cases involving asylum seekers as well as women who kill. Her reports have not been challenged in any of those cases (personal communication from Dr Liz Kelly, 25 October 2000).

Of course there are different degrees of abuse and different reactions to it. Nevertheless, if the law could be made to acknowledge that the reasonable woman subject to abuse does not necessarily strike back immediately when threatened, that delay before she acts does not necessarily imply that she is behaving vengefully rather than in self-defence, and that the option of leaving is often not a realistic one, the prejudicial nature of the established self-defence rules might be countered. If there is evidence of severe abuse and of high levels of fear, for example, the law could take account of what a reasonable woman who sees her demise as inevitable and who perceives no escape might do under those conditions. This contextualisation is necessary to counterbalance the context that is already implicit in the law of self-defence: mutual combat, usually outside of intimate, continuing relations, between opponents who are broadly speaking of comparable strength. And for the present, it seems that the expert is essential in providing this counterweight. Expert evidence is necessary to embody women victims of violence as, say, smaller than their assailants, dominated, afraid and trapped.

### Simplifying Complexity

This process of embodying the defendant has its inherent problems however. The image of the battered woman produced by the experts and taken on board by the courts can operate to the disadvantage of some abused women who kill. According to McColgan, the experience in the United States calls into question the benefits of admitting expert evidence; it has been used to construct stereotypical images of battered women and women who do not fit the stereotype are prejudiced (1993, p.524).

In addition, there are even more fundamental difficulties in getting the law to understand the circumstances of the defendant. Even if complex and inclusive versions of battered women were presented to the courts by experts versed in the knowledge produced by the 'psy' professions and by social science, such versions will be unlikely to survive the transition into the courtroom. The law will inevitably deal with knowledge of this kind selectively in order to simplify complexity. Typical or likely responses tend to be transformed into rigid 'principles'.<sup>68</sup> In its quest for 'clear normative principles'<sup>69</sup> the law will reinterpret this knowledge to create new and simplified rules. These rules will undoubtedly ill-serve some abused women; the new norms will marginalise those individuals and groups of women who fail to conform. Yet expert evidence has the potential at least to broaden the already selective and even narrower perspective of women's experiences that currently inhabit the world of judicial and popular common-sense.

### Conclusions

Domestic violence has come to be constructed as a public rather than merely a private problem and it is a problem that law, in order to maintain legitimacy, must confront in the context of domestic homicide as elsewhere. In order to appear just, the law has to take into

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<sup>68</sup>See Kaganas (2000) pp.322-3.

<sup>69</sup>King and Piper (1995) p.51.

account the abuse suffered by the defendant in apportioning blame. However the rules that have developed around the defences of provocation and self-defence mirror common-sense understandings of violence that exclude the experiences of abused women and it seems that the only way to counter these is through the deployment of expert evidence. Through expert evidence, the defendant who has suffered abuse is embodied for law and invested with the perceptions and understandings of her world. It is only once these become visible to law that any cogent inferences can be drawn from her actions. Through expertise aimed at revealing these women's state of mind and their reasons for acting as they did, law's interpretation of their physical acts through its focus on timing and method can become less blinkered. Moreover, it is through expert evidence that the court has shown signs of accepting the normality and, potentially, the reasonableness of abused women's responses to violence. It is through expert evidence that the defence of provocation has come within the reach of battered women who kill. And it is through expert evidence that the defence of self-defence might also be brought within their grasp.

Of course, expert evidence is no guarantee of success. For one thing, juries might take the view that, despite what they have been told about domestic violence, it is insufficient to provide a moral excuse or justification for killing an abuser. It has been said, in the sphere of tort law, that the law, while quick to protect the interests traditionally valued by men, is slow in its response to women's concerns (Conaghan, 1996a). Yet there are signs, in family law for example, that the law's resistance to women's perceptions is softening a little.<sup>70</sup> And these shifts, although they may ultimately be incorporated into the law's common-sense understandings of the world, all stem from social science and 'psy' knowledge.

There is little doubt that there are difficulties inherent in the use of expert evidence. In particular, the law has a tendency to reinterpret and simplify expert knowledge. But unless and until common-sense comes to embrace the perceptions of abused women, it is the experts who offer the prospect, at least to some defendants who kill, of being judged as something other than mad or bad.

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<sup>70</sup>In relation to contact with children by abusive men, courts have begun to advert to the potential danger to mothers posed by such contact. There is some understanding of separation violence and the LCD (2000) has now issued a document recommending guidelines to be used in cases of violence. Admittedly, it may be that concern about violence in this field took hold more easily because of research linking woman abuse with child abuse; the state and the law appear to respond more readily to the plight of children in danger than that of women.

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