

**The Limitations of the Legal Response to
Domestic Violence in
England and Wales:
A Critical Analysis**

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ABSTRACT

This thesis examines the limitations of the legal responses to 'domestic violence' from the perspective of two central arguments; first, domestic violence is a social problem, rather than one caused by the deviancy of particular individuals, and, secondly, legal and societal understandings display a misplaced focus on 'violence' as the defining feature of an abusive relationship. By failing to address the root social causes or comprehend the true dynamics of abusive relationships as a range of coercive and controlling strategies, incidents of mainly physical violence and the behaviour and personality of the abused woman become the social and legal focus.

The thesis asserts that the root causes of domestic violence are the gendered expectations placed upon masculinity and femininity, thus explaining why it is women that are predominantly the victims. To refute the common misconception that women would exit an abusive relationship if they wanted to, a comparison is made between domestic violence and capture crimes such as kidnapping, and the range of social and psychological difficulties encountered by women as a result of the abusive relationship are used to support the claim that the sense of self, autonomy and decision-making ability of the victim is so undermined by the abuser's tactics that they become entrapped in the abusive relationship. It is then argued that societal and legal misunderstandings of the dynamics and impact of the abuse lead to misinformed legal responses based upon the premise that women are able to safely report domestic violence and receive an adequate response, should they choose to do so.

Bringing together critiques of the operation of the civil and criminal justice system in this context with the possibilities and limitations of the international human rights system, the thesis aims to demonstrate not just where the legal responses pertaining to domestic violence are limited, but also why. The research concludes that a legal approach to this problem which overlooks the root causes and over-emphasises isolated incidents of mainly physical violence does not and cannot work; the causes and impacts of domestic violence must be understood and addressed at a society-wide level.

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INTRODUCTION

This thesis aims to critique the understanding of, and approach taken to, domestic violence that is found within the legal system of England and Wales. By 'legal system' is meant the civil and criminal justice systems insofar as they impact on attempts to protect victims of domestic abuse. The purpose of this introductory chapter is thus to outline the importance of assessing the legal treatment of domestic violence as a field of study and to explain the focus on females as victims. An overview of the legal and policy reforms will be provided to indicate that the Government is aware of the need to tackle domestic violence, providing the basis for the analysis of why these reforms are not working to reduce the prevalence of domestic violence, improve the protection offered to victims and increase the likelihood of a criminal conviction for perpetrators. There will then be an explanation and clarification of two of the key terms and concepts to be used throughout; 'domestic violence' and 'patriarchal society'. Following this, an outline of the purposes and aims of the analysis contained in the thesis will be provided, situating the critique in the context of the current literature on legal responses to domestic violence.

The critique contained in this thesis will aim to provide support for two central arguments concerning the causes, context and dynamics of this type of inter-personal violence or abuse, and the ways in which they impact upon understandings of domestic violence found in the operation of the civil law remedies, criminal justice system, and international human rights law mechanisms. The first of these arguments is that domestic violence is first and foremost a social problem, not one caused by the deviancy of particular individuals and relationship dynamics. If found to be true, this would carry the implication that individualised responses which ignore the root causes of domestic violence do not and cannot work. The second of the two central arguments is that legal and societal understandings of domestic violence remain premised upon *violence* – mainly physical violence – as the defining feature of an abusive relationship, despite increasing recognition, particularly outside of the legal sphere, of the importance of recognising other abusive strategies. If this second argument is found to accurately reflect the legal understandings, there would need to be an assessment of whether this focus on physical violence limits the legal responses, and, if so, how.

The Importance of Addressing Domestic Violence

Even before it is taken into account that an over-emphasis on physical harm and injury may be excluding many women from being categorised as victims in the prevalence statistics, the extremely high numbers of victims already identified within current statistics clearly demonstrate that developing appropriate responses is of paramount importance in terms of protecting the physical and mental well-being of all women and children as actual and potential victims. The statistics and broader indications of the prevalence of domestic violence indicate that 'women are still at more risk of violent crime at home than anywhere else'¹ and the 'single most significant risk to women's safety and the safety of their children is entering into a heterosexual partnership arrangement'.² Statistics indicate that domestic violence is the leading cause of death world-wide in female 19-44 year olds, ahead of war, cancer or road traffic accidents.³ Annually in the UK nearly 1 million women experience at least one incident⁴ of domestic abuse each year,⁵ at least 750,000 children a year witness domestic violence,⁶ and almost 50,000 women and children shelter from violence in refuges.⁷ Whilst being 'chronically under-reported', this type of violence accounts for 16% of all violent crime, has more repeat victims⁸ than any other crime (76%),⁹ with costs in excess of £23 billion per year. On average two women die *per week* at the hands of their current or former male partner.¹⁰ Wykes and Welsh¹¹ identify the prevalence statistics contained in the British Crime Survey (2001) on domestic and sexual violence as 'staggeringly high' and also emphasise that these are still likely to be underestimated¹² because many people do not recognise that what has happened to them is a crime.¹³

¹ Keir Starmer (Director of Public Prosecutions): 2011 (http://www.cps.gov.uk/news/articles/domestic_violence_-_the_facts_the_issues_the_future/)

² Wykes and Welsh: 2009 p. 43

³ Crime in England and Wales 04/05 report

⁴ Criticisms of this narrow 'incident'-based approach will appear throughout this thesis.

⁵ British Crime Survey: 2009/10

⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/116347/hosb1210.pdf

⁷ Department of Health: Women's Mental Health: Into the Mainstream: 2002 p. 16

⁸ BBC Panorama 'Hitting Home' (2003)

⁹ A victim endures an average of 35 assaults before first calling the police (Wykes and Welsh: 2009 p. 2).

¹⁰ Flatley, Kershaw, Smith, Chaplin and Moon: 2010 p. 24

¹¹ Wykes and Welsh: 2009 p. 2 – statistics from Crime in England and Wales 04/05 report.

¹² Wykes and Welsh: 2009

¹³ See Walby and Myhill: 2001

¹⁴ Wykes and Welsh: 2009 p. 42

Much of the behaviours that it will be claimed are the defining features of an abusive relationship will be recorded as 'no-crimes' by the police.¹⁴

Explaining Female Violence and Refuting Symmetry in Male and Female Perpetrated Domestic Violence

The question thus arises – why women? This thesis intends to answer this question by demonstrating that the root social causes of domestic violence is the oppression and subordination of women that occurs within a society characterised by patriarchy and helps to maintain the current system of social order. Domestic violence will be shown to be both symptom and cause of the hierarchical structure of society in general, and the family in particular, under a patriarchal system. In a small minority of societies wife beating does not occur,¹⁵ lending support to the hypothesis that it is not an inevitable consequence of the differences between the sexes or of women's 'natural' place in society. The following section will explain reasons for the focus on female victims.

Since the 1970s, the Battered Women's Movement has highlighted that physical violence in the home is commonplace and that women are its usual victims and men its usual perpetrators. Pence and Paymar in the 1990s showed how every source of data¹⁶ points to an enormous gender disparity between who is initiating the violence, who is more physically harmed, and who is seeking safety from violence.¹⁷ Despite this, there is often claimed to be symmetry in levels of male and female violence in intimate relationships which is sometimes used to argue against the focus on female victims of domestic violence and service-provision aimed at them.¹⁸ It is therefore necessary to establish why this symmetry is believed to be erroneous in order to justify the present focus on men as perpetrators and women as victims. This can be done by examining research on types of violence in a domestic context, and through

¹⁴ This does not mean that the incidents are ignored, the police do record them and they will be used as a part of a domestic abuse risk assessment using the DASH 2009 Model (see <http://www.dashriskchecklist.co.uk/>)

¹⁵ For example the Central Thai studied by Levinson: 1989 and 16 other societies in his cross-cultural study.

¹⁶ From police reports, A&E records, counselling centres, divorce courts, and so on.

¹⁷ Pence and Paymar: 1993 p. 5

¹⁸ See, for example, an article in the Guardian in 2010 claiming that 40% of domestic violence victims are male (<http://www.theguardian.com/society/2010/sep/05/men-victims-domestic-violence>) and another article from 2011 claiming women are as likely to use domestic violence as men (although accepting that women are twice as likely to be injured or killed) (<http://www.theguardian.com/commentisfree/2011/jun/07/feminism-domestic-violence-men>).

research into the differences in terms of context, consequences, purpose, severity and frequency in male and female-perpetrated violence.

The most prominent and extensive work on typologies and domestic violence is that of Michael Johnson and colleagues, who first posited that there are different types of violence occurring in domestic situations more than twenty years ago. Johnson has since this time developed and refined his conceptions of the various types of domestic violence, calling the type that will be focused upon here '*coercive controlling violence*.'¹⁹ This type of violence is typically perpetrated by a man against his female partner as a way of controlling her and involves a 'pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence.'²⁰ This type of violence is distinct from '*violent resistance*' used in response to coercive controlling violence, '*situational couple violence*' (not motivated by control but used in response to a particular situation or conflict, perpetrated equally by men and women and '[p]robably the most common type of partner violence',²¹) '*separation-instigated violence*' (occurs in the context of separation with no history of violence nor does it continue after separation²²), and '*mutual violent control*' (when both partners use violence to control the other, this form of violence is 'rare' and little is known about it (p. 950).²³

Research indicating symmetry between violence inflicted by male and female partners can thus be explained by a failure to distinguish between different types of violence in a domestic setting, thus overlooking the differences in context and consequences of the different types. This has led to a reliance on the measurement of discrete acts when assessing the prevalence of male and female perpetrated violence in the home in a way that merely conflates the number of incidents, with no separation of severity or context.²⁴ Nearly all the studies that have found gender symmetry in domestic violence have relied upon some version of the Conflict Tactic Scale²⁵ (CTS). Under this scoring method, it

¹⁹ Kelly and Johnson: 2008

²⁰ Kelly and Johnson: 2008 p. 476

²¹ Kelly and Johnson: 2008 p. 11

²² Research by Humphreys and Thiara: 2003 on '*post-separation violence*' and by Mahoney: 1991 on '*separation assault*' have provided useful definitions and descriptions of the violence that can occur when a woman tries to leave an abusive relationship characterised by coercive controlling violence. An understanding of this type of violence has helped to emphasise that a woman is at the highest risk of death or serious injury at the point of separation, one of the ways that the proposition that a woman would 'just leave' if she wanted to can be undermined.

²³ Kelly and Johnson: 2008 p. 950

²⁴ Studies have found that women typically only use violence in self-defence or when partners are using similar levels of violence against each other (Hester: 2009 cited by Herring: 2011 p. 77) and the degree of violence used by women also differs with injury rates being much greater for women (Silverzweig: 2010 cited by Herring: 2011 p. 77).

²⁵ Straus: 1979

is only necessary for a man or woman to have committed one act to be classified as violent; therefore 'a woman who has committed one trivial act is equated with a man who has committed several serious acts of a different nature'.²⁶ Reece claims that family violence research that uses the CTS to assess levels of domestic violence is 'insensitive to context: by concentrating narrowly on discrete acts, the research de-contextualises these acts'.²⁷ So, for example, playful kicking while in bed together would be recorded as a couple kicking each other, and, whilst 'throwing a lamp at a partner is very different from throwing a pillow... both are recorded as throwing an object at one's partner'.²⁸ The CTS has been amended by its designers,²⁹ but it seems that any kind of scoring method based on a version of the CTS is simply not capable of moving beyond a narrow act-based approach to the definition and measurement of violence. Therefore, to develop this approach, the context, consequences, severity, frequency, motivations, intentions and reactions that accompany the acts need to be taken into account. Once this is done, it is found that domestic violence is 'overwhelmingly an issue of male violence against women'.³⁰ This is borne out by the latest Home Office Research – *Domestic Violence, Sexual Assault and Stalking* - which found the asymmetry in rates of domestic violence was even more pronounced when regard was given to context and consequences.³¹

Furthermore, whilst women can be violent to men, the nature of this violence can be seen to differ from men's in two ways. First, women's violence rarely occurs in the context of an ongoing abusive relationship³² and instead is typically used in self-defence³³ or when a couple use similar levels of force against each other.³⁴ It is important to distinguish the abuse that occurs within marital relationships from fights that take place between two people as an irrational response to an argument.³⁵ Pence and Paymar found that women do often kick, scratch and bite the men who beat them, but this clearly does not

²⁶ Reece: 2006 p. 781

²⁷ Reece: 2009 p. 42

²⁸ Dobash and Dobash: 2004 p. 329

²⁹ Straus, Hamby, Boney-McCoy and Sugarman: 1996

³⁰ Dobash and Dobash: 2004 p. 325

³¹ Reece: 2006 pp. 781-2

³² Stark: 2009 and Kelly and Johnson: 2008 refer to the violence and other tactics used in an ongoing abusive relationship as Coercive Control or Coercive Controlling Violence. This will be explored in Chapter Three

³³ See Hester: 2009 and Dobash and Dobash: 2004

³⁴ Kelly and Johnson refer to violence that occurs when couples use similar levels of force against each other as Situational Couple Violence.

³⁵ See above, this is the type of violence that Kelly and Johnson(2008) term Situational Couple Violence.

constitute mutual battering.³⁶ A further difference is found in the degree of violence used with injury rates being much greater for women³⁷ and women being more likely than men to sustain physical or emotional injury as a result of domestic abuse.³⁸ In 2004 the Dobashes³⁹ conducted a study with 95 couples indicating that, even if the levels of violence were comparable (which the statistics suggest is not the case), male and female *experiences* of violence are very different.⁴⁰ Claiming a simple correspondence that ‘women do it too’ ignores the realities of politics and the family, both of which, it will be argued in Chapters One and Two, are institutions of male control and domination.⁴¹

The level of violent incidents in England and Wales perpetrated by men is also of significance to the symmetry arguments; the most recent British Crime Survey found that 91% of violent incidents perpetrated in general in Great Britain in 2009-10 were perpetrated by men, and during the 2011 summer riots 92% of the first 466 defendants were male and of the 124 individuals charged with violent offences, all were male.⁴² Of course, it cannot be ignored that women do sometimes use violence, and that there are clearly a number of male victims of domestic violence each year. The aim here is not in any way to minimise or trivialise the abuse that male victims of domestic violence can suffer. However, the focus here on male violence against women can be seen to be justified by the overwhelming prevalence of this type of violence and its greater severity.⁴³

Legal and Policy Reforms

A critique of the limitations, misconceptions and failures that make up much of the legal system’s present approach to domestic violence needs to be seen in

³⁶ Pence and Paymar: 1993 pp. 5

³⁷ Silverzweig: 2010

³⁸ Walby and Allen: 2004

³⁹ Dobash and Dobash: 2004

⁴⁰ Women in their study reported feeling frightened (79%), abused (65%), alone (65%), helpless (60%) and trapped (57%), whilst men reported being ‘not bothered’ (26%), ‘ridiculing’ female partners for using violence (17%), or feeling that their female partner was justified in responding with violence (20%). Only 6% of the men interviewed reported feeling victimised and 3% were *impressed* that their partner had managed to respond. Overall, the interview responses demonstrate that a significant proportion of the men saw the violence as insignificant, comical or ludicrous (Dobash and Dobash: 2004 p. 340).

⁴¹ Kuypers: 1992 p. 19

⁴² British Crime Survey: 2010/11

⁴³ This is borne out by the numbers of women killed by their current or former male partner, compared with the numbers of men killed by their female partners or ex-partners. On average 2 women a week are killed in the UK by a current or former male partner, compared with 10 men a year being killed by their current or former female partner, typically in self-preservation or self-defence (although not legally recognised as such) after years of continual abuse. See Chapter Eight: Women who Kill their Abusers.

the context of the considerable reforms to legislation and policy in this area over the last 30 years. In addition, support services such as Independent Domestic Violence Advocacy Services (IDVAs),⁴⁴ Specialist Domestic Violence Courts (SDVCs)⁴⁵ and Multi-Agency Risk Assessment Conference (MARAC) coordinators and administrators⁴⁶ have all been introduced in order to improve the support available for victims.

In terms of policy changes, 2013 saw the cross-government definition of domestic violence, although – significantly – not the legal one, expand to include 16 and 17 year olds within its definition of who could be a victim, and to incorporate coercive and controlling behaviour. Domestic violence and abuse is now defined as *‘any incident or pattern of incidents of controlling, coercive, threatening behaviour, violence or abuse between those aged 16 or over who are, or have been intimate partners or family members regardless of gender or sexuality. The abuse can encompass, but is not limited to: psychological, physical, sexual, financial, or emotional’*.⁴⁷ In addition, currently (2013) being piloted is a domestic violence disclosure scheme⁴⁸ enabling women to ask police to check whether their partner has a violent past. The scheme is also assessing how the police can proactively release information to the partners of those with a violent past when it is ‘lawful, necessary and proportionate’ to do so. Another scheme with the aim of protecting victims was also piloted in 2012 – the Domestic Violence Protection Notices and Orders (DVPO). This gives victims who might have had to flee their homes time to get the support they need by giving police and magistrates powers to stop the perpetrator of an attack from contacting the victim or returning home for up to 28 days (a period of time when the victim may be particularly vulnerable because the police were unable to charge the perpetrator for evidential reasons and because of the time it generally takes for an injunction to be granted). The future of these two schemes is yet to be decided.

Following extensive criticism, the police service and the Crown Prosecution Service (CPS) have both attempted to improve their response to domestic violence. Police Domestic Violence Units were introduced in the

⁴⁴ These provide advice including practical steps to help victims protect themselves as well as more long-term solutions.

⁴⁵ These aim to provide specialist training and integrate the responses from all the agencies involved in cases of domestic violence.

⁴⁶ These aim to establish communication between all parties involved in a situation of domestic violence.

⁴⁷ Home Office: 2013 (www.gov.uk/domestic-violence-and-abuse)

⁴⁸ See www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf

1990s along with special police officers⁴⁹ intended to work closely with other agencies involved in domestic violence service provision, and the CPS now takes a more pro-active role in gathering evidence and has established a network of domestic violence experts who work with women's specialist services and other agencies.⁵⁰ The Director of Public Prosecutions (DPP) admitted in 2011 that it is 'only in the last ten years that [domestic violence] has been taken seriously as a criminal justice issue'⁵¹ and in the same speech showed clear recognition of the 'serious and pernicious' nature of domestic violence. However, he himself recognised that 'the refrain "it's just a domestic" is still heard far too frequently' within the CPS and their criminal justice partners, and 'a change in attitude is clearly needed'.⁵² This thesis intends to develop arguments to show the reasons for and difficulties arising from ingrained cultural attitudes towards domestic violence, and why the change is needed.

For a time there was an increase in gender-neutral language and although this is reflected in the recent governmental definitions above, the 2010 Home Office paper '*Call to End Violence against Women and Girls*,' (although recognising that men and boys could be victims of domestic violence) does focus firmly on gender-based violence, as does the 2011 '*Call to End Violence against Women and Girls: Action Plan*' which sets out short and long term priorities and frames 'policy development within an equalities and prevention framework'⁵³ and is backed by a £28 million fund to support the provision of prevention work and specialist services for victims.

The number of refuges and other support services for victims of domestic violence has increased dramatically over the last forty years and has been vital in helping many women exit abusive relationships, rebuild their lives, and bring their partners to justice under the criminal justice system. The work of these organisations is often frustrated by obstacles and these are not just financial and resource-based ones – many women either do not wish to leave a violent partner, or return multiple times despite having access to the support required to leave. Legislation such as the Protection from Harassment Act 1997 (PHA) and the Domestic Violence, Crime and Victims Act 2004 (DVCVA) has been

⁴⁹ See www.acpo.police.uk/documents/crime/2008/2008-cba-inv-dom-abuse.pdf

⁵⁰ See www.cps.gov.uk/publications/prosecution/domestic/domv.html

⁵¹ Keir Starmer (Director of Public Prosecutions): 2011 (www.cps.gov.uk/news/articles/domestic_violence_-_the_facts_the_issues_the_future/)

⁵² *ibid*

⁵³ Matczak et al: 2011 p. 7

developed in this area, which reflects a growing acceptance of the distinct characteristics of domestic violence, and breaches of civil protection orders are now criminalised under the latter as well. These reforms show a clear commitment to provide protection and legal redress for victims of domestic violence, thus providing the background against which the effectiveness in practice of these measures must be considered, to assess whether rhetoric is matched by action.

Terminology Difficulties: Domestic Violence

The use of the term 'domestic violence' poses some problems that warrant further consideration. Various writers have attempted to find useful alternative terms to characterise abusive relations to include economic, psychological and emotional control and abuse. Numerous alternatives such as domestic abuse, intimate partner violence, intimate abuse, and so on have been utilised. The term 'intimate partner violence' is becoming increasingly common, and does seem more successful in at least alluding to the fact that this type of abuse is inflicted by an intimate, not a stranger. Evan Stark coined the phrase 'coercive control' to highlight this dynamic, which, as will be claimed in Chapter Seven, seems to convey a far more accurate picture of the actual abuse that occurs. The risk is that the term might be taken to refer to a type of abuse other than domestic violence because this is typically understood to be physical violence. However, the concept does explore more fully the nature of abuse, as the second of the two central arguments of this thesis requires.

As Kelly has emphasised, if something is not named it is invisible and, in a social sense, it does not exist.⁵⁴ This means that if the term 'domestic violence' does not reflect victim's experiences, for reasons explored below, then the type of abuse they are suffering is not seen as a problem by themselves, the law and by society. Whilst the expression domestic violence could be seen as a useful one due to its 'juxtaposition of words' because 'the domestic sphere has traditionally been regarded as a refuge and a haven, not the site of violence' and so the 'broad acceptance of the term means that is no longer a

⁵⁴ Kelly: 1988 p. 114

given that women are safe at home',⁵⁵ the term has proved to be highly inadequate. This is because, although commonly understood, it has become 'watered down' in recent years ('it's only a domestic') so that it 'neutralises the harm done'.⁵⁶ Isabel Marcus argues that characterising some violence as "domestic" explicitly diminishes its seriousness; 'we do not utilise the terms "stranger violence" and "domestic" violence as parallel terms. We separate out from "violence" abuse which occurs between partners or in a family by modifying it and characterising it with a term connoting a status relationship – "domestic". The unmodified term "violence" which is applied to situations not involving intimates is "real" and, therefore, clearly punishable. Due to its linguistic location, the category "domestic", which modifies and specifically locates violence, is residual and, perhaps, less clearly subject to disapproval or punishment'⁵⁷ and this will have implications for the addressing of domestic violence.

Furthermore, work by Ohana-Eavry examining the processes of legal naming and social exclusion demonstrates that naming is a *social* act, with the more powerful groups in society being the ones able to shape and name a phenomenon, deciding what the name means, and what it will exclude. She emphasises that in choosing the name 'domestic violence' a mechanism of trivialisation was at work in relation to incorporation of the word 'domestic', and that at some point a 'choice' was made to focus on *physical* violence, as opposed to other forms of coercion. The decision to use the term 'domestic violence' in legal and policy definitions has thus resulted in there being no legal name for women victim's experiences; the term 'violence' does not describe what happens⁵⁸ in any meaningful way and thus leads to misunderstandings concerning the dynamics and impact of the abuse.

A further problem with using the term domestic violence is that the identity of the perpetrator is omitted; Kuypers alleges that the terms used to identify male violence against women, including domestic violence, reflect an unwillingness to clearly implicate the male.⁵⁹ This can be linked with Stanko's point that male violence 'is still defined as a problem for women; men have yet

⁵⁵ Naffine: 2002 p. 76

⁵⁶ Graycar and Morgan: 2002 p. 313

⁵⁷ Marcus: 1994 p. 26 in Fineman and Mykitiuk (eds): 1994 p. 26

⁵⁸ Ohana-Eavry: 2013 taken from email correspondence and a paper entitled 'Legal Naming and Social Exclusion – Domestic Violence Against Women' given at the University of Exeter on 1st February 2013.

⁵⁹ Kuypers: 1992 pp. 27-8

to define their own behaviours as problematic'.⁶⁰ Victim-blaming, or focusing on the person to whom an act was done rather than the person who did the act, will be shown to be pervasive in relation to sexual and domestic violence.

However, despite the limitations and misconceptions perpetuated by the term 'domestic violence', it is at least a term understood by most people, and the one used by the majority of legal and social institutions. Throughout this thesis, therefore, the term 'domestic violence' will be generally used to include physical violence and wider forms of violence, although the expressions intimate abuse, domestic abuse, or coercive control will be substituted on occasion to indicate the contrast of such strategies with physical violence.

'Patriarchal Society': How the Concept will be Used

The development of patriarchal society has a long history and the view that the phrase can still be used to accurately describe modern Western society is widely debated. Despite being problematic, and sometimes unpopular and controversial even within feminism,⁶¹ the concept of a patriarchal society or system will be employed throughout this thesis to refer to the type of society currently in existence in England and Wales. The first of the central arguments of this thesis focuses on showing that domestic violence is first and foremost a social problem, not one caused by the deviancy of particular individuals and relationship dynamics. This requires, therefore, an analysis at the societal level. A quote from Rhonda Copelon enunciates the reason why the term patriarchy is felt to be needed due to the link it reveals between male superiority and violence against women:

'Domestic violence against women is systemic and structural, a mechanism of patriarchal control of women that is built upon male superiority and female inferiority,⁶² sex-stereotyped roles and expectations, and the economic, social and political predominance of men and dependency of women. While the legal and cultural embodiments of patriarchal thinking vary among different cultures, there

⁶⁰ Stanko: 1985 p. 93

⁶¹ See, for example, Smart: 1995 p. 130

⁶² It must be noted that Copelon is not stating female inferiority and male superiority as facts, but as hierarchical conceptions that are widespread under a patriarchal system.

is an astounding convergence in regard to the basic tenets of patriarchy and legitimacy, if not necessity, of violence as a mechanism of enforcing that system. Violence is encouraged by and perpetuates women's dependence and her dehumanisation as "other," a servant and a form of property'.⁶³

Patriarchy will thus be used to mean a system of male privilege which sustains, and is sustained by, the current societal structure. A society is characterised as privileging maleness to the extent that is *male dominated, male identified, male centred*, and characterised by an obsession with control.⁶⁴ One of the key aspects of this need for control is the oppression of women,⁶⁵ of which the use of violence is a key component.⁶⁶ A society would be male dominated, and thus patriarchal, when positions of authority (political, economic, legal, religious, educational, military, domestic) are generally reserved for men, with it being the exception to the rule when a woman gains one of these positions.⁶⁷ *Male identification* is seen in a society where the 'core cultural ideas about what is considered good, desirable, preferable, or normal are associated with how we think about men and masculinity.'⁶⁸ A further aspect of patriarchy can be seen when the description of masculinity and the ideal man⁶⁹ uses terms that closely resemble what is valued most by society as a whole. These 'male-identified qualities are associated with the work valued most in patriarchal societies - business, politics, war, athletics, law, and medicine - because this work has been organised in ways that require such qualities for success'.⁷⁰ Under a patriarchal system, qualities associated with femininity and femaleness are devalued, except when women are prized for their beauty as objects of male desire (but in this they are possessed and controlled in a way that devalues them).⁷¹ *Male-centredness* is reflected in the way that patriarchal culture uses male experience to represent *human* experience. If a society is patriarchal, this

⁶³ Copelon: 1994(b) p. 305

⁶⁴ Johnson: 2005 pp. 5-15

⁶⁵ Johnson: 2005 p. 14

⁶⁶ The relationship between violence against women and the patriarchal state will be explored in detail in the context of the witch hunts which took place in England from 1560 to around 1750.

⁶⁷ Due to it being exceptional for women to gain one of these positions, questions are asked about how she will 'measure up' compared with men. The same question is rarely asked of men, except when they 'venture into devalued domestic and other 'caring' work typically done by women. Even then, men's failure to measure up can be interpreted as a sign of their superiority'. (Johnson: 2005 p. 5).

⁶⁸ Johnson: 2005 p. 6

⁶⁹ Qualities such as control, strength, competitiveness, coolness under pressure, logic, forcefulness, decisiveness, rationality, autonomy, self-sufficiency, and so on.

⁷⁰ Johnson: 2005 p. 7

⁷¹ Johnson: 2005 p. 7

would be evident when the 'focus of attention is primarily on men and what they do'⁷² – such as in newspapers, films, mainstream literature and television dramas all containing mainly stories about the lives of men. The final element – obsession with control – is emphasised by Johnson as the core value around which social life is organised in a patriarchal society; men maintain their privilege by controlling women. This in turn depends upon a clear division between the sexes because it is only possible for one group to dominate and control another if the two groups have clearly opposed characteristics.

In view of the above, the claims of this thesis will be founded upon the hypothesis that contemporary English and Welsh society is patriarchal, when it is understood as referring to the type of society delineated above. There is a large body of opinion that Western society continues to be male dominated or patriarchal⁷³ because its key institutions – the state, the Church and the family – continue to be male-dominated and there is perceived to be a strong division between the sexes. If these opinions are correct, the impact on the ability of the legal system to deal with domestic violence effectively is likely to be profound because of the relationship that patriarchal structures have with all forms of violence against women, including domestic violence. It will be shown that there is a failure in the legal system to address domestic violence fully, which in turn indicates that this hypothesis is correct. Furthermore, it will be claimed that the connection with patriarchy is not often understood in the context of the literature evaluating the legal responses to domestic violence and that this overlooks the role that violence has in maintaining the current patriarchal social order.

The claim that Western society is based upon a system of male privilege and the idea that men are superior to women does not mean that all men are powerful, but that where there is a concentration of power, men are more likely to be the ones to have it; they are the default. Men as a group reap 'the patriarchal dividend;' the benefit all men have from the dominance of men in the overall gender order. Although it is not equally enjoyed by all men, as a group all men draw on that power and dominance. This also does not mean that all women are power/less, but powerful women stand out as exceptions because male dominance is the norm. The benefits that males derive, as a group, from patriarchy will be considered in the discussion of masculinities in Chapter Two

⁷² Johnson:

⁷³ For example see Johnson: 2005, Walby: 1995, Bennett: 2006, Federici: 2004, Mies: 2014, Lerner: 1987

where it will be related to the gendered expectations that create the conditions in which domestic violence occurs.

Overview of Thesis and Review of Existing Literature

A body of literature has grown over the past thirty years which has brought domestic violence to the foreground of academic and legal discussion. However, an examination of all the main legal remedies applicable in England and Wales which examine reasons for their limitations, rather than just where the limitations occur, has not been attempted before. The first two chapters will build support for the argument that domestic violence needs to be seen first and foremost as a social problem, rather than one caused by the deviancy of particular individuals or relationship dynamics. Identifying and evaluating the root causes of domestic violence are thus a key consideration of this thesis. These causes will be shown to be located within society. Chapter One will use the period of European history characterised by state-legitimated witch hunts to demonstrate the role of violence against women in the creation of an increasingly male-dominated society. The witch Hunts that began in the mid-sixteenth century, therefore, are taken as a key historical starting point. Here can be seen the strongest evidence of developing gender disparity and the oppression of women can be identified more strongly than in any previous historical epoch. Chapter Two will then build on this by claiming that the gendered expectations placed upon males and females, and the structure of the family, further help to sustain the patriarchal system and provide the context in which domestic violence, as a way of creating and recreating these expectations, occurs.

Previously, the most prominent enunciation of the causes and social context of domestic violence was that of the Dobashes in *Violence Against Wives: A Case Against Patriarchy*.⁷⁴ Their work provided an extensive analysis of the context and underlying causes of this type of abuse, situating it firmly in the context of the marital-type relationship and the gendered expectations placed upon women within this type of relationship. A later study, again by the

⁷⁴ Dobash and Dobash: 1979

Dobashes, (*The Violent Men Study*)⁷⁵ developed further early understandings of the causes of domestic violence by supporting claims that it is men's sense of privilege and authority that provides part of the justification for domestic violence.⁷⁶

The analysis provided by the Dobashes based on these early studies thus needs updating and directly applying to the legal responses to domestic violence found in the English and Welsh legal system. The gendered expectations placed upon males and females – i.e. being masculine or feminine – particularly those typical of the marital-type relationship, will be shown to be put into the contemporary and related to domestic violence in the work of Evan Stark.⁷⁷ His findings into the impact of gender stereotypes and expectations on the occurrence of domestic violence claim that domestic violence as coercive control is a gendered phenomenon. He sets domestic violence in the context of 'women's newly won equality',⁷⁸ asserting that men engage in these behaviours as part of a strategy of behaviour patterns which attempt to redress the balance due to higher levels of 'formal equality' for women in the public sphere, which in turn has led men to need to control the individual women in their lives. Stark finds the core tactics of coercive control are targeted at domestic activities and childcare – things that are already often consigned to women and are reflective of their subordinate status. He concludes that coercive control has evolved out of other forms of violence against women with the control tactics centering on 'gendered enactments',⁷⁹ which means the tactics are easy to confuse with 'the range of sacrifices women are expected to make in their roles as homemakers, parents and sexual partners'. However, as Madden Dempsey has noted, insights from social science research into domestic violence, such as that of Stark, have had little impact on legal understandings.⁸⁰ This is something that this thesis will seek to redress, particularly in Chapter Seven when the appropriate conceptualisation of the harm of domestic violence is considered

⁷⁵ Dobash and Dobash: 1996

⁷⁶ Interview responses from over 122 men who had been sentenced for an offence involving violence against their partner showed that men used violence when women tried to negotiate or debate over the allocation of resources and the affairs of daily life. This was perceived as 'nagging' and not 'shutting up', with men believing that their female partners do not have the same right as them to argue or negotiate, meaning violence was often used to silence debate and reassert male authority (see Dobash and Dobash: 1996).

⁷⁷ Stark: 2009. See Chapter Seven for a discussion of Stark's claim that the term coercive control would more accurately encapsulate the dynamics of abusive relationships.

⁷⁸ Stark: 2009 p. 130

⁷⁹ Stark: 2009 p.

⁸⁰ Madden Dempsey: 2005 pp. 302-5

and arguments are made for how the legal responses could more appropriately conceptualise it.

In light of the argument that domestic violence occurs in part occurs as a result of the gendered expectations placed upon males and females in the context of the marital-type relationship, Chapter Three will go on to demonstrate the role that pornography, and the pornographic representations of women found in more mainstream media and culture, have in continuing to sustain these gendered expectations. It will be claimed that pornography plays a significant role in supporting male dominance and violence. The chapter will analyse the understanding of the harm of pornography found in its statutory regulation in England and Wales from a position situated in the context of the landmark studies concerning the harms and regulation of pornography.⁸¹

Chapter Four will follow with an analysis of the extent to which the legal system itself contributes to the creation of the conditions in which domestic violence occurs, primarily through the examination of judicial constructions of the appropriate roles and behaviours for men and women. This is something that has not been fully done before in the context of domestic violence; it appears that the literature to date either exposes the ways in which the legal system fails, or is aimed more generally at demonstrating that the legal system is gendered.⁸² This has led to a situation where the limitations of the legal system in responding to issues of concern to women, such as domestic violence, are recognised in theory but this recognition is not necessarily applied to the more practical critique of where and how the legal system is failing. It has not always been considered that the legal system, as it currently operates, may not be responding to domestic violence effectively because it constitutes part of the problem. There are of course exceptions to this⁸³ but not in terms of an extensive body of research addressing all the possible legal remedies for abused women.

Chapters Five and Six will then analyse the various legal responses to domestic violence in England and Wales to assess the extent to which they fail to recognise domestic violence as a social problem, and how this affects its effectiveness. Whilst there already exists a wealth of literature evaluating the

⁸¹ Dworkin and MacKinnon *Model Anti-pornography Civil Rights Ordinance*: 1983, MacKinnon: 1985, Itzin: 1992 Stoltenberg:1992, The Meese Commission Report: 1986. Also, in the UK context, McGlynn and Rackley: 2009, McGlynn and Ward: 2009.

⁸² See Smart: 1995, Naffine: 1990 MacKinnon: 1987, MacKinnon: 2006

⁸³ See, for example, Burton: 2011, Edwards: 2011, Herring: 2007, Herring: 2011

operation of the domestic legal system with regard to domestic violence, the majority focuses more upon how the system works in practice,⁸⁴ and appears to advocate the view that merely tinkering with the definitions contained in legislation and policy documents and calling for improvements in practice will help to overcome the pervasiveness nature of domestic violence. The research will thus attempt to redress this perceived oversight by analysing the limitations of the legal response on the basis that it operates without an understanding of the causes and social context of domestic violence. If this is found to be the case, it will support the argument that it is insufficient to simply expose where the legal remedies are not working without linking this to the underlying causes of the abuse (as described in this thesis) in the first place, and the ways in which government and judicial understandings of domestic violence constitute a failure to appropriately conceptualise and address the problem.

Chapter Five will analyse the limitations of the implementation of the existing civil law remedies for domestic violence through examination of legislation, judicial utterances and survey data into practitioner attitudes. In particular, there will be an examination of the extent to which the persistence of stereotypical attitudes concerning the roles of men and women are apparent and seen to be preventing adequate protection being offered to victims. The response of the criminal justice system to domestic violence will be assessed in Chapter Six. The starting point for this critique will be the fact that the criminal justice response attempts to criminalise domestic violence on a model derived from stranger violence. Thus there will need to be an analysis of the limitations that emerge from this model due to its failure to understand the unique aspects of violence that occurs within an intimate relationship and whether the way in which the legislation requires the violent act to be abstracted from its social context further prevents consideration of the broader social context of the abuse.

If the analysis of these two justice systems does illustrate that they are limited because they fail to fully take into account the social context and functional nature of the abuse, it will provide the basis for the second central argument of this thesis; that the failure to engage with root causes of domestic violence leads to a focus on physical violence when providing protection for victims. Therefore, these chapters will also serve to highlight where the remedies focus solely, or primarily, on physical violence. In doing this the

⁸⁴ See, for example, Burton: 2008 and McQuigg: 2011

foundations for Chapter Seven will be laid which will use theoretical and empirical insights relating to domestic violence taken from sociological and psychological research to argue that this focus on physical violence is misplaced.

Chapter Seven will use the existing literature on the dynamics of abusive relationships to support the claim that the focus on physical violence within the legal responses to domestic violence is misplaced. This will involve an exploration of the dynamics of the non-physical aspects of domestic violence. The claims in this context will be situated within the major foundational studies provided by Lenore Walker, although her work will be seen to retain the primary focus on physical violence which this thesis is challenging. Stark's proposal that the term 'coercive control' is a more accurate definition of what takes place in abusive relationships than the term domestic violence will be explored in detail as well. Alternative conceptions of the harm of domestic violence will be used to show the inaccuracy of some of the assumptions common to legal and societal understandings.

One of the most commonly held views about domestic violence is that women would leave the abusive relationship if they really wanted to, and therefore they are responsible for the violence and abuse that is inflicted if they *choose* to stay. This will be shown to be a grave misconception. In order to understand the potentially damaging nature of this erroneous contention, it is necessary to look to literature from psychology and sociology studying the impact of this type of abuse on victims'.⁸⁵ However, to date none of these insights has been *directly* and *extensively* applied to the legal system, especially the system of international human rights law, which remains very much on the periphery of our understandings still.

Chapter Eight will follow with an analysis of the treatment of women who kill their abusers when they come before the criminal courts. In examining the application of the potential defences available for these women, the implications of the arguments contained in this thesis can be assessed. If the arguments contained in this thesis are a true reflection of the difficulties inherent to the legal system in its attempts to address domestic violence, it would have a serious impact upon its ability to respond to abused women who kill in a way that takes account of the social context and dynamics of the abuse.

⁸⁵ See Herman: 1992, Dutton and Goodman: 2003, Fischer et al: 1992 and Williamson: 2010

Following the anticipated conclusion that the legal system does not respond to domestic violence appropriately because it does not conceptualise it in a way that reflects its true context and dynamics, Chapter Nine will then evaluate the application of international human rights law to domestic violence with the aim of assessing whether it seems any better able to respond to domestic violence with an understanding of the causes, context and impact of ongoing abuse than the national legal system. Research into how international human rights law has been held to apply to domestic violence tends not to focus on the underlying causes of the violence, or on the dynamics of abusive relationships, but more on critiquing the practical aspects of the law. McQuigg⁸⁶ has extensively evaluated the current and potential future efficacy of international human rights law in terms of addressing domestic violence and Edwards⁸⁷ has assessed how international human rights law could be used to tackle all forms of violence against women, rather than a specific focus on domestic violence. There is literature in the field of women's human rights that does take a more theoretical approach,⁸⁸ highlighting the masculine nature of international law and how it has traditionally excluded women's concerns, primarily as a result of the operation of the public private dichotomy in the international arena, but it has not been applied directly to the practical operation of the various mechanisms. The concluding chapter will then provide a synthesis of the key findings of this research. This will enable the identification of the reasons for the limited effectiveness of the legal remedies and responses to domestic violence in England and Wales. There will also be a consideration of the limitations of this research, and recommendations for further research in this field.

⁸⁶ McQuigg: 2011(a)

⁸⁷ Edwards: 2010

⁸⁸ See in particular Bunch: 1995, Charlesworth: 1994; 1995; 1999, Charlesworth, Chinkin and Wright: 1991 and Otto: 2005; 2010.

CHAPTER ONE
THE ROLE OF VIOLENCE AGAINST WOMEN IN
ESTABLISHING MALE CONTROL

In the introduction, the characteristics of a patriarchal society to be used for present purposes was outlined as being one that is male-dominated, male-centred, male-identified and centred around an obsession with control and power.¹ It was further claimed that many scholars believe evidence shows that the unequal gender relations characteristic of a patriarchal society are still in existence in England and Wales. It is anticipated that the analysis of the legal responses in England and Wales will prove consistent with this claim. This chapter will claim that gendered violence is a symptom of, and device for maintaining, the unequal gender relations that are integral to the maintenance of patriarchy. This will be supported primarily through an analysis of some of the reasons patriarchy as a social system may have developed, and its relationship with violence against women.

The period of European history dominated by witch hunts (the mid-sixteenth to mid-eighteenth centuries) will be used to emphasise both the integral nature of violence against women in creating and sustaining the patriarchal system and the Church and the states apparent interest in perpetuating this system. The claim will be made that the purpose of the persecution of the witch hunts was to destroy women whose actions challenged the patriarchal social order² and to send a symbolic message to all women about men's ultimate control over them. Male domination and violence against women existed prior to this period, but the witch hunts are one of the main periods of recent human history when violence and misogyny against women can be seen as systemic and purposeful, reflecting the perceived need to control women's sexuality and reproductive function in the interests of sustaining the patriarchal social order. The mechanisms used in the witch hunts confirm that it was not a spontaneous process because such high levels of official organisation and administration were required,³ thus supporting the claim that the state, the Church and the legal system played a key role in

¹ See Johnson: 2005 and the introduction for a full explanation of the ways in which patriarchy can be seen to operate in contemporary society.

² It will be shown below that women who were deemed to be witches were typically those who challenged the patriarchal order by refusing to marry, having sex out of wedlock, or controlling women's reproductive function.

³ Federici: 2004 p. 166

legitimizing the violence and misogyny. It will be argued in later chapters that this legitimization continues today in the context of domestic violence.

Part One will examine the role of violence against women in sustaining the patriarchal social order. Part Two will then examine the witch hunts which took place in Europe from 1560-1760 to assert that they demonstrate the social function of violence against women and state and Church legitimization of misogynistic beliefs and practices. In Part Three will be an analysis of the reason why the desire to control women's sexuality and reproductive function through violence seen in the witch hunts is necessary to maintain the patriarchal state. The claim that differences between the sexes and biologically masculine traits are the reason for male supremacy, dominance and aggression need to be challenged before fully claiming that violence against women is integral to a patriarchal system.

Male Supremacy: Refuting Gender Differences

The theory that it is men's greater physical strength and greater aggressiveness that led them to become hunters and providers of food – thus making them more valued than women⁴ - has had a powerful explanatory and reinforcing effect on contemporary ideas of male supremacy, thus relieving modern-day men of any responsibility for male dominance. Despite the ways in which this theory has been undermined by anthropological evidence concerning hunting and gathering societies, and despite the fact that feminist anthropologists have challenged the earlier generalisations that male dominance is virtually universal,⁵ this out-dated theory is still often used to justify the subordination of women and male dominance, aggression and violence.⁶ The current hierarchical gender order and system of male dominance and privilege is typically defended on the basis that patriarchy is rooted in the natural order of things, thus merely reflecting the 'essential' differences between men and women based on biology or genetics. However, this ignores much of what has

⁴ Some of this can be attributed to the differing physical strength of men and women, although this is a contentious issue with some studies indicating that the differential treatment received by males and females from birth means their bodies develop in different ways, for example through different levels and types of physical activity. See Johnson: 2005 and Fine: 2010.

⁵ See Rosaldo: 1974 pp. 16-42, Silverblatt: 1978 pp. 37-61 cited by Lerner: 1986

⁶ This theory can still be seen to justify, implicitly and explicitly, the differential treatment of men and women in society, especially under the legal system, as will be revealed in subsequent chapters.

been revealed about gender differences based on empirical studies and other research; '[e]ssentialism... can't account for the enormous variability we find *among* women and *among* men, or the similarities between men and women in similar situations'.⁷ Many studies have found that there are actually more differences between groups of men or groups of women than between men and women, and expectations of how the sexes are expected to perform on certain tasks has also been found to influence how well the tasks are performed.⁸ For example, women who were told that 'recent research has shown that there are clear differences in the scores obtained by men and women in logical-mathematical tasks' themselves then listed twice as many negative thoughts about the maths test. They subsequently did not perform as well as the control group (who had been told that there are no differences between men and women performance on these tasks).⁹ In addition, essentialism is unable to explain why so much coercion is needed to keep patriarchy going; if male privilege were rooted in some male essence then it would not follow that many men experience such pain, confusion, ambivalence and resistance during their training for patriarchal manhood and their lives as adult men. If women were naturally subordinate, it would also be hard to explain the long history of women resisting oppression and learning to undermine and counteract male dominance.¹⁰

Part One

The Role of Violence Against Women in the Maintenance of Patriarchy

Marital violence can be seen to have an ancient history and, as Davidson writes, 'to find a time in history when wifebeaters did not enjoy having custom and the law on their side, it is necessary to go back more than 2000 years to... pre-Biblical times'.¹¹ To the extent that violence against women is tied to domestic arrangements, the work of Engels suggests that the key institutions of civilized society – family, private property and the state – were non-existent in prehistoric life, suggesting that social institutions are not eternal or unchanging

⁷ Johnson: 2005 p. 53

⁸ See Fine: 2010 pp. 9-39

⁹ Cadinu et al: 2005 p. 574

¹⁰ Johnson: 2005 p. 53

¹¹ Davidson in Roy (ed): 1977 p. 4

but have 'come into existence at certain periods of history due to specific socioeconomic conditions'.¹² Engels further claims that the institution of the family is no exception to this; prior to property ownership the key institutions of the state and the patriarchal family were not needed and therefore did not exist.¹³

Violence Against Women in the Middle Ages

Patriarchal and misogynistic attitudes toward women existed earlier but can be seen to have been more fully and consistently condoned and supported by the state and the Church in the Middle Ages. During this period it was believed that a husband's right to beat his wife derived from God's command and the Church approved this as a method of keeping women in subjection. The performing of infibulation¹⁴ on men's wives and the sewing up of the labia over the vaginal opening was commonly practiced, revealing an attempt at ensuring chastity and fidelity in order for male lineage to be traced. Elements of this concept of women as a form of property to be justifiably controlled by their husbands or male partners persists today and infidelity continues to be used as justification, within the legal responses and public understandings, for violence against wives and female partners. The use of instruments of torture and punishment in the Middle Ages against strong women who spoke their own minds¹⁵ demonstrates the role of violence in keeping women under male control. The public chastisement of women deemed to be angry troublemakers would have had an impact on all women in terms of reminding them of their place, what was expected of them, and that they should defer to the power of their husbands and other males. Indeed, it was not until 1967 that the Common Scold Law was declared obsolete in England by the Criminal Law Act¹⁶ and even since this time the imagery of the provoking wife has remained 'a powerful justification and rationalisation for the physical punishments and degradations meted out by husbands in private'.¹⁷ There have been instances of leading social figures

¹² Evelyn Reed's introduction in Engels: 1972 p. 8

¹³ See Engels: 1972 and Lerner: 1986 on the development of patriarchy

¹⁴ The practice of fastening together the labia majora by means of a ring, buckle or padlock

¹⁵ Women during this time were convicted as 'nagging wives' or 'scolds' for breaking the peace – a crime that only women could commit.

¹⁶ Section 13(1)(a) Criminal Law Act 1967

¹⁷ Dobash and Dobash: 1979 p. 59

reflecting a perpetuation of these views that it is women's provoking and nagging behaviour that causes men to be violent against them.¹⁸ Women's 'nagging', infidelity, and failure to conform to the expectations of femininity or fulfil the role required of a wife or female partner can thus be seen to continue to operate as an excuse that justifies violence perpetrated against a woman by her husband or male partner. However, as suggested above, the process of the witch hunts clearly show the systemic and purposeful nature and the level of state and Church legitimisation of violence against women required for the continuation of patriarchy. Elements of this will be later shown to persist in the current day.

Part Two

The Witch Hunts: State Legitimation of Misogyny and Violence Against Women

The main period of the witch hunts in Europe ran from 1560-1760 when it is estimated that 100,000¹⁹ women were killed, and many more were brutally tortured, for being heretics and witches. The witch hunts can be conceived as a campaign directed against those holding views considered to be unorthodox or a threat to society. The process of the witch hunts claimed to uncover subversive activities but appeared to be used to harass and undermine those of differing views. They developed into a rigorous campaign to round up or expose dissenters on the pretext of guarding the welfare of the public. State authorisation and control over the witch hunts is shown by Parliament passing the Witchcraft Act in 1542 which defined witchcraft as a crime punishable by death. This first Act was repealed in 1547 but restored by a new Act in 1562, when the trial of witches was transferred from the Church to the ordinary courts. In 1736 Parliament passed an Act repealing the laws against witchcraft, but imposing fines or imprisonment on people who claimed to be able to use magical powers.²⁰

¹⁸ See the operation of the old provocation defence p. 90-1 and *Re H (A Child) (Contact: Domestic Violence)* [2006] 1 FCR 102 where the trial judge described the wife's treatment of the husband as 'autocratic and domineering' (para 30) and stated that this provocation explained the violence he used against her (para 44).

¹⁹ Barstow believes the numbers killed have been wildly overestimated by previous historians who claim that millions were killed and her research demonstrates that 100,000, a still significant number, is a much more accurate estimation.

²⁰ <http://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/overview/witchcraft/>

This part of the chapter will analyse the aims and ideology behind the witch hunts apparent in the text of the *Malleus Maleficarum*. Translated as 'The Witch Hammer,' this was a book on witchcraft published by the Catholic Church in 1484 and was the leading authority on how to conduct a witch hunt for 200 years.²¹ Through this analysis of the text itself emerge three linked themes. The first is its implicit misogyny, defined as a dislike of, contempt for and ingrained prejudice against women. There had probably existed ancient and perhaps unconscious misogyny before this time, but this is when it becomes fully evident that the establishments of the Church and the state practices this misogyny.²² This implicit misogyny reveals a great deal about the motives and purpose behind the witch hunts. Second is an obsession with women's sexuality and the sexual nature of the witch trials themselves,²³ and third can be seen a preoccupation with the continuation of life. These latter two are linked and will be analysed in Part Three of this chapter to support the claim that central to the witch hunts was the need to control women's sexuality and reproductive function to ensure that sexual intercourse only took place within marriage for procreation purposes and women's reproductive function could not be controlled by midwives. This helps to explain why it was predominantly women who were found guilty of witchcraft.²⁴

It will be contended that witch burning (together with other oppressive measures against women) enabled the Church and the state to challenge the control women had over their sexuality and reproductive function in order to further embed the developing patriarchal social order. The analysis will be based on the view that the witch hunts played an integral part in the economic and political transition from the feudal system to the developing system of capitalism during this period.²⁵ This is based upon an analysis of the purpose of

²¹ There have been many translations of the different Latin versions of the original text. The one used here was translated by P. G. Maxwell-Stuart in 2007 and is translated from the 1588 Frankfurt edition. Maxwell-Stuart states that the *Malleus Maleficarum* is often, misleadingly, referred to as a 'manual'. Instead it is best understood as an idiosyncratic compilation reflective of Insitoris's personal preoccupations. He also explains that it gained pre-eminence among demonological and witchcraft treatises because it provided a pattern for future generations of writers and scholars to understand what witchcraft was (Maxwell-Stuart: 2007pp. 31-2).

²² Maxwell-Stuart asserts that an earlier translation by Montague Summers gives the impression of a text more targeted upon women than it actually is because *maleficus/malefica/malefici* was translated indiscriminately as 'witch' which, in English-speaking consciousness almost inevitably produces the image of a female (Maxwell-Stuart: 2007 p. 38). However, it is notable that Insitoris uses the feminine pronoun whenever he designates the offender (Maxwell-Stuart: 2007 p. 34).

²³ Women's 'sexual relations with evil spirits lie at the heart of their willingness to act as agents for Satan's plans to overthrow humanity' (Maxwell-Stuart: 2007 p. 32).

²⁴ The text of the *Malleus Maleficarum* takes it as a given that there are 'more workers of harmful magic found in the female sex... than among men' (Maxwell-Stuart: 2007 p. 74).

²⁵ For a brief historical account of how capitalism – defined as an economic and political system in which a country's trade and industry are controlled by private owners for profits, rather than by the state – developed out of the feudal

the witch hunts provided by Federici which suggests that missing from Marx's analysis of the proletariat is the integral nature of the witch hunt to the exploitation of women. She claims that this in turn played a central function in the process of capitalist accumulation because of women's role as the producers and reproducers of 'the most essential capitalist commodity: labour power.'²⁶ For capitalism to be successful, there needed to be a continual source of new labour and it can be argued that this was what primarily dictated the changes that arose in the social position of women; the power of women under the feudal system had to be challenged.²⁷ The witch hunts coincided with the enclosure²⁸ of the commons and, prior to this time, the commons served a particularly important social function for women²⁹ and this 'web of cooperative relations... crumbled when the open-field system was abolished and the communal lands were fenced off'.³⁰ Federici claims that there is 'no doubt that in the "transition from feudalism to capitalism" women suffered a unique process of social degradation that was fundamental to the accumulation of capital and has remained so ever since'.³¹ The devaluing of women as workers,³² and their loss of autonomy with respect to men, demanded their subjection to an 'intense process of social degradation'³³ and the witch hunts were an integral part of this process, signifying a 'turning point in the history of women in Europe'.³⁴ The ability of witches to control nature in undesirable ways – such as through inducing miscarriage – and the threat they posed to the ideal of sexual intercourse within marriage for reproduction purposes will be argued to have

system see Marx and Engel's Communist Manifesto of 1848, available at <http://www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf>

²⁶ Federici: 2004 p. 8

²⁷ Federici: 2004 pp. 21-22, 69. Federici's explanation therefore adds to Marx's concept of 'primitive accumulation' by uncovering the development of a new *sexual* division of labour which subjugated women's labour and reproductive function to the reproduction of the work force and led to the construction of a new patriarchal order based upon the exclusion of women from waged work and their subordination to men, and led to the transformation of women's bodies into a machine of production for new workers (Federici: 2004 p. 12).

²⁸ 'Enclosure' is a technical term used to describe a set of strategies used by English lords and rich farmers to eliminate communal land and expand their holdings. It involved the abolition of the open-field system, the fencing off of the commons, and the pulling down of the shacks dwelt in by poor cottagers who had no land of their own but who could survive due to having access to customary rights. (Federici: 2004 pp. 69-70).

²⁹ This was due to women having less title to land and less social power which made them more dependent on them for subsistence, autonomy and sociality (Federici: 2004 p. 71). Noteworthy is that in the regions of England where land privatisation had not occurred and was not on the agenda there is no record of witch hunting, and in Essex, where most of the English witch trials occurred, the bulk of the land had been enclosed by the sixteenth century (Federici: 2004 p. 171).

³⁰ Federici: 2004 p. 72

³¹ Federici: 2004 p. 75

³² From the end of the seventeenth century all female work done in the home – even if it was done for others and payment was received for it, was defined as 'housekeeping', and even when it was done outside of the home it was paid less than 'men's work' and was never enough for women to live on. This led to a massification of prostitution and the view that marriage was women's true career, with women's inability to support themselves becoming a taken for granted reality (Federici: 2004 p. 94).

³³ Federici: 2004 p. 100

³⁴ Federici: 2004 p. 164

been perceived by the Church and the state as undermining the growth of state-condoned male control and the power of the patriarchal state.

Accused 'witches' have been portrayed as social failures in some of the literature,³⁵ rather than an understanding of the purpose for their persecution. This led to a tendency to blame them for incurring persecution, thus failing to see that the charges of female sexual transgressions such as illegitimacy promiscuity and sexual voracity, are the 'stuff of which misogyny is made'.³⁶ More recently, it has been shown that the witch hunts were systemic attacks aimed at destroying the power of women in general.³⁷ A lack of awareness of traditional misogyny and the oppression of women led some historians to conclude that the accused witches were to blame for their own misfortune. Therefore, Federici claims that although it is 'generally agreed that the witch hunts aimed at destroying the control that women had exercised over their reproductive function and served to pave the way for the development of a more oppressive patriarchal regime,' and that it has previously been argued that the witch hunts were 'rooted in the social transformations that accompanied the rise of capitalism,' the 'specific historical circumstances... and the reasons why the rise of capitalism demanded a genocidal attack on women have not been investigated'.³⁸ It is here argued that the social order felt threatened by nonconformist women and that women were accused 'primarily by men, tried by male juries, examined by male searchers, sentenced by male judges, tortured by male jailers, [and] burned to death by male executioners'.³⁹ Williams and Williams highlight the salient point that 'the story of witchcraft continues to blind writers to its most sensational aspect, the mass killing of women, in part, at least, as a way of denying women political and economic power'.⁴⁰

The Misogynistic Nature of the Witch Hunts

The misogyny of the *Malleus Maleficarum* almost certainly reflects the misogynistic nature of the society for whom it was written, it certainly suggests a

³⁵ Daly: 1978 p. 213

³⁶ Barstow: 1994 p. 3

³⁷ Federici: 2004

³⁸ Federici: 2004 p. 14

³⁹ Barstow: 1994 p. 9

⁴⁰ Williams and Williams: 1992 p. 3

striking hostility: women 'have a lewd, slippery tongue, and have difficulty concealing from fellow-women those things they know by means of their evil skill,'⁴¹ To denigrate women in this fashion would assist a social objective of subordinating women to male power and control. The text offers circular arguments in which assumptions about women's inherent nature are used to explain why it is predominantly women that practice harmful magic. Certain aspects of women's 'nature' are assumed, rather than proved, and then used to justify the assertion that women are more likely to practice harmful magic than men. For example, the credulous nature of women makes them inclined to leak, and this renders it easier for individual spirits [*spiritus*] to make an impression upon them'; also, 'because they do not have physical strength, they find it easy to assert themselves in secret through acts of harmful magic'. In the text it is taken as a given that 'this type of betrayal of God [is] found more in women than in men.'⁴²

The power of the Church and the state was deployed to identify the range of women who would be accused of witchcraft – midwives, 'adulteresses', 'fornicators', and the 'mistresses' of rich and powerful men.⁴³ It was then stated that they had the traits that make them a witch; 'these women apply themselves to acts of harmful magic more than anyone else because, much more than all the others, they are given over to those [particular] vices'.⁴⁴ Alongside this, in Part III of the *Malleus Maleficarum* where the judicial process is described, it is stated that the house is to be searched and 'if she has the reputation of being a witch, then there is no doubt that various pieces of [magical] apparatus will be found, unless she has already hidden them'⁴⁵ indicating that they cannot fail to accuse her; the trial is being conducted on the basis of her reputation, regardless of how that came about. The use of institutional violence was a norm; the male judge used torture to find tricks and signs that enabled him to recognise a witch such as whether she can shed tears; if she was a witch she would not be able to shed tears despite trying 'hard enough',⁴⁶ thus revealing the ways in which this form of gender violence was legitimated by the state and the Church in order to support the developing status quo. This was seen as an

⁴¹ Maxwell-Stuart: 2007 p. 75

⁴² Maxwell-Stuart: 2007 p. 74

⁴³ Maxwell-Stuart: 2007 p. 77

⁴⁴ Maxwell-Stuart: 2007 p. 77

⁴⁵ Maxwell-Stuart: 2007 p. 218

⁴⁶ Maxwell-Stuart: 2007 p. 230

'absolutely reliable sign, based on long-standing information from worthy men',⁴⁷ revealing a privileging of male testimony and knowledge over that of women. Therefore, it can be argued that the misogyny of the *Malleus Maleficarum* reveals a great deal about the motives behind, and purpose of, the witch hunts because it portrays women as untrustworthy, overly-sexualised and willing to harm other women and their children for personal gain.

These assumptions are also reflective of much Christian belief, where the concept of Original Sin can clearly be seen to be a misogynistic interpretation of other creation myths used to subjugate women to the authority of the Church, the state and men.⁴⁸ Eve's responsibility for destroying paradise illustrates to men the dangers of listening to their wives, whilst women are punished for Eve's misdemeanour for all eternity by being made subject to the rule of their husbands. The Adam and Eve story has been 'twisted into the rationalisation for much of the Christian world's mistreatment of wives. It aided and abetted the view of woman as inherently evil'⁴⁹ which is further apparent in the conducting of the witch hunts where the role of the Church and the state in legitimating misogyny and violence against women becomes visible, as substantiated by the nature of the text of the *Malleus Maleficarum*.

Part Three

Establishing Control over Female Sexuality and Women's Reproductive Function

The *Malleus Maleficarum* displays a preoccupation with women's sexuality and uses the supposed sexual nature of the female witch, implied (by the absence of mention of male sexuality) as being in opposition to men's nature,⁵⁰ to explain why they were predominantly the ones that practiced harmful magic. The original text states that women were more likely to be witches because they are 'more given to fleshly lusts than a man, as is clear from her many acts of carnal

⁴⁷ Maxwell-Stuart: 2007 p. 230

⁴⁸ In Chapter 2, verse 22 of Genesis (the Book of Creation) woman is created out of man (Adam's 'spare rib') and within twenty subsequent verses her weak nature has brought about devastation and curses for all.

⁴⁹ Davidson in Roy (ed): 1977 p. 7

⁵⁰ Quotes such as 'experience tells us that women are weaker than men both intellectually and physically. Indeed, when it comes to intellectual or spiritual matters, they seem to be of a different species' (Maxwell-Stuart: 2007 p. 75) reveal the dominant assumption in the text that men and women are, by their natures, opposed to one another.

filthiness'.⁵¹ Women are held to be 'unfinished' because they were 'formed from a curved rib' and it is concluded from this that 'she is always... deceptive'⁵² and her 'fleshly lust... is never satisfied'.⁵³ Men, by contrast, are preserved – by God – 'from so great a disgrace'.⁵⁴ The type of women held to be 'infected' were those 'who are hot to fulfill their corrupt lusts'⁵⁵ – 'adulteresses', 'fornicators' and 'mistresses' – and it can be seen that these women were the ones perceived as a threat to one of the key institutions of patriarchy; the family. Federici notes the huge effect it must have had on women to see their neighbours, friends and relatives being burned at the stake and to realise that 'any contraceptive initiative on their side might be construed as the product of demonic perversion'.⁵⁶ The *Malleus Maleficarum* states that women being burned had stated that their masters (i.e. evil spirits) had 'enjoined them to use every effort to bring about the downfall of holy virgins and widows'⁵⁷ which indicates the preference for women to be 'pure' and married; those accused of witchcraft can be seen to be those undermining this preferred way for women to live. It is argued here that views about female sexuality were actually used to justify the promotion of monogamous marriage (at least on the part of the woman) and to challenge – by accusing them of witchcraft – any woman who appeared to undermine this institution; '[f]emale witches were, in effect, adulteresses. They formed a bond with someone other than their husbands – entered, in fact, into a private contract with the devil'.⁵⁸ For patriarchy to be sustained, the preferred state of affairs is monogamous marriage because this enables lineage to be traced through the man. This analysis enables the suggestion that part of the purpose of the witch hunts was to control women's sexuality in order to maintain control over their reproductive function and ensure that they did not have sex outside of marriage. This was done by putting fear into all women – not just those accused – of what would happen to them if they had sex out of wedlock.

Sections of Part II of the *Malleus Maleficarum* explaining how the crimes are committed display a fascination with the sexual acts supposedly performed by the witch and the incubus, for example when the text discusses whether or not the incubus is visible; 'witches themselves have frequently been seen lying

⁵¹ Maxwell-Stuart: 2007 p. 76

⁵² Maxwell-Stuart: 2007 p. 76

⁵³ Maxwell-Stuart: 2007 p. 76

⁵⁴ Maxwell-Stuart: 2007 p. 76

⁵⁵ Maxwell-Stuart: 2007 p. 77

⁵⁶ Federici: 2004 p. 184

⁵⁷ Maxwell-Stuart: 2007 p. 145

⁵⁸ Maxwell-Stuart: 2007 p. 14

on their backs in fields or woods. They have removed their clothes as far as the navel and, in accordance with what is required by that act of filthiness, they get their limbs (their shins and shanks) in the right position and stimulate themselves. As far as people standing around are concerned, they are doing this in conjunction with incubi who are invisible while it is taking place'.⁵⁹ According to the original writer, Insitoris, detailed questions relating to a woman's sexual behaviour were essential because witches tended to be sexually promiscuous and so evidence of this would assist the court in determining whether the woman being interrogated was a witch'.⁶⁰

The sexual component of the witch hunts, then, is essential in understanding the patriarchal control and misogyny that led to this form of violence against women. The 'sexual sadism displayed by the torture reveals a misogyny that has no parallel in history'⁶¹ and all members of a community had to attend the execution, including the children of the accused; the daughters' of the accused would often be whipped in front of the stake on which their mother was being burned alive. The concept of the 'devil's teat', a mark that could be found anywhere on a woman's body in the form of a teat from which animals or demons sucked, is clearly an inversion of the female function of providing breast milk.⁶² As Barstow points out, locating the 'devil's teat' extended across all female anatomy and some of the most basic negative imagery of witch lore was taken from the female anatomy.⁶³ Making women appear as sexually voracious provides a means to justify controlling their sexuality, thus helping to create a sense of shame that could be manipulated to ensure women only had intercourse within marriage for procreation purposes (thus enabling the traceability of male lineage for property and inheritance purposes).

Therefore, key elements of the *Malleus Maleficarum* provide further support for the analysis linking violence against women to the patriarchal system because the text reveals a preoccupation with the continuation of life – something integral to the continuation of capitalism because a new generation of workers needs to be provided. In the introduction to his translation, Maxwell-Stuart suggests that the attacks on female fertility may be explained as being due to the rage of post-menopausal women against younger, child-bearing

⁵⁹ Maxwell-Stuart: 2007 p. 143

⁶⁰ Maxwell-Stuart: 2007 p. 26

⁶¹ Federici: 2004 p. 185

⁶² Barstow: 1994 p. 129

⁶³ Barstow: 1994 p. 252

women,⁶⁴ and in this way the witch hunts are being set in the context of women against other women, thus turning it into a personal attack, rather than a public attack that supports the social order desired by the state. The text indicates that women of child-bearing age in particular were identified as those able, and often willing, to harm the next generation⁶⁵ and the vitriol expressed towards midwives further supports this analysis; 'what of midwives who surpass all other women in wickedness?'.⁶⁶ Midwives were held to prevent women from conceiving, make women miscarry, and devour children or offer them to evil spirits; those who are 'indisputably witches are accustomed, against the inclination of human nature..., to devour and feast on young children'.⁶⁷ Notably, only one 'eyewitness' account is offered in support of this claim.⁶⁸ Thus midwives were perceived as able to control nature by influencing women's reproductive capacities, and thus their persecution reflected the need to challenge women's control over their reproductive capacity.⁶⁹

State Legitimation of Violence Against Women

For patriarchy to be sustained, Federici views the witch hunts as the beginning of 'the transformation of female sexual activity into work, a service to men, and procreation... [Therefore], central to this process was the banning, as anti-social and virtually demonic, of all non-productive, non-procreative forms of female sexuality'.⁷⁰ Central to the control over women's sexuality and reproductive function were the severe legal penalties imposed against contraception, abortion and infanticide and the new forms of surveillance that were adopted to make sure women did not terminate their pregnancies during the mid-sixteenth century.⁷¹ The rise in laws restraining sexual conduct and women's control over reproduction and their own bodies, such as adultery, bearing illegitimate

⁶⁴ Maxwell-Stuart: 2007 p. 18

⁶⁵ See Maxwell-Stuart: 2007 p. 26

⁶⁶ Maxwell-Stuart: 2007 p. 74

⁶⁷ Maxwell-Stuart: 2007 p. 92

⁶⁸ See Maxwell-Stuart: 2007 p. 93

⁶⁹ The introduction of male gynaecologists following this time indicates the removal of midwives from a position of expertise and authority in relation to childbirth.

⁷⁰ Federici: 2004 p. 192

⁷¹ A statute was introduced in 1623 making it a penal offence punishable by the death penalty for a mother to kill her bastard infant. The mother was to be presumed guilty (an extremely rare use of the device of a legal presumption) if her infant died, regardless of natural causes or the effects of poverty. Alongside this the regulation of marriage began in 1753 with the Marriage Act, and abortion at any stage was criminalised. According to Smart, this constructed a category of 'dangerous motherhood' (Smart: 1995 p. 195) whilst at the same time making it increasingly difficult to avoid unmarried pregnancy and childbirth, thus reflecting the aims of the witch hunts.

children, abortion, incest and infanticide, parallels the sexual content of witchcraft prosecution; charges of sex crimes and witchcraft often overlapped.⁷² It can be seen that the witch hunts not only 'condemned female sexuality as the source of every evil' but also enabled 'a broad restructuring of sexual life that, conforming with the newly emerging capitalist work-discipline, criminalised any sexual activity that threatened procreation, the transmission of property within the family, or took time and energies away from work'.⁷³ Federici asserts that the significance of the 'criminalisation of women's control over procreation... cannot be overemphasised... [in terms of] its effects on women and its consequences for the capitalist organisation of work'.⁷⁴

The statistics are 'sufficient to document an intentional mass murder of women.'⁷⁵ Married women learned that the safest route was 'to mind one's business and obey one's husband'⁷⁶ and this lesson has clearly carried through to the present day, when women are still punished and violated for disobeying their husbands, disregarding their wishes and failing to fulfil the role expected of them.⁷⁷ Mary Daly argues that the enforced active/instrumental role of children in the trials has carried the lessons of the witch hunts down through the centuries into the present day. She believes that for a daughter to remember all her life that she had been used to accuse and condemn her mother to death, effectively matricide, would have given the girl an unimaginable burden of self-loathing and this self-hatred would have been branded upon their own daughters and on following generations.⁷⁸ Whether or not these effects have been overstated in her account, the witch hunts do serve to illustrate the developing need for male control over the female body and freedom of action. The legal regulation of marriage⁷⁹ and reproduction continues to this day; the Ellenborough Acts of the 19th century made abortion punishable by the death penalty, under the Offences Against the Person Act 1861 (OAPA) abortion or trying to self-abort punishable carried a sentence of life imprisonment, in 1929 the Infant Life Preservation Act created a new crime of killing a viable fetus (28

⁷² Barstow: 1994 p. 133

⁷³ Federici: 2004 p. 194

⁷⁴ Federici: 2004 p. 92. She also reveals how when contraception returned to the social scene they were specifically created for use by men, whereas previous methods were of a type that women could use.

⁷⁵ Barstow: 1994 p. 26

⁷⁶ Wilson: 2006 p. 321

⁷⁷ This argument will be developed in subsequent chapters, in particular Chapters Two and Three.

⁷⁸ Daly: 1978 p. 197

⁷⁹ Matrimonial Causes Act 1973 and *Hyde v Hyde and Woodmansee* [1866] L Rev 1 P & D 130 (see Chapter Four p. 113 for a discussion of the legal regulation of marriage).

weeks) in all cases except where the mother's life was at risk, and in 1967 the Abortion Act de-criminalised abortion but only under certain conditions.⁸⁰

Therefore, the witch hunts were 'instrumental in the construction of the newly developing patriarchal order where women's bodies, their labour, their sexual and reproductive powers were placed under the control of the Church and state and transformed into economic resources'.⁸¹ The state clearly had an interest in this control of women for economic purposes. Through the witch hunts, the state brought an end to the use of the methods women had developed to control procreation, thus institutionalising the state's control over the female body, itself a precondition for the subordination of the female body to the reproduction of labour-power.⁸² Witches were women who avoided maternity, promiscuous women, or any woman who exercised her sexuality outside the bonds of marriage⁸³ and procreation.

The witch hunts also resulted in the murder of thousands of wise women which led to the 'virtual elimination of female healers and left the way open for the creation of a new male medical profession'.⁸⁴ Therefore emerged a new medical practice where the life of the fetus (the 'new worker' required for patriarchal capitalism) was prioritised over the life of the mother and led to the marginalisation of the midwife. Thus women lost control over procreation and were reduced to a passive role in child delivery.⁸⁵ Male doctors took over the role of midwives and between the late 1700s and late 1800s became known as gynaecologists.

Hysteria and Medical Justifications for Misogynistic Treatment of Women

It can be seen, therefore, that the central themes drawn out from the text of the *Malleus Maleficarum* reveal much about not only the position of a woman in society at the time of the witch hunts, but also about the purpose her position served in facilitating the development of a patriarchal system. The themes can

⁸⁰ The Abortion Act 1967 Section 1 states a person shall not be guilty of an offence when a pregnancy is terminated before 24 weeks and where the continuance of the pregnancy would involve risk, greater than if the pregnancy were terminated, of injury to the physical or mental health of the pregnant woman or any existing children of her family, there would be a risk to the life of the pregnant woman, or where the child is likely to be born seriously handicapped.

⁸¹ Federici: 2004 p. 170

⁸² Federici: 2004 p. 184

⁸³ Witches were also accused of generating excessive erotic passion in men and so it was easy for a man caught in an illicit affair to claim that he had been bewitched (Federici: 2004 p. 190).

⁸⁴ Wilson: 2006 p. 334

⁸⁵ Federici: 2004 p. 89

be seen to continue into the nineteenth and twentieth centuries, when doctors viewed menstruation, pregnancy and menopause as physical diseases making women 'intellectual liabilities' in need of expert care and rendering them incapable of certain roles and positions in society. The desire to control women's sexuality and the idea that women should not enjoy sex but only engage in it for procreation⁸⁶ - to preserve male lineage – was continued during this period, with clitoridectomy being practiced to cure female hysteria, nymphomania and masturbation.⁸⁷ Thus the continuance of the control of female sexuality that was particularly apparent during the witch hunts can clearly be seen. Doctors noted that hysteria was likely to appear in rebellious young women who were more independent and assertive than 'normal' women. Thus further instances of women who disobeyed their husbands and other important males in their lives, and were not happy to be subordinated and controlled, being subjected to misogynistic and harmful practices are apparent here. Elaine Showalter writes that 'during an era when patriarchal culture felt itself to be under attack by its rebellious daughters, one obvious defence was to label women campaigning for access to the universities, the professions, and the vote as mentally disturbed, and of all the nervous disorders... hysteria was the most strongly identified with the feminist movement.'⁸⁸ Ehrenreich and English explain how society 'assigned affluent women to a life of confinement and inactivity, and medicine justified this assignment by describing women as innately sick. In the epidemic of hysteria, women were both accepting their inherent "sickness" and finding a way to rebel against an intolerable social role. Sickness... became a rebellion, and medical treatment, which had always had strong overtones of coercion, revealed itself as frankly and brutally oppressive'.⁸⁹

⁸⁶ For example, the assertion in the *Malleus Maleficarum* that incubi infest 'any females, regardless, who take a greater or lesser delight in sexual pleasure (Maxwell-Stuart: 2007 p. 144).

⁸⁷ Clitoridectomy was first practiced as a cure for female hysteria by a respected member of the Obstetrical Society of London, Isaac Baker Brown, in 1859. Convinced that female hysteria was caused by masturbation he believed that removal of the clitoris would stop the disease. In the 1860s he extended the practice to removal of the labia and operated on patients as young as ten. He operated on 'five women whose "madness" consisted of their wish to take advantage of the new Divorce Act of 1857 and ... was most certain of clitoridectomy as a cure for nymphomania, for he had never seen a recurrence of the disease after surgery'⁸⁷. Although Brown was expelled from the Obstetrical Society in 1867 for coercing his patients into treatment, clitoridectomy was accepted as a cure for female masturbation by some American gynaecologists who claimed that women were susceptible to hysteria, insanity and criminal impulses as result of their sexual organs. From 1873 'female castration' (removal of the ovaries) to cure insanity began to be used.

⁸⁸ Showalter: 1985 in Wilson: 2006 p. 335

⁸⁹ Ehrenreich and English: 1979 pp. 125-6

Conclusion

This chapter has presented arguments in support of the theory that violence against women is deeply ingrained in our past and the foundations of current Western society and culture. The intention behind this argument is to show the state has an ongoing interest in controlling women's behaviour, sexuality and reproductive function. Examination of the *Malleus Maleficarum* shows much about the importance of this control over women. Significantly in this text, and other records of how the trials were conducted, can be seen the institutionalisation of violence against women in a very overt way. This theme will be more fully developed in the following chapter as the gendered stereotypes of male and female roles and behaviours will be analysed in support of the claim that gendered expectations are integral to the maintenance of one of the primary patriarchal institutions; the family.

Therefore, examination of the misogynistic nature of the witch hunts confirms them as primarily a campaign against women, thus revealing their rationale; to provide the state and the Church with a means of controlling any women perceived as a threat to the patriarchal social order. This can be seen to have occurred directly, through the accusation of witchcraft, or indirectly, as a result of the symbolic message sent to all women. The very public nature of the persecution and execution of accused witches seems to indicate that they were a chief sixteenth century device for 'teaching both sexes about men's ultimate control over women'.⁹⁰ . The desire to control women's sexuality could be seen to embed the ideology that sexual intercourse should only occur in marriage, which in turn would mean patriarchal lineage i.e. inheritance and property, could be traced through the male line.

Presenting the social function of the unequal gender relations integral to patriarchy and asserting that violence is often a necessary way of maintaining these relations, provides support for the first central argument of this thesis; domestic violence is primarily a social problem, not one that can be attributed to deviant individuals or problematic relationship dynamics. This material leads to the conclusion that neither a full understanding of domestic violence, nor the provision of solid foundations for solutions, are possible without recognising the continuing social function of this type of abuse and why it is predominantly

⁹⁰ Barstow: 1994 p. 149

women that are its victims. If the analysis contained in this chapter is correct, it carries the implication that legal reform alone will not be sufficient to address the problem.

CHAPTER TWO
THE IMPACT OF MASCULINE AND FEMININE IDENTITIES
ON DOMESTIC VIOLENCE

The material analysed in this chapter aims to show the expectations placed upon men to be masculine and women to be feminine are one of the root causes of domestic violence. It will be claimed that the gendering of essentially human qualities is central to the maintenance of patriarchal systems; it is only through establishing that the characters and behaviours of men and women are in opposition that male privilege and domination over women can be justified. An analysis of gender role stereotypes and expectations, particularly in the context of dating and marital-type relationships, is intended to support the claim that domestic violence, as a central mechanism in sustaining the current social order, is thus primarily a social problem. This claim can be used to challenge individualistic discourses pertaining to domestic violence. These discourses suggest the problem is attributable to the deviance of particular individuals or relationship dynamics and thus that solutions can be found by focusing on treating the pathologies of those involved.

The perspective taken will be that gender is socially constructed and thus distinct from biological sex, making masculine and feminine identities not the 'natural' products of being sexed as either male or female. This argument is made in order to refute the claim that men's 'natural' aggression gives them their place as the dominant sex. Part One of this chapter will examine the gender roles that are constructed for men and women and the contribution that expectations of appropriate masculine and feminine behaviour have on the occurrence of domestic violence. It will be contended that it is women's identity first and foremost as wives or female partners that places them in a role that allows them to be beaten, abused and controlled. An examination of masculine gender identities is also necessary because, through the study of masculinities,¹ feminism has been alerted to the limitations of focusing on just women's lives to explain phenomenon surrounding gender. As Bibbings contends, if feminists are concerned with the treatment of women in society, 'they need to understand

¹ The term 'masculinities' emerged in the 1980s and by the early 1990s was used to identify a coherent field particularly situated in sociology (Dowd: 2008 p. 208)

what it is about men that make them oppress women'.² Analysing the roles and expectations placed upon men within a patriarchal system indicates that we cannot understand the abuse of women by focusing simply on femininity; a more holistic understanding of gender norms and expectations is required.

Part Two will then advance the argument that it is the expectations placed upon appropriate roles within the marital-type relationship that provide the context in which violence and abuse occurs. Research into young people's experience of abuse will then be used to claim that the same dynamics and inequalities can be seen in dating relationships. This will be shown to indicate that 'essentialist ideas about gender remain dominant in young people's understandings'³ therefore the gendered expectations that support the patriarchal social order are persisting in current times.

Part One

The Social Construction of Gender Roles

Within current Western culture, great significance is attached to the identification of people with their gender, i.e. being male or female, and there is a strong demand to behave in ways that are appropriate to our biological sex.⁴ This emphasis on masculine and feminine identities begins before babies are even born and has an overwhelming influence on the roles and positions that men and women envisage for themselves in the future. It is common for humans to divide people into groups and, whilst these groups can be divided on the basis of race, age, religion and so on, the most widespread divide is gender groups. This process is both 'habitual and automatic';⁵ usually the 'first thing we determine when meeting someone new, is their gender'.⁶ However, this division of the world into two groups leads to a tendency to 'consider all males similar, all females similar, and the two categories of "males" and "females" very

² Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 232

³ Chung: 2005 p. 445

⁴ A revealing study by Bettman: 2009 conducted via interviews and focus groups to discover the current perceived qualities and roles of masculinity and femininity, and the benefits that men felt they gained from being male, indicated that 'patriarchal ideologies remain the 'energy source' of Western cultural discourse' (Bettman: 2009 p. 24). The study also examined attitudes to violence and found that the use of violence by men within relationships was linked to the dominant patriarchal discourse (p. 26).

⁵ Crespi: 2003 (online article at <http://www.mariecurie.org/annals/volume3/crespi.pdf>)

⁶ Crespi: 2003 (online article at <http://www.mariecurie.org/annals/volume3/crespi.pdf>)

differently'.⁷ This ignores that there is at least considerable overlap in terms of the characteristics commonly attributed to each gender; 'gender polarisation often creates an artificial gap between women and men'⁸ and this polarisation of gender has created, and continues to create, gender roles which endure.

According to Connell,⁹ efforts to maintain strong divisions between the sexes, for example statements made by the law, in the media and in advertising, give strong evidence of the instability of the boundaries. She highlights a whole industry of popular psychology telling us that men and women are naturally opposites in their thinking, emotions and capacities. These accounts tell us: women and men communicate in different ways; boys and girls learn differently; hormones make men into warriors; and our 'brain sex' rules our lives. Connell points to a mass of research evidence showing these claims to be 'complete nonsense' and asserts that the 'popular psychology doctrine of natural difference is harmful to children's education, to women's employment rights and to all adults' emotional relationships'.¹⁰ She concludes that the idea of *character dichotomy* is commonly used in popular psychology to link bodily differences and social effects, with women assumed to possess one set of traits and men another. Most often, though not always, these work to the advantage of men because the traits they are held to possess are those that are more useful and more highly valued under a patriarchal system. In fact, studies have shown no significant sex differences in many areas of brain anatomy and functioning, and where there are differences they may be *caused by* different behaviours, rather than causing them.¹¹

Despite this, the need to conform to gender norms is great, and it can be argued, as Butler does, that because human existence is always gendered existence, to 'stray outside of established gender is in some sense to put one's very existence into question'.¹² In contexts where gender norms are well entrenched the corresponding norms function prescriptively, providing the basis for judgements about how people ought to act and be. This prescriptive force is backed up by social sanctions and then, significantly, conformity to gender norms becomes internally motivated as opposed to being socially enforced.¹³

⁷ Crespi: 2003 (online article at <http://www.mariecurie.org/annals/volume3/crespi.pdf>)

⁸ Crespi: 2003 (online article at <http://www.mariecurie.org/annals/volume3/crespi.pdf>)

⁹ Connell: 2005

¹⁰ Connell: 2009 p. 50

¹¹ Connell: 2009 p. 52

¹² Butler: 1987 p. 132

¹³ Haslanger: 1993 pp. 89-90

The prescriptive role of gender norms is seldom acknowledged and instead it is often concluded that the sex difference is natural or inevitable and woman is 'essentially' feminine.¹⁴ However, as Haslanger asserts, particular traits, norms and identities, considered in abstraction from their social context, have no claim to be classified as masculine or feminine. Any classification is derivative and depends on prior social classifications.¹⁵

The next two subsections will argue that in Western patriarchal societies, the roles that are allocated to each gender support and strengthen one of the institutions fundamental to the continuation of the patriarchal hierarchy; the family. It will be claimed that this is achieved through the continuation of gendered expectations making women's identity depend upon being a good wife and mother and enabling the domination of men, achieved through the creation of a firm masculine identity against which men's adherence can be measured and evaluated. Theoretical support and empirical evidence will be provided for the assertion that the root causes of domestic violence, often overlooked by legal authorities and policy makers, are the gendered expectations placed upon men and women, particularly in relation to how they 'ought' to behave in intimate relationships. It will be claimed that many women, even young girls and teenagers, derive their sense of self from being in an intimate relationship and that this expectation leads many women to become unable to leave an abusive relationship.

Women's Identity as Wives and Female Partners

Despite numerous changes in the status of women over the last 100 years and the fact that some women are able to break out of this confining role and choose not to become a wife or mother, these roles are still marks of legitimate womanhood. Departures from this norm typically need internal or external justification. For the majority of women being married and settling down is their ultimate goal in life and there seems to be a much stronger negative social stigma attached to being a spinster than being a bachelor. Fairy tales and stories still teach young girls they need only wait for a handsome prince to come

¹⁴ Haslanger: 1993 p. 90

¹⁵ Haslanger: 1993 p. 90

along to be 'assured of true love and living happily ever after'¹⁶ and these tales, whilst allegedly only stories, are powerful influences on young girls. They contain strong subliminal messages perpetuating views of marriage as the end-point in a woman's life and show her located within the domestic world of cleaning, cooking and taking care of others.¹⁷ These stories continue to be an 'enormously influential part of our culture' and, according to Cosslett they can be seen to *cause* women to take on certain beliefs about their cultural role, or at least reinforce what culture is already telling them in other ways.¹⁸

There has been little change in the patriarchal ideals and hierarchical nature of family organisation based upon a father as the head with a wife and children; the same beliefs are taught to children and the control husbands have over their wives and female partners continues to be institutionalised and legitimated in various ways. Female children still tend to be given baby dolls to mother, playhouses, miniature vacuum cleaners, irons, pots and pans, bride outfits to dress up in and are generally encouraged to imitate the behaviour and attitudes of married women. On the other hand little boys are given toys to encourage them to think of themselves in terms of work and to foster independence; they are not actively socialised to become husbands or fathers, but individuals.

Research conducted by Belotti, indicating that this conditioning 'represents a "forced" integration of all children into the cultural mould of sex-linked identity',¹⁹ provides support for the claim that children are gendered right from birth. She asserts that the hierarchy of worth of individuals, based on what they will become as adults, is marked by an overwhelming preference in society for male children; mothers indulge little boys and even submit happily to their assertions of authority, shaping the behaviour of boys by reacting to them 'in the same tolerant, compliant, accomplice's attitude which [they maintain] towards adult men. Alternatively, a woman will shape her daughter in accordance with the image of females approved by men'.²⁰ This is further evidence currently in the pages of most toy shop catalogues, with toys grouped into 'boys toys' (adventure, science, discovery, construction and so on) and 'girls toys' (baby dolls, miniature kitchens and cleaning sets, fairy and princess costumes)

¹⁶ Bradley Berry: 2000 p. 26

¹⁷ Cosslett: 1996 in Cosslett, Easton and Summerfield (eds.): 1996 pp. 81-2

¹⁸ Cosslett: 1996 pp. 81-2

¹⁹ Belotti: 1975 p. 16

²⁰ Belotti: 1975 p. 31

continuing to perpetuate gender stereotypes. Some toy shops have reacted to criticisms of the division by removing overt labelling, but there only needs to be 'blue' and 'pink' displays and packaging for children – and parents – to know where the appropriate toys for each gender will be found. In addition, the forums of many online websites for mothers contain frequent discussions along the lines of 'boys will be boys' and condoning, even relishing, 'typical' boys' behaviour, whilst worries abound about girls not being feminine and ladylike enough when they are small; 'such effort is put into ensuring that girls become wives that by a very early age many of them find it almost impossible to think of themselves in any other way', effectively robbing them of their ability to conceive of themselves in the future as an autonomous individual.²¹

Looking at the historical development of the status of women within both the public and private sphere, it can be argued that the sentimentalising of the institution of the family 'provided a new rationale for the subordination of women'.²² By examining the rise of the family and the rationale for its setup entrenched by political theorists such as Locke and Hobbes, Moller Okin identifies the rationale behind organising society on the basis of family units as initially being 'predominantly pragmatic and instrumental' with the chief reason for entering being the rearing of children, rather than love or companionship.²³ It wasn't until the mid-seventeenth century that the 'sentimental nuclear family' began to develop²⁴ and the family type that began developing among the gentry and bourgeois classes by the late seventeenth and early eighteenth centuries was much closer to the family as we know it - it was based on love rather than (or as well as) practical considerations and was higher in affect and psychological commitment. In addition it was 'separated much more clearly from the outside world, valuing its privacy and cherishing its inward-turning and intimate sphere of domesticity'.²⁵ Domestic privacy and psychological intensity and intimacy were becoming the ideal, even if not so often the reality'.²⁶

The point that Moller Okin intends to make is that this did not, as some have argued, lead to an 'improvement in prevalent conceptions and attitudes toward women' because in reality women's spheres of dependence and

²¹ Dobash and Dobash: 1979 pp. 81 and 286

²² Moller Okin: 1982 p. 65

²³ Moller Okin: 1982 pp. 65-69

²⁴ Prior to this the family type in traditional society was founded almost exclusively on economic or pragmatic considerations and was formal and distant with little value placed on intimacy.

²⁵ Moller Okin: 1982 p. 73

²⁶ Moller Okin: 1982 p. 74

domesticity were actually divided from the outside world more strictly, women were increasingly characterised as creatures of sentiment and love (meaning they did not possess the rationality needed for citizenship). The legitimisation of male rule within and outside the family was thus reinforced on the grounds that the interests of the family are always united, based only on love, and husbands and fathers can therefore be trusted with the power within the household and to represent the family's interests in the political realm. In Rousseau's philosophy can clearly be seen 'the effects of the sentimental, but still clearly patriarchal, family working to legitimise and justify the exclusion of women from social, political, legal, and economic equality'.²⁷ As will be seen in Chapters 4 and 6, this is reflected in judicial attitudes to motherhood and women's roles. Expectations of love and the provision of caring can be just as oppressive as the more overt forms of oppression as they still constitute the gender stereotyped expectations that provide the context in which domestic violence occurs.

Following on from this, the portrayals of women's lives found in the majority of mainstream culture (soap operas, romantic comedies, 'chick lit', and most popular romance, as well as other less obvious forms such as the huge range of relationship advice books targeted at women) can be seen to both contribute to and reflect dominant norms and the pervasive 'ideology of romantic love teaches [women] that [their] life can be meaningful and significant through devoting [themselves] to finding and keeping a man'.²⁸ The power dynamic in love relationships can be hard to identify because it works 'insidiously through shaping the subjectivity of the less powerful so that they see their disadvantaged position as normal and natural'.²⁹ Inequality is typically sustained by hidden power 'reflected in everyday understandings and

²⁷ Moller Okin: 1982 p. 77. Rousseau was one of the most influential eighteenth century writers on mothering and the education of women and Moller Okin uncovers how his views on women are essentially connected to the family type he idealises. Rousseau identifies sentiment and the natural feelings of the father for his family as justifying his absolute rule over it and the 'appeal to sentimental family has allowed Rousseau to argue that women do not need equality either within or outside of their domestic havens. But he also uses the sentimental family in order to define women's nature... to render them *incapable* of any role outside the domestic sphere'. He asserts that women are 'innately imbued with many of the qualities the patriarchal family requires of them – modesty, fastidiousness, the desire to please, a limited capacity for rational thought, and even the capacity for submitting meekly to unjust treatment'. As Rousseau stated, women's education must be 'relative to men' to 'please them, to be useful to them, to be loved and honoured by them, to rear them when they are young, to care for them when they are grown up, to counsel and console, to make their lives pleasant and charming, these are the duties of women at all times'. (Rousseau: 1762 quoted by Moller Okin: 1982 pp. 76-7). Even John Stuart Mill (who argued against female subordination) believed women could be legitimately excluded from voting because their interests were included in those of their husbands and fathers, demonstrating a sentimentalising of the relationships within the family.

²⁸ Langford: 1996 in Cosslett, Easton and Summerfield (eds.): 1996 p. 24

²⁹ Langford: 1996 in Cosslett, Easton and Summerfield (eds.): 1996 p. 28

legitimation of the status quo'.³⁰ The claim that the focus on romantic love merely reflects our emotional responses can be countered through an understanding that, however real our emotions are, they are still 'socially ordered, linguistically mediated and culturally specific',³¹ meaning that our emotions are still a response to the cultural and social expectations placed upon us. Jackson draws attention to the narrative of romantic love to justify this claim;

*'We can identify with love stories not because they record some pre-existing emotion, but because our cultural tradition supplies us with narrative forms with which we begin to be familiarised in childhood and through which we learn what love is. Narratives are not only encountered in novels, plays and films – they are very much part of everyday cultural competences. We constantly tell stories to ourselves and others and we continually construct and reconstruct our own biographies in narrative form. Hence subjectivity is in part constituted through narrative.'*³²

The predominant hetero-normativity of romance in its popular manifestations is also very clear with the construction of love relationships between men and women being portrayed as the 'natural' way to find fulfilment. These beliefs can be seen to contribute to the predominant view of heterosexuality as a 'compulsory' way of life, a theme that will be taken up again in Chapter Four in relation to the ways in which the legal system constructs gender norms. Under a patriarchal system, cultural ideals of masculine manhood and feminine womanhood are organised on a heterosexual model. What is commonly assumed to be 'normal' human sexuality is actually a set of cultural ideas about sexuality and how we think about *heterosexuality* is key to patriarchy because ideas about gender are at its core, with heterosexuality and gender being defined in terms of each other. This makes a 'real man' someone who can 'act out core patriarchal values by orienting himself to the task of controlling sexual access to women'.³³ Johnson defines the problem with patriarchal sexuality as being the merging of sexuality with control, dominance, and, therefore, violence as the means for achieving both. Under a patriarchal system, violence can be

³⁰ Langford: 1996 in Cosslett, Easton and Summerfield (eds.): 1996 p. 28, discussing a Dutch study of marriage conducted by Aafke Komter in 1989.

³¹ Jackson: 1993 p. 46

³² Jackson: 1993 p. 46

³³ Johnson: 2005 pp. 147-8

seen to be about power *and* sex. Patriarchal culture defines mainstream sexuality *in terms of* power and male privilege, and power and male dominance are routinely conceived in sexual terms.³⁴ Langford concludes that romantic love is clearly a patriarchal narrative which implicates women emotionally in a system of relationships which disadvantages them.³⁵ The emphasis on heterosexual romantic love portrayed in most popular media and culture is a crucial way in which the expectations placed upon girls to enter into the marital-type relationship as the 'end-point' of their life and main way of attaining fulfilment still continues to operate clearly and pervasively in current times. This theme will be explored further in the following chapter when pornography and degrading portrayals of women in popular culture are analysed.

The Role of Masculinities and Male Identity in Domestic Violence

As stated above, it is not sufficient simply to examine the expectations placed upon females under a patriarchal system to understand how gender-role stereotypes contribute to the conditions sustaining domestic violence; the expectations placed upon males are as important. 'Masculinity' and 'femininity' are inherently relational concepts; one only exists in contrast with the other and there cannot be a concept of 'masculinity' without treating men and women as polarised character types.³⁶ Masculinities is a plural term, and, by accepting the existence of multiple masculinities, feminist understandings can be improved; '[w]hat has been critiqued as essentialist when considering women as a group has been accepted with respect to men'.³⁷ Although there are multiple conceptions, there is still a dominant set of norms of masculinity - referred to as 'hegemonic masculinity' - which exist at the top of the hierarchy of masculinities. Whilst 'few men meet the definition of hegemonic masculinity... most men benefit from it by reaping the patriarchal dividend'.³⁸

³⁴ For example the expression 'Fuck you!' hetero-sexualises aggression 'by identifying the aggressor with men who 'fuck' and the object of the aggression with women who are 'fucked'. Similarly, being hurt or taken advantage of is often linked to heterosexual imagery, as in "I've been screwed," "had," "taken," or "fucked". As well as aggression, power is also hetero-sexualised, for example the use of "fucking" as 'an adjective indicating something of awesome proportions (as in "fucking fantastic"), or the idea that men have the right to sexualise all women, including employees, co-workers, strangers on the street' (Johnson: 2005 p. 149).

³⁵ Langford: 1996 in Cosslett, Easton and Summerfield (eds.): 1996 pp. 30-31

³⁶ Connell: 2009 p. 31

³⁷ Dowd: 2008 p. 204

³⁸ Dowd: 2008 pp. 208-211

Men often pay a price individually for this privilege as their mental and physical health is often affected by the demands of masculinity and the masculine refusal to seek care. However, the patriarchal dividend, as the benefit all men have from the dominance of men in the overall gender order, empowers all men as a group. 'Hegemonic masculinity' is so pervasive that it goes largely unnoticed – it is taken-for-granted oppression – and although it is not equally enjoyed by all men, as a group all men draw on that power. In addition, the two most common defining elements are the negative imperatives not to be a woman and not to be gay, involving a lifelong rejection of all things female. Masculinity is as much about men's relation to other men as it is about their relation to women – it is a process of comparison, putting all men against each other with the constant challenge to meet the standard of masculinity.³⁹ In this climate, men are powerful but often feel powerless, and cannot endorse the core claim of feminism – that males have a superior status and inequality is caused by males having more power in relation to females; it – does not ring true for most men,⁴⁰ which would explain any masculine resistance to the descriptions of their power.

The sense of powerlessness reflected in 'hegemonic' masculinity's desire for control – to a large degree masculinity is about fear, shame and emotional isolation – has a clear impact upon the methods of coercive control that typically characterise an abusive relationship. Notions of manhood centre around many things – a desire for control, strength, aggressiveness, assertiveness and so on – but amongst these can be found a 'will to hurt'.⁴¹ The giving and taking of pain that is central, in many men's minds, to the notion of manhood is a social construction; men teach each other about hurting and they structure their lives in ways that allow them to express this behaviour. This willingness to inflict pain affects men's relationships with other men as much as it affects women.

Violence against women must be seen against the background of male-to-male relations because these are also organised around man's willingness to hurt. This will is not random but relies upon a set of rules or circumstances under which it can be expressed, so that pain is given in directed ways and under finely practiced justifications. Any pleasure, power or profit thus derived must be hidden because otherwise it will reveal a potentially dangerous truth

³⁹ Dowd: 2008 pp. 229-234

⁴⁰ Dowd: 2008 pp. 229-234.

⁴¹ Kuypers: 1992

about men and hurting. This truth, according to Kuypers, is that pleasure in giving pain is not an isolated experience for a few men – animal hunting, pornography, ‘slasher’ movies, playing soldiers and war games (as distinct from the role of being a real soldier) all require that pleasure is achieved through the infliction of pain. As a result of the silence surrounding men’s will to hurt, and the fact that it is only used on ‘deserving victims’⁴² or for moral reasons, the use of violence and other methods of inflicting hurt seem so obvious that they become almost natural. Masculinity can be seen to be created, through a process of gender socialisation, in the same way as femininity is. In terms of hegemonic masculinity, one of the losses is the expression of emotion (unless it is anger or rage) and the underdevelopment of empathy due to the association of these things with femininity.⁴³ Members of the hegemonic masculine group pay a huge emotional cost for this, and because the core elements of this dominant masculinity are negative – *not* being a girl, *not* being gay – members of the subversive or subordinate groups, such as homosexuals, also pay a huge price. Homophobia is a powerful part of the construction of masculinities because it is linked to the need to avoid being feminine in order to meet the norms of hegemonic masculinity. This is expressed by avoiding men who are perceived as feminine, homophobic harassment and violence, and avoiding characteristics and behaviours that would identify them as feminine and gay.⁴⁴

It can also be claimed that the term ‘hegemonic masculinity’ refers to particular collections of characteristics which signify what is truly male or appropriately masculine at a specific point in time and are the standard against which men are measured.⁴⁵ Currently it includes traits such as aggression, self-sufficiency and a sense of competitiveness; ‘normal manliness is constructed as being aggressive and violent; violence is both a proof and an expression of being a man’.⁴⁶ The ‘perpetration of and participation in violent encounters are equated with masculinity, regardless of the outcome; even the scars and wounds of “the loser” may be useful for display and status conferring’.⁴⁷

Although violence perpetrated by men against women has a different cultural meaning and does not affirm personal identity in the same way as

⁴² Even in the context of ‘slasher’ movies, the victim is typically portrayed as deserving of the violence in some way, often through stupidity or making a series of wrong choices.

⁴³ Dowd: 2008 p. 219

⁴⁵ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 234

⁴⁶ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 234

⁴⁷ Dobash and Dobash: 1998 p. 15 and p. 164

violence between men, Bibbings argues that the acceptability of certain types of inter-male violence has a definite impact on levels of violence against women.⁴⁸ The risk is that the effect of this continued condoning by communities of a certain type of inter-male violence in some spheres is likely to carry across to incidents of male violence against women. It is also likely to affect the perceptions of male perpetrators of violence within the criminal justice system, as will be explored in Chapter Four.

Walker's research found that a high risk factor for a woman experiencing future abuse was marrying a man with more traditional attitudes towards women's roles. She also found that traditional attitudes go along with the patriarchal sex role stereotyped patterns that rigidly assign tasks according to gender. As well as this, her research found that men who were violent towards their wives or female partners tended to be insecure and highly dependent on their female partners whilst at the same time adhering to the traditional notion that it is a sign of weakness for them to express their emotions.⁴⁹ It appears that these men are adhering to the expectations of hegemonic masculinity and that this is contributing to the violence and abuse they inflict on their partners. Men who exhibit dominant behaviour are insecure, vulnerable, dependent and also unreasonably jealous of anything or anyone that takes their partner's attention away from them, including other men, family, friends and interests outside the home.⁵⁰ Many abusers have very traditional ideas about male superiority and the stereotypical sex roles. Hence, the roles and expectations of femininity can be seen to be insufficient on their own to create conditions in which domestic violence is a likely outcome, in the patriarchal system. The demands placed upon men to conform to the standards expected of them are also key contributing factors. It seems that an understanding of masculine identities under patriarchy, as well as feminine ones, are integral to understanding the reasons domestic violence occurs. The sources of violent conflict within marital-type relationships will be explored next, with the intention of showing that the

⁴⁸ See Bibbings: 2000 in Nicolson and Bibbings (eds): 2000

⁴⁹ Walker: 2009 pp. 17-18

⁵⁰ For example, a study by Jacobsen and Gottman: 1998 found that men who battered their female partners were unable to concede anything to their partners once an argument had begun because they needed to maintain dominance at any price. In addition he identified two related categories that men who batter typically fit into - "Pit Bulls" and "Cobras". He found that those in the former category (80% of the sample) had an unrelenting contempt for women, blaming them and punishing them for their own neediness, whilst at the same time being extremely dependent upon them. "Cobras," on the other hand, 'struck out immediately, from what appeared to be a calm state... [becoming] outwardly calm... before striking out... and were more severely violent and more likely to have used deadly weapons against their partners than the pit bulls'.

internal and external pressure to conform to these roles does actually lead to male abuse within relationships.

Part Two

Gender Role Expectations in Marital-type Relationships

As well as the expectations upon women and men to enter into marriage or heterosexual partnerships, there are also expectations placed upon them to behave in certain ways once they have done so. An early study in the 1970s conducted by the Dobashes comparing the social life of couples, separately and together, before marriage with their social life once married found an emerging pattern which was 'not random or subject to a great deal of variation between couples' and which was reflective of 'widely held cultural expectations about the appropriate spheres of husbands and wives'.⁵¹ The negotiation of daily life and allocation of resources takes place within the home and is thus usually seen as a private matter, but the wider social context of the roles identified for husbands and wives and the marital hierarchy influences these negotiations and allows the husband to determine the allocation of the majority of the family's resources and the determination of the amount of free time allowed each partner.⁵² This change can be attributed to ideals about married life, especially the husband's ideals, and it can be further asserted that ideas about the acceptable or appropriate behaviour of husband and wife were based upon a patriarchal model which included issues of differential authority, dependence, responsibility and individuality. Financial support was traditionally seen as the only absolute commitment to marriage that a husband should make and, because of the way they 'represent' the family in the economic world, authority, independence and freedom of movement were all thought to be appropriate. Entertainment was viewed as a necessary release from, and reward for, wage work outside of the home, leading to the belief that it was the man's prerogative to carry on with his separate social life after marriage. On the other hand, the 'exclusive commitment that a woman must make to marriage underlies the initial

⁵¹ Dobash and Dobash: 1979 p. 87

⁵² Dobash and Dobash: 1979 p. 127-9

curtailment of her social life and movements and not, as is often stated, the demands of domestic duties'.⁵³

These values are still predominant in the twenty-first century despite larger numbers of women working for a wage outside the home. Recent surveys on the differences in paid work and the share of household chores and childcare indicate that things remain relatively unchanged since the Dobashes study in 1979, despite the appearance of higher formal equality for women within the public sphere. Whilst it must be acknowledged that many women claim to have chosen to focus on child-rearing rather than their jobs or careers, some statistics serve to demonstrate the continuing impact of women's disproportionate responsibility for childrearing. A 1990 survey estimated that women in the UK lose around half their lifetime earning potential compared with men due to their continued primary responsibility for looking after infants.⁵⁴ A survey in 1994 indicated that less than one in five mothers with preschool-age children were working whereas four in five fathers were.⁵⁵ The same study found that 80% of British respondents living in a couple deemed it was usually or always the woman's job to do the laundry. Interestingly in Sweden the results for both the latter two studies were similar,⁵⁶ despite the country being thought of as 'pioneering advances in sexual equality'. Figures from the Office for National Statistics uncovered that 'at the end of 2012 there were just over 6000 more full-time, stay-at-home dads looking after babies and toddlers than there were 10 years ago, yet in the same period, around 44,000 women have stopped being stay-at-home mothers. The gap this has created has been filled by childcare and grandparents, not fathers.'⁵⁷ This indicates that men are still not sharing childcare. In fact, a third of men don't take the fortnight's paid paternity

⁵³ Dobash and Dobash: 1979 p. 90. Bringing up the children, domestic work, personal and emotional support were thought to be the major responsibilities of the wife so positioned, and although she may have received some assistance these things were generally accepted as her responsibility. The Dobashes also identified the duties as constant because there is no obvious 'end point' when they are done and so the 'good' wife, which is what every girl is brought up wanting to be (or needing to be for the purpose of her self-identity), must spend little time apart from her family. A 'good' mother can rarely go out without her family because that means leaving her duties and responsibilities behind and so she must plan her life around providing meals and child care; '[w]hen a husband goes out for an evening or attends an afternoon football match or takes a weekend trip, he need not make arrangements for child care or leave sandwiches in the refrigerator, and certainly no feeling of irresponsibility or guilt mars his enjoyment'. However, to be 'a good wife' involves the elimination or curtailment of any activities that interfere with the fulfilment of domestic responsibilities. There is a tacit awareness amongst both husbands and wives that if there is a disagreement about whether or not the husband goes out, he ultimately has 'freedom of action because of his position of authority in the household and his lack of moral obligation to domestic responsibilities' whereas if there is disagreement over the wife's activities 'she must either accede to her husband's wishes or risk moral degradation, physical coercion, and/or punishment of various types' (Dobash and Dobash: 1979 p. 90 and p. 127).

⁵⁴ Davis and Joshi: 1990

⁵⁵ MacInnes: 2001. These statistics are taken from MacInnes' analyses of the 1994 International Social Survey Programme's 1994 survey module *Family and Changing Gender Roles* administered to 33,000 respondents in 18 countries. The data was deposited in the ESRC Data Archive.

⁵⁶ MacInnes: 2001 (as above).

⁵⁷ Burrows writing in *The Guardian*, Friday 5th July 2013.

leave they are entitled to⁵⁸ and, although fathers have had a right to a share of 26 weeks of paid parental leave since April 2011, 40% of fathers said they would not take it and almost 90% of men say they wouldn't take more paternity leave if it was offered to them.⁵⁹ Even when they are not working, surveys indicate men are not doing anywhere near an equal share of baby and toddler-care with 'only a third of couples... taking it in turns to get up for a new baby during the night... [and] one in three dads [not] regularly changing nappies, and a third [not] bathing their babies'.⁶⁰ These figures indicate that the appropriate gendered roles and behaviours of men, particularly in heterosexual partnerships, that have developed throughout history persist in the current day, and as will become clear in the following section, it is these roles and expectations, as part of a set of wider cultural practices, that continue to create the conditions in which domestic violence occurs today.⁶¹

Sources of Violent Conflicts within the Marital-Type Relationship

Research demonstrates that the general themes of conflict typically leading to violence in marital-type relationships are: men's possessiveness and jealousy; disagreements and expectations concerning domestic work and resources such as money; men's sense of the right to punish 'their' women for perceived wrongdoings and the importance to men of maintaining or exercising their power and authority.⁶² This provides support for the claim that the expectations placed upon being masculine and feminine, particularly within the marital-type relationship, provide the context in which domestic violence occurs. The primary findings from a 1996 study in which a large sample of abusive husbands were interviewed support this claim as it was found that men did not believe that women have the same right as them to argue, negotiate or debate. Behaviour of

⁵⁸ Burrows writing in *The Guardian*, Friday 5th July 2013.

⁵⁹ Burrows writing in *The Guardian*, Friday 5th July 2013.

⁶⁰ Burrows writing in *The Guardian*, Friday 5th July 2013.

⁶¹ See also Chapter Seven for an analysis of the ways gendered expectations can be exploited by abusive men in the context of an abusive relationship.

⁶² Dobash and Dobash: 1998 p. 144. Levinson's cross-cultural research into family violence provided three types of wifebeating throughout the world which overlap with these; wife beating as sexual jealousy (occurring primarily in response to real or suspected adultery by the man's wife); wife beating as cause (occurring in societies where it is believed that a husband may beat his wife as long as he has good reason to, including the wife's failure to perform 'her' duties or treat her husband with the degree of respect he expects); and wife beating at will (where people in the society believe it is the husband's right to beat his wife for any reason at all).⁶² Levinson's research identified this latter type as by far the most common and reinforces the findings of the Dobashes demonstrating that conflicts where men assert their authority over their wives frequently lead to violence (Levinson: 1989 p. 33).

this kind was seen as a nuisance and a threat to their authority and thus violence was often used to silence any debate, reassert male authority and deny the woman any say in the affairs of daily life. Nagging, 'going on and on' and failing to 'shut up' were frequent reasons given for the violence and the exact nature and context of the conflict were often ignored or forgotten, indicating that violence was used to establish control and domination. Some examples of men's responses to the question '*Why did you hit her?*' also prove revealing in this context: '*I was wanting to show her who was the boss*'⁶³, '*[b]ecause she knows how to wind me up, basically. Sometimes she doesn't take "no" for an answer. Sometimes she'll go on and on and on about different things*'.⁶⁴

The responses to questions around the issue of what the men were hoping to get out of being violent also serve to illustrate that the men were not angry and 'out of control' when they used violence; it was instrumental to their aim of establishing control over their female partner.⁶⁵ In addition, when questioned on what their wife or partner could have done to stop the abuse, participating men answered '*[k]eep her mouth shut*',⁶⁶ '*[stop] doing things I don't want her to*',⁶⁷ '*[s]hut her mouth*'⁶⁸ and one particularly revealing response; '*I've battered her that many times she should know when to stop her crap*',⁶⁹ providing further support for the claim that violence is used to reassert male authority, and that men believe they are the one who should dominate and control the relationships. The findings from this study can be used to illustrate that the idea that it is necessary for a man to have authority over his wife or female partner was still thriving at this time and was used to justify men's need to be in charge, even if that requires the use of violence.⁷⁰ Stark's findings, based on work with abused women, can be used to update the analysis provided by the Dobashes and show that these gendered expectations still operate as the context and justification for domestic violence.

⁶³ Participant 038 of VMS quoted in Dobash and Dobash: 1998 p. 154

⁶⁴ Participant 006 of VMS quoted in Dobash and Dobash: 1998 p. 154

⁶⁵ For example, '*[w]ell it was actually just to get her to shut up*' (Participant 019 of VMS quoted in Dobash and Dobash: 1998 p. 154).

⁶⁶ Participant 063 of VMS quoted in Dobash and Dobash: 1998 p. 154

⁶⁷ Participant 062 of VMS quoted in Dobash and Dobash: 1998 p. 154

⁶⁸ Participant 005 of VMS quoted in Dobash and Dobash: 1998 p. 154

⁶⁹ Participant 007 of VMS quoted in Dobash and Dobash: 1998 p. 154

⁷⁰ Dobash and Dobash: 1998 p. 164

Stark's theory of domestic violence as coercive control⁷¹ will be examined fully in Chapter Seven. For present purposes, it can be noted that he has found coercive control to be "gendered" in its construction, delivery, and consequences, due to its focus on 'imposing sex stereotypes in everyday life'.⁷² His work identifies the core tactics of coercive control as consisting of rules and demands relating to practices that are determined by gender norms in relationships⁷³ or target devalued activities to which women are already consigned, like cooking, cleaning, and child care.⁷⁴ This means the control tactics can easily be confused with the expectations placed upon women in their traditional, stereotypical roles and are thus often seen as normal or acceptable. Furthermore, the 'regulatory strategies are often disguised as expressions of affection'⁷⁵ and love; many of men's demands seem benign with the only clue that something is wrong being the victim's sense that it is dangerous to refuse the request.⁷⁶ The effect of this is that those who experience or witness abusive strategies may be unable to discern whether they are being loved or controlled. The next section will further consider this idea of the difficulty of distinguishing between love and control tactics in the context of young people's dating relationships.

Young People's Relationships: Romantic Love or Control?

In analysing the findings from empirical studies that seek to investigate the dynamics of dating and marital relationships, further support can be provided for the assertion that the root cause of domestic violence - the gendered expectations placed upon girls and boys and men and women within a patriarchal society – persist in modern times, despite appearances of greater gender equality. It is still very much the case that adolescent peer norms 'often

⁷¹ Stark: 2009

⁷² Stark: 2009 p. 205

⁷³ For example, 'ceding major financial decisions to men or quitting work to "make a home" (Stark: 2009 p. 210)

⁷⁴ Stark: 2009 pp. 210-1

⁷⁵ One of the examples Stark uses to illustrate the chain of dominance which transforms gestures and events that seem caring and representative of love into coercive and controlling acts is the 'Sweatshirt case': 'Cheryl was the star pitcher for her factory softball team. After several innings when she pitched well, her boyfriend, Jason, would come onto the field and offer Cheryl her sweatshirt, saying, "Darling, you're cold. Why don't you put this on?" To the dismay of her teammates, Cheryl, would "fall apart." Cheryl's teammates interpreted Jason's gesture as caring. But to Cheryl, the message was that she had violated an agreement not to make him jealous. The sweatshirt was his warning that, because of her infraction, she would have to cover up her arms after he beat her. Cheryl's "mistake" was to draw attention to herself by striking out the opposing batters. She quickly corrected this fault by falling apart.' (Stark: 2009 p. 229).

⁷⁶ Stark: 2009 p. 230

“require” that a young woman have a boyfriend’.⁷⁷ As a result of this “requirement”, girls, in particular, begin to derive their sense of identity and self-esteem from the perceived success of the relationship.⁷⁸ Evidence also suggests that abused women tend to have very traditional ideas about what constitutes an achievement for a woman and base their feelings of self-worth on how they view their capacity to be a good wife and home maker.⁷⁹ It then also follows that, because girls and women derive their primary sense of self-identity from their status as a girlfriend, wife or partner, they will attempt to justify or rationalise any abuse or violence that they suffer at the hands of their male partner in an attempt to minimise what is happening and avoid questions over why they remain in the relationship. This can then make it difficult for women to name what is happening to them as abuse or domestic violence.⁸⁰

Studies seeking to understand violence in young people’s relationships indicate that views on appropriate feminine and masculine roles and behaviours remain relatively unchanged in current times and are contributing to, if not causing, violence in intimate relationships to occur as an acceptable – albeit unpleasant – part of relationships for the next generation of men and women. Looking at the findings of a study conducted by Chung, it becomes clear that taking on ‘gendered heterosexual identities as girlfriend or boyfriend... signifies to peers progress towards adulthood which is associated with the successful performance of masculinity and femininity’.⁸¹ In order to maintain the dominance of hegemonic masculinity (see below), boys and men are expected, by other men, to behave in particular ways to their intimate partners. For example, Levy’s study found that peers ‘expect a “boyfriend” to be sexually aggressive in, domineering in, and controlling of all aspects of the relationship’.⁸²

As discussed above, the institution of romantic love dominates in western society, making it inescapable for young women, and Chung’s study found it has ‘a powerful influence on how young women attribute meaning to their experiences of dating relationships’.⁸³ A young girl, and even a more mature woman, ‘may not see her relationship as abusive... [because] she may interpret

⁷⁷ Levy: 1991 p. 4

⁷⁸ Suarez: 1994 p. 428

⁷⁹ Bradley Berry: 2000 p. 54

⁸⁰ Hague and Mullender: 2006

⁸¹ Chung: 2005 p. 447

⁸² Levy: 1991 p. 5

⁸³ Chung: 2005 p. 449

the violence as a sign of jealousy' and view it as 'a sign of love'.⁸⁴ Interviews conducted by Chung with young people show how 'various aspects of romantic love are used to divert attention away from behaviours being interpreted as male control of women and instead being interpreted as signs of love and commitment,' for example policing of behaviour and clothes, or jealousy. Behaviour like this was seen as a sign of his love, not as behaviour aimed at control. Indeed, young men's use of the term 'ownership' in relation to his girlfriend was not considered to indicate that he saw her as his property.⁸⁵ Violence then becomes 'a normal way to express love'.⁸⁶ In addition, the expectations placed upon girls and women to be the emotional caretakers of their relationships makes them feel 'responsible for the success of the relationship and dependent upon the boyfriend for social acceptance and self-esteem'.⁸⁷

The same individualistic discourses that are a common part of legal understandings of domestic violence⁸⁸ can also be seen as a barrier to young women identifying their relationship as violent, abusive or coercive, in part because 'the individualistic discourse encourages young women to understand violence and abuse as a problem of the individuals involved. Acknowledging a boyfriend was violent would represent her personal failing and inability to choose a suitable partner'.⁸⁹ This can be attributed to an 'unintended legacy of feminism that disguises and displaces the power relations that continue to shape young people's intimate heterosexual interactions' as the discourse of equality that young people use to explain their sexual relations.⁹⁰ In addition, this individualistic discourse means that if a woman remains in an abusive relationship it is her 'choice' because she is an individual with free will,⁹¹ and this is a significant barrier to adequate legal responses to domestic violence.⁹² The social context of the prevailing gendered power relations is not taken into account, suggesting that just as in adult relationships characterised by abuse, control and violence the victim is often seen to remain out of 'choice', the same

⁸⁴ Suarez: 1994 p. 429

⁸⁵ Chung: 2005 p. 449

⁸⁶ Suarez: 1994 p. 429

⁸⁷ Levy: 1991 pp. 4-5

⁸⁸ See Chapter Six at pp. 144-6

⁸⁹ Chung: 2005 p. 452

⁹⁰ Chung: 2005 p. 453

⁹¹ Chung: 2005 p. 453

⁹² The impact of individualistic discourses will be considered in the context of the criminal justice response to domestic violence in Chapter Five. Chapter Seven will challenge dominant understandings concerning women's free choice to remain in an abusive relationship through an examination of the impact of the coercive behaviours typically engaged in by an abuser and how they these operate to prevent the victim from leaving.

is true of young people and therefore these messages are continuing to be passed down through the generations. Gender inequality is hidden by the individualistic discourse, leaving gendered power relations that characterise the majority of intimate relationships relatively intact.⁹³

Studies such as these build support for the claim that the differing gender-role expectations placed upon males and females in intimate heterosexual relationships (as a way of maintaining a patriarchal social order) also underlie young people's dating relationships. The implication of this is that the same cultural beliefs and social conditions uncovered by researchers such as the Dobashes in the 1970s and 1980s as generating the context for domestic violence are persisting in current times.

Conclusion

At the beginning of this chapter it was asserted that the gender role expectations placed upon masculine and feminine identities are one of the root causes of domestic violence. It was claimed that the polarisation of men and women, and their appropriate roles, is socially constructed and necessary for the sustaining of the patriarchal social order. It is not possible to have a dominant group without having a group seen as different and thus controllable. In particular, it was suggested that these gender roles support one of the key institutions of the patriarchal state; the family. Gendered expectations affirm women in their place as wife and mother and these become internalised to form a sense of identity. The sentimentalising of the family as a place of safety and security, and the ideal of romantic love, become less benign-seeming when they are taken as the context in which domestic abuse occurs. The expectations of hegemonic masculinity – for men to be strong, aggressive, assertive and in control – alongside expectations for women to be good wives and mothers through supporting men in their dominant role, legitimates male rule in the public and private sphere. This was seen in the analysis of the expectations of

⁹³ Chung: 2005 p. 453. The existence of gendered power relations against the background of supposed equality between men and women in a Western Liberal Democracy have been well recognised and documented by feminist critics of liberalism such as Pateman: 1990 and Lacey: 1993. These critiques remain crucially important in the present day, perhaps even more so than when they were first written because women are generally viewed to now have an equal status with men and to be exercising free will and autonomy, meaning that it is their choice to enter into or remain in a relationship characterised by abuse.

dating and marital-type relationships as the context in which domestic abuse occurs. Heteronormativity, through the presentation of heterosexual relationships as 'normal' and desirable, is a central way of maintaining the institution of the family that is necessary for the continuation of a patriarchal society.

Moreover, Chung's data indicates the ways in which these gender role expectations serve to individualise and minimise relationship violence and abuse. The implication of this is that the construction of the gender role stereotypes that enable domestic violence to occur must be seen as integral to the patriarchal state, rather than explanations being offered for this type of violence which look to deviant or pathological individuals or family structures. Analysis of the dynamics and impact of domestic violence in subsequent chapters will challenge the prevailing views that emphasise the deviant nature of domestic violence⁹⁴ and the pathological nature of the women who stay in abusive relationships. If violence in marital-type relationships is seen as a random deviance from the norm then everyday social life does not need to be addressed, only those cases that deviate from it. As will be seen in Chapters Five and 6, this is reflected in the legal responses to domestic violence in England and Wales. The existing civil and criminal justice remedies are only able to respond to the symptoms of domestic violence by addressing its occurrence in individual relationships. In Chapter 6 there will be an exploration of the ways in which legal responses abstract the violent relationship from its social context. This leads to a failure to recognise the abuse as resulting from the nature of the family within patriarchal society and the expectations placed upon the wife or female partner within this institution. Instead of being seen as a reflection of recurrent social relations, domestic violence then becomes seen as an individual problem.

The following chapter will analyse the portrayals of women and men contained in pornography and pornographic representations found in more mainstream media and culture to assess their impact on the creation of the stereotypical views of appropriate masculine and femininity that it has been claimed are necessary for the continued maintenance of a patriarchal system. Pornography will be demonstrated to be legally regulated in England and Wales

⁹⁴ Dobash and Dobash: 1979 p. 27

in a way that overlooks its potential harm to women thus providing further support for the claim that the state acts to preserve patriarchal interests.

CHAPTER THREE

PORNOGRAPHIC PORTRAYALS AND DOMESTIC VIOLENCE

Feminists have targeted pornographic representations of women as ‘symbols of patriarchal ideology’ and this focus has ‘served to highlight the media, and pornography in particular’ as a crucial site of explanation for both patriarchal attitudes and (sexual) violence against women’.¹ Though debates continue as to the putative harm(s) caused by negative (including overtly pornographic) representations of women, this chapter will claim that such images contribute to the maintenance of the societal and cultural conditions which enable domestic violence to occur.

Part One of this chapter will provide an analysis of the conception of the harmful effects of pornography understood through the approach to its legal regulation in England and Wales. It will be seen that the legal response continues to be based on an obscenity standard which focuses on harm to the consumer, thus overlooking the harm to women as a group that results from the negative portrayals. Part Two will then build on the critique of this conceptualisation of harm and examine alternative arguments relating to the harmful effects of pornography on women. It will be argued that, regardless of whether there is a direct causal link between exposure to pornography and violence against women, there is still little doubt that pornography contains damaging messages about what it means to be a female which impact upon domestic violence. These messages will be seen to contribute to the polarised and stereotypical views of masculinity and femininity that it has been claimed are necessary for the continued maintenance of patriarchy. Thus, the failure to legally regulate pornography on an appropriate conception of harm will be presented as another way in which the legal system contributes to the conditions in which domestic violence occurs. The chapter will conclude that a new distinction between material considered to be pornography and material held to be erotica would enable a new conception of the harm of pornography without reverting to arguments that see the danger of certain materials as resulting from their explicitness, rather than the damaging messages about women they contain. This distinction would also avoid siding either with feminists who see all sex under patriarchy as bad for women, or with

¹ Eckersley: 1987 p. 150

conservative and religious opponents whose arguments against pornography themselves are typically based on patriarchal views about women's role in society.

Therefore, rather than drawing a distinction between representations of women that are overtly pornographic (due to being highly sexually explicit) and images that 'merely' objectify, subordinate and degrade women in a sexual way (such as those seen in advertising and popular culture), it will be claimed that all sexualised images portraying women in an objectified and subordinate way fall on a spectrum when harm to women is assessed, regardless of the level of explicitness. The availability of the female body, and its compliance and submissiveness, pervades advertising and other forms of media and popular culture, and therefore 'hard pornography' is 'but a variation on this theme'.² The effect of all the forms of detrimental feminine imagery that infiltrate contemporary society is to maintain the acceptability of viewing women as inferior and as objects who exist for the purpose of sexual titillation.³ They also promote the perception that male violence, of both a sexual and non-sexual nature, is acceptable – a justifiable part of men's masculine status. Eckersley has emphasised that redirecting attention to so-called 'soft-core' pornography and the everyday images of women in the media enables pornography to be examined as a *signifying practice* sharing many characteristics with other more everyday representations of women.⁴ Viewing pornography as a 'social and ideological construct'⁵ carries the implication that pornography can be 'treated in the same way as any other representation in the media'⁶ because they all structure the way men look at women, meaning 'so-called hard and soft pornography are not generically different'.⁷

² Eckersley: 1987 p. 165

³ OBJECT and *Turn your Back on Page 3* Joint Submission to the Leveson Inquiry, December 2011 <http://www.object.org.uk/files/The%20Leveson%20Inquiry%20-%20OBJECT%20and%20Turn%20Your%20Back%20on%20Page%203%20Joint%20Submission.pdf>

⁴ Eckersley: 1987 p. 164

⁵ Kuhn: 1982 p. 71

⁶ Eckersley: 1987 p. 164

⁷ Eckersley: 1987 p. 164

Part One
The Legal Approach to Pornography in England and Wales:
The Obscenity Standard

This part will examine the legal regulation of pornography under the Obscene Publications Act 1959 (OPA), the amendments to the Video Recordings Act 1984 (VRA) introduced by the Criminal Justice and Public Order Act 1994 (CJPOA), and the criminalisation of the possession of ‘extreme pornography’ under the Criminal Justice and Immigration Act 2008 (CJIA).⁸ Analysing the conceptualisation of the harm of pornography under English and Welsh law will reveal a continuing focus on ‘obscenity’ as the harm of pornography, rather than harm to women. It is acknowledged that legal regulation is not necessarily the best tool to use to overcome the prevalence of pornographic and degrading representations. Censorship under a patriarchal state can cause more harm than good.⁹ However, the failure to appropriately conceptualise and address the harm of pornography evident in the legal regulation of pornographic materials can be seen as a significant way in which the state itself contributes and sustains the social conditions in which domestic violence continues to thrive.

In taking an obscenity approach to the regulation of pornography, the OPA attempts to enforce certain morals through the prohibition of sex that *some men* (typically those in the ruling classes) find offensive. This focus on offence to consumers renders the actual women depicted and the view of women it perpetuates entirely invisible.¹⁰ Historically, under English and Welsh law, pornography has come to be associated, even defined as interchangeable with, ‘all that is considered immoral.’¹¹ Even the new measures dealing with ‘extreme pornography’ under the CJIA 2008 lapsed back into standards of obscenity and disgust,¹² losing the opportunity to move toward a harm-based standard.¹³

⁸ Edwards: 1996 also identifies Section 53 of the Criminal Law Act (CLA) 1977 which brought cinematographic exhibitions within the ambit of the 1959 and 1964 OPA; Section 162 of the Broadcasting Act 1990 (BA) which extended these provisions to TV broadcasting; Section 42 of the Customs Consolidation Act 1876 (CCA) and Section 50(1)(b) of the Customs and Excise and Management Act 1979 (CEMA); Section 1 of the Post Office Act 1952 (POA) and Section 4 Unsolicited Goods and Services Act 1971.

⁹ It can be claimed that more harm than good would be done by censorship because of the power imbalance in our patriarchal society; ‘censorship measures throughout history have been used disproportionately to silence those who are relatively disempowered and who seek to challenge the status quo. Since women and feminists are in that category, it is predictable that any censorship scheme – even one purportedly designed to further their interests – would in fact be used to suppress expression that is especially important to their interests’ (Strossen: 2009 pp. 31-2)

¹⁰ MacKinnon: 1995 in MacKinnon: 2006 p. 113

¹¹ Barker: 2000 in Cornell (ed.): 2000 p. 644

¹² Section 63(6) of the CJOA 2008 defines an ‘extreme image’ as one that is ‘grossly offensive, disgusting or otherwise of an obscene character’.

¹³ McGlynn and Rackley: 2009 p. 252

The OPA only targets those who produce and disseminate obscene materials and does not cover possession for private use. Obscene material is defined in terms of a tendency to 'deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it'.¹⁴ This focus 'clearly highlights the moralistic nature of this regulation'¹⁵ and there is no requirement to 'demonstrate harm (other than (presumably) moral harm to the consumer)'.¹⁶ The US judge Justice Stewart's famous description of his obscenity standard – 'I know it when I see it'¹⁷ – was criticised by liberals as exposing that the obscenity standard is relative, partial and sounds insufficiently abstract. For MacKinnon, the problem is that his view permits an obscenity standard built on what the male standpoint sees. She claims that pornography is also built on this male standpoint.¹⁸ Obscenity is sex that makes male sexuality look bad, not sex that harms women – obscenity law has never even considered pornography to be a women's issue.¹⁹

The relativity of the obscenity standard is apparent in the test's consideration of 'likely' readers or viewers;²⁰ whether or not material is judged to be pornographic is relative and subjective because it is only obscene in relation to those 'likely' to come across it.²¹ The heart of this difficulty is that the test focuses on the mind of the consumer, and his morals, and makes invisible those who are violated in the making of the materials, as well as those who are injured and subordinated by consumers acting upon the messages contained within them.²² Obscenity is judged on community standards, i.e. what it is thought most people would find offensive. However, the people (men) who decide what these community standards are and how they should be applied are those with power under a patriarchal state and thus the standard applied is open to question.²³ The legislation is designed to suppress, not eradicate, and

¹⁴ Section 1(1) OPA 1959. Under the common law of obscenity, the harm of pornography is its tendency to 'deprave and corrupt those whose minds are open to such immoral influences and into whose hands publications of this sort may fall' (*R v Hicklin* [1868] LR3 QB 360).

¹⁵ McGlynn and Rackley: 2009 p. 246

¹⁶ McGlynn and Rackley: 2009 p. 246

¹⁷ *Jacobellis v. Ohio*, 378 U.S. 184, 197 [1964]

¹⁸ MacKinnon: 1987 p. 148

¹⁹ MacKinnon: 1987 p. 175

²⁰ See *R v O'Sullivan* (1995) 1 Cr App R 455

²¹ Edwards: 1996 p. 122. Lord Wilberforce in *DPP v Whyte* [1972] AC 849; [1972] 3 WLR 410 states that an article 'cannot be considered as obscene in itself: it can only be so in relation to its likely readers' (para 17)

²² MacKinnon: 1994 p. xi

²³ Carse: 1995 p. 158

does nothing to hold pornographers accountable for promoting aggression, discrimination and the subordination and objectification of women.

The most that obscenity law does is address the public visibility of pornography. It does nothing about the harm of its production and consumption; the concern is virtue and vice, not women and children. The Williams Committee on Obscenity and Film Censorship's report²⁴ (1979), following in the wake of the Wolfenden Report²⁵ (1957), supported the liberal principle that the main concern of the law should be the prevention of identifiable harms. The report of the Williams Committee rejected the argument that pornography acts as a stimulus to sexual violence. The only harm it identified was the possible offensiveness of some materials to many people and so – in order to guarantee individual rights and at the same time prevent this harm – it recommended that items whose 'unrestricted availability is offensive to reasonable people'²⁶ should be confined to special shops with blank windows, large warnings and restricted to those aged 18 years and above.²⁷ By stating that the purpose of the OPA was to 'prevent the depraving and corrupting of men's minds by certain types of writing'²⁸ Lord Wilberforce's judgment in *DPP v Whyte*²⁹ impliedly excludes from its objectives the effect of hard-core pornography on the likelihood of commissioning rape and violence towards women. This supports the claim that using obscenity as the standard against which explicit material is measured results in the legislature and the judiciary entirely missing what the actual harm of pornography is argued to be.

The CJPOA 1994 made some minor amendments to the existing provisions under the VRA 1984 but, as Edwards emphasises, pornography is still viewed as a question of morality, not harm to women, because the test is still the potential the material has to deprave and corrupt.³⁰ Edwards does identify a development in the construction of harm under the CJPOA 1994 where, in respect of film certification,³¹ the recognition of harm is given 'statutory

²⁴ Report of the Committee on Obscenity and Film Censorship: 1979 p. 123

²⁵ Report of the Committee on Homosexual Offences and Prostitution: 1957

²⁶ Report of the Committee on Obscenity and Film Censorship: 1979 p. 123

²⁷ See Report of the Committee on Obscenity and Film Censorship: 1979 pp. 112-118

²⁸ *DPP v Whyte* [1972] AC 849 at para 863. This can be compared with the approach of the Canadian Supreme Court in *Butler* where it was held that despite the difficulty of establishing a direct causal link between exposure to pornography and incidents of violence against women, there is a causal link with negative attitudes and conduct towards women.

²⁹ *DPP v Whyte* [1972] AC 849; [1972] 3 WLR 410.

³⁰ Edwards: 1996 p. 138

³¹ Section 89(2) puts the British Board of Film Classification under an obligation to have 'special regard... to any harm that may be caused to potential viewers, or through their behaviour, to society'.

authentication'.³² Under this legislation, harm to the viewer or consumer is recognised as resulting from viewing violence or pornography if certain, albeit unspecified, 'behaviour' arises from this viewing.³³ Unfortunately, due to difficulties with interpretation of the resultant harm, the amendments to the VRA 1984 under the CJPOA 2008 have had 'little bite' in practice.³⁴

The new offences contained under the CJIA 2008 relate directly to pornography, but continue to rely upon the 'language of disgust and obscenity'³⁵ found under the OPA 1959; an image is 'extreme' if it is 'grossly offensive, disgusting or otherwise of an obscene character'.³⁶ This provision was added during the final stages of the parliamentary process and maintains an express link to the OPA by ensuring that 'only material that would be caught by' the OPA falls within the new Act.³⁷ Using obscenity as the standard by which pornography is regulated reflects the contributions made by Christian interest groups who hold that pornography portrays a distorted and selfish view of sexuality due to its promotion of promiscuity. They claim that this entails a threat to society, thus maintaining Devlin's 1957 commentary on the Wolfendon Report which inextricably links the English law with questions of morality and faith.³⁸ In Part Two, conceptualisations of the harm of pornography will be considered and objections to using an obscenity approach to understanding the harmful impact of pornography will be considered in more detail.

Despite the potential for the CJIA to 'move from the OPA's disgust and offence-based terminology toward a harm-based standard', this approach has been lost.³⁹ McGlynn and Rackley suggest that when first introducing the proposals in 2005, the Government appeared keen 'to emphasise that extreme pornography may contribute to a cultural context in which violent sexual activity is encouraged or legitimated'. However the Government later came under pressure and 'lost sight of the nature of the harm it was seeking to legislate against and reverted to the weakest possible justification for action, disgust'.⁴⁰ This is seen in Section 63 (6)(b) which defines an 'extreme image' as one which 'is grossly offensive, disgusting or otherwise of an obscene character'. The

³² Edwards: 1996 p. 138

³³ Edwards: 1996 p. 138

³⁴ Edwards: 1996 pp. 139-140

³⁵ McGlynn and Rackley: 2009 p. 247

³⁶ Section 64(6)(b) CJIA 2008

³⁷ Lord Hunt, *Hansard*, HL Vol.699, col.894 (March 3, 2008).

³⁸ McGlynn and Ward: 2009 p. 329

³⁹ McGlynn and Rackley: 2009 p. 252. They also note that this threshold continues to obscure due to difficulties with the definition of obscene material and the objectionable nature of 'disgust' as a basis for law-making.

⁴⁰ McGlynn and Rackley: 2009 p. 256

original argument found in the proposals was that whilst no 'definite conclusions' could be reached as to the 'likely long term impact of such materials generally,'⁴¹ extreme pornography 'may encourage' an interest in 'violent or aberrant sexual activity'⁴² and thus contribute to a climate in which sexual violence is not taken seriously.⁴³ This concept of harm moves beyond arguments of immediate cause and effect to a recognition that the harm of pornography can be found in terms of the unequal view of women that it promotes. In later reverting to arguments concerning direct harm, the legislation reveals a return to liberal arguments and the demand for evidence of direct, causal links, thus ultimately ignoring feminist conceptions of the harm of pornography as being the harm to society resulting from the view of women contained within the materials.⁴⁴

In addition, to fall within the new legislation, the pornographic image must portray in an 'explicit and realistic way' an act which, among other things,⁴⁵ either threatens a person's life,⁴⁶ results, or is likely to result, in serious injury to a person's anus, breasts or genitals.⁴⁷ McGlynn and Rackley state the requirement for life-threatening and serious injury 'reveals much about the legislative process' because the Government originally proposed taking action against 'serious violence in a sexual context' and 'serious sexual violence'⁴⁸ but amended its proposals, apparently on the basis of the imprecision of what would be included within these categories.⁴⁹ As a result of this amendment to the original proposal, excluded from these measures are pornographic pro-rape websites such as *rapedbitch.com* and *rapepassion.com*. Some 'violent' rapes may be covered – and McGlynn and Rackley question what a 'non-violent' rape is – if they involve weapons or result in serious injury to the anus, breasts or genitals, many pornographic rape images are excluded.⁵⁰ This exclusion is concerning because, as will be claimed below, representations of rape arguably contribute to the perception of women as objects available primarily for the use of men.

⁴¹ *Consultation: On the Possession of Extreme Pornographic Material*: 2005 para.31.

⁴² *Consultation: On the Possession of Extreme Pornographic Material*: 2005 para.27.

⁴³ McGlynn and Rackley: 2009 p. 257

⁴⁴ McGlynn and Rackley: 2009 p. 259

⁴⁵ Also included are acts which involve sexual intercourse with a human corpse (Section 63(7)(c) and a person performing an act of intercourse or oral sex with an animal (dead or alive) which a reasonable person would think was a real person or animal (Section 63(7)(d)).

⁴⁶ Section 67(7)(a) CJA 2008

⁴⁷ Section 67(7)(b) CJA 2008

⁴⁸ *Consultation: On the Possession of Extreme Pornographic Material*: 2005 paras 39-42.

⁴⁹ McGlynn and Rackley: 2009 p. 248

⁵⁰ McGlynn and Rackley: 2009 pp. 249-50

Following on from the above argument, Part Two will consider alternative conceptions of the harm of pornography, both as a basis for legal regulation and social condemnation, which are not based on an obscenity approach. This will illustrate continuing difficulties with claiming that pornography is harmful to women due to a lack of proof of a direct causal link between exposure to pornography and incidents of violence against women. A conceptualisation of the harmful impact of pornography will be offered that contends that the existence of a direct causal link is irrelevant, the harm of pornography is its perpetuation of the damaging messages about women that bolster the patriarchal state and enable domestic violence to occur.

Part Two

The Harm of Pornography

Understandings of the harm of pornography can be categorised into three distinct areas; the conservative-moral argument (seen above in relation to the legal regulation of pornography in England and Wales) that pornography is a threat to society due to the impact it has on consumers as a result of the abhorrent and 'obscene' view of sexuality that it promotes; radical feminist arguments that pornography directly causes violence against women, or is, in itself, violence against women; and a more general feminist argument that, whilst it may not be possible to prove a direct causal relationship between the consumption of pornography and violence against women, pornography contributes to a negative view of women reflective and constitutive of their inferior, subordinated and objectified status. Difficulties with the conservative arguments against pornography and the Dworkin-MacKinnon Anti-pornography Civil Rights Ordinance⁵¹ which formed an alliance with these arguments will be examined first, followed by an analysis of the causal relationship, if any, between pornography and violence against women. Arguments will then be put forward to support the claim of this thesis that pornography, and more mainstream pornographic images of women, contribute to the stereotypical perceptions of appropriate masculinity and femininity which it is suggested form the root cause of domestic violence.

⁵¹ Dworkin and MacKinnon *Model Anti-pornography Civil Rights Ordinance*: 1983

Traditional Conceptions of the Harm of Pornography

The debate over pornography has traditionally consisted of liberal versus conservative arguments, with liberals claiming that pornography has value because it satisfies a well-defined interest⁵² and needs to be protected as free speech. Conservatives disagree that pornography has value; 'value is derivative of virtue, not interests, and pornography is an assault on virtue' because it publicises things that should be private and violates norms of 'decency'. It does this through the promotion of impersonal and pleasurable sex, thus promoting infidelity and undermining traditional family values.⁵³ However, both agree that pornography is 'victimless speech that satisfies a particular sexual interest or preference and constitutes an offensive assault on a traditional conception of sexual virtue'.⁵⁴ However, as West has argued, this conceptualisation of the debate depends upon the *male experience of pornography*; the harm pornography does to women is very different from the harm pornography has been thought to cause men.⁵⁵ The view that pornography promotes the oppression and victimisation of women was propounded by Dworkin and MacKinnon in the 1980s when their Anti-Pornography Civil Rights Ordinance⁵⁶ formed the basis for new legislation in the US State of Minneapolis. An acceptance of their conception of the harm of pornography can be inferred from the conclusions of the Meese Commission Report.⁵⁷ However, before moving on to examine feminist arguments about the impact of the objectification inherent in pornographic representations of women, a brief exploration of the objectification contained within gender-role norms and their impact on the objectification of women is warranted.

Gender Norms and Objectification

The gender norms integral to patriarchy dictate that men should be strong, active, independent, rational and handsome, whereas women should be

⁵² West: 1987 p. 683

⁵³ West: 1987 p. 683

⁵⁴ West: 1987 p. 683

⁵⁵ West: 1987 p. 684

⁵⁶ Dworkin and MacKinnon *Model Anti-pornography Civil Rights Ordinance*: 1992

⁵⁷ The Attorney General's Commission on Pornography: 1986, usually referred to as The Meese Report.

passive, nurturing, emotional, cooperative, submissive and pretty. In contexts where gender expectations are well entrenched the corresponding norms function prescriptively, providing the basis for judgements about how people ought to act and be. This prescriptive force is backed up by social sanctions resulting in conformity to gender norms becoming internally motivated as opposed to being socially enforced.⁵⁸ Despite this, the prescriptive role of gender norms is seldom acknowledged and instead it is concluded that the sex difference is natural or inevitable and woman is 'essentially' feminine⁵⁹. However, particular traits, norms and identities, considered in abstraction from their social context, have no claim to be classified as masculine or feminine; any classification is derivative and depends upon prior social classifications.⁶⁰ Itzin argues that because women are conditioned to conform to stereotyped images of femininity and womanhood they are often unaware that they are misrepresented and mistreated; the oppression becomes internalised.⁶¹

Sexuality is both socially constructed and at the same time constructing⁶² and MacKinnon argues that the relations constituting gender are, by definition, hierarchical; relations of domination *constitute* the categories. Gender relations are defined by and in the interests of men, and gender is 'sexualised';

*'sexuality is gendered as gender is sexualised... feminism is a theory of how the eroticisation of dominance and submission creates gender, creates woman and man in the social form in which we know them. Thus the sex difference and the dominance-submission dynamic define each other. The erotic is what defines sex as an inequality, hence as a meaningful difference'*⁶³.

For MacKinnon, a person is a man 'by virtue of standing in a position of eroticised dominance over others [and] a woman by virtue of standing in a position of eroticised submission to others... [It is] not necessary that one be anatomically female to be a woman or anatomically male to be a man,⁶⁴

⁵⁸ Haslanger: 1993 pp. 89-90

⁵⁹ Haslanger: 1993 p. 90

⁶⁰ Haslanger: 1993 p. 90

⁶¹ Itzin: 1992 p. 62

⁶² MacKinnon: 1987 p. 49

⁶³ MacKinnon: 1987 p. 50

⁶⁴ This point is evidenced by Donovan et al's 2006 survey comparing domestic abuse in same sex and heterosexual relationships. The findings indicated that this abuse is experienced in very similar ways by both groups, suggesting that

though... this is the norm'.⁶⁵ Furthermore, because dominance/submission is eroticised, 'the submissive participant must be viewed, at least by the dominant participant (though often by both participants), as being an object for the satisfaction of the dominant's desire... [leading to] her submissiveness to him, and his domination of her [being presented as] erotic'.⁶⁶ If social arrangements, such as legal institutions, are structured in order to accommodate the different 'natures' of men and women,⁶⁷ this will merely reinforce existing gendered social roles and sustain the social arrangements whereby men dominate and women submit. This makes the subordination in gender inequality invisible and, by seeing as natural something that is actually produced by power relations, 'the harm that has been done will not be perceptible as harm – it becomes just the way things are'.⁶⁸

Objectification in Pornography and Popular Culture

One of the key ways in which male dominance and female subordination is eroticised is through the representations contained within pornography. MacKinnon asserts that the recent recognition that male sexual violence against women is pervasive, alongside recognition that there is a distinctive pattern of men holding power over women in society, means that sexual violence is no longer able to be characterised and hidden as violence, not sex. Acts of this type are enjoyed sexually by men; it is *sex for them*.⁶⁹ MacKinnon questions what sex is except that which is sexual and claims that understandings of sex must extend beyond simple recognition of a purely physiological response. Her argument is compelling; '[w]hen acts of dominance and submission, up to and including acts of violence, are experienced as sexually arousing, as sex itself, that is what they are... Violence is sex when it is practiced as sex'.⁷⁰ The recognition that pornography represents domination and violence, that it is power implemented through the sexual control of women, means that sexual liberals focus on the arousal aspect of pornographic materials can be

the gender roles taken on in same sex relationships often mirror the gender roles found in heterosexual relationships (Donovan, Hester, Holmes and McCarry: 2006).

⁶⁵ Haslanger: 1993 p. 99

⁶⁶ Haslanger: 1993 p. 100

⁶⁷ Seen as proven to be natural because of *existing* gender differences

⁶⁸ MacKinnon: 1987 p. 59

⁶⁹ MacKinnon: 1987 p. 6

⁷⁰ MacKinnon: 1987 p. 6

challenged.⁷¹ The work of Stoltenberg echoes that of MacKinnon and can be used to argue against the liberal conception of pornography as promoting sexual freedom. He asserts that sexual objectification has a crucial relationship to male supremacy; domination and subordination – the very essence of injustice and unfreedom – have become culturally eroticised.⁷² The concept of sexual freedom that liberals believe is epitomised through pornography can then be challenged on the basis that pornography has really been about maintaining men's superior status, men's power over women, and about sexualising women's inferior status. '[S]exual freedom has been about preserving a sexuality that preserves male supremacy,'⁷³ rather than being about sexual justice between men and women.

In recognising that pornography institutionalises male supremacy, it can thus be seen as one of the main ways in which the patriarchal state, and therefore the social and cultural context in which domestic violence takes place, is maintained. In relation to the internalisation of gender roles and expectations that objectify women, the hyper-sexualisation of women that is now prevalent in Western society⁷⁴ can be seen to negatively transform the individual and collective identity of females. This occurs as a result of constant exposure to images that sustain the sexual objectification of women; the growth and accessibility of the sex industry – through pornography – has allowed it to infiltrate within various realms of society – media, advertising, fashion and so on. 'The culture of pornography has been introduced and has unfortunately secured its home in today's popular culture'.⁷⁵ It then follows that one of the main ways that women know what is required of them to be successfully feminine is through representations and images that present women in a sex-stereotyped way as these are a fundamental part of the conditioning.⁷⁶ Women's magazines and advertisements are both an important source of images and information on femininity and, for Itzin, act as 'agents of

⁷¹ Edwards: 1996 p. 91

⁷² Stoltenberg: 1992 p. 151. Stoltenberg also argues that homophobia is integral to the system of sexualised male supremacy because it expresses a whole range of anti-female revulsion; homophobia is rooted in the woman-hating that male supremacy thrives on and there is an intimate connection between male supremacy in both heterosexual and homosexual pornography, with women-hating and effemiphobia in them both as well (see Stoltenberg: 1992 pp. 155-8 and also Edwards: 1996 pp. 92-3). This theme will be continued in Chapter Four (pp. 108-110) when arguments are put forward concerning the legal regulation of same-sex marriage as a way of promoting the traditional family type necessary for the maintenance of patriarchy.

⁷³ Stoltenberg: 1992 p. 148

⁷⁴ Concern is often expressed at the increasing sexualisation of young children that is found in terms of clothing targeted at young girls and so on, but this thesis contends that this focus is limited; it is the hyper-sexualisation of women in general that is the concern.

⁷⁵ http://www.maisonlether.com/web/doc/pdf/en/Hyper-sexualisation_20121012152746.pdf

⁷⁶ Itzin: 1992 p. 61

socialisation with implications for how the gender characteristics of females are acquired and how the position of women in society is determined'.⁷⁷

Therefore, it is claimed that the images of women contained within pornography do not just express subordination, they in part constitute it; pornography objectifies women and makes their purpose for men; 'women are sexual objects for the titillation and sexual gratification of men: objects of men's lust and desire'.⁷⁸ For MacKinnon, 'pornography makes hierarchy sexy',⁷⁹ a sentiment echoed by Stoltenberg.⁸⁰ In pornography the objectification is an act which subordinates women, and this same act is found in many representations of women within other forms of popular culture where women are portrayed as passive, servile, servicing men sexually, and linked with domestic servitude.⁸¹ Pornography and other forms of sex-objectified, sex-stereotyped presentations do not just construct female sexuality, they are also one of the main ways in which *normal masculinity* is constructed and thus help to maintain the whole system of male power. As discussed in Chapter 2, masculinity is also coercively conditioned and hegemonic masculinity depends upon men conforming to these stereotypes.⁸²

The Causal Nexus between Pornography and Violence Against Women

A difficulty in the anti-pornography movement has always been that any feminist who objects to pornography is immediately challenged to demonstrate the causal relationship between exposure to pornography and violent, misogynistic behaviour. Anyone who doubts the existence of that relationship is under pressure to concede that pornography is not a problem.⁸³ Cornell questions the 'appropriateness of the causal model which traces rape as the direct effect of pornography' because 'social-scientific studies are inconclusive as to the relationship between pornography and rape'.⁸⁴ The issue is more complex, however, than a simple causal connection between pornography and violence,

⁷⁷ Itzin: 1992 p. 62

⁷⁸ Itzin: 1992 p. 66

⁷⁹ MacKinnon: 1985 p. 17

⁸⁰ Stoltenberg: 1990 p. 260

⁸¹ Itzin: 1992 p. 66

⁸² Itzin: 1992 p. 63 and p. 67

⁸³ Cameron and Frazer: 2000 in Cornell (ed.): 2000 p. 240

⁸⁴ Cornell: 1995 p. 101

including rape; Cameron and Frazer point out, 'causal accounts are completely inappropriate to explain any kind of human behaviour'.⁸⁵

Furthermore, research conducted by Diana Russell provides strong support to advocate a perspective which accepts that whilst pornography does not *directly* cause violence against women, it contributes to the overall objectified status of women as inferior and available to be violated. Studies can be used to support the view that pornography increases attitudes and behaviours of aggression and other discrimination by men against women.⁸⁶ During the hearings for the Ordinance drafted by MacKinnon and Dworkin, women spoke of being made to watch pornography and duplicate the acts exactly and psychologists who had worked with survivors spoke of the role of pornography in sexual torture. Laboratory experiments have shown that pornography which portrays sexual aggression as pleasurable for the victim increases the acceptance of the use of coercion in sexual relations, that acceptance of coercive sexuality appears related to sexual aggression, and that exposure to violent pornography increases men's punishing behaviour toward women in the laboratory.⁸⁷

A Multi-Causal Theory

The conclusions of Diana Russell (reached through her own and other researchers' findings) provide extensive support for a theory of the causative role of pornography that differs from the idea of simple causation.⁸⁸ Although her research focused specifically on sexual violence, she believes the same conclusions apply to domestic and other forms of violence against women. She suggests that many factors may predispose a large number of men to want to rape or assault women sexually;⁸⁹ in order for rape to occur a man must not only be predisposed to rape, his internal and social inhibitions against acting out

⁸⁵ Cameron and Frazer: 2000 in Cornell (ed.): 2000 p. 248

⁸⁶ For example, OBJECT refer to Dean and Malamuth: 1997, Murnen, Wright and Kaluzny: 2002; Osland, Fitch and Willis: 1996; Spence, Losoff and Robbins: 1991; Truman, Tokar and Fischer: 1996 and Vogel: 2000. <http://www.object.org.uk/files/The%20Leveson%20Inquiry%20-%20OBJECT%20and%20Turn%20Your%20Back%20on%20Page%203%20Joint%20Submission.pdf>

⁸⁷ Meese Commission Report: 1986 p. xviii

⁸⁸ The basis of her multi-causal model is that of sociologist David Finkelhor (1984) in his examination of the occurrence of child sexual abuse. She concludes that the same conditions outlined by Finkelhor have to be met in order for rape, battery, and other forms of sexual assault on adult women to occur.

⁸⁹ Russell lists things such as biological factors, childhood experiences of sexual abuse, male sex-role socialisation, exposure to mass media that encourages rape and exposure to pornography.

his rape desires must be undermined. Her theory differs from simple causation⁹⁰, under which pornography clearly does not cause rape because an unknown percentage of pornography consumers do not rape women and many rapes are unrelated to pornography. However, the concept of 'multiple causation' provides a strong case for there being some link between pornography and (sexual) violence against women. Under multiple causation, *'various possible causes may be seen for a given event, any one of which may be a sufficient but not necessary condition for the occurrence of the effect, or a necessary but not sufficient condition.'*⁹¹ Russell's arguments in relation to the role of exposure to pornography in terms of objectifying women, acceptance of interpersonal violence and desensitising males to rape are important to consider. Feminists have frequently emphasised the role of objectification in the occurrence of rape⁹² and other (sexual) violence against women. Russell notes that 'the dehumanisation of women that occurs in pornography is often not recognised because of its sexual guise and its pervasiveness... It is important to note that the objectification of women is as common in nonviolent pornography as it is in violent pornography'.⁹³ This again supports the idea that the proposed distinction between erotica and pornography should be taken on board, because nonviolent pornography is as damaging as violent pornography in terms of the objectification of women. The multi-causal theory lends further support for the contention that even if pornography does not directly cause violence against women, its consumption does contribute to a cultural climate in which objectification and violence against women are sexualised and normalised.

Pornography: Recognition of Indirect Harms

The conception of the harm of pornography contained within the Meese Commission Report of 1986 can be seen to blend the differing conceptions of

⁹⁰ *'[a]n event (or events) that precedes and results in the occurrence of another event. Whenever the first event (the cause) occurs, the second event (the effect) necessarily or inevitably follows... [I]n simple causation the second event does not occur unless the first event has occurred. Thus the cause is both the SUFFICIENT CONDITION and the NECESSARY CONDITION for the occurrence of the effect.'*⁹⁰

⁹¹ Russell in Cornell (ed.): 2000 p. 64. It is important to note that the idea of 'multiple causation' is potentially problematic in terms of the laws of causation and evidence when determining criminal liability. However, the call here is not for the model to be used to bring cases against perpetrators, but to use it to undermine claims that there is no causal relationship between exposure to pornography and violence against women.

⁹² See, for example, Medea and Thompson: 1974 and Russell: 1975

⁹³ Russell: 2000 in Cornell (ed.): 2000 p. 73

harm advanced in 'feminist anti-pornography rhetoric' and conservative ideology'.⁹⁴ The Commission was asked to 'review the available empirical evidence on the relationship between exposure to pornographic materials and antisocial behaviour'.⁹⁵ Imputed in their conclusions is MacKinnon's causal link between exposure to pornography and rape. For both MacKinnon and Dworkin, pornography *is* violence against women. MacKinnon asserts that 'in pornography the violence *is* sex'.⁹⁶ By challenging the classic liberal argument that pornography must be protected in the interests of free speech in a democratic society and asserting that pornography must be seen as violence, inequality and objectification, MacKinnon is challenging the label of pornography as being about sex. This enables some feminists to emphasise that pornography has been disguised as being about something other than it really is.⁹⁷ This type of feminist analysis has been influential in terms of shifting the emphasis away from morality and obscenity to reconstituting pornography as an issue of women's rights.⁹⁸

However, a key difficulty with the work of MacKinnon and Dworkin is their view that all heterosexual sex is subordinating and objectifying. Strossen has argued that the pro-censorship feminists assertion – that sexually explicit expression perpetuates demeaning stereotypes about women – itself perpetuates demeaning stereotypes. The most significant of these being 'that sex is inherently degrading to women' and that there is a 'mutual inconsistency between a woman's freedom and her participation in sexual relations with men'.⁹⁹ This is not a position consistent with the end of women's repression and degradation. Cornell also challenges the assumption that all heterosexual sex is subordinating and asserts that anti-pornography feminists such as MacKinnon and Dworkin ignore the way that we are all sexual beings and that, whilst not always recognised as such, sex and sexuality are unique and formative to human personality.¹⁰⁰ In contrast to MacKinnon, Cornell emphasises 'unleashing the feminine imaginary',¹⁰¹ rather than constraining men. It is anticipated that the reconstituted boundary between the erotic and the

⁹⁴ West: 1987 p. 685

⁹⁵ Meese Commission Report: 1986 p. 216

⁹⁶ MacKinnon: 1984 p. 34

⁹⁷ Edwards: 1996 p. 94

⁹⁸ Edwards: 1996 p. 134

⁹⁹ Strossen: 2000 p. 107

¹⁰⁰ Cornell: 1995 pp. 5-7

¹⁰¹ Cornell: 1995 p. 98

pornographic proposed below will enable the free expression of women's sexuality in a way that is compatible with their equality.

The Meese Commission Report

Whilst the Meese Commission Report concluded that there is a causal relationship between exposure to many forms of pornography and harmful effects including increased levels of violence against women, an analysis of the conclusions of the report reveals several key difficulties. The Commission's reliance upon arguments that making sex public and commercial, depicting sex outside of marriage and love, and depicting certain acts of sex that may be condemned by society, could be harmful to the moral environment of society demonstrates that it is the conservative conception of the harmful impact of pornography, rather than feminist conceptions that are relied upon. In their individual statements, the commissioners can be seen to make all the traditional conservative arguments against pornography: pornography publicises that which should be kept private;¹⁰² it violates norms of 'decency';¹⁰³ it promotes promiscuity;¹⁰⁴ it promotes sex-for-pleasure instead of sex-for-reproduction;¹⁰⁵ it constitutes an assault on family and marriage;¹⁰⁶ and it legitimates irresponsibility, hedonism, laziness, impersonal sex, and infidelity.¹⁰⁷ West claims that the report results in a feminist-conservative argument against pornography that is 'neither feminist nor conservative but a peculiar blend of both'.¹⁰⁸ This alliance could be seen as a positive move for those working to end violence against women because it enables the recognition that, whilst pornography is an attack on virtue, it is also 'a threat to women's physical safety and integrity',¹⁰⁹ and thus incorporates feminist objections to pornography in mainstream understandings. However, whilst the report 'adopts much of the argument and rhetoric of the feminist anti-pornography movement',¹¹⁰ the

¹⁰² Meese Commission Report: 1986 pp. 115-126

¹⁰³ Meese Commission Report: 1986 p. 97 and pp. 115-126

¹⁰⁴ Meese Commission Report: 1986 p. 339

¹⁰⁵ Meese Commission Report: 1986 pp. 95-98

¹⁰⁶ Meese Commission Report: 1986 pp. 82-83

¹⁰⁷ Meese Commission Report: 1986 pp. 29-30, pp. 42-43, p. 45, p. 51, pp. 106-110 and pp.117-134.

¹⁰⁸ West: 1987 p. 685

¹⁰⁹ West: 1987 p. 698

¹¹⁰ West: 1987 p. 700

Commission's final analysis defines actionable pornography 'by reference to a traditional obscenity standard, not a feminist subordination standard'.¹¹¹

Therefore, it is suggested that this alliance is actually more concerning than promising to the feminist anti-pornography movement because the conservative-religious ideology is one of the central mechanisms of female oppression and subordination due to the messages it perpetuates about appropriate masculine and feminine behaviour and its privileging of heterosexual marriage. Allying with this movement means the goals of the feminist anti-pornography movement will 'become identified in the popular mind with conservative goals and conservative ideology, rather than with feminism more largely conceived'. Anti-pornography feminists are concerned about pornography because it oppresses women, not because it is an 'assault on institutions that conservatives regard as essential to the maintenance of social virtue – the family, marriage, monogamy, and heterosexuality'.¹¹² It is imperative that women's physical security does not become linked with sexual virtue, marriage and the family because the gender-role stereotypes implicit in this conception of women's place and value provides the social and cultural context in which domestic violence flourishes. There needs to be a way of conceptualising the harm of pornography without also bolstering patriarchal ideology concerning gendered expectations and the appropriate roles and behaviours of women under this social system.

Alongside this are further concerns about the nature of the material that the Meese Commission Report deems to be actionable; all 92 recommendations call for greater restrictions on sexually *explicit* material. However, Linz, Penrod and Donnerstein contend that much research demonstrates that it is sexually *violent* material, rather than sexually *explicit* material that results in violence against women.¹¹³ These depictions are 'pervasive in the mass media' and 'need not be sexually implicit to have a negative impact'.¹¹⁴ Linz, Penrod and Donnerstein suggest that 'the level of sexual explicitness need not attain a level anything like that which would be judged "obscene" or "pornographic" in order to find harmful effects'.¹¹⁵ This indicates that the focus of the anti-pornography movement is misplaced, and

¹¹¹ West: 1987 p. 699

¹¹² West: 1987 p. 700

¹¹³ Linz, Penrod and Donnerstein: 1987 p. 713

¹¹⁴ Linz, Penrod and Donnerstein: 1987 p. 719

¹¹⁵ Linz, Penrod and Donnerstein: 1987 p. 720

lends support to a new distinction between erotica and pornography and for the recognition that society is inundated with images and representations that degrade and objectify women, with pornography being just one of the fora in which this occurs.

Pornography's Harm: Perceptions of Women

The debate over pornography has traditionally been fought in terms of the issue of offence and obscenity, and this is clearly still the case even with the new offences relating to 'extreme pornography' under the Criminal Justice and Immigration Act 2008 (CJIA) (examined above). The argument here is that, whether or not there is a *direct causal link* between exposure to pornography and violence against women, it is essential that the emphasis shifts to an understanding of the issue as being one of harm to *women*, not harm to *consumers* and the 'moral fabric of society'.¹¹⁶ 'Harm' should be seen in broader terms, extending 'beyond direct physical injury and coercion to the contempt for and degradation of women collectively, as women'.¹¹⁷ When considering whether pornography impacts upon women in a way that threatens their status as independent and equal, the possible impact that the use of pornographic materials has on attitudes and behaviour in our society must be examined. It is contended that the harm of pornography is the role it plays in 'sustaining the social conditions through which women's liberty and equality are undercut'.¹¹⁸ When taken from the perspective of the mainstream conception of harm, the harm of pornography is generally misunderstood or its true nature is overlooked.

It has been argued that the ideas contained within pornography and other representations of women in popular culture are one of the main mechanisms by which human sexuality has been constructed. At the heart of pornography is the fantasy of dominating and totally controlling another, and the users of pornography ('millions of *normal* men'¹¹⁹) take this fantasy as integral to their self-identity as 'real men.' According to Ramos, human sexuality

¹¹⁶ Carse: 1995 p. 165

¹¹⁷ Carse: 1995 p. 165

¹¹⁸ Carse: 1995 p. 155

¹¹⁹ Jones: 2000 p. 116

researchers have clearly established what individuals find arousing is almost entirely learned and culturally influenced.¹²⁰ To deny the relationship between pornography and attitudes, and attitudes and behaviours, is to deny the standard conceptions of learning.¹²¹ Even without empirical proof, it is widely accepted in a range of circumstances¹²² that there is a causation, or at least a *correlation* between an act and certain types of behaviour.¹²³ Due to pornography's influence on mainstream culture, it will impact sexuality even without direct consumption.¹²⁴ It can also be seen to impact on women's desires; when women's sexuality is represented in pornography it is in terms of their pleasure at fulfilling male desires, not their own.¹²⁵ Humans are conditioned and shaped by the expectations put upon them, and the things they may be persuaded that they want, need and desire, for example through media and advertising. It therefore follows that women's responses are likely to be conditioned by what society tells them they should find arousing,¹²⁶ which could explain why some women may appear to embrace the messages about sexuality contained in pornography.

In addition, women will be conditioned by other forms of popular culture such as advertising, women's magazines and books, music videos and so on. Women's magazines contain 'a meaning of femininity that is tied to the everyday activities and beliefs of women that bring this meaning into being and thereby sustain it'.¹²⁷ The advertisements, articles and stories that appear in women's magazines can be characterised as 'vehicles of women's socialisation into subordinate roles'¹²⁸ because they 'affix meanings to our everyday experiences as women that support patriarchal and capitalist interests in the subordination of women'.¹²⁹ Gender and sexuality, viewed as social constructs, are 'situated in and shaped by patriarchal cultural myths as articulated in

¹²⁰ Ramos: 2000 in Cornell (ed.): 2000 p. 46

¹²¹ Carse: 1995 p. 164

¹²² Edwards notes this acceptance in the context of education (where it is accepted that the content and form of education impacts upon child development in its broadest sense), the relationship between family and crime, and the assumed causal link between sales and advertising (Edwards: 1996 p. 100).

¹²³ Edwards: 1996 p. 100

¹²⁴ Ramos: 2000 in Cornell (ed.): 2000 p. 46

¹²⁵ This point is supported by a recent study which found that women are less likely to orgasm during intercourse than men due to social forces that privilege male pleasure. See http://www.alternet.org/sex-amp-relationships/orgasm-gap-real-reason-women-get-less-often-men-and-how-fix-it?page=0%2C1&buffer_share=2b00a&utm_source=buffer

¹²⁶ The work of Adrian Howe is notable on this point. She draws attention to 'hegemonic heterosexuality' and, by examining women's magazines such as *She* and *Cosmopolitan*, draws attention to the continuing existence of 'a sexual regime where his feelings still matter most despite 'feminist advances', where lying to save his pride and compromising himself remains the path of least resistance for many women'. See Howe: 2008 Chapter One.

¹²⁷ Currie: 1997 p. 460

¹²⁸ Currie: 1997 p. 456

¹²⁹ Currie: 1997 p. 461

popular culture'.¹³⁰ Currie's study into young girl's perceptions of femininity in advertisements reveals that they assess what womanhood is and how they match up to it through representations such as these. Their definitions of femininity are shaped in this way; girls 'become women naturally through domestic and sexual roles'.¹³¹ The young girls in the study associated happiness with motherhood and being married, an association previously highlighted as providing part of the social context in which the gender-role stereotypes that enable domestic violence can occur. Cultural images of femininity, masculinity and female-male relationships have an enduring nature. As a result, 'the portrayal of men as powerful and women as powerless and constantly trying to entertain, please gratify, satisfy and flatter men',¹³² or their portrayal as decorative objects in traditional and stereotypical roles,¹³³ remain consistent themes. Pornographic representations embody and encourage a distinctive way of "seeing" women, both reflecting and fostering an objectified view of women¹³⁴ that can be seen to be held by both men and women in contemporary society.

A New Distinction between Pornography and Erotica

Anti-censorship feminists, such as Cornell, wish to counter the dangers associated with sex not by censoring images of women as sexual objects but by challenging the central assumptions about sexuality which determine sexual ideology in our culture. Women should be free to be sexually expressive, they should not have their sexuality repressed.¹³⁵ Feminists arguing against censorship wish to challenge the equation of sexual arousal with degradation and many of them believe that the only lasting road to women's liberation is the general strengthening of the position of women in society. Feminists arguing for censorship are opposed to pornography *per se* because of the messages about women it contains and the harm that this causes. As seen above, calls for censorship have led to limited and potentially dangerous alliances with

¹³⁰ Kalof: 1993 p. 639

¹³¹ Currie: 1997 p. 455

¹³² Kalof: 1993 p. 640

¹³³ Kalof: 1993 p. 640

¹³⁴ Carse: 1995 p. 165

¹³⁵ Rodgeron and Wilson: 1991 p. 11

conservatives and religious groups who oppose pornography for very different reasons. When the contribution that pornographic images of women makes to domestic violence is considered, this debate causes problems. This is because viewing pornography as unproblematic ignores the impact it has on perceptions of women more generally, but calling for pornography to be banned can be seen as a refusal to recognise the importance of sexuality to human growth and development.

Therefore, at present, there seems to be a lack of recognition that it is possible to condemn pornography without calling for censorship of all sexually explicit imagery. The social construction of gender discussed earlier involves a denial of the feminine aspects of human nature in order to be a 'real man'. This suggests that the sexual objectification and violence inflicted on women in pornography expresses hatred and contempt for a denied component of the males own soul – the natural, feminine component.¹³⁶ Griffin sees 'true eroticism' as the answer to the denial of feminine qualities in men and vice versa. Her understanding is that eros, represented through erotica, enables the masculine and feminine components of the soul to be fused in harmony.¹³⁷ Pornography has been argued to be a direct denial of the power of the erotic; it represents the suppression of true feeling and emphasises sensation without feeling. The word 'erotic' comes from the Greek word 'Eros', meaning the personification of love in all its aspects. There are frequent attempts to equate pornography and eroticism but they are two diametrically opposed uses of the sexual.¹³⁸

It is suggested that calling for a new distinction between pornography and erotica, which recognises that erotica is sexually explicit material which embraces equality between the sexes and true sexual freedom would be a way to overcome these difficulties.¹³⁹ The new distinction would not be based on sexual explicitness *per se*, but on whether the material contains representations that degrade, subordinate and objectify women in a sexual context. Crucial to the designation of material as "pornographic" would be that the abuse or degradation depicted is also, even if only implicitly, *endorsed or*

¹³⁶ Eckersley: 1987 p. 152

¹³⁷ Griffin: 1981

¹³⁸ Lourde: 2000 in Cornell (ed.): 2000 p. 571

¹³⁹ It is acknowledged that there are difficulties inherent in any definition of erotica resulting from the fact that images and materials need to be interpreted by the reader or viewer and are thus, always going to be subjective.

recommended'.¹⁴⁰ Erotica would encompass all 'sexually suggestive or arousing material that is *free of sexism, racism and homophobia* and is respectful of all human beings being portrayed.'¹⁴¹ The implication of this would be that much material generally held to be 'pornography' could be included within the definition of 'erotica'. This would avoid lending support to conservative and religious opponents of pornography who object to it based on sexual explicitness and obscenity, rather than harm to women. The acceptance of erotica would enable material that contributes to the creation and maintenance of the gender-role stereotypes that are integral to the maintenance of patriarchy to be condemned without supporting patriarchal messages about the need to repress women's sexuality and promote monogamous heterosexual relationships as the only acceptable expression of sexuality. Sexualised images and representations of women found in more mainstream media and advertising that objectify and degrade would be condemned as pornography if they contained damaging messages about women, regardless of sexual explicitness. Elements of sexually explicit material to eradicate would be those that bolster the hostile, misogynistic elements of male sexuality, leaving risqué material that enhances people's lives through the positive promotion of free and equal sexual expression free from condemnation and legal regulation. Calling for a new conceptualisation of the distinction between erotica and pornography enables true sexual liberation to be attained by calling for an end to the imagery which conveys damaging messages about women but not on the basis of sexual explicitness *per se*.

There would clearly be difficulties with this definition because no sexual imagery can be given one universal meaning; individuals must interpret and respond to material in order for it to have meaning for them, and this by its very nature will always be subjective.¹⁴² However, with the more extreme forms of pornography, for example where violence against women is portrayed and endorsed, this will be less problematic, and even if there are sometimes difficulties over where a particular type of depiction fits, it is submitted that overall the new categories would enable a more successful and positive conceptualisation of the harm of pornography.

¹⁴⁰ Carse: 1995 p. 159

¹⁴¹ Definition taken from Russell: 2000 in Cornell (ed.): 2000 p. 48 (emphasis added).

¹⁴² Stossen: 2000 p. 155

Conclusion

The argument being developed in this chapter was that the difficulties inherent in the legal approach to the regulation of pornography in England and Wales constitute one of the ways in which the conditions which enable domestic violence to occur are perpetuated by the state. Part One demonstrated that legal regulation continues to be on the basis of whether the materials are 'obscene', assessed on the basis of whether they are offensive, not whether they harm women. The moralistic approach taken in the OPA was seen to still be evident in the most recent attempt to regulate pornography under the CJIA. It was argued in Part Two that this conceptualisation of harm overlooks the impact that the availability of pornography has on discrimination and violence against women. The harm of pornography was then considered from the perspective that it causes increased levels of violence against women. Harm was presented as likely even in the absence of a direct causal link; exposure to pornography is likely to lower men's inhibitions against perpetrating violence against women. This direct link does remain questionable but it was then contended that this does not mean pornography should be regarded as victimless; regardless of whether a direct or indirect causal link can be proved, it is asserted that pornography is damaging to women as a group. This is clearly the case due to the patriarchal messages it contains concerning women's value and status as compared to men. These messages encourage the further polarisation of men and women and their appropriate roles, bolster sex role stereotypes, and present women as the appropriate victims of male power and control. These messages support the continuance of domestic violence as they support the gendered expectations that underpin the continuation of the patriarchal state.

In conceptualising the harm in terms of obscenity, rather than harm to women, the legal response itself continues to perpetuate the same type of potentially damaging messages that are contained in pornography. The focus on obscenity and offence renders the harm to women invisible, in the same way that the objectification of women in pornography becomes invisible because it is seen as based on 'natural' differences between the sexes. The need to avoid allying with anti-pornography proponents who themselves perpetuate damaging messages about women is evident; the condemnation of pornography must not be based upon the notion that it undermines the institutions of family and

marriage. The expectations placed upon these are in themselves damaging to women. It is suggested that the new distinction between erotica and pornography proposed would enable the harm of pornography to be conceptualised in a more appropriate way and form a better basis for legal or, in light of potential difficulties with legal regulation, societal regulation. This could go some way toward reducing the negative messages pornography perpetuates about women.

The following chapter will present an analysis of the ways in which the state further contributes to the creation and maintenance of polarised images of men and women. This will be done through the examination of statutory and judicial constructions of human beings as gendered, and the roles and behaviours assumed appropriate to each sex. This analysis will thus support the claim that one way in which gendered expectations are created and sustained is via legal understandings, and will provide the basis for the discussion of the civil and criminal justice remedies for domestic violence in subsequent chapters.

CHAPTER FOUR
LEGAL CONSTRUCTIONS OF GENDERED EXPECTATIONS

It has been shown that domestic violence continues to play a role in maintaining the cultural and social arrangements that sustain patriarchy. As a result of this social function, it is suggested that the legal system of England and Wales, as one of the key institutions that sustains the current social order, is one of the main contributors to the causes of domestic violence itself, insofar as it perpetuates the norms and expectations placed on masculinity and femininity that create the context in which domestic violence occurs. Therefore, exploring and analysing judicial statements in relation to the treatment of men and women will provide further support for the claim that the legal responses are not simply ill-equipped to seriously address domestic violence, this inadequacy is actually functional; when viewed as part of the patriarchal state, the legal system's overall response to domestic violence can be seen in terms of promoting the values that maintain the current status quo. Thus legal responses do not simply fail to adequately address domestic violence, they can also be seen to contribute to the norms and understandings that create the conditions for this type of abuse to occur in the first place.

Support for this assertion will first be provided by examining the construction of human beings as gendered beings found within judicial statements, and the gendered stereotypes that persist in understandings of appropriate feminine and masculine behaviour. An analysis of legislation and case law will then follow, revealing a heteronormative stance and a continuing preference for particular family types – those that sustain a patriarchal system. The final section of this chapter will reveal the continuing assimilation of womanhood with being a wife and mother found within legal understandings of appropriate gender roles. All these factors help to perpetuate the acceptance of the expectations placed upon women to enter into the marital-type relationship and to take on certain roles and exhibit certain behaviours once they have done so. The law is a very powerful normative discourse and thus its construction of the ideal Woman as a wife and mother, its promotion of monogamous heterosexual marriage and its normalisation of the nuclear family, all have a clear influence on internal motivations to conform to imposed gender norms.

Regulation of the family is a major concern of the state,¹ despite its protestations that this is a site free from legal and political regulation and interference. Policies ‘in areas which impinge on the family and which are expressed in legislative, judicial and administrative provisions construct a particular family form. The nuclear family... is an expression of these policies’.²

Part One

Gender Stereotypes: The Law’s Construction of Gender Differences

It was argued in Chapter Two that the social construction of gender differences based upon biological sex create gendered expectations concerning appropriate masculine and feminine behaviour. It was further claimed that these expectations constitute the conditions in which domestic violence can occur. This section will use judicial constructions and interpretations of the law found in the appellate courts to support the assertion that these are one of the main ways in which these gendered stereotypes persist. The focus is on the appellate courts as these are the only places where there is a full record of the judgment (apart from when the appeal judge quotes the trial judge) but it is likely that the same or similar attitudes are held by juries and judges in trial courts.

Despite a number of legal and policy changes aimed at reducing gender discrimination in recent decades – for example the replacement of the common law partial defence of provocation with loss of control³ and new guidelines in place for the judiciary on the use of gender stereotypes⁴ – some elements of such discrimination suffuse legal culture and are thus particularly resistant to eradication. The gendering of human characteristics as being either male or female, and the persistent prevalence of views that men and women’s different natures determine which roles they take on and which characteristics they exhibit, is evident in a number of cases which will be examined below. Gender-norms promote behaviours and attributes which appear to the individual subject to underpin their social acceptance and allow them to excel in these sanctioned

¹ For example, marriage involves entering into a binding legal contract which only the family courts have the power to dissolve, and child residency and contact arrangements can be decided upon and enforced by the courts in the event of a dispute between parents.

² Graycar and Morgan: 2002 p. 12

³ Section 54 Coroners and Justice Act 2009

⁴ The Judicial College’s Equal Treatment Bench Book: 2007, updated in 2011. Available at <http://www.judiciary.gov.uk/publications/equal-treatment-bench-book/>

gender roles.⁵ As Smart states, the law may not malevolently confirm women in their discursive place as women – the argument presented is that it does, intentionally or not.⁶ When these gender norms and expectations stop being seen as the natural and desirable role for women, and instead are taken as the context in which domestic violence occurs, the assumptions made about gender roles and characteristics evident in judicial statements can be seen to play a central role in the perpetuation of this type of abuse even whilst purporting to be trying to deal seriously with the issue.

Despite the fact that training provided by the Judicial College now explicitly warns against the use of sexual stereotypes because ‘it is important to be aware of the wide diversity of women’s experiences’,⁷ it is clear that ‘senior judges in England and Wales do indeed still at least sometimes employ crude and problematic sexual stereotypes in their judgements or overlook the use of such stereotypes by trials judges’.⁸ The overt use and continuing acceptance of these stereotypes as unproblematic may indicate that when judges avoid using them they are merely paying ‘lip service to “correct” forms of behaviour or use of language while not accepting that such forms or language have any valid basis’.⁹ It then becomes ‘inevitable that stereotypes will surface in their speech or writing from time to time’¹⁰ which may in turn indicate that ‘these sexual stereotypes are seen as unproblematic at a wider level within at least certain leading elements of the legal profession in England and Wales’.¹¹ This means that sexual stereotypes based on men and women’s assumed biological differences may still be permeating judicial decisions and influencing the outcomes, even when politically correct forms of speech are used. Legal institutions are positioned on the ‘hierarchy of knowledge’ and are thus a powerful discourse with a strong influence on social roles and behaviours.¹² A stereotype ‘does not need to be widespread in order for it to be important if the person wielding it is in a position of power over others, and appellate judges are clearly in this position’.¹³

⁵ Haslanger: 1993 p. 89

⁶ Smart: 1995 p. 82

⁷ The Judicial College’s Equal Treatment Bench Book on Gender: 2011. Available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_Gender_finalised_.pdf

⁸ Elvin: 2010 p. 277

⁹ Elvin: 2010 p. 276

¹⁰ Elvin: 2010 p. 276

¹¹ Elvin: 2010 p. 277

¹² Smart: 1995 p. 82

¹³ Elvin: 2010 p. 277

Thirty years ago the use of crude sexual stereotypes was more widespread within the judiciary, for example Lord Denning's notorious statement that 'you cannot alter the fact that women are quite different from men. The principal task in the life of women is to bear and rear children... He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. These diversities of function and temperament lead to differences of outlook which cannot be ignored'.¹⁴ Although this statement was made over 30 years ago, it will now be shown that beliefs pertaining to the different natures of men and women, based on assumed biological differences, persist to this day and permeate the responses of the legal system.

Whilst stereotypes can be problematic because they lead to discrimination against people who are perceived as failing to conform to them,¹⁵ the intention here is to demonstrate the ways in which the legal system, through influential judicial statements, constructs men and women in accordance with assumed masculine and feminine characteristics, thus providing support for the claim that the law is one of the key institutions creating the expectations of gender roles that are integral to the context of domestic violence. Elements of the judgments from four key cases from the last 15 years suggest that the law continues to construct masculinity and femininity based upon commonly accepted inherent biological differences. The first is *R v Smith (Morgan)*,¹⁶ a case concerning the old partial defence of provocation,¹⁷ where Lord Hoffman made a sweeping generalisation that the 'hormonal development of male adolescents is different from that of females' implying that girls develop emotional maturity earlier than boys and can thus be expected to have a higher standard of self-control than boys. This aspect of Lord Hoffman's speech, at least, still represents the law.¹⁸ It may be that the claim is supported by scientific studies, but he does not refer to any, and 'the matter is not clear-cut and Lord Hoffman does not appear to see anything problematic about making a sweeping assertion about hormonal differences between boys and girls'.¹⁹

¹⁴ Denning: 1980 p. 194

¹⁵ See Elvin: 2010 pp. 277-80 for various definitions of stereotypes and why they are problematic

¹⁶ [2001] 1 AC 146

¹⁷ Section 3 Homicide Act 1957 partially defines the scope of this defence.

¹⁸ The ratio in *Smith (Morgan)* is no longer good law and the partial defence of provocation was abolished by Section 56 Coroners and Justice Act 2009 and replaced with Loss of Control (Sections 54 and 55 Coroners and Justice Act 2009). However, the ways in which characteristics of the defendant to be taken into account were interpreted under the old law will continue to be influential.

¹⁹ Elvin: 2010 p. 284

Also on the issue of the level of self-control expected of the reasonable man, Lord Nicholls in *Attorney General for Jersey v Holley*,²⁰ stated that the ‘powers of self-control possessed by *ordinary* people vary according to their age and, more doubtfully, their sex’.²¹ The *Holley* decision ‘is premised upon the notion that there are significant differences between males and females as a group in terms of their powers of self-control’²² thus enabling the jury to apply any preconceptions they might already have with regards to gender and to use any sexual stereotypes that they deem appropriate when reaching their decision.

The trial judge in *Bonser v UK Coal Mining Ltd*²³ also made a statement based upon the supposed biological differences between men and women; ‘[b]earing in mind that... she was a woman and the rest men, I would expect the reasonable man to have said: ‘If this continues she will crack up’,²⁴ thus indicating that he ‘partially reached his decision upon the basis of a perceived inherent biological difference between men and women’²⁵ as a result of the assumption that women are more likely to “crack up”. The trial judge did not mention power differentials between the sexes and therefore his reference to the sex of the Claimant was purely due to supposed biological differences.²⁶

In a statement reminiscent of Lord Denning’s famous 1980 utterance in *Ministry of Defence v Jeremiah*²⁷ that ‘[a] woman’s hair is her crowning glory, so it is said. She does not like it disturbed: especially when she has just had a ‘hair-do’,²⁸ in *DPP v Smith*²⁹ Cresswell K’s judgment included the statement that ‘[t]o a woman her hair is a vitally important part of her body’.³⁰ This ‘invokes the notion that women are obsessed with their hair’³¹ and further implies that this is not necessarily the case for males. His failure to qualify his remarks (by saying ‘some’ or ‘many’ women) indicates that he was ‘confident enough to make a sweeping generalisation about women, as if the matter were unproblematic’.³²

²⁰ [2006] UKPC 23

²¹ [2006] UKPC 23 at para 13. He states that these are relevant when identifying and applying an objective standard of self-control, but that abnormalities (features not found in a person having ordinary powers of self-control) are not.

²² Elvin: 2010 p. 285

²³ [2003] EWCA Civ 1296

²⁴ [2003] EWCA Civ 1296 at para 20

²⁵ Elvin: 2010 p. 286

²⁶ This decision was overturned on appeal but not on this basis; the appeal judge questioned the significance of the distinction between men and women, but did not rule out the possibility that the distinction could be relevant.

²⁷ [1980] QB 87

²⁸ [1980] QB 87 at para 96

²⁹ [2006] EWHC 94

³⁰ [2006] EWHC 94 at para 21

³¹ Elvin: 2010 p. 292

³² Elvin: 2010 p. 293

These judgments demonstrate that 'certain senior judges are still willing to openly employ questionable sexual stereotypes in their judgments or [are] reluctant to challenge the use of these stereotypes [and] there may be many more judges who are willing to covertly use these sexual stereotypes in their legal decision-making'.³³ Through the continuing use of sexual stereotypes about the inherent differences between men and women, it can be seen that the judiciary and other influential legal figures are contributing to the creation of the perception of human beings as gendered; English legal culture continues to work on the assumption that terms such as 'femininity', 'gender' and 'sexuality' (social and legal constructs which are not fixed and immutable) are fixed,³⁴ thus playing a key role as a dynamic constructing force in understandings of these central terms.

Sexual Stereotypes and the Acceptability of Male Violence

Chapter Two explored conceptions of masculinity and the impact that these have on the occurrence of domestic violence. This impact was claimed to be in part due to the expectations placed upon men, through hegemonic masculinity, and its promotion of male aggression and dominance as normal and natural. It was further highlighted that it is not just the acceptability of male violence against women under a patriarchal system that is problematic, but the acceptability of certain levels of male-on-male violence generally. One of the ways in which hegemonic masculinity can be seen to be maintained is through the legal construction of masculinity apparent within the criminal justice system's response to male violence.³⁵ Analysing judicial understandings of inter-male violence indicates a widely held belief that certain types of male behaviour, including violence in some situations, is an expected and acceptable aspect of manhood. By effectively allowing men to be violent in some circumstances, the criminal law replicates and produces social conceptions of masculinity by constructing male violence as normal and natural.³⁶ Bibbings argues that the general legal condoning of male violence may affect the

³³ Elvin: 2010 p. 294

³⁴ Beresford: 1996 p. 187

³⁵ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 231

³⁶ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 232

outcomes of cases and sentencing decisions for violent offences and, within the appellate courts, may impact upon judicial constructions of the law itself.³⁷

This judicial construction can be seen in the category of 'horseplay' as an exception to the general legal principle that consent is not a defence to the non-fatal offences.³⁸ The very existence of this category as a defence to the infliction of harm indicates the view that a certain level or type of male violence is to be expected. In *R v Jones*³⁹, the appellants were charged with causing grievous bodily harm when two boys were thrown into the air and seriously injured upon landing. It was held that they were entitled to have the defence of horseplay left to the jury so that the jury could acquit them if they thought that the appellants had been 'merely indulging in "rough and undisciplined play" with no intent to injure, and in the genuine belief that the victims were consenting'.⁴⁰ Although the court felt that the jury in *Jones* might have rejected the idea that the boys had *merely* been indulging in 'rough and undisciplined play' in the present context,⁴¹ the decision, and the use of the word *merely*, implies 'that schoolboys are assumed to accept a certain degree of risk as a result of their status as boys.'⁴² This effectively makes the question of consent legally irrelevant because the focus is exclusively on whether the perpetrator believed there was consent.

A similar argument was successful in *R v Aitken*,⁴³ a case involving three appellants and G who were RAF officers at a party where there was heavy drinking and some 'horseplay' which included setting light to the fire resistant suits of two officers. When G decided to go to bed, the appellants set fire to his fire resistant suit, severely burning him. The appellants were charged under Section 20 OAPA and the judge directed the court that the action would be unlawful if it went beyond the horseplay that was normal on such occasions.⁴⁴ Their appeals were allowed because G had taken part in the horseplay and other activities during the evening and it was therefore 'possible that G's

³⁷ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 238

³⁸ Consent can be a defence to assault and battery, but not to Sections 18, 20 and 47 of the Offences Against the Person Act 1861. *R v Coney* (1882) 8 QBD 534 enunciated the legal principle that consent is no defence when injury is inflicted that is injurious to the public or to the person injured. *R v Donovan* [1934] 2 KB 498 the exceptional circumstances when consent could be defence, including 'manly diversions' intended to give strength, skill and activity and 'rough and undisciplined sport and play' such as horseplay. These exceptions have been partly eroded but the notion of manly diversions and horseplay remain today.

³⁹ *R v Jones*; *R v Campbell*; *R v Smith*; *R v Nicholas*, *R v Blackwood* and *R v Muir* (1986) 83 Cr App R 375

⁴⁰ (1986) 83 Cr App R 375 at para 376

⁴¹ (1986) 83 Cr App R 375 at para 379

⁴² Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 241

⁴³ *R v Aitken*; *R v Bennett* and *R v Barson* [1992] 1 WLR 1006

⁴⁴ For the purposes of Section 20 it also needed to have been foreseeable that their act might have caused injury, or foreseeable if they had not been drinking.

continued presence was an acceptance that such an activity might be perpetrated on him and an indication that he consented to such an action.⁴⁵ Again, it was held on appeal that the question for the jury should have been whether the appellants genuinely believed that G was consenting, again rendering his actual consent legally irrelevant.⁴⁶ The notion of a normal and acceptable level of violence that amounts simply to horseplay reveals much about conceptions of appropriate, or at least acceptable, masculine behaviour. These cases indicate the type and level of male violence the courts appear unwilling to criminalise, even when there is no proof of the victim's consent.⁴⁷ In *Jones* there was evidence that both boys resisted⁴⁸ and in *Aitken* it was noted that G tried to resist but could only do so weakly because of his drunken state⁴⁹ and yet it was held that there was implied consent as a result of the context in which the violence occurred.

Contrasting these cases with *R v Brown*⁵⁰ where it was held that consent was not a defence to charges under Sections 20 and 47 OAPA in the context of a group of men engaging in sado-masochistic activities, reveals a privileging of certain types of masculinity within judicial constructions. The tone of the judgments in all three cases suggest that, whilst horseplay 'was assumed to be a quintessentially male activity'⁵¹ that was normal, even 'manly,' for boys and men to engage in, gay sado-masochistic activity was unnatural and not in the public interest.⁵² The implication of these cases is that extreme levels of male violence are to be expected and are allowed,⁵³ provided they take place within a context which supports appropriate, or hegemonic, masculinity. The implication of this for the judicial treatment of domestic violence is that, as long as male violence is constructed in judicial understandings as normal and to be expected, the acceptability of male violence *per se* will not be challenged. This enables the persistence of assumptions that men are naturally violent, thus continuing to undermine attempts to change legal attitudes towards men who are violent towards women.⁵⁴

⁴⁵ [1992] 1 WLR 1006 at para 1007

⁴⁶ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 242

⁴⁷ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 241

⁴⁸ See (1986) 83 Cr App R 375 at para 377: 'He was protesting and trying to get away

⁴⁹ [1992] 1 WLR 1006 at para 1006

⁵⁰ [1994] 1 AC 212

⁵¹ Bibbings: 2000 Nicolson and Bibbings (eds): 2000 p. 242

⁵² [1994] 1 AC 212 at para 246

⁵³ The description of how the injuries occurred in *Jones* and *Aitken* indicate quite extreme levels violence being inflicted. See (1986) 83 Cr App R 375 at para 377 and [1992] 1 WLR 1006 at paras 1009 and 1010.

⁵⁴ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 pp. 251-2

Part Two

Legal Promotion of Hetero-normativity: the Privileging of Marriage

In continuing to focus on the legal system's implicit sustaining of a patriarchal system, cases and legislation will now be examined in relation to the claim that the legal system is based upon a privileging of heterosexual marriage, something that can be seen to contribute to the maintenance of the patriarchal state, of which domestic violence has a primary function. This privileging will be shown firstly through the legal regulation of cohabitation, secondly through the regulation of artificial reproduction, and finally by the way lesbian and gay couples are treated in legislation and by the judiciary.

Barlow and James have noted that whilst the social acceptance of heterosexual cohabitation has been achieved almost universally, the legal vulnerability of cohabiting families continues to be addressed only through ad hoc, piecemeal reforms which have left the law in this area in a state of uncertainty and complexity.⁵⁵ They suggest that the most obvious problem with this area of law is that 'whilst heterosexual cohabitation may in certain situations confer legal rights, there is no universal definition of cohabiting relationships which confer legal status. Broadly speaking, inclusion has been reserved almost exclusively... for the most marriage-like relationships, where a man and woman are living together 'as husband and wife'.⁵⁶ A classic case demonstrating this legal privileging is *Burns v Burns*⁵⁷ which, despite being heard in 1984, still represents good law. In this case, even after 19 years of unmarried cohabitation during which time she raised two children, worked part-time and paid some of the household bills, Valerie Burns was unable to establish either an express or inferred 'common intention' which could found a constructive trust under which she and her partner shared ownership of their family home. She was therefore left without beneficial interest in the home which was under her partner's name and there was no legal redress available to her. This is in direct contrast to spouses, where 'family assets may be redistributed on divorce whether or not there are minor children, and largely regardless of the original ownership of assets'.⁵⁸

⁵⁵ Barlow and James: 2004 p. 143

⁵⁶ Barlow and James: 2004 p. 145

⁵⁷ [1984] Ch 317

⁵⁸ Barlow and James: 2004 p. 148

The difficulties encountered in recent years as a result of new technology enabling artificial reproduction (so that it is not a straightforward case of pregnancy and childbirth making a woman a mother) and the Parliamentary debates and provisions of the legislation concerning the issue, serve to further illustrate the privileging of particular family types over other, less conventional forms. The Parliamentary debates concerning the *Human Fertilisation and Embryology Act 1990* (HFEA) demonstrate a clear hetero-normative stance on sexuality and relationships. Originally, Ann Winterton proposed that single women should not be inseminated unless they could bring forward a man to stand as a social father. Although the proposal to criminalise the treatment of unmarried women was defeated in the House of Lords, this was only a narrow defeat, and the 1990 Act made concessions to this viewpoint in that artificial insemination was restricted to ‘deserving couples’ who fitted the stereotype of the nuclear family. The original Act included the requirement that the welfare of any potential child be considered prior to treatment, ‘including the need of that child for a father,’⁵⁹ and although this was amended in the 2008 Act so that the provision now requires consideration of the need for ‘supportive parenting’⁶⁰ (alongside recognition that this does not necessarily include the need of a father figure),⁶¹ the original wording and Parliamentary debates that led to the creation of the Act betray a clear belief held by those involved with the drafting of the legislation that a child needs a father *figure*.⁶² Alongside this belief runs the assumption that mothers need husbands or long-standing partners and thus affirms heterosexuality as the norm.

Beresford identifies a less obvious assumption underlying these debates; women should be heterosexual, or at least live a heterosexual lifestyle, and the report produced by the Committee of Inquiry which led to the original Act does reflect clear concern over what assisted reproductive technologies would mean for the ‘traditional family’. The Committee’s report stated ‘[a]s a general rule it is better for children to be born into a two-parent family, with both father and

⁵⁹ This requirement is found under Section 13(5), known as ‘the welfare clause’, which is part of the licensing conditions that clinics offering services covered by the HFEA must comply with before offering treatment and reads ‘A woman shall not be provide with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father)’.

⁶⁰ Section 14(b) Human Fertilisation and Embryology Act 2008 reads ‘for “a father” substitute “supportive parenting”’.

⁶¹ Section 13(1) Human Fertilisation and Embryology Act 1990

⁶² This is distinct from having a biological father, which, of course, every child must have.

mother’.⁶³ This carries the implication that motherhood is not just about the relationship between the woman and her child, but also about the woman’s relationship with her husband or male partner. McCandless and Sheldon conceptualise the original text of Section 13(5)⁶⁴ as a ‘refusal of single motherhood and a desire to link women to men.’⁶⁵ ‘Law is therefore unable to perceive mothers as being separate legal beings from the husband or male partner’.⁶⁶ McCandless and Sheldon believe the Parliamentary debates and original text of the Act ‘suggest that parliamentarians were less concerned with the need to ensure a financial provider or hands-on (male) carer than they were with the symbolic value of ensuring children were born into (quasi) marital units.’⁶⁷

The amendments to the 1990 Act in this context that were introduced by the 2008 Act must be acknowledged, but it also must be recognised that the Parliamentary discussions that took place prior to its introduction indicate that the ideology underlying this issue remains the same. As McCandless and Sheldon suggest, ‘the reworded section does not represent a significant break from the previous law as it had been interpreted in practice’.⁶⁸ This is perhaps because clinics were generally ‘reluctant to use Section 13(5) as a convenient way to withhold treatment from certain people, it could have been assumed that ‘the deletion of the “need for a father” from Section 13(5) was a matter of nothing more than updating the legislation to bring it in line with clinical practice’. In reality, it proved highly controversial which is itself revealing about persistent ideas of appropriate family types and the need for father figures, particularly on the part of those involved in legislative reform in the UK. Members of the Joint Committee discussing the proposed amendment recommended that the phrase be replaced with the requirement of consideration of the “need for a second parent”⁶⁹ and although they held that

⁶³ Report of the Committee of Inquiry into Fertilization and Embryology, 1984, para 2.11 (available at http://www.hfea.gov.uk/docs/Warnock_Report_of_the_Committee_of_Inquiry_into_Human_Fertilisation_and_Embryology_1984.pdf).

⁶⁴ ‘A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth’.

⁶⁵ McCandless and Sheldon: 2010 p. 205

⁶⁶ Beresford: 1996 p. 189

⁶⁷ McCandless and Sheldon: 2010 p. 205

⁶⁸ McCandless and Sheldon: 2010 p. 201. Whilst the first edition of the guidelines for centres providing treatment under the Act required them to have ‘regard to the child’s need for a father’ and to ‘pay particular attention to the prospective mother’s ability to meet the child’s needs throughout his or her childhood’, it did not require an appropriate male ‘role model’ (although some clinics did interpret it as imposing this requirement). Since the first edition the Code of Practice has liberalised the guidance, but how it has been interpreted varies with some clinics being far more liberal than others.

⁶⁹ JC 2007, Vol I, para 243, cited by McCandless and Sheldon: 2010 p. 209

they were not discriminating against single women seeking treatment, in reality it does not seem possible 'to prefer a two parent family while not thereby failing to prefer other family forms'.⁷⁰ According to the chairman of the JC '[i]t must be an ideal to bring a child into the world with two supporting parents. Mustn't it?'⁷¹

Parliamentary debates saw reference being made to the 'naturalness' of families with two parents; 'Children flourish when nurtured in a family with two parents of the opposite sex who work together and complement each other. That is God's design and intention. We see from research that the pattern that God has laid down for fatherhood is necessary,'⁷² and 'The law as it stands provides an important safeguard for the unborn child, [by] recognising and promoting the generally accepted notion of the ideal family unit – the one designed by nature, that of a mother, father and child,'⁷³ and 'it is a natural thing for a family to consist of a man and a woman who have children'.⁷⁴ Despite the Governments proposal for the 2008 Act to require consideration of the need for 'supportive parenting', Parliaments concern with the 'symbolic message... sent out by this reform'⁷⁵ is highly revealing. McCandless and Sheldon suggest that the new section 'reflects the same kind of anxieties about the shape of the family and the role of men within it as were in evidence in the late 1980s'.⁷⁶ The debates over this section of the Act indicate that the law's conception of the appropriate family type as consisting of two heterosexual partners is still very much in existence and is still a powerful influence on norms and expectations.⁷⁷

On appeal, in the case of *C v C (Custody of Child)*⁷⁸, a case concerning the custody of a child born within a marital relationship but whose mother entered a lesbian relationship after the subsequent divorce, the way in which the judges deal with the lesbian relationship is particularly revealing in the context of the privileging of heterosexuality within legal understandings. It was held that 'it was axiomatic that the ideal environment for the upbringing of a child was the home of loving, caring and sensible parents: the mother and

⁷⁰ McCandless and Sheldon: 2010 p. 209 [and, one might say, thereby calling into question alternative forms].

⁷¹ Quoted by McCandless and Sheldon: 2010 p. 209, taken from an interview conducted with Phil Willis, MP, on 19 March 2009.

⁷² Iris Robinson, HC Debates, Vol 475, Col 1125 (12 May 2008)

⁷³ Geraldine Smith, HC Debates, Vol 475, Col 1097 (12 May 2008)

⁷⁴ Sir Patrick Cormack, HC Debs, Vol 476, Col 206-207 (20 May 2008)

⁷⁵ McCandless and Sheldon: 2010 p. 213

⁷⁶ McCandless and Sheldon: 2010 p. 222

⁷⁷ It is important to note the negative impact of gender expectations under a patriarchal system for men too, as seen in terms of the difficulties a single man is likely to face if he tried to adopt by himself.

⁷⁸ [1991] FCR 254

father'.⁷⁹ The use of the term 'axiomatic' gives the impression that this is 'a truth about which there is no need to explain or justify, despite the fact that this 'truth' is challenged factually by the increasing diversity of family forms'.⁸⁰ When this ideal could not be maintained due to separation, the court recognised their role in deciding which of two possible alternatives was preferable for the child's welfare and that they had to choose the alternative closest to the 'ideal'.⁸¹ They held in this case it was the home of the father and that the lesbian relationship of the mother needed to be taken into account when determining what was best for the child; '[i]f her home was to be with the father, it would be normal by the standards of society'. Balcombe LJ stated that it was 'undesirable that this child should learn or understand at any age the nature of her mother's relationship'⁸² and that in our society it is still the norm that children are brought up in a home with a father, mother and siblings (if any) and, other things being equal, such an upbringing is most likely to be conducive to their welfare'.⁸³ This case clearly demonstrates that a same-sex relationship 'remains a factor which must be explained away or overcome'.⁸⁴ In *B v B (Minors) (Custody, Care and Control)*⁸⁵ a lesbian mother was seen to wish for her son to be brought up on a heterosexual basis, perhaps because she was aware that this would work in her favour when it came to the decision over custody. Judge Callman stated the importance of distinguishing between mothers who were 'private persons' who did not believe in advertising their lesbianism, and those who were militant, implying that those who did not advertise their lesbianism were less likely to end up with homosexual children. Apparently expert evidence was regarded as necessary, and was accordingly adduced, to show that there is 'no systematic evidence to suggest an increased incidence of homosexuality among the children of homosexual parents'.⁸⁶ Thus heterosexuality was affirmed as the norm, homosexuality as deviant.

These cases demonstrate 'the power that the idea, if not the reality, of the heterosexual nuclear family continues to hold in English custody law'.⁸⁷ Although they were decided more than twenty years ago, more recent case law

⁷⁹ [1991] FCR 254 at 255

⁸⁰ Boyd: 1992 pp. 272-3

⁸¹ [1991] FCR 254 at 255

⁸² [1991] FCR 254 at 260

⁸³ [1991] FCR 254 at 262

⁸⁴ Boyd: 1992 p. 271

⁸⁵ [1991] 1 FLR 402

⁸⁶ [1991] 1 FLR 402

⁸⁷ Boyd: 1992 p. 276

indicates that, despite the possibility of Civil Partnerships and Marriage for same-sex couples,⁸⁸ the privileging of the heterosexual marital relationship and the gender roles that constitute this type of relationship continue. For example, in the joined appeal cases of *Re G; Re Z (Children: Sperm Donors: Leave to Apply for Children Act Orders)*⁸⁹ sperm donor or biological fathers were granted leave to apply for contact despite the wishes of the lesbian mothers who were the legal parents. Despite the fact that Parliament had decided, through the HFEA 2008, to provide explicitly that men in circumstances like these should not be treated as parents,⁹⁰ the judges held that, due to their relationship with the children, the sperm donors could apply for contact. This decision seems to indicate that, despite legal reform and increased societal acceptance of 'alternative' family types, there is a continuing privileging of the nuclear family type and the ideology that children need involvement from two parents of opposite sexes.

Part Three

The Natural Role of Women: Wives and Mothers

Legal understandings, particularly those within legislation and the judiciary, can be seen to play a central role in creating the expectations – internal and external – that girls are 'born' to be 'wives' and mothers.⁹¹ Beresford highlights that since at least the eighteenth century women's chief vocation has been defined as 'motherhood' with the words 'mother' and 'woman' becoming synonymous. These gendered expectations have been presented as forming the context in which domestic violence occurs, and thus legal constructions of women as mothers, and understandings of the traits of a 'good' mother, can be analysed through a series of cases to provide support for the argument that legal understandings play a central role in the creation of the conditions in which domestic violence occurs.

Recent judicial understandings of the appropriate roles of men and women can be traced back to Lord Denning's statement in *Watchel v Watchel*

⁸⁸ Civil Partnership Act 2004 and Marriage (Same Sex Couples) Act 2013

⁸⁹ [2013] EWHC 134 (Fam)

⁹⁰ Section 41(1) Human Fertilisation and Embryology Act 2008

⁹¹ See Chapter Two and also Dobash and Dobash: 1979

(No. 2)⁹² that '[w]hen a marriage breaks up there will thenceforward be two households instead of one. The husband will have to go out to work all day and must get some woman to look after the house - either a wife, if he remarries, or a housekeeper, if he does not. He will also have to provide maintenance for the children. The wife will not usually have so much expense. She may go out to work herself, but she will not usually employ a housekeeper. She will do most of the housework herself, perhaps with some help. Or she may remarry, in which case her new husband will provide for her. In any case, when there are two households, the greater expense will, in most cases, fall on the husband than the wife'.⁹³ Thus women are affirmed in their natural place as homemakers and domestic servants who, in return, are provided for by their husbands. In *C v C* (discussed above), the trial judge commented that 'there are differences between a mother's relationship with a child and a father's relationship with a child' which verges on 'invoking a maternal presumption, rather than looking to the actual relationship'⁹⁴ between C and the father and mother.

Lord Millett's dissenting judgement in *MacFarlane v Tayside Health Board*⁹⁵ (a case on wrongful conception) and the academic analysis that follows is illuminating with regard to the attitudes of the judiciary and much of legal academia about the 'naturalness' of pregnancy, birth and motherhood. In this case, a woman became pregnant after a vasectomy was negligently performed on her husband. The majority of the Law Lords 'simply argued that the negligent treatment to which Mrs McFarlane had been subject had resulted in pain and suffering and that was enough on which to base the claim'.⁹⁶ (The couple could not claim for the costs of raising the child and here the court can be seen to be imposing its pro-life stance and conception of "the good" by viewing something the couple did not want to happen as *objectively* beneficial).⁹⁷ Witting, a prominent academic (male) has supported Lord Millet's dissenting position that 'the women in wrongful conception cases should not be compensated for pain and suffering in relation to the birth because conception and pregnancy is "natural".⁹⁸ Richardson finds it interesting that an 'appeal to what is "natural" can operate as the basis of an argument that no harm has been done as a result of

⁹² [1973] EWCA Civ 10

⁹³ [1973] EWCA Civ 10 para 91

⁹⁴ Boyd: 1992 p. 271

⁹⁵ [2000] 2 AC 59; [1999] 3 WLR 1301

⁹⁶ Richardson: 2009 p. 138

⁹⁷ Richardson: 2009 p. 138

⁹⁸ Witting: 2002 p. 192

negligence which produced a result clearly unwanted by the woman'.⁹⁹ Several of Witting's comments demonstrate the appeal to 'an image of women as defined by natural status and not their own choices'; '[i]n McFarlane, the mother's conception was an entirely natural event that her physiological constitution was designed to induce and accommodate... Most women are only too glad to avail themselves of the opportunity to conceive and give birth at some stage in their reproductive lives... Her organs continued to function in the way that "nature intended"'.¹⁰⁰ Here it can clearly be seen that members of the judiciary, supported by legal academics, find it hard to conceive of a woman who is not, and does not wish to be, a mother. This perpetuation of a stereotypical view of women, supported by appeals to "nature", serves to demonstrate the law's complicity in sustaining the conditions in which domestic violence occurs.

The JSB guidance on sexual equality issues warns judges not to make assumptions about women's lives¹⁰¹ and yet here there is evidence that these types of assumptions are still made. Whilst assumptions such as these may help individual women, they 'draw upon, and reinforce, objectionable notions of stereotypical femininity'.¹⁰² A further recent case, *Re G (Children) (Residence: Same-Sex Partner)*,¹⁰³ further indicates the acceptance of views about women being best placed to care for children, thus continuing to affirm them in this role because it is natural. Lord Nicholls held in this case that 'the court should always have in mind that in the ordinary way the rearing of a child by his or her biological parent can be expected to be in the child's best interests'¹⁰⁴ and Lord Scott held that 'Thorpe LJ failed to give the gestational, biological and psychological relationship between CG and the girls the weight that that relationship deserved. Mothers are special'.¹⁰⁵ Baroness Hale agreed and stated that 'the fact that CG is the natural mother of these children in every sense of that term, while raising no presumption in her favour, is undoubtedly an important and significant factor in determining what will be best for them'.¹⁰⁶

⁹⁹ Richardson: 2009 p. 138

¹⁰⁰ Witting: 2002 pp. 192-3

¹⁰¹ The Judicial College's Equal Treatment Bench Book on Gender: 2011. Available at http://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/judicial-college/ETBB_Gender_finalised.pdf

¹⁰² Elvin: 2010 p. 291

¹⁰³ [2006] UKHL 43

¹⁰⁴ [2006] UKHL 43 para 1

¹⁰⁵ [2006] UKHL 43 para 2

¹⁰⁶ [2006] UKHL 43 para 44

Whilst not always recognised as such, marriage itself is a highly controlled legal arrangement in which a woman's identity and sexuality is further defined by the rules which prescribe how it should be done i.e. it is voluntary, for life, heterosexual and monogamous.¹⁰⁷ In addition, for the marriage to be legal, the woman must conform to very strictly prescribed sexual behaviour because marriage is consummated¹⁰⁸ through 'ordinary' sexual intercourse, defined as intercourse which is 'ordinary and complete' penetration of the woman by the man.¹⁰⁹ The emphasis on the determination of the validity of a marriage through consummation reveals a 'continuing dependence on notions of 'proper' sexuality and its function within marriage' and this 'reliance and dependence upon male penetration of the female demonstrates the narrow judicial understandings of the expression of sexual identity' and 'a definition of sexuality [itself] is [also] implied.... Legal culture prescribes precisely how a woman's sexual identity should be expressed within marriage and it does this by sole reference to the male'.¹¹⁰ Within a 'phallogocentric culture' sexuality is always seen to be heterosexual and sex becomes penetration.¹¹¹ It is submitted that this expectation contained within the law is damaging to women because it implies that they are only fulfilled in a monogamous relationship where the male is dominant. This perpetuates the social pressures on women to be in a long-term or marital relationship, making it hard for them to see their identity as separate from their relationship with their male partner. This enables both men and women to continue to place expectations on women in terms of the role they must fulfil within the relationship, argued in Chapter Two to be the context in which domestic violence occurs.

The law's assumption that 'motherhood' is automatically linked to heterosexuality, and the implications of this in terms of the expectations and

¹⁰⁷ The judicial definition of marriage most commonly referred to is from *Hyde v Hyde and Woodmansee* [1866] L Rev 1 P & D 130 which states marriage is 'the voluntary union for life of one man and one woman to the exclusion of all others' (para 133). Although this description is deceptively simple, it has not been directly overruled and its main principles can be seen to have been incorporated into the Matrimonial Causes Act 1973 (MCA) (Diduck and Kaganas: 2006 p. 39).

¹⁰⁸ One of the ways a marriage can be declared void under Sections 12(a) and 12(b) of the MCA is if it has not been consummated.

¹⁰⁹ Under the Sexual Offences Act 2003, rape is defined as intentional penetration of the vagina, anus or mouth of another person by a penis, with rape also defined as 'sexual intercourse' (without consent) in the Sexual Offences Act 1956, meaning sexual intercourse is intentional penile penetration. It could be considered that the law is protecting both parties here because if a man fails to penetrate his wife then the marriage would be an annulity. However, it is contended here that under the current system of gender inequality it is likely to be men who benefit more from this clause than women.

¹¹⁰ Beresford: 1996 p. 190

¹¹¹ Smart: 1995 p. 79. Butler's work has drawn attention to the fact that although there may be a whole spectrum of genders, we still only recognise two and attempt to fit all gender attributes into either masculine or feminine. Butler asserts that this gender binary reinforces the 'heterosexual matrix' and reaffirms the dominant understanding that 'normal' sexual desire arises out of difference. The presumption of reproductive sex also reinforces the naturalness of heterosexuality (See Butler, J., 1990. *Gender Trouble: Feminism and the Subversion of Identity*. London: Routledge).

demands it places on individual women to be in this type of relationship (as well as the assumptions it makes about appropriate roles of each sex in these types of relationships), becomes even clearer when the legal perspective on 'lesbian mothers' is considered; this concept is an oxymoron from the perspective, considered above, that 'real' mothers are wives, and therefore lesbian mothers become legally invisible. The courts preoccupation with the sexual lifestyle of the lesbian mother, as seen in the case of *C v C* where Lord Balcombe stated that it would be undesirable for the child to learn or understand at any early age the nature of her mother's relationship,¹¹² reveals a belief underlying the operation of the law that women should not be sexual beings unless a man is present. Under the law, sexual intercourse is defined as penetration. The *Sexual Offences Act 1967* contains no mention of lesbianism and there are no laws on the age of consent. Therefore, it seems there is an emphasis on preventing men from engaging in homosexual sex, indicating the importance of men's heterosexual masculine identity. This desire to protect men from homosexuality can be seen in the fact that homosexuality was not decriminalised until 1967¹¹³ and there was not an equal age of consent for homosexual and heterosexual sex until 2000.¹¹⁴ The aforementioned case of *R v Brown* can also be seen to indicate the desire to protect men from homosexuality when a majority of the House of Lords chose not to extend the list of exceptional categories where consent can be a defence to harm under the OAPA to homosexual sado-masochistic activities on the grounds, amongst others, that it was not in the public interest and that sado-masochism was 'cruel' evil, uncivilised and served no social use.¹¹⁵

Conclusion

One of the foundational claims this thesis seeks to support is that domestic violence continues to perform a key function within the social system of patriarchy. Chapter One emphasised the historical perspectives of the socially embedded nature of domestic violence and presented arguments for its role in

¹¹² [1991] FCR 254 at 260

¹¹³ Section 1 Sexual Offences Act 1967

¹¹⁴ Section 1 (2)(a) Sexual Offences (Amendment) Act 2000

¹¹⁵ See Lord Templeman in *R v Brown* 1 AC 212, in particular at para 237

maintaining male domination and control. Chapter Two then explored the social construction of gender differences and how the expectations concerning appropriate masculine and feminine behaviour, particularly within the marital-type relationship, provide the context in which domestic violence occurs. Following on from these views, this chapter has sought to demonstrate the ways in which the legal system itself, as a key institution within a patriarchal society, can be seen to contribute to and sustain the underlying causes of domestic violence through the construction of appropriate gendered roles, informed by a heteronormative stance on relationships and family types.

An analysis of judicial constructions of gender stereotypes and appropriate masculine and feminine behaviour have highlighted that sexual stereotyping and assumptions about typical masculine and feminine behaviour are still widespread within the appellate courts. In judicial utterances, legislation and Parliamentary debates are also seen explicit and implied approval for certain types of family set-ups; those that preserve the interests of a patriarchal system. Confirming women in their 'natural' place as wife and mother, and presenting the two categories as mutually exclusive, was demonstrated as a further way that statements made by the judiciary promote heteronormativity and appropriate gender roles. This was evidenced not just by the treatment of heterosexuals under the relevant legislation and its interpretation by the judiciary, but also in conceptions of lesbians and homosexual men.

The expectations of the roles and behaviours appropriate to each gender within the patriarchal family system were identified in Chapter Two as part of the underlying cause of domestic violence. It can thus be seen that the legal system itself, whilst purporting to protect women from abuse, actually contributes to the perpetuation of the conditions necessary for that very abuse due to its role in the social construction of gender. The next two chapters will examine the remedies available to victims under the civil and criminal justice systems in light of this critique of the root causes of domestic violence.

CHAPTER FIVE

CIVIL LAW REMEDIES FOR DOMESTIC VIOLENCE

The second chapter concluded with the suggestion that it is the expectations placed upon masculine and feminine identities, particularly in the context of the marital-type relationship, that can lead to the conditions in which domestic violence occurs. The previous chapter then presented an analysis implicating judicial and legislative constructions of gender in the continuation of these social conditions. In furthering these arguments, this chapter will analyse the understandings of domestic violence found within the civil law remedies (and areas of civil law, such as housing and child contact proceedings, where the presence of domestic violence impacts upon the application of the law) to provide support for the claim that these gendered expectations prevent there being an adequate response to domestic violence within the civil justice system. It will also be claimed that civil law remedies take an individualistic approach to the problem; typically responsibility for taking steps to deal with the abuse is placed on the victim, rather than conceiving of the problem in a broader social context. Through examination of judicial attitudes concerning male property rights and female responsibility for provoking the violence, it will be demonstrated that gendered stereotypes, in part constituted by the legal construction of 'appropriate' femininity and masculinity, persist within the civil law responses. The critique of the legal responses to domestic violence contained in this chapter and the following one, which examines the criminal justice response to domestic violence, will also highlight that legal understandings typically rely upon physical violence as the defining feature of a relationship characterised by domestic violence,¹ rather than understanding the range of strategies men typically use in an abusive relationship. This will provide the foundation for the claims made in Chapter Seven that this focus is

¹ The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) contains the most recent legal definition of domestic violence: 'any incident of threatening behaviour, violence or abuse (whether psychological, physical, sexual, financial or emotional) between individuals who are associated with each other' (Schedule 1, Part 1, Section 12 (9)). Although this definition is not limited to physical violence, it continues to be incident-based, rather than understanding that domestic violence is best understood as a programme of coercive control. It will be argued in Chapter Seven that this prevents the on-going impact of the abuse from being sufficiently taken into account, leading to a general requirement, albeit implicit at times, for domestic violence to reach a threshold level of severity, which is likely to be dependent upon serious physical violence. The second implication of viewing domestic violence as separate incidents is that it leads to the assumption that women have sufficient volitional space between the incidents to exit the relationship, should they choose to do so.

misplaced and occurs, in part, as a result of the failure to see the social function of domestic violence.

The last 40 years have seen the framework governing the civil law's response to domestic violence undergo many reforms and it is therefore useful – in terms of providing an analysis of the reasons its responses continue to be limited – to examine historical research findings separately from those concerning more recent civil justice measures. This will illustrate that many of the old difficulties and misconceptions are still apparent, preventing the reforms from having their desired impact in terms of protection and prevention. The effectiveness of the legal remedies for this type of violence first began to be assessed from the 1980s. Part One will examine the civil law remedies prior to the implementation of the Family Law Act 1996 (FLA) and Part Two will examine the remedies post-implementation of the FLA, including the criminalisation of breaches of civil protection orders under the Domestic Violence, Crime and Victims Act 2004 (DVCVA). Then Part Three will analyse understandings of domestic violence found in other areas of the civil law: housing provision, legal aid and child contact proceedings.

Part One

The Civil Remedies Prior to the Family Law Act 1996

Prior to the Family Law Act 1996 courts were often reluctant to intervene where domestic violence was alleged, especially in terms of excluding the perpetrator from 'his' home.² Courts were also reluctant to attach a power of arrest to measures under the old law,³ as seen in the case of *Horner v Horner*⁴ where Lord Ormrod stated that 'to attach a power of arrest to an injunction is very serious because it exposes the husband to immediate arrest'. Hester et al suggest this reluctance probably results from the fact that, due to the operation of the public/private divide, arrest was seen as a draconian measure involving the police unnecessarily in a civil and family matter.⁵

² See *B v B (Occupation Order)* [1999] 1 FLR 715 and *Chalmers v Johns* [1999] 1 FLR 392

³ Domestic Violence and Matrimonial Proceedings Act 1976 and Magistrates Courts Act 1978

⁴ [1982] Fam 90

⁵ Hester et al: 2008 p. 25

Early studies⁶ and analysis of case law from this time reveal that the accounts of male perpetrators were more likely to be believed than those of female victims. A bare denial of allegations was often enough to offer a viable defence in contested applications for injunctions, whereas the victim's claims had to be vigorously corroborated and were often trivialised. For example the case of *Richards v Richards*⁷ where the trial judge found the allegations to be "rubbishy" and "very flimsy indeed" and it was stated that, alongside these trivial allegations, the fact that 'she has had a number of affairs in the course of the marriage, whereas nothing adverse to the husband has been found,'⁸ meant that she was not in need of protection. It is suggested that the conduct of the wife, and conceptions of appropriate feminine behaviour, such as fidelity, was one of the considerations influencing whether or not the victim was seen as deserving of legal protection.⁹ Under Radford's analysis, judges tended to give more weight to men's counter-allegations than women's corroborated claims and a presumption of disbelief shifted the emphasis to the woman's role as precipitator of violence and away from her need for protection. Judges were also seen to add to the unsympathetic treatment that women already received from their own lawyers in some instances.¹⁰ In Barron's 1990 study, the judges interviewed demonstrated little sympathy with victims of violence in many cases. They also emphasised the draconian nature of exclusion orders and that they would rarely grant them *ex parte* even though they were allowed to, indicating concern for the man's "right to reply".¹¹ This made it hard for women to obtain occupation orders, with considerations of the perpetrator's accommodation needs¹² sometimes resulting in him being given several weeks to leave the shared home.¹³ The needs of victims were also often undermined, for example a judge interviewed in Barron's study stated '[i]t's amazing how these women do cope for a week or a bit longer.'¹⁴ The need for serious

⁶ For example Radford: 1988

⁷ [1984] AC 174

⁸ [1984] AC 174 at para 193

⁹ The position under Section 1(3) Matrimonial Homes Act (MHA) 1983 was that the conduct of the parties in relation to each other was to be taken into account when it was decided whether an order under Section 1 was to be granted.

¹⁰ Radford: 1987 pp. 135-151

¹¹ Barron: 1990 p. 50

¹² The perpetrator would be seen by housing offices to have made himself 'voluntarily homeless' through his domestic violence and this would likely exclude him from assistance and shelter (see Housing Act 1996 S.1).

¹³ Barron: 1990 p. 51

¹⁴ Barron: 1990 p. 50

physical violence to occur to justify legal intervention was also apparent; '[p]erhaps if she came hobbling in on crutches or something'.¹⁵

Analysis of case law at this time reveals judicial reluctance to exclude perpetrators from the family home because this would interfere with male property rights.¹⁶ This is clearly seen in the cases of *B v B (Domestic Violence: Jurisdiction)*¹⁷ and *Cantliff v Jenkins*¹⁸ where injunctions excluding a violent male partner from the shared home were discharged due to the male's right of property. These cases were later overruled by *Davis v Johnson*¹⁹ on the grounds that preserving violent men's property rights was contrary to the intention of Parliament; the Domestic Violence and Matrimonial Proceedings Act (DVMPA) was introduced for the very purpose of protecting women subjected to violence.

In *Davis v Johnson* it was held that Section 1 of the DVMPA should not be limited to those with a proprietary interest if there was 'the evil of domestic violence.'²⁰ Lord Denning's sympathy for the woman subjected to violence is clear; he described the abuse in detail and, in relation to the shelter she fled to, used phrases such as 'the conditions there are said to be deplorable' and '[n]othing could be worse for this battered wife and child - or any other battered wife for that matter - than to have to take refuge there.'²¹ However, the focus on physical violence as the defining feature of an abusive relationship is clear from his statement that the phrase "battered wives" was 'invented to call the attention of the public to an evil... when a woman suffered serious or repeated physical injury from the man with whom she lived'.²² Lord Scarman's judgment in this case interpreted molestation as extending beyond physical violence to conduct that would make it 'impossible or intolerable... for the other partner, or the children, to remain at home.'²³ However, it is submitted that without a judicial understanding of the dynamics and impact of domestic violence as being the need to maintain control over the victim, and the impact this may have on the victim, the conduct of the perpetrator – such as the use of credible threats which

¹⁵ Barron: 1990 p. 50

¹⁶ See *B v B (Occupation Order)* [1999] 1 FLR 715 and *Chalmers v Johns* [1999] 1 FLR 392

¹⁷ [1978] Fam 26

¹⁸ [1978] Fam 47

¹⁹ [1979] AC 264

²⁰ [1979] AC 264 at para 265

²¹ [1979] AC 264 at para 271-2

²² [1979] AC 264 at para 270

²³ [1979] AC 264 at para 348

have meaning only in the context of the abusive relationship²⁴ – may not be understood to be molestation, even under this wider definition. The introduction of the DVMPA and the judgment in this case indicates that at this time there began to be Parliamentary and judicial concern over domestic violence, but the focus on severe physical violence would have left many women without recourse to a legal remedy in the form of an order excluding the perpetrator from their home.

In a later case, *Horner v Horner*,²⁵ menacing letters were held to amount to molestation, but when it came to attaching a power of arrest to the non-molestation order granted under Section 1(a) of the DVMPA, Lord Ormrod held that, in accordance with the legislation, a power of arrest could only be attached 'if the judge is satisfied that the other party has caused actual bodily harm to the applicant, or to the child, and considers that he is likely to do it again.'²⁶ Whilst behaviour such as accosting his wife at the railway station, hanging scurrilous posters about her on the school railings where she worked, and making repeated phone calls to her place of work amounted to a nuisance and was 'annoying' and 'embarrassing',²⁷ no power of arrest would be attached because it was not violent and did not cause actual bodily harm. The fact that there had been violence in the past was not taken into account and the harassment was deemed to be 'personal idiosyncratic behaviour.'²⁸ This indicates a definite lack of judicial understanding of the impact of non-physical violence. Alongside this can be seen trivialisation and minimisation of the harassment through the use of the terms 'annoying and embarrassing' and the way it is attributed to 'idiosyncratic' behaviour, rather than termed threatening or menacing.

The apparent reluctance over exclusion orders can be traced back to gender stereotypes of women as passive and dependent on their male partners and the time when women had no income or property of their own and were seen as the property of their husbands. Domestic contributions and childcare were not (and still are not) valued as much as financial contributions to the family home and therefore the male was seen to have property rights in a shared home because he had financially provided for it. This reluctance also clearly reflects the impact of the law's withdrawal from the private sphere,

²⁴ See Chapter Seven at p. 176 and p. 177

²⁵ [1982] Fam 90

²⁶ Section 2(1) DVMPA 1976

²⁷ [1982] Fam 90 at para 91

²⁸ [1982] Fam 90 at para 93

perhaps for political reasons, which led to – and was reinforced by – the widely held view that violence and abuse within the home is ‘a private matter’ which the state should not intervene in.

Despite variation in the background and type of work solicitors undertake, it has still been asserted that the legal profession at this time was, as a whole, strongly masculine, with both male and female solicitors’ approaches being aggressive, assertive, and, critically for domestic violence victims, lacking in empathy (traditionally seen as a feminine quality).²⁹ As Finley has argued, men of law are taught to think, live and work in a particular way³⁰ and so to be part of law women must also be taught to think in this way. Law does not become an ‘androgynous language’ just by training women to become adept at this way of male thinking, it simply means that women have learned this male language, in the same way as people are able to learn a foreign one.³¹

Radford’s study in the 1980’s found that solicitors – the ‘gatekeepers’ to the civil remedies for domestic violence victims – often discouraged victims from pursuing legal remedies and women generally reported very negative experiences of their own solicitors.³² She also found a strong presumption among solicitors, even those representing the victim, that the victim had done something to precipitate the violence, reflecting the long-held beliefs of law and society that women are provoking and deserving of the violence. Findings at this time also suggested that because the victim’s experience had to be translated into legally understandable language, solicitors had to present an account relevant to the court. Presenting a ‘good case’ had to take precedence over describing the victim’s experience in her own words, and although this was often done for the victim’s benefit (and not because they were not believed) it still resulted in women feeling undermined and discredited by the court process. Women also reported that solicitors were reluctant to apply for injunctions on their behalf unless they also took the more irrevocable step toward obtaining a divorce by initiating proceedings.³³ This illustrates the likelihood that solicitors lacked an adequate understanding of the dynamics of domestic violence and the risk of post-separation violence.³⁴

²⁹ Burton: 2008 p. 33

³⁰ Rationality, abstraction, a preference for statistical and empirical proofs over experiential or anecdotal evidence all correspond to how these men are taught to think.

³¹ Finley: 1989 in Freeman (ed): 2008 pp. 1378-9

³² See Radford: 1987 pp. 135-151 and Barron: 1990 p. 49

³³ Barron: 1990 pp. 42-75

³⁴ Post-separation violence is discussed, and statistics on its prevalence provided at p. 132, p. 163, p. 209 and p. 212

Part Two

The Civil Remedies Post-Implementation of the Family Law Act 1996

Part IV of the FLA came into force in October 1997 and remains the main legislation providing civil law remedies for victims of domestic violence. It provides for two types of civil protection orders: occupation orders³⁵ and non-molestation orders.³⁶ However, despite new legislation, it seems that the judiciary found it hard to break from traditional views that 'excluding a man from his home is a 'draconian' solution'³⁷ and that women are in some way responsible for the violence perpetrated against them. Most of the issues that arose were in association with the implementation of the legislation, as opposed to with the actual substantive law. It is thought that the problems identified with the civil justice system prior to the FLA continued because the same personnel remained responsible for providing protection under the new legislation. The embedded nature of the attitudes of those responsible for the implementation of the legislation demonstrate the continuing misconceptions and prejudices that act as obstacles to victims gaining satisfactory protection from domestic violence under the civil law. The role of the solicitor as 'gatekeeper' to the legal remedies remained as important under the FLA as it was at the time of the earlier studies. The quality of legal advice, the level of familiarity the solicitor had with the legislation, and practitioners perceptions of domestic violence remained vital in terms of victims being able to access the remedies.³⁸

In light of the fact that it was the implementation of the law that was problematic, it would have been unsurprising if the FLA initially brought little change; '[c]hanging the legal rules does not necessarily mean a change in the court culture and values of the legal profession'.³⁹ However, a study by Edwards did find some aspects of the new legislation to be more effective, with an increase in the number of occupation orders granted and a dramatic increase in the use of powers of arrest.⁴⁰ However, she concluded that the new Act was probably not as effective as anticipated with one of the main difficulties being the financial cost of seeking an injunction due to changes in public funding

³⁵ Section 33 Family Law Act 1996

³⁶ Section 42 Family Law Act 1996

³⁷ See *Chalmers v Johns* [1999] 1 FLR 392

³⁸ Burton: 2008 p. 40

³⁹ Burton: 2008 p. 36

⁴⁰ Edwards: 2001 p. 187

criteria at the time the act was introduced.⁴¹ Edwards also suggests that judges became reluctant to grant non-molestation orders in cases where they would have been legislatively required to attach a power of arrest and did not wish to do so,⁴² suggesting that the idea that domestic violence is not a criminal matter persisted. Whilst Edwards concluded, from statistical analysis of the granting of protection orders since the FLA, that the new measures were more effective because they brought all the remedies under one Act,⁴³ the problem remained that enforcement depended upon breaches by the perpetrator of the protection orders being taken seriously by the police and the judiciary. In addition, the FLA does not provide effective remedies for non-physical abuse and, despite the definition of molestation being potentially broad⁴⁴ respondents in a study by Burton et al reported difficulties in obtaining orders. They also reported an impression given by some solicitors that there needed to be evidence of physical injury before they could seek a remedy; ‘the whole range of abusive behaviours is little understood by people who advise, but particularly judges and magistrates... The whole debate has been kaleidoscoped down to one view, did he/she/they hit you and what was the severity of the injury’.⁴⁵ Solicitors themselves stated that they would find it difficult to justify an application for public funding for clients who had not experienced some physical violence and injury. This view was then reinforced by the Legal Services Commission who stated that ‘public funding would not be considered urgent for non-physical abuse and that medical evidence would be required to document the fact that mental abuse was having a serious impact on the victim’s health’.⁴⁶ Legal personnel appeared to have no understanding of the typical dynamics and impact of an abusive relationship; as will be shown in Chapter Seven, physical violence is often just one type of behaviour employed to gain power over the victim. There is also evidence that the police were not acting appropriately on powers of arrest attached to injunctions, perhaps because they were unclear which parts of the injunction had a power of arrest attached. It was thought that

⁴¹ Edwards: 2001 p. 200

⁴² Edwards: 2001 pp. 200-201

⁴³ Edwards: 2001 p. 202

⁴⁴ There is no statutory definition of molestation, but in its report of 1992 the Law Commission envisaged that the term would be interpreted broadly and case law shows that the concept is interpreted flexibly; *Horner v Horner*. [1982] Fam 90

⁴⁵ Burton et al: 2002 (unpublished report, submitted to the Lord Chancellor’s Department, 2002, quoted from by Burton: 2008 p. 40)

⁴⁶ Burton: 2008 p. 40

there would be more clarity in this area following the criminalising of all breaches under the DVCVA, considered below.

Early case law under the FLA reveals a continuing reluctance to grant exclusion orders because of a perception that occupation orders remained 'draconian' and were only justified in exceptional circumstances. In *Chalmers v Johns*⁴⁷ it was held that the trial judge had been right to find that the case barely came within the ambit of domestic violence, despite the fact that the police had been called to the couple's home four times in the year before the applicant left with her daughter. This misconception meant that it was not appropriate for such a draconian order to be made, indicating that initially not enough weight was being given to the applicant's need for protection under the new legislation. In *B v B (Occupation Order)*⁴⁸ there was serious physical violence to the applicant. Even so, the likelihood of harm to the two children involved was more influential than the risk to her, despite the Court of Appeal's protestations that the FLA was 'designed to protect cohabitants from domestic violence and to secure their safe occupation of previously shared property; nothing in the judgment should be read as weakening that objective.'⁴⁹

Lord Justice Ward made it clear in *Re Y (Children) (Occupation Order)*⁵⁰ that 'the eviction of a co-owner of a matrimonial home is a Draconian remedy. It is a last resort and is not an order lightly to be made. That was the position before the 1996 Act and it remains the position now, as this court has confirmed in the matter of *Chalmers v Johns*.'⁵¹ Then in *G v G (Occupation Order: Conduct)*⁵² not only were exclusion orders again stated to be 'draconian and only to be made in exceptional cases'⁵³ but the friction between the parties was attributed to their 'incompatible personalities'⁵⁴ and therefore, as the wife had 'not suffered any violence at the hands of the husband',⁵⁵ an exclusion order was held to be inappropriate, thus overlooking the potential for abuse of a non-physical violent nature to be occurring.⁵⁶ The combined effect of *Re Y* and *G v*

⁴⁷ [1999] 1 FLR 392

⁴⁸ [1999] 1 FLR 715

⁴⁹ [1999] FLR 715 at para 724

⁵⁰ [2000] FCR 470

⁵¹ [2000] FCR 470 – Lord Justice Ward's judgment

⁵² [2000] WL 416

⁵³ [2000] WL 416 at para 30

⁵⁴ [2000] WL 416 at para 30

⁵⁵ [2000] WL 416 at para 30

⁵⁶ The judge's use of the phrase 'violence at the hands of the husband' implies a requirement for violence of a physical nature.

G seems to indicate that occupation orders will be difficult to obtain in the absence of serious physical violence.

The case of *Re H (A Child) (Contact: Domestic Violence)*⁵⁷ (discussed in more detail in the context of child contact proceedings, below) may have been overturned on appeal and heavily criticised by the Court of Appeal, but, as Lord Justice Wall himself stated ‘very few cases reach this court, and when one does, we have no means of knowing whether it is an aberration or the tip of a particular nasty iceberg’.⁵⁸ Aside from the difficulties this case raises in terms of the failure to follow guidelines⁵⁹ relating to child contact when there has been domestic violence, Judge Cockroft – in the court of first instance – can be seen to rely upon and invoke many stereotypical assumptions concerning domestic violence. His judgment contains stereotypical conceptions of female provocation making the victim somehow deserving of violence, obvious bias against the mother with disbelief of her allegations against her husband and assertions that she exaggerated the violence. In addition Judge Cockroft can be seen to minimise and trivialise the violence by asserting that the assault was a one-off occurrence because it was the only one for which there was medical evidence. This latter point ignores the fact that women typically endure 35 assaults before first seeking help.⁶⁰ The judgment minimises the assault by using the phrase ‘just an ugly and sustained assault’ and holds the mother responsible for the violence inflicted on her; ‘[t]his is not a violent man, it is a man who was driven to lose control wholly exceptionally in circumstances that I have outlined, for which mother is principally responsible.’⁶¹ Although this decision is heavily criticised by the Court of Appeal for all the reasons suggested above, it is concerning that such extreme prejudicial attitudes and assumptions are operating at the lower court level. The privileging of the perpetrator’s evidence over that provided by the victim apparent in earlier case law such as *Richards v Richards* is also apparent in *Re H*; Judge Cockroft dismissed evidence provided by the wife, apart from that for which he had medical evidence, and accepted the husband’s denials of the other incidents.⁶²

⁵⁷ [2006] 1 FCR 102

⁵⁸ [2006] 1 FCR 102 at para 9

⁵⁹ *Re L (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* [2001] Fam. 260; [2001] 2 W.L.R. 339

⁶⁰ Wykes and Welsh: 2009 p. 2

⁶¹ Judge Cockroft quoted by Lord Justice Wall [2006] 1 FCR at para 50

⁶² Judge Cockroft quoted by Lord Justice Wall [2006] 1 FCR at para 26

Analysis of this case also indicates a lack of understanding about the duress and coercion typically imposed upon a victim of domestic violence; in his statement concerning the mother ‘breaking the promise which the father made her swear on the Koran not to tell anybody about the assault’ Judge Cockroft held that the father was ‘instantly ashamed at what he had done and did not want it to go any further, showing proper remorse after losing his temper and control.’⁶³ This reveals a failure to appreciate that domestic violence is so often a hidden crime and that victims are often coerced into hiding the abuse from family, friends, the police and other helping institutions. Judge Cockroft is implicitly critical of the mother for breaking the promise and putting her own position above her religious duty,⁶⁴ therefore implying that the mother should not have told her family about the abuse because she was bound by her promise not to disclose it.

Furthermore, this reveals concerning attitudes regarding female responsibility for the violence inflicted upon them. A failure to understand the coercion victims are often placed under not to disclose abuse is also apparent, together with views that male violence is often an understandable and out of character outburst resulting from provocation, and the view that victims often exaggerate the violence inflicted upon them, are all still seen to occur at the lower court level. The concern noted above, that the accounts of male perpetrators were more likely to be believed than those of female victims, is also still a potential problem as seen in Judge Cockroft’s assertion that ‘although mother’s statement dramatically includes a wealth of colourful detail in relation to these allegations, there is no reference in that statement to her being dragged downstairs by him, when surely there would have been, if it had happened. This is confirmation that no such incident took place... It would certainly have been convenient for this allegation to be made up.’⁶⁵ Despite this original decision being held to be ‘deeply flawed and plainly wrong,’⁶⁶ not many cases reach appeal and therefore it is not known how widespread these misunderstandings and stereotypical attitudes concerning domestic violence are within the lower courts.

⁶³ Judge Cockroft quoted by Lord Justice Wall [2006] 1 FCR at para 30

⁶⁴ Judge Cockroft cited by Lord Justice Wall [2006] 1 FCR at para 99

⁶⁵ Judge Cockroft judge cited by Lord Justice Wall [2006] 1 FCR at para 24

⁶⁶ [2006] 1 FCR at para 110

The Criminalising of Breaches of Non-Molestation Orders under the Domestic Violence, Crime and Victims Act 2004

The criminalising of breaches of non-molestation orders under Section 1 of the DVCVA signal that the 'interface' between the civil and criminal law is starting to be developed, something heralded as important in the Government's 2003 Consultation Paper on domestic violence. The aim is to put the victim at the heart of the criminal justice system.⁶⁷ It will be suggested here that, overall, traditional attitudes towards domestic violence are still held by those responsible for implementing justice under the DVCVA 2004, thus limiting the potential effectiveness of the new protective measures.⁶⁸ Securing protection for victims seems to be further hindered by a great deal of confusion and lack of cohesion in terms of the scope and enforcement of the new remedy. Despite hopes that it would have a significant impact on the method of dealing with domestic violence under the civil law, in practice the impact of the new Act has been less significant. It has perhaps even proved detrimental to victims due to its blurring of the boundaries between the civil remedies and the criminal justice responses. This seems to have led to confusion on the part of those responsible for implementation and perhaps even reluctance on the part of judges to grant and enforce protection orders. Victims have also been found to be reluctant to apply for them, perhaps due to their desire to avoid the stigma of criminalisation for their partner and their belief that the criminal justice system is not the appropriate mechanism for dealing with the violence and abuse they are suffering.

The positive and commendable reasons for criminalising breaches under the DVCVA demonstrate, perhaps, that the legislature at the time had an increasing awareness of the severity and impact of domestic violence and the need to address the issue through the introduction of new measures. It is contended that even though criminalisation does serve the important political purpose of conveying the message that the government takes domestic violence seriously, the reform may have proved counter-productive for some domestic violence victims. Concerns also persist over the poor enforcement of civil orders that was seen prior to the DVCVA because the victim is still reliant

⁶⁷ Home Office: 2003. *Safety and justice: the Government's proposals on domestic violence* (Cm 5847)

⁶⁸ Part 1 of the DVCVA 2004 amended Part 4 of the FLA 1996, Section 1 now makes breach of a non-molestation order a criminal offence.

on the police responding to the breach of the order by the perpetrator. There is a higher burden of proof under criminal law, and the victim is required to be a witness in breach proceedings even when she may be afraid to do so.⁶⁹ The criminalisation of breaches does extend the available sentencing options to include community-based penalties,⁷⁰ which may be more successful in terms of regulating behaviour than imprisonment. Prison sentences may achieve short-term protection through incapacitation, but studies show that a short prison sentence may actually aggravate the situation.⁷¹ It is also unclear whether the purpose of this criminalisation is just as a deterrent or rehabilitative process, or whether other criminal, as opposed to civil, law objectives such as retribution and censure are also being pursued.⁷² Criminalisation does send out a symbolic message about the unacceptability of domestic violence, indicating that it is the responsibility of the state to address it so that enforcement of the order stops being a matter for the individual victim. The problem is that the victim's interests are 'supplanted by the wider public interest' and a victim may be punished for not giving evidence to support the prosecution of a breach,⁷³ regardless of whether they intended or desired this criminal remedy to come into being. Despite victims not wishing their partner to carry the stigma of criminalisation (often for their own and their children's benefit and not necessarily to help the perpetrator or because they have hopes of reconciliation), this section operates to remove the option of pursuing a purely civil remedy, something that may have appealed to many victims. In addition, victims may be guilty of the offence of 'aiding and abetting a breach' which dilutes the message of who is responsible for domestic violence and whose behaviour the order is intended to regulate. This in turn perpetuates the culture of 'women blaming' and the misconception that it is always the women's freely made choice if she is living with the perpetrator again.⁷⁴

Statistics show an immediate and sharp drop in the number of applications for non-molestation orders⁷⁵ under the FLA since the criminalisation of breaches under the DVCVA came into force in 2007, despite

⁶⁹ Burton: 2003b p. 313

⁷⁰ Previously breach of a protective order would have been punishable as contempt of court leading to a fine or commitment to prison.

⁷¹ For example a victim in a recent study conducted by NFWI expressed fear that her partner would be sent home to her in a 'heightened sense of rage' having been in the police station overnight after already being in a rage (NFWI Research, October 2011).

⁷² Burton: 2003b pp. 304-5

⁷³ Burton: 2003b pp. 305-6

⁷⁴ Burton: 2003b p. 311

⁷⁵ The drop was an average of 25% and varied from 15% to 30% (Platt: 2008)

the government introducing the measure in the hope that tougher sanctions would encourage more victims of domestic violence to seek protection from the family courts. The possible reasons for this drop suggest that the government introduced new legal provisions without a clear understanding of what would really be of benefit to victims in terms of ending the abuse, or what the victims themselves are actually looking for from the legal system. The Government itself acknowledges that there is serious disagreement over whether the criminal or civil route is the most effective in bringing an end to the abuse. A major problem highlighted by Judge John Platt⁷⁶ is the lack of effective communication and information sharing between the police and the court which granted the original civil injunction. This can lead to situations where neither the investigating officer nor the CPS lawyer (whose decision it is whether to charge or not) are aware of the evidence upon which the injunction has been granted. An incident that appears to be isolated and comparatively minor is often part of a much larger and more serious picture. If this is ignored it can lead to incorrect charging decisions and decisions merely to caution, echoing problems with the way in which the law generally abstracts and isolates incidents from their social context. This is something that is particularly detrimental given the often-overlooked programmatic nature⁷⁷ of domestic violence. The new domestic abuse guidance issued to the police in 2008⁷⁸ does not even mention the need to discover the precise wording of any non-molestation order. Yet Section 42A of the new Act creates judge-made offences specific to the person against whom the order is made. It is therefore important that the investigating officer discovers whether the conduct being investigated, even if it is not a serious crime under general law, is in fact a serious crime under Section 42.

It appears that the Government's stated intention that 'criminalising breaches of non-molestation injunctions will send an important message to defendants that the government takes a very serious view of domestic violence and offenders may be seriously punished'⁷⁹ is being undermined because the police have been making regular use of cautions to deal with those arrested under Section 42A.⁸⁰ In addition, criminalising the breach of a Section 42 order

⁷⁶ Platt: 2008

⁷⁷ Chapter Seven will develop the argument that domestic violence is best understood as a programme of coercive control.

⁷⁸ National Policing Improvement Agency (11 April 2008) available at www.acpo.police.uk/policies.asp

⁷⁹ Platt: 2008

⁸⁰ Platt: 2008

gives the accused the right to a jury trial; this places a huge administrative burden on the police and the CPS. Also, the resulting delay⁸¹ provides the opportunity for coercive and controlling behaviour, threats, emotional damage and blackmail, making it more likely that victims will withdraw their statement under pressure. It has been suggested that an additional difficulty is that the securing of a conviction by a jury is harder than establishing contempt before an experienced family court judge.⁸² Police officers who were respondents in a study commissioned by the Ministry of Justice to evaluate the impact of the DVCVA talked about the lack of training they had received on this aspect of the Act both before and after implementation,⁸³ suggesting that responding to breaches of civil orders is not being made a police priority.

All of these factors point to a lack of cohesion and immense confusion over the new powers under this legislation. Research commissioned by the Ministry of Justice discovered that some legal advisors attributed the decrease in the number of applications to difficulties in obtaining legal aid⁸⁴ and this will only get worse under the restrictive criteria of the new legislation,⁸⁵ examined below. The whole concept of legal aid in relation to domestic violence implies that it is an individual problem, not a social problem; public funding is available for other so-called social problems such as health care, disabilities, and families needing support from Child Protection Services.

⁸¹ Under the old system the power of arrest meant that the police had no choice but to bring the arrested person before a family court within 24 hours, which also meant the paperwork was minimal.

⁸² Platt: 2008

⁸³ Hester et al: 2008 p. 21

⁸⁴ Hester et al: 2008 p. 21

⁸⁵ At present, solicitors have delegated legal powers to grant legal aid so that victims who qualify can be in court making their application for a non-molestation order within 24 hours of first consulting a solicitor. Under the new law an applicant wishing to apply for a committal or for the issue of a warrant of arrest needs to obtain an extension to the certificate which is not covered by delegated powers and so delay occurs. The overlap between civil and criminal proceedings creates problems here because under the new law an applicant is 'effectively having to present what, in human rights terms, is a criminal prosecution... [and it is] unlikely that [s]he will be able to do so without legal representation' (Platt: 2008).

Part Three

Civil Law Understandings of Domestic Violence in the Provision of Legal Aid, Housing and in Child Contact Proceedings

Restrictions to Legal Aid Provision under the Legal Aid, Sentencing and Punishment of Offenders Act 2012

The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) was implemented in March 2013, reforming the criteria for legal aid.⁸⁶ Extensive primary research conducted into women's experiences of legal aid, both prior to and after the reforms, confirmed initial concerns over the impact this new legislation will have on victims of domestic violence.⁸⁷ Research conducted prior to the implementation of LASPO found that the provision of legal aid for domestic violence victims is invaluable in providing women with safety and protection. Without it many women would still be in the abusive relationship because they would have had no way to leave and the financial impact would have deterred them from seeking help.⁸⁸

In order to access legal aid under the new legislation, supporting documents are needed such as evidence of a non-molestation order being granted, a criminal conviction for a domestic violence offence by the other party towards the applicant, a referral to a Multi-Agency Risk Assessment Conference (as a high risk victim of domestic violence) or a letter from a health professional. Many of these forms of evidence are unlikely to be available in the absence of serious physical violence. Even if a domestic violence victim is able to provide one of these forms of evidence, she will be able to access legal aid only in certain areas of family law.⁸⁹ Legal advice on housing, education, employment, debt, welfare benefits, medical negligence and immigration⁹⁰ will not be funded. Thus the new legislation undermines the government commitment to effectively tackle domestic violence, failing to appreciate some of the most serious

⁸⁶ Legal Aid, Sentencing and Punishment of Offenders Act 2012

⁸⁷ Rights of Women and Women's Aid: 2013

⁸⁸ NFWI Research: October 2011 pp. 14-16

⁸⁹ Ancillary relief (help from the courts to resolve financial issues following the end of a marriage or civil partnership) and private law family and children cases (including child contact and residence cases).

⁹⁰ except asylum cases and cases under the domestic violence rule.

problems women face when they leave a violent relationship⁹¹ and so making it more difficult to leave the relationship.

Supporting Documents

The approved forms of evidence⁹² fail to reflect many women's experiences of abuse. The majority of the supporting documents are subject to a 24 month timeframe;⁹³ after this time they cannot be used as evidence in order to access legal aid. This ignores the fact that many of the problems requiring legal aid continue to affect women more than 24 months after particular incidents of violence; there is rarely a clear end to the violence and the vast majority experience some form of post-separation violence.⁹⁴ In addition it fails to recognise that the abuse is unlikely to be of a purely physical nature. Research by Thiara and Gill found that ex-partners often track victims down by starting child contact proceedings, thus actively using the court system to continue the abuse.⁹⁵ If this is done 24 months after the last 'proven' violent incident, the victim would not be eligible for legal aid under the new legislation. Many of the respondents felt that they would not have been ready to pursue a civil remedy within 24 months and others felt it would actually have put them at more risk if they had started legal proceedings straight away: 'I've had a MARAC⁹⁶ probably three or four months ago. I was with him for seven years: we split for six... so 13-odd years of history between us, that will just be completely dismissed if he comes in and finally gets a solicitor on the 12th hour.'⁹⁷ Most significantly some of the respondents felt that if the perpetrators were aware of the time frame they would use this as a way to continue the abuse; 'It's a gift for perpetrators to say, 'keep my nose clean for 12⁹⁸ months'. Because they're so controlling and controlled that they will manipulate anything that they possibly can.'⁹⁹ In very

⁹¹ Gill: 2011 p. 41

⁹² The full list of supporting documents is set out at Section 33 of The Civil Legal Aid (Procedure) Regulations 2012

⁹³ This was amended from a 12 month time-frame under the draft legislation, which does go some way toward addressing concerns raised during the consultation process

⁹⁴ These findings are shown by examples of studies such as Kelly et al 1999 - a London-based study which found that one-third of police calls for domestic violence incidents came from women who were separated and being harassed by their ex-partners, and Wilcox 2000 - a study which found that 1/3 of women who had left a situation of domestic violence suffered persistent and systematic violence and a further third experienced continued harassment.

⁹⁵ Thiara and Gill: 2011. This issue is discussed further at pp. 136-9

⁹⁶ Multi-Agency Risk-Assessment Conference

⁹⁷ Respondent in NFWI Research: October 2011 p. 26

⁹⁸ This study was conducted when the legislation was still in draft form. The government later amended the time frame from 12 to 24 months.

⁹⁹ Respondent in NFWI Research: October 2011 p. 26

few cases of domestic violence is a conviction secured against the perpetrator, partly because it can be very hard for women to disclose abuse and partly because, as will be argued in the next chapter, the criminal justice framework is not adequately set up to respond to domestic violence.

Certain types of abuse, particularly of a non-physical nature, are extremely difficult to prove. Some women do not even see the police as a potential source of help.¹⁰⁰ It is therefore unlikely that a woman would be able to use the perpetrator's criminal conviction to satisfy the evidential requirements for legal aid. A study conducted by Rights of Women¹⁰¹ found that around half of women with experience of domestic violence did not have the prescribed forms of evidence to access legal aid.¹⁰² Reasons for this included not having a copy of the evidence and not knowing who to ask to obtain it, cultural reasons for not wanting to disclose to a GP, being too frightened to go to the police, victims being unable to obtain a refuge place, charges for copies of the evidence from the police and health professionals,¹⁰³ and the difficulty of establishing non-physical abuse.¹⁰⁴ Lack of legal aid explained the failure of 60.5% of respondents to take action to deal with their family dispute via family law.¹⁰⁵

Increase in Mediation

One of the intentions behind the reforms was to encourage people to consider ways to resolve domestic disputes as an alternative to involving the court system. Whilst the government has said that women who have experienced domestic violence will not be required to take part in mediation, early research indicates that the restrictive nature of the gateways for accessing legal aid is leading some couples to be directed to participate in it, despite the presence of abuse. Further, it may not be recognised that mediation is inappropriate in a particular case since many women do not disclose the abuse that has occurred.¹⁰⁶ Women with experience of mediation in cases characterised by

¹⁰⁰ NFWI Research: October 2011 pp. 22-3

¹⁰¹ Rights of Women: 2013

¹⁰² Rights of Women: 2013 p. 1.

¹⁰³ Rights of Women: 2013 p. 1 and Blacklaws: 2014 p. 627

¹⁰⁴ Hunter: 2014 p. 661

¹⁰⁵ Rights of Women: 2013 p. 2

¹⁰⁶ Gill: 2011 p. 42

domestic abuse unanimously reported that it had not worked in their case, with other women stating that their safety would have been compromised by mediation had they used it. Some thought that the process would be used by perpetrators as a way of continuing the abuse; '[h]e would love the chance to go into mediation because that would be another way to control me'; 'mediation is not for women that live with a control freak because it gives them back the control'.¹⁰⁷ It is thought that fear of reprisals may lead to a woman feeling unable to fully take part in the mediation process resulting in an outcome to which she has not genuinely agreed.

It seems then that mediation is especially unsuitable for couples where domestic violence is involved due to the dynamics which will be outlined in Chapter Seven. The use of "signals"¹⁰⁸ unique to the relationship between the perpetrator and victim will be emphasised as one of the subtle ways in which power and control over the victim is maintained. Also, it is well-documented that domestic violence does not end upon separation.¹⁰⁹ This makes it likely that some of the controlling tactics will be used during the mediation sessions themselves. In light of this, Fischer et al argue that after separation mediation 'may actually enhance the likelihood and seriousness of the violence because [physical] abuse is one of the few tools the abuser has left to attempt to dominate and control his victim'.¹¹⁰ The mediator's role includes asking questions and encouraging the couple mediating to 'reality test' their decisions, they are not allowed to give legal advice¹¹¹ or comment about what would happen to the case if it went to court, and therefore provided the couple (appear) to agree on the outcomes decided upon in mediation, the mediator is not able to comment on any unfairness apparent in the decision.

Findings from the second phase of empirical research conducted by Barlow, Hunter and Smithson¹¹² identified increasing pressure being put on parties to try mediation. There was also a disturbing lack of appropriate screening for domestic violence or mental health issues, despite the requirement that mediators take steps to discover whether there is fear of abuse

¹⁰⁷ Respondents in NFWI Research: October 2011 pp. 28-9

¹⁰⁸ The use of signals in an abusive relationship is discussed in Chapter Seven at pp. 175-6

¹⁰⁹ See Humphrey's and Thiara: 2003 and Thiara and Gill: 2011 on the ways in which abuse can be sustained after separation.

¹¹⁰ Fischer et al: 1992 p. 2142

¹¹¹ For the Family Mediation Council codes of practice for practitioners see www.familymediationcouncil.org.uk/us/code-practice

¹¹² For further details of the complete project, see 'Mapping Paths to Family Justice: a national picture of findings on out of court family dispute resolution' [2013] 43 *Family Law* 306 – 310

or any other harm, and whether there have been any allegations of abuse by either participant.¹¹³ This finding led the researchers to question whether the notion of 'voluntary' mediation is already beginning to disappear because couples are finding themselves in mediation even when it may not be appropriate because of domestic violence. Reports from legally aided parties indicated that since 2005 solicitors have referred parties directly to mediation without offering any alternatives.¹¹⁴ Reports of pressure being put on parties to attend mediation become more frequent after 2010 and two parties in the study believed they were ordered by the judge to mediate. In addition, solicitors were found to be referring clients to mediation even when it was clearly inappropriate due to violence and abuse within the relationship, and parties were often found not to have been screened for domestic violence. One respondent who was in mediation with her husband stated that she had not been asked if there had been abuse and did not feel able to mention it, and she also did not feel able to be clear about what she wanted because she was intimidated being in the same room as him. Another respondent was referred to the Citizens Advice Bureau by Women's Aid and then referred on to a solicitor who referred her to mediation, despite the presence of domestic violence.¹¹⁵

From April 1st 2013, when the LASPO was implemented, problems such as those outlined above are likely to occur more frequently as funding for legal aid for private family disputes is available for mediation only if recent domestic violence can be proven in the prescribed manner. It will be mediators rather than solicitors who will be the first to see clients about their family dispute.¹¹⁶ Hunter emphasises the 'LASPO gap' which consists of 'the gap between the ability to reach a successful resolution of a dispute in mediation, and eligibility for litigation legal aid'.¹¹⁷ Into this gap fall victims of domestic violence who cannot produce the required evidence but for whom mediation is inappropriate. It seems that these parties may sometimes end up in the mediation process anyway, despite the documented dangers and difficulties of doing so.

Litigants in Person

¹¹³ Section 5.7.8 of the Family Mediation Council's Code of Practice (www.familymediationcouncil.org.uk/us/code-practice).

¹¹⁴ For example one respondent said her solicitor had told her mediation was compulsory even though her husband was abusive, and another said she was advised by her solicitor that if she wanted legal aid mediation had to be tried first. (Taken from a paper entitled 'The End of Voluntary Mediation?' given at the Socio-Legal Studies Annual Conference at the University of York on 27th March 2013 by Anne Barlow and Rosemary Hunter).

¹¹⁵ Barlow et al: 2014 pp. 25-7

¹¹⁶ Barlow and Hunter: 2013 (preliminary findings). Taken from a paper entitled 'The End of Voluntary Mediation?' given at the Socio-Legal Studies Annual Conference at the University of York on 27th March 2013.

¹¹⁷ Hunter: 2014 p. 660

Although further statistical data is needed to assess the number of those falling into the 'LASPO gap' who end up in court as a litigant in person, the latest figures indicate that in the first three quarters of 2013, the number of finalised cases in which both parties were represented decreased, while the number of finalised cases in which the applicant or both parties were unrepresented increased by over 8000. This represents an increase of over 11,000 litigants in person.¹¹⁸ In the context of domestic violence, this could mean victims being cross-examined by a perpetrator who is representing himself. This could have extremely detrimental effects; 'you can't think straight', 'if you've been in a very dominating relationship for so long, they know you so well... they will be able to rip you to pieces on that stand because they know every single button to press... to make you crack because they're so used to doing it.'¹¹⁹ Women unanimously said they would not have been able to act as a litigant in person in their own case. Some said they would not feel safe going to court without legal representation and others that they wouldn't have gone to court at all without it. Women with experience of representing themselves had found it traumatic and reported that they lacked the skills and expertise to negotiate the legal system alone. It seems that the new legislation is not taking the already-traumatic nature of domestic violence into consideration by making the court process as easy as possible for victims. To provide adequate protection, the legal aid apparatus must take into account considerations of whether litigants in person can cope with the substantive law, the complexities of procedure, and the technical demands of cross-examining expert and other witnesses, particularly given the emotional detachment necessary to represent themselves effectively.¹²⁰

Child Contact Proceedings

Prior to implementation, concerns were expressed over the Children and Families Act 2014 (CFA) which proposed that, unless shown otherwise, contact with the non-resident parent is to be assumed to be in children's best interests,

¹¹⁸ Hunter: 2014 p. 662

¹¹⁹ Respondents in NFWI Research: October 2011 p. 18

¹²⁰ Gill: 2011 p. 46

even where the non-resident parent has perpetrated domestic violence.¹²¹ The intention of the amendment to the Children Act 1989 by Section 11 of the CFA is ‘to reinforce the importance of children having an ongoing relationship with both parents after family separation, where that is safe, and in the child’s best interests.’ The effect of this amendment is to require the court ‘to presume that a child’s welfare will be furthered by the involvement of each of the child’s parents in his or her life, unless it can be shown that such involvement would not in fact further the child’s welfare.’¹²² This may not necessarily be the case.

Having left a violent relationship, women often find themselves re-victimised by their ex-partners as a result of contact proceedings. If an abuser appears ‘likeable’ to the court, it may be assumed that the abuse allegations are exaggerated and therefore the abuse may not be investigated appropriately.¹²³ In the past, family courts tended not to recognise the importance of not exposing children to the ‘negative role modelling of their abusive father and to his hostility and contempt toward their mother’ and thus tended to believe that ‘children fare better in joint residency or shared parenting’.¹²⁴ There is still no *prima facie* assumption that there should be no direct contact between a parent and a child in cases where allegations of domestic violence had been proven.¹²⁵ The judgment in *Re L*¹²⁶ provided important guidelines for courts to follow in future where it has been proven that the non-resident parent has perpetrated domestic violence. It is important to note, however, that the welfare of the children involved in these four joined appeals was the overriding consideration, not the welfare of the mother. The impact of continuing contact with her abusive former partner was not deemed relevant. Although the view that continuing contact between a child and the non-resident parent is desirable wherever possible is understandable, it does not take into account the impact that ongoing contact may have on the primary caregiver. This reflects the individualised nature and focus of the justice system¹²⁷ where individual rights seem to be taken in isolation from their social context. In practice, it is

¹²¹ Section 11 Children and Families Act 2014

¹²² Government’s Explanatory Notes to the Bill for Children and Families Act 2014

¹²³ From a presentation given by SEEDS Devon at the ADVA (Against Domestic Violence and Abuse) Partnership Presentations Day, 12 December 2012 entitled: ‘The Impact of the Co-operative Parenting Bill upon Post-separation Domestic Abuse in the Family Courts’.

¹²⁴ *ibid*

¹²⁵ See *Re L (Contact: Domestic Violence)* [2000] 2 FLR 334 and *Re M (Children)* [2013] EWCA 1147 at para 14: ‘Domestic violence is not, in itself, a bar to direct contact, but must be assessed in the circumstances as a whole’.

¹²⁶ *Re L (A Child) (Contact: Domestic Violence)*; *Re M (A Child) (Contact: Domestic Violence)*; *Re V (A Child) (Contact: Domestic Violence)*; *Re H (Children) (Contact: Domestic Violence)* [2001] Fam. 260; [2001] 2 W.L.R. 339

¹²⁷ See Chapter Eight for a full discussion of the impact of the individualised nature of legal responsibility and remedies.

impossible to uphold the rights of a child and take their best interests into account without considering the needs and welfare of whoever is their primary caregiver.

The decision in *Re L* was a landmark judgment in terms of signalling domestic violence as an issue that courts should take seriously in contact proceedings, but its real significance can be seen in how it has been subsequently applied.¹²⁸ Two appeals heard by the Court of Appeal after *Re L* are concerning in this regard; *Re K and S (Children) (Contact: Domestic Violence)*¹²⁹ and *Re H (A Child) (Contact: Domestic Violence)*.¹³⁰ In the latter case, discussed above, Judge Cockcroft decided to allow supervised direct contact despite alleged violence and evidence from two expert witnesses that contact would not be in the child's best interests. It is clear that the guidelines in *Re L* were not followed. In particular there was no consideration of the fact that the perpetrator had not admitted the violence, taken responsibility for it or understood the steps needed to address the damage caused by it. This aspect of the case was also criticised by the Court of Appeal, but the fear remains that the judgment was symptomatic of a widespread approach in the lower courts.

Analysis of the judgment of a very recent case, *Re M (Children)*,¹³¹ where a father appealed against the decision not to allow supervised contact, reveals a continuing perception that a 'child's continuing relationship with a non-residential parent is highly desirable and contact should not be denied unless the child's welfare demands it.'¹³² To order that there should be no contact between a child and his non-residential parent was described as 'draconian.'¹³³ The effect of this view appears to be to create a presumption in favour of contact that will be difficult in practice to rebut because of the difficulties of proof and the emphasis on physical violence. The likelihood of a negative impact upon the children involved makes this a grave concern.

Both these cases and the newly-implemented CFA appear to take insufficient account of the danger a child can be in when contact is maintained with an abusive parent.¹³⁴ The prevailing view is that all fathers are good role

¹²⁸ Burton: 2008 p. 31

¹²⁹ [2005] EWCA Civ 1660

¹³⁰ [2006] 1 FCR 102

¹³¹ [2013] EWCA Civ 1147

¹³² [2013] EWCA Civ 1147 at para 14

¹³³ [2013] EWCA Civ 1147 at para 24

¹³⁴ There were 29 cases of homicide where a father killed his children recorded over a 10 year period, in 5 of these cases contact had been ordered by the court (Saunders: 2004, referred to in a presentation given by SEEDS Devon at

models for their children, regardless of whether they are perpetrators of domestic and child abuse. Although the legislation only states that an on-going relationship with both parents is of paramount importance when it is safe and in the child's best interests, it is suggested that the government's failure to appreciate the reality of post-separation abuse,¹³⁵ and its impact on children, means that shared parenting will still often be the preferred option in situations where women and children are put at further risk of violence and abuse. This proposed legislation highlights another instance of the government failing to comprehend the dangerous reality of domestic violence, the power dynamics involved, and the ways in which abusers are able to manipulate child contact proceedings as a way of continuing the abuse.

Recent Understandings of Domestic Violence under Housing Law

Analysis of the application of housing law provisions in the context of domestic violence is also revealing in terms of the potential for misunderstandings of the context and dynamics of domestic violence as coercive control. In *Bond v Leicester City Council*¹³⁶ the Local Housing Authority (LHA) had decided that the victim had become 'intentionally homeless' and accordingly they had no duty to provide her with accommodation.¹³⁷ The initial decision by the LHA was based upon the fact that Miss Bond had never taken any preventative measures or 'reasonable steps' to address the harassment – such as informing the Housing Society, the Police or any other representative body – and had instead gone straight to a refuge. Whilst recognising that Miss Bond had been the subject of domestic violence for some considerable time, the LHA believed that she should have taken action under the criminal/civil law to prevent her ex-partner from coming near her or her home. This reveals a simplistic response that assumes that civil and criminal remedies are available in a timely way for all victims who disclose abuse, and that disclosure brings an end to the abuse. This decision was overturned on appeal by the Court of Appeal where Lady Hale (as she then was) demonstrated a good understanding of the dynamics of

the ADVA (Against Domestic Violence and Abuse) Partnership Presentations Day, 12 December 2012 entitled: 'The Impact of the Co-operative Parenting Bill upon Post-separation Domestic Abuse in the Family Courts').

¹³⁵ See the discussion of post-separation violence at p. 132, p. 163, p. 209, p. 212

¹³⁶ [2001] EWCA Civ 1544

¹³⁷ Under Section 193 of the Housing Act 1996

abuse and the difficulties encountered by victims. Of domestic violence she noted:

'Once begun it is likely to be repeated, often with escalating severity. It induces a sense of shame and of powerlessness in the victims, who often blame themselves and find it impossible to escape. There are various legal and practical remedies available, but it is by no means easy for many victims to invoke these. However hard the family courts try, they are often ineffective. Escape may well be the only practicable answer. The victim is the one who knows the perpetrator best and is likely to be best able to judge this.'¹³⁸

Again, we find an appellate court addressing problems caused by lack of understanding in a court of first instance, raising questions as to the pervasiveness of the lack of awareness. The case raises the same difficulties suggested in the analysis of *Re H*; it is unclear whether decisions such as this one are commonly being made at lower legal and administrative levels, with only a few being highlighted through the appeal process.

In *AN (Pakistan)*¹³⁹ Richards J accepted that the term 'domestic violence' was not limited to physical violence but he also stated that 'it must reach some minimum level of seriousness, which will depend upon the context and particular circumstances.'¹⁴⁰ It is anticipated that, in light of other judicial understandings of domestic violence, the threshold for seriousness is unlikely to be reached without serious bodily harm. The recent case of *Yemshaw*¹⁴¹ does suggest that the courts, in applying the civil law, are beginning to interpret domestic violence in a less restrictive way which recognises that '[t]he test is always the view of the objective outsider but applied to particular facts, circumstances, and personalities of the people involved.'¹⁴² Although in this case the majority of the Supreme Court ruled that 'domestic violence' is not limited to physical contact, the review panel and trial judge initially upheld the decision made by housing officers that Mrs Yemshaw was not 'homeless' as a result of domestic violence because her husband had never actually hit her, or threatened to do so. The Court of Appeal held that they were bound by

¹³⁸ [2001] EWCA Civ 1544 at para 29

¹³⁹ *AN (Pakistan) v Secretary of State for the Home Department* [2010] EWCA Civ 757

¹⁴⁰ [2010] EWCA Civ 757 at para 24

¹⁴¹ [2011] UKSC 3

¹⁴² [2011] UKSC 3 at para 27

*Danesh*¹⁴³ where it was held that ‘violence’ involved some sort of physical contact.¹⁴⁴ On appeal, Baroness Hale stated that violence is a term ‘capable of bearing several meanings and applying to many different types of behaviour.’¹⁴⁵ Despite this, Lord Brown – whilst not dissenting – did state that he did not believe that at any point the “domestic violence” provisions at issue in the case were intended to extend beyond the limits of physical violence,¹⁴⁶ and nor did Parliament contemplate or intend for psychological abuse to be “violence”.¹⁴⁷ Concern can again be raised over the fact that this case had to be decided on appeal and reveals little about what may still be happening at a lower administrative level. Difficulties with this focus on purely physical violence will be discussed in Chapter Seven.

Conclusion

The objective of this chapter was to show that gendered expectations and a failure to see domestic violence as a social problem impacts upon the availability of the civil law remedies for victims. It was suggested that initial problems with enforcement of civil protection orders continued after the implementation of the FLA, with studies indicating judges may have become reluctant to grant a non-molestation order once breaches of them were criminalised under the DVCVA. A failure to believe allegations of domestic violence and accounts by women victims continues to be a potential problem in the courts of first instance, as seen in the case of *Re H*. This case also revealed the continuing use of assumptions based on gendered stereotypes, including the idea that women are responsible for provoking the violence they incur. Male property rights were still taking precedence over the safety of victims in the Court of Appeal in 2000, as seen in *Re Y* and *Re G* which both stated that occupation orders were ‘draconian’. The reluctance to exclude male perpetrators of violence from their home indicates a continuation of male privilege and dominance characteristic of a patriarchal state. There has been no

¹⁴³ *Danesh v Kensington and Chelsea RBC* [2007] 1 WLR 69

¹⁴⁴ [2007] 1 WLR 69 at para 15

¹⁴⁵ [2011] UKSC 3 at para 27

¹⁴⁶ [2011] UKSC 3 para 48

¹⁴⁷ [2011] UKSC 3 para 51. He allowed the appeal despite his ‘very real doubts (para 60) because he didn’t ‘feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent’.

recent case law indicating a change in the position found in *Re Y and Re G* and it therefore seems likely that serious physical violence would be required in order for an occupation order to be granted.

As will be argued in Chapter Seven, the failure to recognise the social function of domestic violence within a patriarchal society as being to sustain the unequal power relations between men and women means the other behaviours characteristic of an abusive relationship are often overlooked or trivialised. Although Lady Hale's judgment in *Yemshaw* is promising in terms of its recognition of the broader manifestations of 'violence', it is not yet known how quickly this will filter through to the lower courts and administrative bodies dealing initially with cases like this. The perception of domestic violence evident in Lord Denning's description of 'the battered woman' in *Davis v Johnson* was still seen in more recent cases where a requirement for physical violence in order to justify the granting of an exclusion order was apparent.

Therefore, even when domestic violence is accepted as widespread, it is still not often recognised as having a social function and this means, first, that legal measures do not address themselves to everyday social life, and secondly that there is a focus on physical violence. The argument that the legal responses to domestic violence in England and Wales only address the symptoms of this abuse by viewing domestic violence as attributable to individual deviance will be continued in the following chapter examining the criminal justice response.

CHAPTER SIX
THE CRIMINAL JUSTICE RESPONSE TO
DOMESTIC VIOLENCE

Calls for a separate criminal offence of 'domestic violence' – as implemented in some European countries¹ - have been rejected² in the UK and therefore the criminal justice response consists of a 'piecemeal strategy'³ of applying the existing criminal law provisions to domestic violence incidents. These provisions consist mainly of prosecutions under the Offences Against the Person Act (OAPA) 1861, introduced over 150 years ago to deal with problems of stranger violence and public order.⁴ As a starting point for critiquing the criminal justice response to domestic violence it is clear that using a model derived from stranger violence is likely to ignore the ways in which domestic violence is unique precisely because it is committed by an intimate.⁵ Along with the OAPA, the Protection from Harassment Act (PHA) 1997 has been used in the context of domestic violence in some cases, although it was originally intended to target stalking offences and not conduct that occurs in the context of an ongoing relationship.

Until relatively recently domestic violence was not seen as a public order issue and its absence as a topic in mainstream criminal law textbooks⁶ demonstrates its continuing invisibility from mainstream perceptions of criminal justice issues. This type of violence occurs within the privacy of the home and has therefore not traditionally been an issue of public concern. Therefore, the criminal justice system has been very slow to recognise and respond to domestic violence, and traditional perceptions about what are issues for the

¹ In 1999, the offence of 'gross violation of a woman's integrity' was passed in Sweden which, according to Kelly (2005) recognises that an event prompting a call to the police may not be especially 'serious' in legal terms and may fall outside of the scope of the existing penal offences. Under the new offence, a perpetrator can be prosecuted for a 'course of conduct' meaning 'repeated offences of this kind are to be considered jointly and are to result in a more stringent sentence than would be the case if each of the acts were to be considered separately' (Lindstrom: 2005 p. 111).

² The 2003 Government Consultation Paper *Safety and Justice* concluded that a separate offence would not improve the protection offered under the criminal law to domestic violence victims and would reduce the range of options and diminish the offence. Burton suggests that this view is premised on the view that the separate offence would be an alternative rather than supplementary to the existing crimes (Burton: 2008 p. 68)

³ Harne and Radford: 2008 p. 22

⁴ The main offences that perpetrators of intimate partner abuse can be charged with are the non-fatal offences under the Offences Against the Person Act 1861 (OAPA). These include assault occasioning actual bodily harm (Section 47), malicious wounding and inflicting grievous bodily harm (Section 20) and wounding and causing grievous bodily harm with intent (Section 18). For a full discussion of the OAPA and subsequent case law applicable to intimate partner abuse (although not discussed in that context) see Simester and Sullivan's Criminal Law (4th ed.): 2010, Herring – Criminal Law (4th ed.): 2011 or Smith and Hogan's Criminal Law (13th ed.): 2011.

⁵ Mills: 2003 p. 51

⁶ Herring: 2011 notes the absence of 'domestic violence' as a topic in the index of Simester and Sullivan's Criminal Law 2010 (4th ed.) textbook and this absence is also apparent in other core criminal law textbooks such as Smith and Hogan's Criminal Law 2011 (13th ed.)

police and other agencies to become involved in may still continue to influence the responses.

Part One of this chapter will focus on the conceptions of harm that are apparent under the criminal law, analysing the theoretical underpinnings of the Offences Against the Person and how they have been interpreted by the courts in a way that excludes much of the harm that victims of domestic violence suffer.⁷ Part Two will then examine the response of the police, the Crown Prosecution Service (CPS) and the Criminal Courts, putting forward evidence that their responses are still hampered by misunderstandings and prejudices concerning domestic violence and its victims. Finally, in Part Three, there will be an analysis of the implications of the offence created by Section 5 of the Domestic Violence Crime and Victims Act 2004 for victims of domestic violence who have been prosecuted and sentenced for 'failing to protect' their children from their violent partner. This will reveal many of the continuing problematic assumptions pertaining to domestic violence made by both Parliament, in not providing a defence of domestic violence in the context of this offence, and by the criminal courts in interpreting the offence.

Part One

The Criminal Law's Conception of Harm and Focus on Isolated Incidents

With perhaps the exception of the Protection from Harassment Act 1997⁸ (discussed below), the criminal law focuses on single incidents, isolating criminal conduct from its consequences and social and cultural context. This creates a situation where a history of domestic violence and the cumulative impact this usually has on the victim is not recognised.⁹ The criminal justice system in England and Wales is underpinned by adversarial principles and, as Robinson asserts, these are particularly ill-suited for dealing with domestic violence.¹⁰ There are a number of difficulties that emerge from this system because of the multi-dimensional nature of domestic violence and the fact that,

⁷ See Chapter Seven for a full discussion of the harm of domestic violence and arguments for how it could more appropriately be conceptualised.

⁸ It will be suggested that case law under this legislation, although intended to look at a 'course of conduct', still ends up focusing on incidents of violence or harassment, and whether they are sufficiently linked to make them a 'course of conduct'.

⁹ Burton: 2008 p. 64

¹⁰ Robinson: forthcoming p. 5

whilst aspects of physical violence are included, the abuse is perhaps best understood as a pattern or programme of behaviours, rather than as discrete and isolated incidents. The criminal justice system's focus on incidents is often in contrast to the lived experience of the victim, who commonly experiences the abuse as a process in everyday life.¹¹

An analysis of the principles of the practical application of liberal political philosophy¹² and the rhetoric of individual liberty will be reserved for Chapter Eight on the partial defences to homicide. However, some further points can serve to illustrate the difficulties with the way in which the criminal law isolates individual incidents of violence from the rest of the abusive context in which they occur. Norrie's critique of the criminal law process reveals that at the heart of modern criminal law exists a 'responsible individual' who is isolated from the real world and the social and moral contexts in which the crime occurs.¹³ However, as will be expanded upon in Chapter Seven, it is only when the context of ongoing abuse is taken into account that seemingly small and trivial incidents can be seen to have a detrimental impact on the victim. As a result of isolating the individual from the context in which the crime occurs, the criminal justice system abstracts the criminal incident from the rest of the defendant's abusive behaviour and actions. The consequence of this is that a cumulative pattern of many small incidents of control, threats and coercion will not be considered and thus a perpetrator may be charged, if at all, with a much lesser offence. The effects of violence over a long period can be taken into account as an aggravating feature when it comes to sentencing, but only where the conduct is proved or accepted,¹⁴ ignoring the difficulty victims often face with disclosing abuse and the fact that it can be very difficult to prove certain types of harm. The perpetrator's 'positive good character' can be a mitigating factor, and whilst the guidelines recognise that 'one of the factors that can allow domestic violence to go unnoticed for lengthy periods is the ability of the perpetrator to have two personae', there must be a 'proven pattern of behaviour' in order for 'an offender's good character in relation to conduct outside the home... [to] be of no relevance'.¹⁵ Again this fails to take into account difficulties of disclosure and proof, especially in relation to certain types of harm. As noted in the

¹¹ Robinson: forthcoming p. 5

¹² See Norrie: 2001 pp. 10-12

¹³ Norrie: 2001 p. 29

¹⁴ Sentencing Guidelines Council: 2006 para 3.14

¹⁵ Sentencing Guidelines Council: 2006 para 3.20

previous chapter, often the first incident that is reported to the police will be following a campaign of abuse stretching over months and years. The sentencing guidelines also allow for provocation by the victim to be a mitigating factor and it is contended that a finding of such is likely to be influenced by the expectations of appropriate feminine behaviour and the expectations of the role of a wife or female partner (explored in Chapter Two). Despite the caveat that provocation will usually involve 'actual or anticipated violence including psychological bullying'¹⁶ it is thought that this could be stretched to include 'nagging', which is often seen to make a woman a 'deserving victim' and to blame for the violence.¹⁷

Another of the obstacles to the criminal law providing sufficient recognition of the harm inflicted by abusive partners results from the fact that so much of the violence is emotional and psychological, with the fear of physical violence based on past experiences operating, typically, as an unspoken threat enabling the abusive partner to maintain power and control. Whilst the definition of 'domestic violence' used by state agencies including criminal justice agencies shows recognition that the phenomenon does not only manifest itself in physical violence,¹⁸ until very recently there has been limited redress for psychological or emotional abuse under the criminal law.

The focus on physical injury and the neglect of psychiatric injury found in the interpretation of the offences under the OAPA has changed to a certain extent recently¹⁹ and the House of Lords has extended bodily harm to include harm to the mind, but only in cases where there is a recognisable psychiatric injury. In *R v Chan Fook*,²⁰ Hobhouse LJ stated that whilst the phrase 'actual bodily harm' is capable of including psychiatric injury, 'it does not include mere emotions such as fear or distress nor panic.'²¹ The reason given for this exclusion is that it is 'likely to create in the minds of the jury the impression that something which is not more than a strong emotion, such as extreme fear or

¹⁶ Sentencing Guidelines Council: 2006 para 3.23

¹⁷ 'Nagging' itself is often the label given to behaviour where the woman is asserting her independence and right to have a say over family arrangements and finances.

¹⁸ The definition adopted by the Home Office in 2003 states that domestic violence is 'Any violence between current and former partners in an intimate relationship, wherever and whenever the violence occurs. The violence may include physical, emotional and financial abuse'.

¹⁹ See the landmark judgement in *R v Ireland; R v Burstow* [1997] 4 All ER 225. This was not a domestic violence case but the courts had to decide whether phone calls could amount to an assault because the defendant was not present in the same room as the victim and therefore arguably could not apprehend immediate force. The House of Lords stretched the definition of immediacy and this has the potential to assist in domestic violence cases where the victim apprehends imminent force but the defendant is not in her physical presence.

²⁰ [1994] 1 WLR 689

²¹ [1994] 1 WLR 689 at para 696

panic, can amount to actual bodily harm'.²² Hobhouse LJ's use of the phrases 'mere emotions' and 'not more than a strong emotion' trivialises responses such as these and, as noted by Munro and Shah in their alternative feminist judgment of this case, there is 'little recognition that emotional suffering, where it is severe in its effects and sustained in its duration, can have serious, harmful consequences'.²³ Following this judgment, Hobhouse LJ has reduced non-physical harm to being 'either psychiatric or 'merely' emotional, with only infliction of the former meriting criminalisation'.²⁴ This judgment is illuminating both in terms of the problematic nature of attempts to apply the existing offences against the person in the context of domestic violence, and also the judicial failure to comprehend the impact that an ongoing programme of abuse may have on a person unless it reaches a medically-recognised threshold.

Therefore, this distinction has continued to prove highly problematic for abused women suffering from the effects of psychological abuse that does not amount to a recognisable psychiatric injury, as demonstrated by the case of *R v Dhaliwal*.²⁵ In this case, the CPS chose to base their case upon the argument that the unlawful act that grounded the manslaughter charge was the inflicting of serious psychological injury on the victim as a result of years of domestic abuse, contrary to Section 20 of the OAPA. The difficulty with this basis for the unlawful act was whether the offence of GBH could be based on non-physical injury. In approving the previous case law²⁶ and reaffirming the requirement for a recognised psychiatric injury, the court in *Dhaliwal* effectively ruled out the impact abuse can have upon a victim when there has not been a formal diagnosis of battered woman's syndrome or post-traumatic stress disorder.²⁷ The psychiatric experts in this case did not find evidence of recognisable psychiatric injury and, despite finding 'some features of depression' that would have impacted on her psychological functioning, the prosecution failed. Burton notes the 'privileging of medical knowledge over a large body of social science research relating to the effects of domestic abuse' and how this is especially problematic given that medical opinion is also uncertain and experts do not always agree.²⁸ Lord Steyn in *R v Ireland; R v Burstow*²⁹ emphasised that the

²² [1994] 1 WLR 689 at para 696

²³ Munro and Shah: 2010 p. 263

²⁴ Munro and Shah: 2010 p. 264

²⁵ [2006] 2 Cr App R 24

²⁶ *R v Chan Fook* [1994] 1 WLR 689 (CA); *R v Ireland; R v Burstow* [1998] AC 147 (HL)

²⁷ Burton: 2010 p. 258

²⁸ Burton: 2010 p. 258

OAPA is a 'living instrument'³⁰ to be interpreted in line with current scientific knowledge but in *Dhaliwal*, despite noting this judgment, he concluded that medical knowledge on the working of the mind was less than complete.

Dhaliwal provided the Court of Appeal with the opportunity to reconceptualise bodily harm in line with the lived experiences of domestic violence victims by recognising that significant psychological symptoms might, in cases where a minimum level of severity is attained, amount to bodily harm despite the lack of a medical diagnosis.³¹ In declining to take this approach, the court can be seen to be reluctant to amend current understandings of harm under the criminal law in a way that would accommodate the impact of ongoing abuse.

This exclusion can be seen to contribute to the view, often held by abused women themselves as well as much of society as a whole, that the effects of abuse are not matters for the criminal law,³² thus perpetuating the sense of shame and self-blame experienced by victims. Through the creation of two new criminal offences, the Protection from Harassment Act 1997 (PHA) opened up new possibilities for criminal prosecutions in cases of intimate partner abuse by enabling the courts to address harassing behaviours without having to wait until psychological or bodily harm is caused, as is the case under the OAPA. The response to domestic abuse found in the new legislation and associated case law is considered below.

The Protection from Harassment Act 1997

The PHA was introduced in 1997 in response to the perceived *inadequacies of the existing law in protecting victims of stalking*.³³ *It creates two new criminal offences – the basic offence of harassment*³⁴ *and the more serious offence of*

²⁹ [1998] AC 147 (HL)

³⁰ *R v Ireland; R v Burstow* [1998] AC 147 (HL) at para 158

³¹ In their feminist judgment of *R v Dhaliwal*, Munro and Shah allow for this approach provided that the psychological harm reaches the threshold level of 'really serious harm' under *DPP v Smith* [1961] 3 WLR 546.

³² Recent studies with abused women suggest that the police are still not always seen as being able to help them and therefore reporting incidents is not necessarily considered to be an option. For example, a respondent in the National Federation of Women's Institutes (NFWI) 2011 study stated 'I never saw the police as an option because I didn't think they could help abused women'. The acceptability of domestic violence is so deeply embedded in society that women often accept it, not recognising it as a crime, and sometimes not even as wrong (<http://www.baringfoundation.org.uk/LegalAidLifeline.pdf>)

³³ Finch: 2002 p. 703

³⁴ Section 2 PHA 1997

*causing fear of violence*³⁵ - and a statutory tort of harassment³⁶ (enabling victims to bring a civil claim at the same time as a criminal case is proceeding against the alleged perpetrator). A court now has the option to attach a restraining order upon conviction of either of these offences,³⁷ effectively giving victims the equivalent of an injunction under the FLA but without the expense of obtaining it.³⁸ The legislation was not intended to be used in relation to domestic violence, but, as will be seen below, cases involving abuse in intimate relationships have been brought under the Act. The legislation *prima facie* appears to indicate that it would be better able to deal with the types of coercive and controlling behaviours that are typical in abusive relationships than the offences against the person. The offence under Section 4 – putting a person in fear that violence will be used against them – seems, at first, likely to be able to better accommodate some of the central elements of domestic violence in a way that the OAPA cannot. This is because it seems able to respond to the reality that the central harm is not necessarily the use of physical violence, but the way in which abuse puts the victim in fear, thus enabling the abusive partner to maintain power and control over them.

Judicial decisions interpreting the Act, however, confound such an analysis. The reason appears to be the continuing misunderstandings of the context and consequences of abusive relationships. The perception of victims as autonomous individuals who remain in or return to the relationship because they freely choose to do so means that judges find it difficult to understand a victim who reports the behaviour of her ex-partner as being contrary to the PHA but remains in the relationship (see the discussion of *R v Hills*³⁹ below). In addition, despite being intended to deal with ‘a course of conduct’ and the Home Office’s report on stalking⁴⁰ recognising that ‘each stalking case is unique and highly personalised, involving an idiosyncratic combination of... a wide range of other diverse types of behaviour’,⁴¹ the judgments lapse back into examination of individual incidents of assault and battery, and whether or not these, in combination, amount to a course of conduct.

³⁵ Section 4 PHA 1997

³⁶ Section 3 PHA 1997

³⁷ Section 5 PHA 1997

³⁸ Burton: 2008 p. 63

³⁹ [2001] 1 FCR 569 at para 12

⁴⁰ See Budd, T. and Mattinson, J., 2000. *The Extent and Nature of Stalking: Findings from the 1998 British Crime Survey* (Home Office Research Study 210, London: HMSO).

⁴¹ Finch: 2002 p. 704

For example, in *DPP v Lau*⁴² there were numerous alleged incidents but only two were proved. Despite the legislation not needing proof of more than two incidents, it was held that the fewer the occasions and the wider they are spread the less likely it would be that a finding of harassment can reasonably be made.⁴³ There are clear difficulties with proving many of the incidents which could be used to demonstrate a course of conduct for the purposes of harassment when they take place in the context of an intimate relationship, typically with no witnesses. Therefore there needs to be recognition that, in a case involving domestic violence, there are likely to be other non-disclosed incidents and that two proved ones should suffice for a conviction. There also needs to be a sufficient nexus between the incidents in order for there to be a course of conduct. In *R v Hills*⁴⁴ this was not found, despite allegations of ongoing abuse between the two proven incidents; 'there was nothing to show that the April matter was more than an unconnected incident.'⁴⁵ It is submitted that if domestic abuse was understood by the judiciary as being programmatic in nature, it would be harder to view two incidents of physical violence occurring in an intimate relationship as isolated and unrelated.

Two of the key cases to date suggest that the judiciary have been reluctant to utilise the offences under the PHA in the context of an on-going relationship between the victim and the alleged perpetrator. In *R. v Hills*⁴⁶ the incidents relied upon to form the basis of the charge under Section 4 were alleged to have occurred between April and October 1999. Allegations of ongoing violence between these dates were discounted for evidential reasons and it was further held that the incidents of physical assault in April and October were unrelated. Lord Justice Otton held that the first incident was unconnected, particularly 'since the parties continued to live with each other through the relevant period, during which time as it had emerged in the earlier rape trial the complainant had made a video of the parties having sexual intercourse together.'⁴⁷ The fact that the victim continued to live with the appellant throughout the period in which she claimed that he put her in fear of violence contrary to Section 4 appears to have influenced the judicial disbelief of the

⁴² [2000] 1 FLR 799

⁴³ [2000] 1 FLR 799 at para 15

⁴⁴ [2001] 1 FCR 569

⁴⁵ [2001] 1 FCR 569, Lord Justice Otton at para 12 (and also see para 13).

⁴⁶ [2010] EWCA Crim 123

⁴⁷ [2010] EWCA Crim 123 at para 12

alleged behaviour between the two incidents. The case of *R v Widdows*⁴⁸ confirms that this approach has not changed in recent years, indicating the assumptions, first, that women freely remain in a relationship characterised by abuse, and, secondly, that the abuse is less serious if it is in the context of a 'long and predominantly affectionate relationship in which both parties persisted and wanted to continue.'⁴⁹ To interpret the legislation from this perspective ignores the dynamics and impacts of ongoing abuse. It also undermines the potential usefulness of the PHA in domestic violence cases in providing a victim with protection⁵⁰ when the relationship is ongoing. In fact, Lord Justice Otton appeared to regard the Act as unsuited to the purpose, stating that the legislation was introduced in the context of stalking, which implies a stranger or estranged spouse.⁵¹ This approach would exclude a course of conduct in the context of the ongoing relationship.

Whether or not the PHA was intended for use within the context of relationships involving abuse and violence, it could have been applied in this way. The use of credible threats and other methods to maintain control over the victim by keeping them in fear of violence or other unwanted events is key to domestic violence. These aspects quite clearly fit with the requirements for a course of unwanted conduct that may not be sinister taken out of context, for example the delivering of flowers or repeated phone calls, but that can take on a more sinister persona in the context of an unwanted or abusive relationship. That the legislation does not seem to have been interpreted in this way displays a lack of judicial comprehension of the dynamics of abusive relationships.

It has been argued that Section 4 of the PHA 'represents a distinct offence focused not on harassment, but on the graver wrong of creating fear of violence.'⁵² Had the legislation been interpreted in this way it could have provided the potential for a case to be brought against a perpetrator of domestic violence who used surveillance, credible threats and intimidation to put the victim in fear of violence. Although this would have still probably been restricted

⁴⁸ [2011] EWCA Crim 1500

⁴⁹ [2011] EWCA Crim 1500 at para 29

⁵⁰ As well as a criminal conviction under either Section 2 or Section 4 of the PHA, the legislation also provides for a restraining order to be attached to the sentence for either of these offences (Section 5).

⁵¹ At para 31 Lord Justice Otton states that 'the state of affairs which was relied upon by the prosecution was miles away from the 'stalking' type of offence for which the Act was intended. That is not to say that it is never appropriate so to charge a person who is making a nuisance of himself to his partner or wife when they have become estranged. However, in a situation such as this, when they were frequently coming back together and intercourse was taking place (apparently a video was taken of them having intercourse) it is unrealistic to think that this fell within the stalking category which either postulates a stranger or an estranged spouse.'

⁵² Ormrod: 2010 p. 639

to fear of *physical* violence being used, it would at least have enabled a case to be brought when fear of violence based on past incidents of physical violence is being used by the abusive partner to maintain power and control.⁵³ However, the approach taken in *R v Curtis*⁵⁴ construes Section 4 in the broader context of the Act,⁵⁵ requiring proof that the course of conduct that puts the victim in fear of violence also amounts to harassment. Although Ormorod asserts that this is only of practical significance 'if there are circumstances in which two or more incidents with a sufficient nexus caused a fear of violence without also being harassing',⁵⁶ it is submitted that without an understanding of the dynamics and context of the abuse, conduct not deemed 'harassing' may still be capable of creating fear in the victim, in the context of the relationship. It is also contended that the 'fear of violence' required for a Section 4 offence is too limited due to the requirement that the victim is afraid that violence *will* be used. In *R v Henley*⁵⁷ Lord Justice Pill emphasised in his judgment that for the offence under section 4 a course of conduct that caused a generalised state of fearfulness, or a fear for the safety of others, could not suffice.⁵⁸ There would therefore need to be two specific incidents which directly caused the victim to fear violence. Hence it is not enough that the victim is seriously frightened of what might happen or frightened that violence will be used against members of her family. This means that much of the behaviours and techniques of domestic violence would be excluded, unless the victim could prove she was afraid that violence would be used against her at that particular time. Also findings by magistrates and juries that a reasonable person⁵⁹ would have realised that someone would be put in fear of violence may be shaped by their existing preconceptions.

Following a Parliamentary inquiry in early 2012 which found that the PFA was 'not an effective tool against stalking',⁶⁰ two new specific offences of stalking were added to the PHA under the Protection of Freedoms Act 2012 (PoF). These were stalking and stalking involving fear of violence or serious

⁵³ Kelly and Johnson: 2008 p. 481

⁵⁴ [2010] EWCA Crim 123

⁵⁵ Ormorod: 2010 p. 639

⁵⁶ Ormorod: 2010 p. 639

⁵⁷ [2000] Crim.L.R. 582

⁵⁸ [2000] Crim LR 582

⁵⁹ To be convicted the defendant must either know or ought to know that his course of conduct will cause another to fear violence on each of the occasions. The defendant can be convicted if any 'reasonable person' in possession of the same information would have known that such conduct would put a person in fear of violence (Section 4(2)).

⁶⁰ Independent Parliamentary Inquiry into Stalking Law Reform: 2012 p. 2, available at <http://www.protectionagainststalking.org/InquiryReportFinal.pdf>

alarm or distress.⁶¹ However, it seems unlikely that this will increase the legal protection available for victims of domestic violence under the criminal law.⁶²

Part Two

The Police, Crown Prosecution Service and Criminal Court Response

The Police Response

It seems that earlier problems with the police response such as women being viewed as 'fickle' when they withdraw their complaints, rather than afraid of further violence,⁶³ and a reluctance to become involved in domestic violence⁶⁴ or record it as a crime,⁶⁵ continue to be major reasons for police refusing to arrest offenders.⁶⁶ This perception betrays a misunderstanding of the real reasons women withdraw their complaints; fear of retaliation from the perpetrator or his family, shame, lack of financial resources, still wanting some kind of relationship with the perpetrator, the involvement of children.⁶⁷ Robinson suggests that some of the reasons for not proceeding with a case emanate from the ways victims interpret and handle risks in their everyday lives, and some are shaped by perceptions of the criminal justice process.⁶⁸ It is thus perhaps inappropriate to use arrests and prosecutions as performance indicators because victims may still benefit from police involvement even in the absence of arrest or prosecution.⁶⁹ However, evidence also suggests that women are less

⁶¹ Section 111 Protection of Freedom Act 2012 added Section 2A (offence of stalking) after Section 2 of the Protection from Harassment Act 1997, and Section 4A (offence of stalking involving fear of violence or serious alarm or distress) after Section 4 of the Protection from Harassment Act.

⁶² The maximum penalty under Section 4A where there is fear of violence remains at 5 years – the same as under the original Act – which indicates a continuing failure to understand the serious impact of offences such as these – the harm caused can be years of mental and emotional distress for women living in fear for the safety of themselves and their children. This is not reflected at all by the severity of the sentence that can be imposed under the new legislation. It is also questionable whether the new offence under Section 2A extends the law in any meaningful way because, as one solicitor comments '[g]iven that an offence of harassment *and* an offence of stalking are likely to be founded upon the same factual basis, namely that the behaviour associated with a *course of conduct* for the purposes of harassment would arguably be analogous to *acts or omissions* for the purposes of stalking, one may ask why the prosecution would seek to proceed with a stalking charge when a harassment charge would be easier to prove... Additionally, given that the maximum sentence for a Section 2A and 2 offence are identical (6 months) this may further beg that question of why the additional offence of stalking is needed' (<http://www.9parkplace.co.uk/news-and-events/2012/12/10/stalking-a-new-offence-or-another-form-of-harassment/>)

⁶³ Edwards: 1989 p. 104

⁶⁴ Bourlet: 1990 p. 74

⁶⁵ A study conducted by Edwards (1989) found great police reluctance to record domestic violence as a crime and a high proportion of incidents were 'no crimed' at this time. Some of this reluctance she attributed to police stereotypes about domestic violence and 'private attitudes regarding appropriate sex-roles, appropriate conduct and family ideologies (Edwards: 1989 p. 91).

⁶⁶ See HMCPSI and HMIC: 2004 p. 6

⁶⁷ See Hester et al: 2003, Gill: 2004

⁶⁸ Robinson: 2006 p. 192

⁶⁹ Robinson: 2006 p. 208

willing to withdraw when they feel the police are committed to investigating and taking the crime seriously and are more prepared to give statements when there is photographic evidence.⁷⁰

The most recent major review of the policing of domestic violence, conducted in 2004 by HMCPSI and HMIC, recognised that ‘tremendous efforts’ had been made to overturn stereotypes but that policies and rhetoric are not matched on the ground by effective responses and solid investigative practice.⁷¹ The report also confirmed the gap between specialist and generalist policing in terms of domestic violence, finding that ‘[w]hilst all officers... were clear about the fact that domestic violence was a priority within their force... with the exception of specialist officers, few had any real understandings of the dynamics of domestic violence.’⁷² There is also worrying evidence of domestic violence incidents still being recorded as ‘no crimes’ when they should not have been.⁷³ Considering that many of the behaviours commonly engaged in by domestic violence perpetrators are deemed to be ‘sub-criminal’ as a result of the conceptualisation of harm under the criminal law and the focus on physical violence, it is particularly important that when incidents can be recorded as crimes that they are.

One of the new measures introduced by the DVCVA, making common assault an arrestable offence,⁷⁴ was seen by the police as a step towards a wider approach to dealing with domestic violence; the power of arrest added clarity and clout to their already existing powers, and victims also supported the measures because the perpetrator could be removed from the situation and given chance to “sober up” or “calm down”.⁷⁵ However, this finding is at odds with anecdotal evidence suggesting that temporary removal from the home after arrest can make the perpetrator even angrier and therefore more likely to inflict serious injury on return.

A recent study indicated poor experiences of police responses, for example an incident occurring after a woman had left her abusive partner where the abuser had broken her car windscreen, slashed the tyres, locked their child in the car, and shouted and screamed at her, being met with the police

⁷⁰ Harne and Radford: 2008 p. 131

⁷¹ HMCPSI and HMIC: 2004 p. 6

⁷² HMCPSI and HMIC: 2004 p. 33

⁷³ The joint review of policing and CPS practice(HMCPSI and HMIC: 2004) by government inspectorates examined 463 files of domestic violence incidents to which police were called and found only one fifth were recorded as crimes when 56% should have been.

response of 'It's all very recent, it's all very raw, you know, that's what happens when people split up.'⁷⁶ This indicates a lack of awareness of the complexities, power dynamics and methods of intimidation found in domestic violence. However, other studies⁷⁷ have found increasing satisfaction with police practice, suggesting their approach is improving in terms of how they respond to the victim and what action they take, but less with the Crown Prosecution Service (CPS) and the criminal courts,⁷⁸ aspects of which will be examined next.

The Crown Prosecution Service Response

The CPS now promotes a policy of effective evidence gathering by the police and the use of alternative evidence such as photographs of the scene and the victim's injuries, evidence from police officers and other witnesses and written statements from the victim.⁷⁹ This is definitely preferable to compelling the victim to testify which can be a very traumatic experience for domestic violence victims. However, the CPS policy statement does highlight that 'where the victim is the only witness to the offence, it is very difficult to satisfy the court that justice is being served when the defence cannot cross-examine the only witnesses against them.'⁸⁰ This probably contributes to their decision not to continue a prosecution. The Crown might take a rather different position if Parliament implements a provision which would enable courts (in addition to imposing restraining orders when sentencing any offence under the PHA⁸¹) to impose a restraining order on acquittal for any violent offence,⁸² for example when there is insufficient evidence to secure a conviction. In an assessment by Hester et al, this provision was singled out by advocates, barristers and other legal professionals as the measure that could potentially have a large and positive impact on how domestic violence cases are dealt with and one Advocacy Service Manager stated 'it's another proactive step that could be taken and another sanction that could be used that saves the woman having to

⁷⁶ Respondent in NFWI Research: October 2011 p. 27

⁷⁷ Hester et al: 2003, Hester and Westmarland: 2005

⁷⁸ Hester et al: 2003, Hester and Westmarland: 2005

⁷⁹ Burton: 2008 p. 98

⁸⁰ CPS: 2005 para 40.20

⁸¹ Section 5(1) Protection from Harassment Act 1997

⁸² Section 12 Domestic Violence, Crime and Victims Act (amends PHA Section 5).

go somewhere else and do it all over again...'⁸³. The implication of this would be that the prosecution of a case could be justified even where a conviction is unlikely. This would be a radical step, but one that could be very useful in protecting victims when a prosecution does not result in a conviction for evidential reasons. It would also, perhaps, enable the police and the Crown to see their role as being to protect victims, rather than simply to secure conviction and inflict punishment.

The CPS policy statement in *The Prosecution of Domestic Violence Cases* (last revised in 2005) deals with the public interest tests⁸⁴ and here there is an inconsistency between the policy (it is the victim's *interests*, not wishes, that are to be weighed in determining whether prosecution is in the public interest) and the practice (where it was found the victim's wishes appeared to determine whether prosecution occurred).⁸⁵ Research also indicates that the reduction in severity of charge, discussed above, is still more likely to happen in domestic violence cases than in cases involving other types of violence. A 2006 study by Cammiss found that in a sample of 100 cases, 17 of which were domestic violence cases, domestic violence cases were deemed suitable for summary trial in 76% of cases, compared to 43% of cases overall.⁸⁶ Interviews conducted with victims of domestic violence who had experienced the criminal justice system found that 'they were generally bewildered and shocked by the plea-bargaining and reduction of sentences that tended to take place in court'.⁸⁷ These difficulties with prosecution are reflective of the general inability of the criminal justice system to conceptualise domestic violence appropriately and in a way that meets with the need and expectations of the victim. In many cases the failure to prosecute may not be due to indifference or ignorance but due to concern as to how the outcome would impact upon victims. For example, if a witness is in fear, her initial – and probably oral – statement to the attending officer or a bystander could be used as hearsay evidence and a conviction sustained upon that. However, the dilemma is whether to go against her wishes to proceed with a prosecution if she either refuses to make a written statement or withdraws the one she did make. The CPS have been urged to prosecute

⁸³ Hester et al: 2008 pp. 30-1

⁸⁴ It is the public interest test that determines whether a prosecution goes ahead despite the victim withdrawing their complaint.

⁸⁵ Joint Inspectorates (HMCPSP and HMIC) research findings of 1998, echoed in their findings of 2004.

⁸⁶ Cammiss: 2006 p. 709

⁸⁷ Hester, Hanmer, Coulson, Morahan and Razak: 2003 p. 13

domestic violence cases but they have to consider both the likelihood of a conviction and whether the victim will suffer further abuse because of their decision.

The recent case of *R v A*⁸⁸ found a victim of domestic violence convicted for perverting the course of justice when she withdrew a complaint of domestic violence against her husband. Whilst the initial prison sentence was quashed on appeal and substituted with a community sentence and supervision order, ‘the conviction for perverting the course of justice following the retraction of a truthful allegation because of fear and pressure still stands.’⁸⁹ This case reaffirms the inappropriateness of prosecuting a domestic violence victim for withdrawing an allegation, where that withdrawal was motivated by fear of further abuse and pressure. In deciding to prosecute, the CPS demonstrated a worrying lack of understanding of ‘the complexity of pressure for a victim of rape and domestic violence, and the difficulty she has in describing her coercion in precise legal niceties.’⁹⁰ Even though The Court of Appeal accepted that the original sentence was excessive, arguments relating to the pressure that the victim was under were only deemed relevant in terms of mitigation of sentence. The Lord Chief Justice of England and Wales rejected the defence’s claim of duress, emphasising the importance of not further eroding the limitations of the doctrine.⁹¹ Despite reference to the plight of domestic violence victims and the coercion they are often placed under, he asserted that this is pressure, not duress which ‘involves pressure which arises in extreme circumstances, the threat of death or serious injury [including rape] which cannot reasonably be evaded.’⁹² Whilst it is understandable that the court felt unable to apply the defence of duress to the circumstances of this case,⁹³ it is concerning that the CPS decided to prosecute, given that someone who retracts a truthful statement because of fear is not usually proceeded against. The CPS guidance states that ‘there may be credible reasons why a complainant of rape or domestic violence may retract a truthful allegation and prosecutors will need to

⁸⁸ [2012] EWCA Crim 434

⁸⁹ Edwards: 2012 p. 141

⁹⁰ Edwards: 2012 p. 147

⁹¹ [2012] EWCA Crim 434 at para 62, referring to *R v Hasan* [2005] 2 AC 467

⁹² [2012] EWCA Crim 434 at para 63

⁹³ For a discussion of the situation of women exposed to domestic violence in the context of the law on duress see Janet Loveless, Domestic Violence, Coercion and Duress [2010] CLR 93. Kuennen: 2007 also highlights the difficulty with judges presuming that if a victim drops a charge it is involuntary and discusses issues of victim autonomy. She concludes that policy makers must recognise the practical and conceptual difficulties the courts would

ensure that the reasons for the retraction are fully explored and understood.⁹⁴ This seems not to have happened in this case, perhaps indicating a lack of case management and a lack of understanding of domestic violence within the organisation.⁹⁵ The decision to prosecute in this case belies a continuing lack of understanding of the fear that domestic violence victims often experience.

Sentencing and the Criminal Court Response

The new sentencing guidelines on domestic violence introduced in 2006 can be seen as another missed opportunity to show that domestic violence is something to be taken seriously and that sentences need to take into account the need for victim protection.⁹⁶ For example the need for a 'previous pattern' of offences that the perpetrator has been convicted or cautioned over means that a domestic violence offender convicted of GBH may get a non-custodial sentence despite there being a considerable history of violence towards their partner.⁹⁷ Yet a woman is assaulted an average of 35 times before she first contacts the police.⁹⁸ Additionally, incidents of violence typically occur against a background of on-going control and intimidation, meaning the severity of the abuse and the risk to the woman cannot be assessed by looking at the previous convictions of the perpetrator for incidents of physical violence alone.

Rape is an integral part of the overall picture of intimate abuse. The new sentencing guidelines issued by the Court of Appeal in *R v Millberry*⁹⁹ state that the starting point for sentencing stranger and non-stranger rape should be the same but Burton expresses concern over elements of the judgement because they create the potential for 'negative and outmoded attitudes to continue to play a significant role in judicial responses to marital and relationship rape'.¹⁰⁰ For example the suggestion that mitigating factors may apply when the offender is married to the victim that would not apply to stranger rape, and the idea that during 'stranger rape' the victim's fear may be increased because her offender

⁹⁴ CPS guidance on Perverting the Course of Justice - Charging in cases involving rape and/or domestic violence allegations found at

http://www.cps.gov.uk/legal/p_to_r/perverting_the_course_of_justice_-_rape_and_dv_allegations/

⁹⁵ Edwards: 2012 p. 148

⁹⁶ Harne and Radford: 2008 p. 140

⁹⁷ Harne and Radford: 2008 pp. 140-1. In addition it is important to note that 76% of all domestic violence involves repeated incidents (Flatley, Kershaw, Smith, Chaplin and Moon: 2010 p. 24).

⁹⁸ Wykes and Welsh: 2009 p. 2

⁹⁹ [2003] 1 WLR 546

¹⁰⁰ Burton: 2008 p. 70

is an 'unknown quantity.'¹⁰¹ This overlooks research on marital rape which suggests that victims are equally fearful because they do not know where their husband or partner will stop¹⁰² (as well as the huge betrayal of trust that results from being raped by an intimate). Circumstances that might amount to mitigation under the Milberry guidelines included the existence of a continuing close relationship, where the victim and offender are regularly sharing a bed, or the offender failed to show the restraint he should have because both parties had been drinking. It was held that it would be contrary to common sense to treat such a category of rape as equivalent to stranger rape. This allows mitigation for intoxication which would not be relevant for stranger rape and endorses the view that rapists are simply unable to control sexual urges,¹⁰³ ignoring the reality that rape is an expression of power. Subsequent case law seems to suggest that these concerns were justified.¹⁰⁴

The way that the criminal law abstracts and isolates incidents leads to a failure to comprehend the link between domestic violence and sexual violence or that rape in marriage is rarely an isolated incident. The perception that the rapist cannot control his sexual desires misunderstands the rapist's motives and ignores the reality that rape is an expression of power and a method of gaining control over the victim.¹⁰⁵ An example of this misunderstanding is provided by a 2006 case¹⁰⁶ where the prosecution had a 999 tape of the defendant raping his wife (an event she claimed had occurred once a week since the parties separated two years previously) and the first instance judge passed a two and a half year sentence remarking that the tape was 'troubling listening' with the victim crying out in pain and begging him to stop. The disturbing part of the judgement is the remark 'in your case it was not pure lust because you did have a genuine affection for your wife and even when this sexual act was over you asked her to give you a cuddle and then you told her that you loved her.'¹⁰⁷ As Burton emphasises, '[t]o view the events as 'sex' motivated by love, belies the

¹⁰¹ Lord Woolf CJ in *R v Millberry* [2003] 1 WLR 546 at para 13

¹⁰² Rumney: 2003 p. 874

¹⁰³ Rumney: 2003 pp. 878-9

¹⁰⁴ See *R v Price* [2003] 2 Cr App R (S) 73 where a starting point of 3 years for rape was approved rather than a starting point of 5 years which should follow from the Millberry guidelines stating that the starting point for marital rape should be the same as the starting point for stranger rape, and *R v E (Keith)* [2005] 1 Cr App R (S) 59 where there were no mitigating factors but the court made dubious comments about the intoxication of the defendant and the absence of sufficient violence with attendant injuries (the bruises were 'relatively slight' compared with other cases) seems to have been treated as a mitigating factor, rather than as an absence of aggravating factors.

¹⁰⁵ Burton: 2008 p. 70

¹⁰⁶ *R v F (Davis Nigel)* [2006] EWCA Crim 2305

¹⁰⁷ Lord Justice Hooper in *R v F (Davis Nigel)* [2006] EWCA Crim 2305 at para 12

real exploitation of power and control evident in this case¹⁰⁸ (the victim was a disabled woman suffering from agoraphobia and thus effectively imprisoned in her home).

The first specialist domestic violence court was set up in Leeds in 1999 and there are now around 50 throughout the country. These are specialist magistrates courts where training on domestic violence for key personnel (CPS lawyers, domestic violence officers, magistrates and clerks) is provided and there is an emphasis on improved sharing of information between the key agencies, with a key aspect being advocacy, provided by Independent Domestic Violence Advisors (IDVAs). The introduction of IDVAs has resulted in a successful outcome (if success is measured by the securing of a conviction) in 73% of the domestic violence cases where an IDVA was present. Early evaluations of their effectiveness is encouraging, with an increase shown in conviction rates, fewer victim withdrawals and more guilty pleas.¹⁰⁹ However, victim satisfaction with the new courts has been found to be mixed and there still seems to be wide variation in practice with a concerning lack of communication between the CPS and victims. In particular, the sentencing of those convicted has been found to be worrying and this is what victims have been most dissatisfied with; they expected to be provided with immediate protection which was not usually the case and they therefore felt the courts had failed them.¹¹⁰ This finding has been reflected in other studies,¹¹¹ leading some victims to question whether it is worth going through the criminal justice process at all. It remains to be seen whether the response and sentencing outcomes provided by the specialist courts has improved in recent years. These concerns echo those above in relation to the police response; the legal approach seems to fail to address the victims' priorities and thus disappoints their expectations.

Alongside this, research into perpetrator programmes which are often ordered following a conviction for domestic violence reveals that they can be more detrimental than beneficial because they allow groups of abusive men to interact. This may result in the promotion of misogyny and negative attitudes towards women, and may actually encourage men to continue engaging in

¹⁰⁸ Burton: 2008 p. 73

¹⁰⁹ Cook et al: 2004 *Evaluation of Specialist Domestic Violence Courts/Fast-track systems*. CPS Policy Directorate (<http://www.cps.gov.uk/publications/docs/specialistdvcourts.pdf>)

¹¹⁰ Cook et al: 2004 *Evaluation of Specialist Domestic Violence Courts/Fast-track systems*. CPS Policy Directorate (<http://www.cps.gov.uk/publications/docs/specialistdvcourts.pdf>).

¹¹¹ See Hester et al: 2003 and Hester and Westmarland: 2005

violence, thus increasing the risk the victim is under.¹¹² When attendance is court-mandated instead of a custodial sentence the programme may be seen as a 'soft option,' thus failing to emphasise that the abusers behaviour is wrong.¹¹³ There is also little evidence that they are successful, especially when attendance is mandatory, and because the abuser only needs to attend there is no assessment of any resulting changes in his behaviour.¹¹⁴ According to Mullender and Burton 'there has been insufficient and insufficiently rigorous monitoring of perpetrators' programmes' and 'much of the practice-based literature makes over-stated, impressionistic claims for success.'¹¹⁵

Part Three

Failure to Protect Policies under the Domestic Violence, Crime and Victims Act 2004

One of the most recent ways that the criminal law can be seen to fail to adequately comprehend the power dynamics and complexities of domestic violence is the devastating impact that the operation of Section 5 of the DVCVA 2004 has had on some victims of abuse. The section effectively creates the offence of 'allowing the death of a child or vulnerable adult' with the intention of overcoming the difficulty of proving which of two individuals residing in a house with a child at the time of a killing caused the death. Where a parent misjudges the seriousness of the risk posed by their abusive partner, or does not summon help 'due to an overarching fear that this could precipitate further violence,'¹¹⁶ there is a risk that the bereaved parent could be imprisoned for up to 14 years under the legislation. It is up to the prosecution to prove beyond reasonable doubt that the parent was, or ought to have been, aware¹¹⁷ of the risk of death or serious physical¹¹⁸ harm and failed to take reasonable steps¹¹⁹ to vitiate the danger. 'Reasonable steps' are thought to include as full a combination of the following as possible; reporting incidents of domestic violence to the police immediately, making applications for injunctions under the FLA 1996, reporting

¹¹² Bennett and Williams: 1999 p. 241

¹¹³ Hague and Malos: 2005 p. 194

¹¹⁴ Becker: 2003 p. 86

¹¹⁵ Mullender and Burton: 2001 p. 75

¹¹⁶ Vallance-Webb: 2008 p. 454

¹¹⁷ Section 5(1)(d)(i) DVCVA 2004

¹¹⁸ Section 5(1)(c) DVCVA 2004

¹¹⁹ Section 5(1)(d)(ii) DVCVA 2004

any breaches of civil protection orders granted immediately to the police, notifying the local authority of any risk to the child, a planned escape to a women's refuge.¹²⁰ All of these things may be both difficult to obtain and may exacerbate the abuse.

In the first reported case under the new legislation, *R v Stephens and Mujuru*¹²¹ Sandra Mujuru – a young asylum seeker escaping violence in Zimbabwe – was convicted of ‘allowing’ her partner to murder her 4 year old child from a previous relationship. She was sentenced to a two year community order, although while awaiting trial she served more than a year in jail. The prosecution contended that Miss Mujuru was aware that her partner had been responsible for hurting her daughter (A) in the past¹²² and was therefore aware that he posed a significant risk of serious physical harm to A. She then failed to take steps that could reasonably have been expected to be taken to prevent the death. In this case the Court of Appeal gave weight to the unusual fact that she may not have fully appreciated how to go about accessing local protection services in England. From this can be inferred that, had the mother been familiar with local protection services in England, her 2–year community sentence could have been drastically more severe. We have seen above that women who report violence will not necessarily receive a fast and supportive response from the criminal justice system or other helping agencies. It was apparently sufficient for a conviction under Section 5(1)(d)(i) and (iii) of the DVCVA that the mother had known her partner to be a domestic abuser, albeit that he had not previously shown any inclination to violence of this magnitude, nor had he previously abused the child blatantly.¹²³ In a case with similar facts, Rebecca Lewis,¹²⁴ despite being absent when her baby was killed, was also convicted under Section 5 and sentenced to 6 years in prison. The jury must have found that because she knew that her partner of 6 weeks had flicked the baby’s ears and feet when he cried, picked him up by his ears and ankles, and thrown him onto a bed that she was aware, or ought to have been aware, that there was a risk of death or serious harm. The fact that she did not summon

¹²⁰ Vallance-Webb: 2008 p. 455

¹²¹ [2007] EWCA Crim 1249

¹²² In the 6 months preceding the child's death, the mother had noticed a scratch to the child's cheeks, a small bruise and a small split to her lip, but the father had explained these away as minor feeding accidents. [2007] EWCA Crim 1249 at para 3.

¹²³ Vallance-Webb: 2008 p. 455

¹²⁴ *R v Lewis (Rebecca)* (Unreported, 2006) (Crown Court, Swansea). *Mirror*, “My Beautiful Boy was Murdered by his Mum’s Evil Lover”, November 13 2006

help because he said he would kill her if she left was not taken into consideration.¹²⁵

It seems entirely 'inappropriate to charge a defendant with failing to protect when they are a victim of domestic violence at the hands of the person who goes on to kill the child.'¹²⁶ The fact that there is not a specific defence for victims of domestic violence so that no or little blame is attributed to them shows how far the effect of the law's failure to understand intimate abuse extends. Herring points out that because victims often regard their own behaviour as the cause of the abuse they often believe that if they can somehow modify their behaviour, they will be able to keep themselves and their children safe.¹²⁷ As the violence is typically used by the man as a method of gaining power and control over the woman, an abused woman seen to be asserting her independence by challenging the authority of the abuser, either by intervening to protect her child by alerting the relevant authorities or restricting contact between the abuser and the child, can find herself and her children in a very dangerous situation. A study by Humphreys and Thiara indicates that the reality of post-separation violence means that it can be more dangerous for a woman to leave than to remain with an abuser.¹²⁸ An abused woman 'may well decide that for herself and her children the violence to which she has become accustomed is safer than the violence that may be provoked by an attempt to leave or seek assistance'.¹²⁹ This assessment is probably not wrong given the reality of post-separation violence and the fact that a woman is most likely to suffer a fatal attack at the point of separation.¹³⁰ The state perspective is completely misplaced in imposing obligations on victims of domestic abuse if it does not succeed in ensuring assistance is in place to enable women to protect their children. In demanding that a woman leaves, regardless of the risk this may pose to her and the children, legal responses can be seen to contribute to the vulnerability of the children involved in abusive relationships.

Policies that 'ask the impossible of mothers'¹³¹ render the abuser invisible by focusing on the mother¹³² and can be seen to reflect a 'glorification

¹²⁵ Herring: 2007 p. 926

¹²⁶ Herring: 2007 p. 928

¹²⁷ Herring: 2007 p. 928

¹²⁸ Humphreys and Thiara: 2003

¹²⁹ Herring: 2007 p. 928

¹³⁰ Wilson and Daly: 1992

¹³¹ This is a term used by Strega and Janzen: 2013

of motherhood'.¹³³ The implication of FTP policies is that women are neglectful, even abusive, because their actions/inactions in response to violence inflicted on them either directly harmed their children or placed them at a risk of harm.¹³⁴ Child protection authorities in most jurisdictions respond to situations of intimate abuse where children are involved¹³⁵ by engaging primarily or solely with victimised women;¹³⁶ male perpetrators of violence are typically ignored, even when they are fathers or father figures, thus absolving them from the responsibility of protecting their children.¹³⁷ These 'gendered practices inappropriately transform women who are intimate partner violence victims into child abusers while exculpating and absenting the actual perpetrators of violence'.¹³⁸ Strega and Janzen identify the most dangerous implication of FTP policies as their expectation that 'women can, and hence should, control men's violence'.¹³⁹ While this may seem 'absurd', it accords with persistent and widespread beliefs about women's responsibility for male violence.¹⁴⁰

Research has shown that mothers frequently take action to safeguard their children from the effects of violence,¹⁴¹ and yet the ways abused mothers seek to protect their children are often overlooked.¹⁴² To be seen as acting protectively by child support agencies, women are required to monitor and manage the behaviour of violent men and reduce the consequences of the violence.¹⁴³ The frequent requirement of child protection services that mothers control violent men's access to their children is often in direct contradiction of family court orders requiring women to facilitate contact, and again demonstrates a failure of the law to adequately comprehend the problem and a failure of the various state agencies to work together in addressing it. Women have been imprisoned and threatened with the loss of their children through child protection services proceedings when they refused to facilitate their

¹³² Herring provides examples of newspaper headlines which attribute all the blame to the mother for 'allowing' her baby or child to be killed: 'Woman lets boyfriend kill her baby' (BBC News Online 11/04/06) and 'Mother allowed baby son's murder' (BBC News Online 13/03/07)

¹³³ Herring: 2007 p. 932

¹³⁴ Strega and Janzen: 2013 p. 53

¹³⁵ The definition of the categories of child abuse and vulnerabilities in the Children Act 1989 was expanded in 2002 to include reference to failure to protect children from exposure to any form of danger, clearing the way for CPS intervention in cases of intimate partner abuse (Strega and Janzen: 2013 p. 51) and witnessing domestic violence is now seen as a form of emotional abuse in the Home Office policy document *Working Together to Safeguard Children* (DCSF 2010).

¹³⁶ Strega and Janzen: 2013 p. 53

¹³⁷ Strega and Janzen: 2013 pp. 49-53

¹³⁸ Strega and Janzen: 2013 p. 55

¹³⁹ Strega and Janzen: 2013 p. 53

¹⁴⁰ See Howe: 2008

¹⁴¹ Strega and Janzen: 2013 p. 55

¹⁴² Herring: 2007 p. 930

¹⁴³ Strega and Janzen: 2013 p. 55

children's contact with a violent partner.¹⁴⁴ As Bancroft has stated, a woman in 'an abusive relationship is criticised for continuing to live with an abusive man, and child protection officials can take the children away from her for 'failure to protect'. However when an abused woman leaves an abusive relationship suddenly she is punished by court personnel for being reluctant to expose her children to the same man.'¹⁴⁵ One of the obstacles identified by Strega is that there is now a 'moral panic' about children's exposure to domestic violence,¹⁴⁶ but instead of making *perpetrating* violence in front of children the focus, the attention remains on the mother for allowing the abuse to occur in front of her children.¹⁴⁷ A number of assumptions, then, are inherent in the operation of S. 5 DVCVA and FTP policies more generally; first that the woman has some control over the violence, secondly that reporting the violence or leaving will reduce it and that the criminal justice system provides fast and supportive responses for women who choose to report violence.¹⁴⁸ The reality is very different. Post-separation violence means that defining a good mother as a mother who leaves¹⁴⁹ and working on the assumption that women have the 'choice' to leave in order to protect themselves and their children is yet another way the law fails to take into account the realities and complexities of intimate partner abuse.

Conclusion

A general theme can be seen to be emerging of good intentions within the criminal justice response being thwarted due to continued naiveté about domestic violence. As was seen in Part One, the ability of the criminal justice system to respond to domestic violence appropriately is hampered due to only being able to criminalise behaviour on a model founded upon stranger violence. The dynamics resulting from the intimate nature of the abuse are not able to be fully conceptualised and the judiciary are seen to struggle to comprehend

¹⁴⁴ Women's Aid Federation: 2002

¹⁴⁵ Bancroft: 2002 quoted in a presentation given by SEEDS Devon at the ADVA (Against Domestic Violence and Abuse) Partnership Presentations Day, 12 December 2012 entitled: 'The Impact of the Co-operative Parenting Bill upon Post-separation Domestic Abuse in the Family Courts'

¹⁴⁶ The definition of the categories of child abuse and vulnerabilities in the Children Act 1989 was expanded in 2002 to include reference to failure to protect children from exposure to any form of danger, clearing the way for CPS intervention in cases of intimate partner abuse (Humphreys and Stanley: 2006 referred to by Strega and Janzen: 2013 p. 51) and witnessing domestic violence is now seen as a form of emotional abuse in the Home Office policy document *Working Together to Safeguard Children* (DCSF 2010).

¹⁴⁷ Susan Strega – Gendered Violence conference proceedings, Bristol, November 2011.

¹⁴⁸ Strega and Janzen: 2013 p. 57

¹⁴⁹ Strega and Janzen: 2013 p. 57

violence and abuse in the context of a relationship in some of the cases under the PHA. The prevalence of stranger violence within criminal law understandings, alongside a failure to comprehend the additional complexities of domestic violence, has led to a focus on the need for bodily harm, unless a recognised psychiatric injury can be proved – as seen in *Chan Fook*, ‘mere’ emotions such as fear are not enough. It was also seen that the criminal law process focuses on single incidents and isolates conduct from its broader social context. This is seen in the cases under the OAPA and the PHA, despite the latter being introduced to provide an offence relating to a ‘course of conduct’. The cumulative impact of the abuse is not able to be taken sufficiently into account.

It seems, therefore, that the impact of the abuse on the victim, especially her fear and the coercion she is usually under are misunderstood to some extent at least by all the criminal justice agencies. This is particularly evident in relation to the discussion of the convictions of abused women under the DVCVA. There is also the continuing perception that women who report abuse receive a fast and effective response to the abuse and that it is safe for them to leave if they choose to do so. This results in the misconception that women would exit the relationship if they wanted to. This will be revealed to be an incorrect assumption in the analysis of the dynamics and impact of the abuse in the following chapter. It is contended that it is partly the failure to recognise the role of domestic violence in sustaining male dominance within a patriarchal state that leads to this focus on incidents of physical violence. Until the root causes and purpose of domestic violence are acknowledged, the violence can be seen as angry outbursts resulting from individual stresses and frustrations. The next chapter will develop the argument that once it is understood that domestic violence is functional, it becomes clear that it is best understood as a programme of coercive control designed to control and dominate the victim, thus challenging the traditional focus on isolated incidents of mainly physical violence.

CHAPTER SEVEN

THE LIMITATIONS OF A LEGAL FOCUS ON PHYSICAL VIOLENCE

In the previous chapters the argument was developed that domestic violence is embedded in the key institutions of society and is therefore primarily a social problem, not one caused by the deviancy of particular individuals or relationship dynamics. It was argued that one of its root causes is gender-role stereotypes and the expectations placed upon males and females to behave in certain ways and adopt certain roles – particularly within the institution of the family – that are necessary to sustain a patriarchal society. The analysis of the legal responses to domestic violence in England and Wales further revealed that the responses not only overlook its root causes, they also focus primarily on physical violence when assessing both the existence and the severity of this violence. Chapter Six concluded by suggesting that this focus on physical violence could be explained by a failure to see the functional nature of domestic violence as a method of establishing male power and domination over the victim.

One explanation for the difficulties found within the legal responses to domestic violence is that legal academic literature has not employed the insights developed in some sociological and social-psychological literature to examine the underlying conceptual question of what ‘counts’ as domestic violence.¹ In engaging with these insights, this chapter will attempt to develop an alternative conception of the dynamics and harm of abusive relationships in order to highlight the limitations of the legal focus on physical violence as their defining feature. It will be claimed that this focus is misplaced; the dynamics of abusive relationships can best be understood as a range of coercive and controlling strategies used to maintain power over the victim, with physical violence being merely one tool to establish this. When this is not understood, the victim of abuse becomes identified with the ‘battered woman’,² leaving many victims unidentified and unprotected because their experience is not recognised as domestic violence.

¹ Madden Dempsey: 2005 pp. 304-5

² This is the term first used by Walker in 1979 (*The Battered Woman*, New York: Harper and Row) and in 1984 (*The Battered Woman Syndrome*, New York: Springer). It was retained in her revised 2009 edition (*The Battered Woman Syndrome* 3rd ed. New York: Springer Publishing Company). See also Lord Denning in *Davis v Johnson* where he clearly associates domestic violence with physical violence by referring to the victim as a ‘battered wife’ ([1979]AC 264 at para 271-2).

Part One will demonstrate that much of the sociological and psychological literature on domestic violence that has influenced the legal responses continues to perpetuate the focus on domestic violence as incidents of mainly physical violence. In particular this can be found in the foundational studies by Lenore Walker,³ which, despite revisions, continue to identify abusers as ‘batterers’ and victims as ‘battered women’.⁴ An alternative conception of domestic violence will then be presented in Part Two, where the dynamics of domestic violence will be shown to be best understood as a range of methods aimed to gain power over the victim by undermining her autonomy and decision-making ability. The aim of this analysis is to provide the basis for the claims that it is hard, or impossible, for the victim to leave the relationship, and that the requirement or expectation of serious physical violence under many of the legal remedies and responses in England and Wales leaves many victims outside the protection of the law. Part Three will then aim to show the problematic nature of this approach, claiming that it ignores the programmatic nature of the abuse and the other control strategies typically used by abusers. It will be claimed that this has led to the medicalisation of the ‘battered woman’⁵ through syndromes which suggest her response is unusual, and that this, in turn, has led to a focus on the behaviour and personality of the individual woman, rather than the social context in which the abuse occurs.

Part One

The Focus on Incidents of Physical Violence

Throughout the previous two chapters, it was noted that the current legal responses to domestic violence typically require evidence of physical violence (or fear of physical violence under the PHA) before legal protection can be offered.⁶ This chapter will develop arguments to support the claim that this focus is misplaced, thus challenging many of the assumptions that influence the operation of legislation and practice that engages with domestic violence

³ See Walker, L., 1979. *The Battered Woman*, New York: Harper and Row; Walker, L., 1984. *The Battered Woman Syndrome*, New York: Springer.

⁴ Walker: 2009

⁵ Through the use of Walker’s ‘Battered Woman Syndrome’ (BWS) (Walker: 2009) and Post-traumatic stress disorder (PTSD) to explain the behaviour of the victim of abuse.

⁶ See Chapter Five and Chapter Six where this focus is noted throughout.

victims, such as Section 5 DVCVA,⁷ the domestic violence evidential requirements under LASPO,⁸ the granting of occupation orders under the Family Law Act,⁹ and the operation of policies implicitly based upon the assumption that women would choose to leave an abusive relationship if they wanted to.¹⁰

Stanko helps to clarify the difficulties with the approach to harm taken in the criminal justice system due to its conception of violence. She claims that 'what violence *means* is and always will be fluid, not fixed; it is mutable'.¹¹ However, the statutes used to criminalise violence specify the form of injury, threat and harm in a fixed way, and place different violent acts along a continuum that separates their seriousness by some 'objective' measure of outcome.¹² This has led Stanko to question whether the criminal law can be adequately used to address domestic violence due to its very clear conception of the harm arising from physical violence and which outcomes are the most harmful.¹³ It seems to be assumed that different forms of violent behaviour will have similar consequences if the objective harm is the same. This approach does not account for the differential vulnerability of victims of violence. The dynamics of abusive relationships explored below will reveal that physical violence does not accurately encapsulate the harm of domestic violence, and the ways in which particular vulnerabilities can be created and exploited by the abuser in the context of the abusive relationship.

It can be seen that different definitions of violence are clearly in existence and used in different contexts. It is not problematic for definitions to differ in terms of the range of behaviours and experiences researchers include in the term violence, provided they are explicit about how they are operationalising the term.¹⁴ Herein lies the difficulty; societal and legal understandings of domestic violence continue to be premised upon incidents of physical violence, even

⁷ See Chapter Six at pp. 161-5

⁸ See Chapter Five at pp. 132-3

⁹ See Chapter Five at p. 118, p. 122-5 and p. 141

¹⁰ The focus on physical violence leads to an incident-based approach which assumes that there is time and space *between* incidents of violence in which a woman can exercise her choice to leave the relationship. Thus, when she does not, she is seen to choose to remain in the relationship. This assumption will be challenged in Part Two at p. 173-181 and in Part Three at p. 181-3, below.

¹¹ Stanko: 2003 p. 3. Stanko clarifies that this does not mean outlawing forms of violence is misguided, it is necessary for the prosecution of some kinds of violence that the legal definitions be precise. However, the focus on the outcomes of specific forms of violence is not helpful in all circumstances (p. 5).

¹² Stanko: 2002 p. xiii

¹³ Under the OAPA, grievous bodily harm (Sections 18 and 20) is the most serious outcome, followed by actual bodily harm (Section 47) and common assault (Section 39 Criminal Justice Act 1988) which is either battery (defined in *R v Burstow*) or assault (defined in *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439).

¹⁴ Gordon: 2000 p. 6

where it is purported to include different types. This leads to the side-lining of non-physical violence which thus becomes perceived as less important and less harmful. Domestic violence as a term to describe what happens to abused women has come to be understood as a particular thing – battering – and therefore despite recognition that domestic violence can *involve* other types of abuse, this hasn't adequately filtered down to everyday and legal understandings which tend to be culturally ingrained.

Research that has impacted on Legal Understandings of Domestic Violence

Psychologist Lenore Walker's model remains the dominant explanation of the ways in which the dynamics of an abusive relationship can impact upon the victim adopted in legal understandings. Her theories of 'Battered Woman Syndrome' (BWS) and 'Learned Helplessness'¹⁵ have in part determined the availability of the partial defence of Diminished Responsibility¹⁶ for women who kill their abusers.¹⁷ Battered Woman Syndrome, as it was originally conceived, 'consisted of the signs and symptoms that have been found to occur after a woman has been physically, sexually, and/or psychologically abused in an intimate relationship, when her partner (usually, but not always a man) exerted power and control over the woman to coerce her into doing what he wanted, without regard for her rights or feelings.'¹⁸ The model will be explored in more detail below, when difficulties with this focus on physical violence are considered. For present purposes it can be noted that even in the revised editions Walker continues to use the term 'battered women'¹⁹ to refer to women in abusive relationships. Whilst many women do experience at least low-level physical violence and beatings on a regular basis,²⁰ the use of this phrase serves to exclude the experiences of many women who are not experiencing serious and frequent physical violence and thus, by not identifying themselves

¹⁵ This is the theory that woman passive and stop trying to help themselves due to ongoing violence. See Walker: 2009 Chapter 4 for the most recent explanation of the theory and implications of Walker's theory of Learned Helplessness.

¹⁶ Section 52 Coroners and Justice Act 2009 amended Section 2 Homicide Act 1957 so that those relying on the partial defence of Diminished Responsibility needed to prove they killed as a result of suffering from a 'recognisable medical condition' (Section 52(1)(a)).

¹⁷ See the discussion of Diminished Responsibility in Chapter Eight.

¹⁸ Walker: 2009 p. 42

¹⁹ Walker: 2009

²⁰ Stark's research found that physical assaults in abusive relationships are typically minor, but routine (Stark: 2009 p. 206).

as being 'battered,' may not see themselves as experiencing 'real' domestic violence. Calling men 'batterers' retains a primary focus on physical abuse. Instead, the focus must be on 'the nature of domination'²¹ and the ways in which it prevents women from leaving the relationship. Walker doesn't explicitly exclude the other aspects of abuse, and she does recognise that the man uses various forms of abuse (physical, sexual and/or psychological) to exert power and control over the woman in order to coerce her into doing what he wants her to do,²² but the term impliedly excludes these other aspects and focuses attention on physical violence.

Walker's cycle of violence theory²³ is based on the idea that there are three distinct phases associated with a 'recurring battering cycle: 1) tension building accompanied with rising sense of danger, 2) the acute battering incident, and 3) loving contrition.'²⁴ Phase two is seen as 'inevitable explosion... characterised by the uncontrollable discharge of tensions that have built up during phase one.'²⁵ In focusing on physical violence as the culmination of the cycle, the cycle of violence gives both a pre-eminence to physical violence and perpetuates an incident, or act-based, approach to domestic violence (because physical violence inherently consists of isolated incidents; even when there are multiple incidents, each one is separate from the previous). This implies that there is a respite from the abuse between incidents and therefore that women have the 'opportunity to exit' and 'sufficient volitional space *between* abusive incidents to exercise decisional autonomy.'²⁶ Stark's research indicates that this simply is not the reality 'in the millions of cases where abuse is unrelenting, volitional space closed, or decisional autonomy is significantly compromised'.²⁷ The cycle theory also provides implicit support for the assumption that violence occurs as a result of pent-up anger and frustration, thus overlooking its purposive nature and function as one of the methods of sustaining power and control over the victim. These points will be explored in more detail below.

Some attempt has been made to integrate an understanding of the harms of domestic violence apparent in sociological literature into legal understandings, for example the conceptual analysis provided by Madden

²¹ Williamson: 2010 p. 1414

²² Walker: 2009 p. 42

²³ See Walker: 2009 Chapter Five for the most recent explanation of her theory of the cycle of violence

²⁴ Walker: 2009 p. 91

²⁵ Walker: 1979 p. 59

²⁶ Stark: 2008 p. 115

²⁷ Stark: 2008 p. 115

Dempsey.²⁸ Her analysis is useful in that it recognises that domestic violence entails structural inequality; something she identifies is not acknowledged by the 'violence account' of domestic violence which predominates in criminal justice understandings.²⁹ Her explanation of structural inequality³⁰ as one of the defining features of domestic violence reveals an understanding of the root causes of domestic violence and the reasons why men are able to coerce and control their female partners.³¹

However, detailed analysis of Madden Dempsey's understandings of the worst form of domestic violence (domestic violence in its 'strong' sense³²) reveals an operationalising of a hierarchy of harms whereby domestic *violence* involving physical violence is seen as more serious than domestic abuse. In building her analysis she can be seen to accept the existing terminology, with a clear privileging of 'violence' *per se* as characterising the worst type of domestic violence.³³ The methods used by abusers to gain control and power over victims,³⁴ she classifies as 'domestic abuse' rather than domestic violence. In accepting that 'violence can be best understood under a non-legitimist account³⁵... [she] adopts a narrow view of what counts as violence, focusing on the direct, physical use of force',³⁶ and, whilst she does not intend to exclude violent acts that do not result in injury or damage (recognising that 'violent acts are no less violent for their failure to cause injury or damage'³⁷), this nevertheless has the effect of relegating the types of acts that should, it will be argued below, be the defining features of domestic violence to a less serious category of harm. It is from what is included in the category of 'domestic abuse'

²⁸ Madden Dempsey notes the two diverging debates regarding domestic violence in recent decades – one in sociological literature over gender prevalence and one in legal literature over how the criminal justice system should address domestic violence, and notes that the sociological debate has had little significant impact on the legal debate (Madden Dempsey: 2005 pp 302-5).

²⁹ Madden Dempsey: 2005 p. 321

³⁰ Madden Dempsey defines this as the social structures that sustain or perpetuate the uneven distribution of social power and that are underlined by power and control (Madden Dempsey: 2005 pp. 314-5).

³¹ see Chapter Two in particular, but also Chapters One and Four.

³² Madden Dempsey: 2005

³³ Under her model there are four categories of domestic violence (these are 1) violent acts occurring in a domestic context that tend to sustain or perpetuate structural inequality - domestic violence in its 'strong' sense; 2) includes violent acts occurring in non-domestic setting that tend to sustain or perpetuate structural inequality e.g. stranger rape, lynching; 3) violent acts occurring in a domestic context that do not tend to sustain or perpetuate structural inequality – domestic violence in its 'weak' sense; 4) nonviolent acts occurring in a domestic context that tend to sustain or perpetuate structural inequality – domestic abuse (Madden Dempsey: 2005 p. 318)) and only one category has all three of the required elements – structural inequality which sustains or perpetuates the uneven distribution of power, violence and domesticity which she defines as location and relationship between the parties, with location being important because the home is in the "private" sphere where people's conduct is protected from external scrutiny and also due to its symbolic significance 'as a place of comfort, safety and protection' (pp. 306-316). This she refers to as domestic violence in its 'strong' sense, with the classic paradigm being 'wife beating' (p. 318).

³⁴ Such as 'a refusal to allow an abused person contact with friends or family, demands to know the abused person's location and companions at all times or a refusal to allow the abused person to work outside the home or have access to money or other necessities' (Madden Dempsey: 2005 pp. 318-9).a

³⁵ See Madden Dempsey: 2005 pp. 307-310 for her understanding and critique of legitimist accounts and structuralist a

³⁶ Madden Dempsey: 2005 p. 310

³⁷ Madden Dempsey: 2005 p. 310

that it becomes apparent that Madden Dempsey's analysis of domestic violence in its strong sense does not extend beyond physical acts, and thus her analysis continues to fail to accurately capture the harm of domestic violence (see below). It can be seen, therefore, that even feminist scholars attempting to improve the criminal justice response to domestic violence by highlighting structural inequality as integral to domestic violence lapse back into a focus on physical violence as characterising the harm of domestic violence. It is necessary to examine further ideas about the shortcomings of the focus on physical violence.

Part Two

The Dynamics of 'Domestic Violence': An Alternative Conception

The dominant model of the dynamics of abuse in legal understandings – Walker's Cycle of Violence, outlined above – suggests that physical violence occurs as part of a cyclical explosion of pent-up anger and frustration. However, other models, such as Pence and Paymar's Wheel of Power and Control,³⁸ can be used to undermine this model. These models contend that while physical violence may appear to be cyclical because of its relatively infrequent occurrence, the use of physical assaults and sexual abuse merely serves to reinforce the power of the other tactics, explored below. Walker's model can be seen to perpetuate the myth that assaults are neatly circumscribed but Stark has found that 'abusive assaults are typically comprised of numerous acts of coercion and control of varying degrees of severity and may extend over an hour, all night, or be separated by periods of R&R, when the offender sleeps, goes out to buy beer or drugs, or he or the victim goes to work'.³⁹ The time between seemingly discrete episodes must not be negated; as a result of not knowing when the next incident will occur, and perhaps living with on-going psychological abuse, she is subjected her to a continuing 'state of siege'.⁴⁰ The

³⁸ Pence and Paymar devised the wheel to illustrate that violence is part of a pattern of behaviours rather than isolated incidents of physical abuse, thus drawing drew attention to violence as a constant force in abusive relationships (See Pence ad Paymar: 1993). 'With "power and control" at its hub and surrounded by a rim of physical and sexual violence, the spokes of the wheel are subdivided into economic abuse; coercion and threats; intimidation: emotional abuse; isolation; minimising, denying and blaming; using children; and abusing male privilege.' (Stark: 2009 p. 203).

³⁹ Stark: 2009 p. 246

⁴⁰ Dutton: 1993 p. 1208

methods used to maintain this 'state of siege' will now be considered and their seriousness explained.

The Dynamics of Coercion and Control

Evan Stark divides the 'technology' of coercive control⁴¹ into: isolation (intended to prevent disclosure and the seeking of help or support, instil dependence, express exclusive possession, monopolise skills or resources), intimidation (induced through threats, surveillance, and degradation in order to instil fear, secrecy, dependence, compliance and shame), control (an array of tactics that ensure the woman's subordination, deprive her of the means needed for autonomy or escape, and regulate her behaviour to conform with stereotypic gender roles⁴²) and violence (used concurrently with the other technologies to establish dominance, prevent escape, repress conflict, appropriate resources and establish privileges lessens its importance in achieving these aims).⁴³ Violence does not need to be a constant presence for the victims to feel threatened that it could erupt at any point. To keep the victim in fear and thus control her behaviour, there need only be the threat of future violence, often based on past experiences.⁴⁴

The abuser typically employs violence to establish power and control over the victim through the making of extremely controlling rules backed up with threats. These rules dictate how the victim must act in all aspects of everyday life and are often abusive in and of themselves. The victim will be punished for breaking them, either through physical violence or through other threatened consequences. In order to maintain control over the victim, the abuser's demand must be linked with a 'credible threatened negative consequence for noncompliance.'⁴⁵ This ensures that the victim feels compelled to comply to avoid the negative consequences that are threatened. These can include the threat of physical violence if sexual demands are not met, the threat to take children away from their mother if the abuser is not allowed to return home and

⁴¹ For a full explanation of the tactics and techniques of coercive control identified by Stark in his research and work with abused women and examples of the types of behaviours controlling men engage in see Stark: 2009 pp. 207-9 and pp. 228-288.

⁴² See Chapter Two p. 27 for a discussion of Stark's assertion that domestic violence as coercive control is a gendered phenomenon.

⁴³ Stark: 2009 pp. 241-274

⁴⁴ Fischer et al: 1992 p. 2128

⁴⁵ Dutton and Goodman: 2005 p. 747

also coercion that is seen as less serious than physical harm – but psychologically harmful nevertheless – such as ‘the threat to embarrass a woman in front of her family, or to seek sex outside of the relationship if a woman doesn’t allow her partner to engage in unwanted sexual behaviours with her’.⁴⁶ A victim is likely to be particularly vulnerable to coercion even when the immediate threat is relatively minor if she has experienced violence from her partner already; ‘the possibility remains that it will happen again’.⁴⁷ Dutton and Goodman refer to this as ‘priming’ the target for coercion; this can happen in many ways and is how the stage is set for coercive threats to be complied with in the future. Whether these threats are coercive or not cannot be judged objectively; they depend upon the social context of the relationship and whether the victim has reason to believe the threats can and will be carried out.⁴⁸

Therefore, as the rules become internalised and automatically performed by the victim, less and less physical violence and other punishing behaviour is needed to ensure compliance. The rules are even more likely to become internalised when the victim feels responsible for making the relationship work due to societal expectations that this is the responsibility of the female in the relationship. At the same time, the abuser will often blame her for the “failure” of the relationship and thus the need for the abuse. This reinforces societal messages concerning women’s responsibility which may result in the woman making ‘frantic attempts... to be the perfect wife, mother, and homemaker’⁴⁹ by conforming to the rules and expectations.

In many abusive relationships the rules set by the perpetrator do not even need to be verbally expressed to create an atmosphere that is controlled by the abuser.⁵⁰ The use of signals and other covert messages become integral to the maintenance of control over the victim. In abusive and non-abusive relationships alike, daily interaction and shared history enable couples to develop ‘idiosyncratic modes of communication, such as single word phrases, facial expressions, gestures, tones of voice, and private jokes, that may be mysterious or unnoticed to outsiders but which convey clear meaning to the couple themselves’.⁵¹ In abusive relationships, these modes of communication

⁴⁶ Dutton and Goodman: 2005 p. 747

⁴⁷ Dutton and Goodman: 2005 p, 748

⁴⁸ Dutton and Goodman: 2005 pp. 747-8

⁴⁹ Fischer et al: 1992 p. 2130

⁵⁰ See Fischer et al: 1992 for examples of how control is maintained through the victim’s reading of nonverbal messages from the abuser.

⁵¹ Fischer et al: 1992 p. 2119

'become an extension of the pattern of domination itself; 'a gesture that seems innocent to an observer is instantly transformed into a threatening symbol to the victim of abuse'.⁵²

The setting of rules and demands by the perpetrator require close surveillance of the victims' behaviour and activities to ensure compliance, something that becomes possible as a result of the close physical and emotional proximity between the parties. For the abuser to maintain their power over the victim they 'need to have information about the target's behaviour to know whether or not the contingency for failure to comply needs to be imposed'⁵³ and it needs to be clear to the victim that her compliance is being monitored. Surveillance methods thus act as 'behavioural constraints'⁵⁴ by ensuring the victim knows she is being watched or overheard. In conveying that the perpetrator is omnipotent and omnipresent, methods of surveillance impact upon a victim's sense of freedom and autonomy. For example, a woman who finds out that her abusive partner has been monitoring her movements and spending habits, and who later gets punished for breaking rules she was not aware of at the time, will become so fearful of making the wrong decision in the future that 'choice itself becomes fearful.'⁵⁵ Furthermore, the success of methods of intimidation such as this 'rely heavily on what a woman's past experience tells her a partner is likely to do'⁵⁶ and are thus linked to the use of credible threats in the past.

The abusive partner may intentionally create vulnerabilities and thus undermine the self-esteem of the victim, making it easier to control her. Control can, therefore, also be maintained, and fear intensified, through 'the extensive use of humiliation, ridicule, criticism, and other forms of emotional abuse; financial abuse; and social isolation'.⁵⁷ Stark identified the technology of coercive control as being designed to respond to women's agency and resistance; '[a]busive partners appreciate what the loss of autonomy means to women and shape their tactics accordingly. In anticipation that their target will attempt to break free or seek support, they may extend their efforts to isolate and control them in ways that can appear vastly disproportionate to the

⁵² Fischer et al: 1992 p. 2120

⁵³ Dutton and Goodman: 2005 p. 745

⁵⁴ Stark: 2009 p. 255

⁵⁵ Stark: 2009 p. 257

⁵⁶ Stark: 2009 p. 249

⁵⁷ Fischer et al: 1992 p. 2132

immediate resistance they confront'.⁵⁸ Isolating the woman from her friends and family can, amongst other things, prevent disclosure and the seeking of help or support, instil dependence and express exclusive possession.⁵⁹ The impact of ongoing abuse on the autonomy and sense of self of the victim will be further considered below.

The Involuntary Nature of Women's Compliance

If it is not recognised that the victim has internalised the petty demands and rules of the abuser in order to avoid violence and other negative consequences, it may seem as though she is acting voluntarily when she complies. However, because the compliance typically follows a period of escalating physical and/or other violence, the victim is aware that the abuser has the means to exert coercion⁶⁰ and therefore, although they have some form of choice over whether to comply, this is not 'free choice.'⁶¹ The use of credible threats and the delivery of threatened consequences in the past increases the likelihood of compliance in the future. For example 'when a man threatens to "teach his wife a lesson" for not having sex with him, and then rapes her when she refuses, the likelihood of her compliance the next time is increased'.⁶²

Alongside gestures, "symbolic violence"⁶³ is also frequently used to maintain control over the victim. For example '[w]hen I came back to the apartment, he had smashed every single piece of furniture in the bedroom. On the wall there was the red dress that I had worn to my office Christmas party the week before. It was stuck to the wall with a butcher knife through the heart'.⁶⁴ Stark provides examples of a woman in his study who would be beaten if the bedcovers were not a certain number of centimetres off the floor. Another woman's husband used to text her phone numbers; she had to guess the significance of these or incur physical violence.⁶⁵ Fear of serious violence, then, can be seen to run as an undercurrent beneath the daily demands and petty routines that must be adhered to, and explains why conforming to these

⁵⁸ Stark: 2009 p. 232

⁵⁹ Stark: 2009 p. 262

⁶⁰ Dutton and Goodman: 2005 p. 745

⁶¹ Dutton and Goodman: 2005 p. 745

⁶² Dutton and Goodman: 2005 p. 750

⁶³ Fischer et al 1992 p. 2128

⁶⁴ Fischer et al: 1992 p. 2128

⁶⁵ Stark: 2009 pp. 198-9

demands may seem voluntary to outsiders, but is in fact vital for the victim's survival. This fear can arise as a result of previous beatings or threats and may also be triggered by 'any verbal or nonverbal symbol associated with the onset of an abusive incident'.⁶⁶

The Impact of Abuse: Loss of Self

As a result of this awareness of the surveillance methods used, and the abused woman's development of tactics, such as conforming to internalised rules, that may reduce further incidents of violence, abuse or other threatened consequences,⁶⁷ it can be seen that women often come to incorporate the world view of their aggressor, leading them to become a 'satellite' of their captor.⁶⁸ This means that the victim may come to know more about her abuser's personality and behaviour than her own, in an attempt to predict his responses and thus avoid violence and other threatened consequences. This can lead the victim to lose her sense of self.

In her work with abused women, psychologist Judith Herman found that ongoing abuse typically leads to personality changes including deformations to the sense of self-identity and the ability to relate to others.⁶⁹ It is widely recognised that the worst fear of any traumatised person is that 'the moment of horror will recur' and, in recognising that this fear is 'actually realised, multiple times, in victims of chronic abuse,' it can be asserted that victims of domestic violence experience a severe disruption to their system of self-defence which 'tends to persist in an altered and exaggerated state long after the actual danger is over.'⁷⁰ This means that chronically traumatised people, such as abused women, are in a permanent state of hyper-arousal and vigilance,⁷¹ thus undermining the perception that women have sufficient space between abusive incidents to make the decision to exit the relationship.

⁶⁶ Fischer et al: 1992 p. 2132

⁶⁷ Dutton and Goodman: 2005 p. 751

⁶⁸ Graham et al: 1988 in Yllo and Bograd (eds): 1988 p. 219. Nicolson identified studies with some health professionals, mainly health visitors and social workers, who noticed that many abused women were unable to see themselves as separate from their partner, suggesting that their 'agency shrinks into a joined sense of identity with [their] abuser (Nicolson: 2010 p. 161).

⁶⁹ Herman: 1992 pp. 118-9

⁷⁰ Herman: 1992 p. 34

⁷¹ Herman: 1992 p. 34

Trust is taken as one of the foundations of an intimate relationship and it can thus be seen that the harm experienced in abusive relationships is different from that experienced when a stranger attacks or abuses an individual because of the breach of the trust commonly established in an intimate relationship. This breach of trust impacts upon the victim because 'it is through our intimate relationships that we form our identity and sense of self' so when a person is domestically abused it 'strikes at the very conception of the self for the victim' and turns 'a tool for self-affirmation and self-identification into a tool for alienation and self-betrayal'.⁷² Brison emphasises that trauma of 'human origin and... intentionally inflicted... shatters one's fundamental assumptions about the world and one's safety in it' and also 'severs the sustaining connection between the self and the rest of humanity'.⁷³ Herman and Stark's work both suggests that the situation of abused women can be compared with that of victims of capture crimes such as kidnapping.⁷⁴ Prolonged captivity produces profound alterations in the victim's identity because '[a]ll the psychological structures of the self – the image of the body, internalised images of others, and the values and ideals that lend a person to a sense of coherence and purpose – have been invaded and systematically broken down'.⁷⁵ Since our sense of self exists fundamentally in relation to others,⁷⁶ and a traumatic event destroys the belief that the person can be herself in relation to others, a situation is created where the victim cannot even be herself to herself.⁷⁷ Stark suggests, however, that regardless of the 'technical resemblance' of coercive control to the techniques used in torture and kidnapping, 'everything about the experience of coercive control reflects its personal and individualised nature... Only in coercive control do perpetrators hone their tactics to their special knowledge' of the victim and her life.⁷⁸

It can thus be seen that the programme of coercive control typical in abusive relationships results in a 'liberty crime';⁷⁹ the primary harm is the

⁷² Herring et al: 2012 p. 208

⁷³ Brison: 2002 p. 40

⁷⁴ See Stark: 2009 pp. 203-5 and Herman: 1992

⁷⁵ Herman: 1992 p. 93. Herman is comparing domestic abuse with capture crimes and therefore here she gives the analogy of the way in which totalitarian systems carry this dehumanising process to the extent of taking away the victim's name. This can also be seen to happen to victims of domestic abuse; Jones notes Pence and Paymar's research finding that men at the Duluth programme found it almost impossible to say their partner's name during sessions (Jones: 2000 p. 92).

⁷⁶ The concept of 'self' developing only in relation to others has been discussed by West (who views the relational self and the autonomous self as interdependent and even constitutive of each other (West: 1998), and also see Nedelsky: 2011.

⁷⁷ Brison: 2002 p. 40

⁷⁸ Stark: 2009 pp. 206-7

⁷⁹ Stark: 2009

deprivation of freedom, not the infliction of physical violence as is commonly held. Stark identified degradation – including shaming – as an isolation tactic and explains how ‘[c]ontrolling men establish their moral superiority by degrading and denying self-respect to their partners.’⁸⁰ In her concept of the ‘project of becoming a person,’ Cornell explains how our perception of “the person” is not static but part of a project that must be ‘open to each one of us on an equivalent basis.’⁸¹ For this project to take place, a human being must be ‘able to imagine herself as whole’ and all must have this ‘equivalent chance of becoming a person’.⁸² This requires freedom and thus the project is interfered with both by the condition of ‘unfreedom’ inherent in relationships of coercive control, and also when the ‘degradation prohibition’⁸³ is violated, as it is by domestic abuse. Ongoing abuse can thus be seen to undermine a woman’s sense of self and threaten her personhood; her conception of herself as a living person. The words of a domestic violence victim (whose partner gouged her eyes out and permanently blinded her) in a 2012 episode of Channel 4’s ‘*Dispatches*’⁸⁴ provide an example of the claim that many traumatised and abused people feel as though a part of themselves has died and is lost forever; ‘*I knew I would die that day*’. Her use of the word *knew*, instead of *thought* is revealing, as if a part of her really did die that day, demonstrating the enormous impact that trauma often has and the way it can result in a loss of sense of self.

Having established the reasons for the assertion that the dynamics of domestic violence need to be recognised to *involve* physical violence as one of the tools to gain power and control over the victim, rather than physical violence being seen as the pinnacle of the abuse, many of the central assumptions pertaining to abusive relationships can be challenged. There are two primary assumptions leading from the failure to recognise the functional and programmatic nature of domestic violence and focusing on incidents of mainly physical violence. The first is that the woman’s behaviour and decision to stay in the relationship becomes the focus. The second, related, assumption is that answers to this question can be provided through examining the personality and behaviour of the abused woman. This has led to a medicalisation of the impact

⁸⁰ Stark: 2009 p. 258

⁸¹ Cornell: 1995 p. 4

⁸² Cornell: 1995 pp. 4-5

⁸³ Cornell bases her ‘degradation prohibition’ on the idea that the primary good of self-respect is violated by ‘hierarchical gradations of any of us as unworthy of personhood’ because these in turn violate the ‘postulation of each one of us as an equal person’ (Cornell: 1995 p. 10)

⁸⁴ *Dispatches*: ‘*Do you know your partner’s past? Tina’s story*’, first aired on Channel 4 on Monday 22nd October 2012.

of the abuse, primarily through the use of BWS. The limitations and implications of these two misconceptions are focused on more fully in Part Three below.

Part Three

Implications of the Focus on Physical Violence

When the programmatic nature of the abuse is seen as the defining feature, with physical violence being recognised as just one tool amongst many coercive strategies to maintain power and control over the victim, it becomes harder to ignore the functional nature of domestic violence than when the focus is on incidents of physical violence alone (because these can be seen as outbursts attributable to anger, frustration and stress). The misplaced focus on incidents of serious physical violence as characterising the most serious aspect of an abusive relationship has led to the question being asked of abused women; “why did she not leave the relationship?”⁸⁵ This is based on the assumption that she could leave safely and easily if she wanted to, and that there is sufficient volitional space between incidents for her to exercise her autonomy by leaving.

‘Why does she Stay?’

The seeking of explanations for why the woman stays in the relationship in terms of her characteristics and behaviour, instead of conceptualising the behaviour of the victim as a response to the abusive situation, has led mental health professionals frequently to attribute the abusive situation to the victim’s presumed underlying psychopathology.⁸⁶ If the viewpoint that the characteristics and problem profile of abused women results from the abuse, rather than causing it, explanations for why the woman stays can then be sought by examining the impact and dynamics of the abuse. This would enable the assumption that women have the opportunity to safely and freely exit an abusive relationship between incidents of violence⁸⁷ to be challenged.

⁸⁵ An example of this focus on the behaviour and decisions of the woman is seen in the statement of the trial judge quoted by Lord Bedlam in *R v Thornton* [1993] 96 Cr App R 112 at para 117: ‘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’.

⁸⁶ Herman: 1992 pp. 116-7

⁸⁷ An example of this assumption can be found in the operation of Section 5 of the DVCVA, discussed in Chapter Six.

The behaviours of an abused woman who remains in an abusive relationship and conforms to the demands of the abuser do not make sense until her cage – and the aspects of her life that constitute the bars – are identified; ‘once we start with the cage, everything changes and seemingly discrete, unrelated behaviours and effects fall into place.’⁸⁸ The bars of her cage consist of things such as a barrage of assaults, a locked door, missing money or the distributor cap from her car, rules for cleaning, a timer set at the telephone, the reality of post-separation violence and the economic inequality of women, not to mention the guilt the woman can feel for not living up to the role expected of her. Stark’s research has found that women often live in a state of perpetual fear for not doing what’s expected of them in the right way, or because they need to work out the significance of a certain message.⁸⁹

When the impact of domestic violence as a programme of coercive control intended to undermine the victim’s autonomy and sense of self is recognised, abused women can be seen as victims of liberty crimes, not violent crimes *per se*. This then undermines the common assumption found within legal and societal understandings that women remain in or return to abusive relationships out of free choice. Questioning why the woman stays is then revealed as a value judgement rather than a real question, demonstrating prevailing societal views and misconceptions concerning the responsibility and behaviour of abused women.⁹⁰ Abstracting the effects from the context results in more attention being paid to the personality and behaviour of the victim than the perpetrator,⁹¹ in an attempt to understand why she behaves as she does. It will be claimed that legal and societal misunderstandings contribute to the perpetuation of the myth that there is something abnormal about the particular woman which makes her a victim; many women can be heard to insist ‘I wouldn’t let that happen to me.’ This puts responsibility firmly on the victims – they *are* letting this type of abuse happen – and this misplacement of responsibility allows perpetrators to avoid incurring appropriate legal and societal scrutiny for their behaviour.

⁸⁸ Stark: 2009 p. 198

⁸⁹ Stark: 2009 pp. 198-9.

⁹⁰ Jones: 2000 p. 131. The question can be seen as cutting two ways by first shifting the blame away from both the ‘nature’ of men alongside societal attitudes and institutions, to the character of the individual victim, and secondly, by suggesting women in contemporary society now have more options and should make use of them (Jones: 2000 p. 200). On the positive side, Jones does point out that at least the question demonstrates that it is now accepted that a woman *should* leave, something which was not the case until relatively recently in human history.

⁹¹ Stark: 2009 p. 198

The explanations outlined above for the reasons women may become 'entrapped'⁹² in an abusive relationship, enduring years, even decades, of continuous physical and mental abuse can be used to challenge the focus on the woman and why she does not leave. None of these explanations make it possible to hold the woman accountable, suggest it is her fault, or support the idea that she stays because she 'enjoys' the abuse. If this were to be understood in legal understandings through a comparison with capture crimes such as kidnapping in the common terminology, then explanations for why the woman stays would be sought in the behaviour of the abusive man and the societal conditions which prevent her from leaving, rather than in the behaviour and personality of the woman. However, because this is not understood, explanations such as the BWS offered by Walker have come to dominate legal understandings. As will now be shown, this has had some success in at least highlighting the plight of individual abused women,⁹³ but has done little to benefit abused women as a group.

'Battered Woman Syndrome' and the Medicalising of the 'Battered' Woman

As the dominant model of the effects of domestic violence used in legal understandings, BWS is concerning because the use of the term "syndrome" implies that 'a malady or psychological impairment'⁹⁴ can be found in the woman to explain why she does not leave.⁹⁵ Walker's theory of learned helplessness implies women are passive, when in fact women develop diverse coping strategies which are far from passive, and make many attempts to

⁹² This is the term chosen by Evan Stark in his book *'Coercive Control: How Men Entrap Women in Personal Life'* (2009), one of the main pieces of literature that will be used in this sub-section.

⁹³ See the discussion of Kiranjit Ahluwalia in Chapter Eight

⁹⁴ Rothenberg: 2003 p. 781

⁹⁵ Although Walker concludes, that 'there are no specific personality traits that would suggest a victim-prone personality for the women' (Walker: 2009 p. 3) this does not prevent implications being drawn from her work that pathologise women and support an individualistic, therapeutic approach to the addressing of domestic violence. Stark emphasises how 'researchers have failed to discover any psychological or background traits that predispose any substantial group of women to enter or remain in abusive relationships. Battered women do suffer disproportionately from a range of psychological and behavioural problems, including some, like substance abuse, that increase their dependence and vulnerability to abuse and control... however, these problems only become disproportionate in the context of on-going abuse and so cannot be its cause.' (Stark: 2009 p. 113). Herman notes that research into domestic battering situations that has tried to find 'personality traits that might predispose a woman to get involved in an abusive relationship have found 'no consistent profile of susceptible women... While some battered women clearly have major psychological difficulties that render them vulnerable, the majority show no evidence of serious psychopathology before entering into the exploitative relationship' (Herman: 1992)

leave.⁹⁶ Evidence that abused women call the police, seek civil protection orders, enter shelters and so on all discount the claim that they are reluctant to seek help.

BWS was widely criticised by feminist advocates in the 1990s who claimed that 'the use of a syndrome to explain the psychological effects from battering was neither empowering nor able to explain all the symptoms that battered women could experience'.⁹⁷ Despite attempting to address these by revising her model several times (the most recent version being in 2009) and re-examining the criteria for BWS⁹⁸ and revising the battered woman syndrome questionnaire,⁹⁹ it is suggested that Walker does not adequately overcome the criticisms levelled at the use of the BWS. Walker asserts that it must not be overlooked that, as a subcategory of Post-traumatic stress disorder (PTSD) BWS 'is the most useful diagnostic category to use for battered women'¹⁰⁰ and that it has enabled an emphasis on trauma therapy as one of the most beneficial interventions for abused women. However, in medicalising the experience of the abused woman, the problem has become individualised with a continuing focus on the behaviour and personality of the woman, rather than a focus on the behaviour of the abuser and the social explanations for this type of behaviour.

Both BWS and PTSD rely upon physical violence *per se* as causing the problem profile found in abused women. Stark suggests that Walker's explanation relies upon an inappropriate direct causal link, retained by Herman's revision of trauma theory,¹⁰¹ 'between the continuous occurrence of life-threatening incidents of violence or prolonged repeated trauma and the

⁹⁶ A study by Ferraro found women attempt to leave, on average, 5-7 times before they permanently exit the relationship (Ferraro: 1998)

⁹⁷ Walker: 2009 p. xvi

⁹⁸ Preliminary results used for her revised (2009) edition showed that the 3 clinical criteria for PTSD (re-experiencing the trauma, high arousal and emotional numbing and avoidance) were associated with BWS, but 3 other criteria were also consistently occurring in new samples of women – disrupted interpersonal relationships associated with the batterer's power and control and isolation of the woman, distorted body image and physical illnesses, and sexual issues. She added and developed scales to measure these (see Walker: 2009 pp. xvi-xvii).

⁹⁹ This was the questionnaire devised by Walker to assess the presence of battered woman syndrome in victims of abuse. See Walker, L., 1984 *The Battered Woman Syndrome*, New York: Springer.

¹⁰⁰ Walker: 2009 p. 70

¹⁰¹ In determining the reasons women remain in abusive relationships, Stark acknowledges that the 'most sophisticated explanation' of dependence prior to his work was that it is a 'by-product of violence-induced trauma; exposure to severe violence so overwhelms the ego's defence mechanisms that a person's capacity to act effectively on their own behalf is paralysed, producing a post-traumatic reaction or a disorder such as post-traumatic stress disorder (PTSD) and a range of secondary psychosocial and behavioural problems.' (Stark: 2009 pp. 114). Trauma theory can be seen to complement 'earlier accounts of how violence-induced changes in a victim's personality make it difficult for her to exit an abusive relationship, particularly... BWS, which ascribes women's entrapment to "learned helplessness," a form of cognitive distortion induced and reinforced by cycles of violence"(Stark: 2009 p. 114). Conclusions drawn from Herman's trauma theory can still be used for present purposes to explain the impact of trauma on a victim's sense of self and autonomy as, in her comparison of the situation of domestic violence victims and victims of other capture crimes such as kidnapping, she provides clear evidence of the impact of the deprivation of freedom, through the same tactics identified by Stark (see Herman: 1992, in particular Chapter Four).

clinical outcomes identified as criteria for BWS or PTSD [despite there being] no evidence from population-based or controlled studies that full-fledged BWS and/or PTSD are widespread among battered women'.¹⁰² An early study conducted by Stark and Flitcraft refuted this as it found that the 'problems [abused] women presented... suggest a pattern of chronic and diffuse stress that has little in common with the more focused and intense trauma anticipated by BWS and PTSD.'¹⁰³ This led them to conclude that '[s]ome-yet-to-be-identified process other than [traumatic] violence was clearly affecting these battered women'¹⁰⁴ and causing the secondary problems they developed. Stark's own research found that the type of violence abused women reported experiencing was only occasional and moderate and therefore not the sort 'normally thought to elicit trauma' and so he suggests that it is on-going trauma in the sense of being entrapped or 'unfree' that leads to the range of problems that keep a woman in an abusive relationship. The implication of this is that abused women should not need to prove that they are suffering from either BWS or PTSD in order for the impact the abuse has had on them to be understood. By medicalising the impact of the abuse, BWS and PTSD have operated to exclude women from being recognised as victims of domestic violence unless they have a medically acceptable reaction to the alleged abuse.

Indeed, BWS also perpetuates this exclusion of many women's experiences by its portrayal of women as passive victims, something which 'resulted in an exclusive definition of who "counts" as a victim.'¹⁰⁵ By operating as a kind of checklist and attempting to fit all abused women's experiences into the specific criteria of the syndrome instead of looking at the reality of each abused woman's actual experience, many women have not been recognised as suffering abuse due to evidence of BWS not being found.¹⁰⁶ This can render expert testimony on BWS inadmissible in court.¹⁰⁷ Exclusive definitions of who "counts" as a victim have led to conceptions of the "ideal victim" being found within criminal justice understandings in particular;¹⁰⁸ the "ideal victim" is a woman who has never provoked a fight, responded physically to aggression, or themselves been violent 'without provocation'. Women who had engaged in any

¹⁰² Stark: 2009 pp. 124-6

¹⁰³ Stark: 2009 p. 128

¹⁰⁴ Stark: 2009 p. 124

¹⁰⁵ Rothenberg: 2003 p.

¹⁰⁶ Nicolson: 2000(b) in Nicolson and Bibbings (eds): 2000 p. 167

¹⁰⁷ Rothenberg: 2003 p. 783

¹⁰⁸ See the discussion of Kiranjit Ahluwalia and Sara Thornton in Chapter Eight

of these things were in danger of having their sympathy revoked¹⁰⁹ and possibly seen to be contributing to the violence.¹¹⁰

The claim here is that it is what Walker's term learned helplessness conveys – an impression of abused women as passive and helpless – that is objectionable, rather than what perhaps Walker herself understands it to mean.¹¹¹ Learned helplessness implies that 'while battered women may employ various strategies to attempt to stop the violence early in the relationship, including leaving the abuser, these attempts decline gradually towards total passivity'.¹¹² This is challenged by accounts of the actions of victims. Fischer et al found various strategies were used to rebel against and resist domination, and that these attempts did not decline in the face of continuous abuse¹¹³ as suggested by Walker's model. Research carried out by Dutton and Goodman indicates that 'as the severity of the violence increases, both battered women's resistance and placating (i.e. compliance) increase'¹¹⁴ and that abused women 'frequently resist their partners demands... in a variety of ways'.¹¹⁵ Sometimes complying is easier than resisting, and, as seen above, sometimes 'compliance with expectations or demands can become internalised or routine – with those actions taking on the appearance of being "voluntary"'.¹¹⁶ Women engaging in strategies of resistance may be excluded from BWS due to their actions not reflecting the concept of learned helplessness. They could thus be excluded from being recognised as a 'real' victim of domestic violence because their behaviour does not conform to that of the ideal, passive victim.¹¹⁷

Walker continues to maintain in the 2009 edition of her book that the term 'learned helplessness' demonstrates how 'someone can lose their ability to perceive that their actions will have a particular outcome' and that it is one of the 'most useful concepts to help jurors understand how a battered woman

¹⁰⁹ Rothenberg: 2003 p. 783

¹¹⁰ For example in the case of *Re H (A Child) (Contact: Domestic Violence)* [2006] 1 FCR 102, the trial judge in the court of first instance (Judge Cockroft) is seen to disregard the psychologist's finding of PTSD in the mother (an alleged victim of abuse) due to the belief that it is inconsistent with his findings of fact (at para 133). He also contended that the mother exaggerated and provoked the violence (see, for example, para 50).

¹¹¹ Walker recognises that battered women are not all helpless, but she contends that to maintain their core self they must give up the belief that they can escape from the batterer in order to develop sophisticated coping strategies. (Walker: 2009 p. 8). Due to being unable to predict that what they do will have a desirable outcome, women stop trying to end the abuse and develop coping strategies 'to live safely with the possibility that he or she will continue to be abused' (Walker: 2009 pp. 83-4).

¹¹² Fischer et al: 1992 p. 2135

¹¹³ See Fischer et al: 1992 pp. 2135-6

¹¹⁴ Dutton and Goodman: 2005 p. 752

¹¹⁵ Dutton and Goodman: 2005 p. 752

¹¹⁶ Dutton and Goodman: 2005 p. 752

¹¹⁷ This can be seen in the contrasting treatment of Kiranjit Ahluwalia and Sara Thornton, discussed in the following chapter at pp. 193-4 and pp. 209-210

could be driven to use deadly force against her batterer in self-defence'.¹¹⁸ The concept of learned helplessness may have had a beneficial impact for some individual battered women, however, it is argued here that it has had a detrimental impact on abused women as a group because it misrepresents the impact of ongoing abuse and has led to a focus on the behaviour and personality of the abused woman, rather than on the abuser and the societal expectations and norms that support his behaviour.

Whilst Walker has recognised the larger societal issues that enable violent relationships to continue,¹¹⁹ demonstrating how the syndrome applies to individual women retains focus on the 'individual women as the problem most in need of immediate fixing'.¹²⁰ However, individualising the problem and pathologising women seems to have done more harm than good in the longer term, thus clearly indicating that it is important to recognise domestic violence as a social problem.¹²¹ It is not enough for the public to be sympathetic to the plight of an individual woman, there needs to be an understanding society-wide that women are not to blame, they do not choose to remain, and nor do they passively give up hope.

The difficulties which emerge from the medicalisation of the battered woman are threefold. First is the retention of the primary focus on the woman, rather than on the abuser and his methods of abuse, and on the societal conditions in which domestic violence occurs. The second is that not all abused women's experiences and behaviours will fit the category of BWS. If women don't appear 'helpless' they will not be deemed to have the recognisable medical condition of battered woman syndrome.¹²² Third is that it is overlooked that a victim does not leave because she is not free to, not because she has a medical condition. The retention of the primary focus on the woman and why she remains has led to individualised solutions rather than the need to address the structural inequalities that lead to the abuse. It is therefore not necessarily

¹¹⁸ Walker: 2009 p. xvi

¹¹⁹ For example she notes that there is a higher risk of a man being abusive when he is more traditional in his attitudes towards women's roles (Walker: 2009 p. 17) and that 'men's dominance over women in a patriarchal society is an important factor in spouse abuse' (Walker: 2009 p. 115).

¹²⁰ Rothenberg: 2003 p. 778

¹²¹ Despite the numerous criticisms levelled at Walker's model, it has been suggested that it represented a useful 'cultural compromise' which 'allowed advocates the chance to appeal to the larger public' by gaining sympathy for battered women. Bringing attention to the experiences of individual battered women meant that that the movement evoked sympathy for particular women from those who were 'otherwise sceptical of feminist claims' meaning that they didn't need to agree with feminist solutions that required an 'overhaul of society's gendered power relationships' (Rothenberg pp. 771-5).

¹²² This is reflected in the continuing need for a recognised medical condition in order for psychiatric harm to be viewed as actual bodily harm for the purposes of the OAPA (as seen in *Chan Fook* and *Dhaliwal*).

that medicalising the impact of abuse is inherently wrong, it is that it results in the perpetuation of certain erroneous explanations for abused women's behaviour so that only the more extreme reactions to abuse seen in PTSD and BWS are legally recognised. This overlooks the central harm of domestic violence which is that it is a liberty crime and this is why women often do not leave. This medicalisation implies it is abnormal, but understandable, for a woman to react to abuse in that way. However, Stark's explanation, which looks beyond physical violence, makes it clear that the loss of autonomy and self-esteem/sense of self are *normal* responses of *ordinary* women resulting from the deprivation of liberty which results from ongoing abuse. The woman stays because she is not free to leave, not because she is psychologically damaged in some way.

Conclusion

Throughout this chapter, the dynamics of abusive relationships as a programme of coercive control have been examined and have provided support for the claim that it is the changes induced by the abuse, the relative status of the partners, and the dynamics of the relationship itself that lead to women being unable to leave an abusive relationship.¹²³ Analysing the various methods used by abusers to maintain control and power over their female partner has revealed that physical violence is but one tool within the framework of coercive control, and that violence becomes less important once the rules set by the abuser have been internalised by the victim. It has been shown that behaviour on the part of the victim, such as conforming to petty rules and demands, often seems voluntary because it is abstracted from the context.

Previously, in Chapter Six, the main legislation used to prosecute domestic violence offenders was explained to be the Offences Against the Person Act 1861¹²⁴ which is limited to acts of physical violence¹²⁵ which cause either physical injury or a recognised psychiatric injury. This chapter has shown

¹²³ Stark refers to the 'entrapment enigma' - why women who are statistically not visible to start with become ensconced in relationships where on-going violence is virtually inevitable (Stark: 2009 p. 113).

¹²⁴ The Protection from Harassment Act 1997 can also be used – there was a full analysis of this legislation in Chapter Six.

¹²⁵ There was a full analysis of the way these offences, and the types of harms incorporated, have evolved, through cases such as *R v Burstow*; *R v Ireland* [1997] UKHL 34 and *R v Dhalwal* [2006] EWCA Crim, 1139, [2006] 2 Cr App R 24 (CA), in Chapter Seven.

how the predominant requirement of physical violence, measured objectively, when assessing the existence of severity of domestic violence is misplaced and contributing to many victims being excluded from legal protection. When seen as coercion and controlling behaviours, the impact of domestic violence cannot simply be measured objectively; its impact will depend upon the context of the relationship. Neither can it be compared with random violence perpetrated by a stranger; as seen above, there is a different impact upon the victim because of the betrayal of the trust developed in an intimate relationship and the ways in which the abuser can exploit his intimate knowledge of the victim's personality, behaviour and activities to gain control over her. A relatively minor incident of physical violence takes on a whole new meaning when it is taken against a programme of coercive control designed to undermine the volition and autonomy of the victim, and this is something that neither the criminal justice system nor the civil remedies are equipped to deal with appropriately.

This is, therefore, one of the main reasons it is difficult to apply the legal responses to domestic violence to coercive controlling behaviour; behaviour such as a woman who has 'a panic attack in the supermarket because they don't have the right shaped piece of meat' does not make sense to most people, but if the woman knows that if she returns home with the wrong shaped piece of meat, or cooks it incorrectly, or does not wipe the surfaces correctly she will be punished, then her behaviour falls into place.¹²⁶ However, the criminal law is not able to punish perpetrators for psychological harm caused by contingent threats, only threats of a serious, physical nature that are actually carried out, or in the case of the PHA put the victim in fear of serious violence. The following chapter will consider the statutory and judicial treatment of women who kill their abusers to further illustrate the impact that these misconceptions and misunderstandings are having in practice.

¹²⁶ Williamson: 2010 p. 1415

CHAPTER EIGHT
VICTIMS TURNED PERPETRATORS:
WOMEN WHO KILL THEIR ABUSERS

The escalating nature of the violence in abusive relationships and the failure of the state and legal institutions to adequately respond before it reaches fatal levels is illustrated by the domestic homicide statistics. Partner and ex-partner homicide has accounted for the deaths of approximately 100 women annually for the past 3 decades,¹ typically in the context of an abusive relationship.² In fewer, but a still significant number of cases (approximately 10 men annually), the ongoing abuse and the inability to exit the relationship results in the abused woman feeling she has no meaningful option but to kill her abuser to protect herself and her children. This chapter is premised upon the argument that it is the lack of adequate legal intervention, revealed in previous chapters, that results from misunderstandings of the causes, consequences and dynamics of domestic violence that leads to this domestic homicide. Support will also be provided for the claim that the gender bias inherent in the legal system is particularly evident when the perpetrators of this lethal violence come before the courts. Women have been unable to rely successfully upon self-defence³ and the partial defences to homicide⁴ are available for women who kill their abusers only in very prescribed circumstances. This will be shown to emphasise judicial inability to fully comprehend the complexities of domestic violence by holding women to a standard set by – and for – men. Analysis of the availability of the partial defences for abused women who kill, alongside a discussion of the criminal law's abstraction and isolation of offences and offenders from their social context, will indicate how the actions of these women are prevented from appearing to be reasonable and understandable. This can be contrasted with the treatment of men who kill their current or former female partner. Men who commit domestic homicide have habitually had their charge reduced from

¹ Smith, Coleman, Eder and Hall (eds): 2011 (Homicide, Firearm Offences and Intimate Violence, Supplementary Volume 2 to Crime in England and Wales 2009/10 (Home Office Statistical Bulletin).

² Wells and Quick: 2010 p. 780

³ Section 3 Homicide Act 1967 as clarified by Section 76 Criminal Justice and Immigration Act 2008. Also see *R v Martin* [2001] EWCA Crim 2245

⁴ Diminished Responsibility Section under Section 2(1) of the Homicide Act, as amended by Section 52 of the Coroners and Justice Act 2009 and Loss of Control under Sections 54 and 55 Coroners and Justice Act 2009 (abolishing the common law partial defence of provocation).

murder to manslaughter and their sentences reduced on the grounds of being provoked by their nagging, alcoholic, unfaithful or departing wives or girlfriends.⁵

Part One

Understandings of Women who Kill their Abusers

In the eighteenth century and before, 'husband killing' was viewed as a 'special crime' threatening the basic conceptions of a traditional society. This means that the current legal responses must be analysed within the context of conceptions of appropriate gender roles and behaviours, and the marital-type relationship. Blackstone's Commentaries state it as a crime of 'treason' akin to that of killing the King because it not only breaks through the restraints of humanity and conjugal affection, it also 'throws off all subjection to the authority of [the] husband'⁶. This history provides evidence of the cultural context in which the law evolved in terms of male authority and female subordination. It can be noted that a serf who killed his master was also guilty of petty treason. In the same way that gender role expectations can still be seen to operate along traditional lines, it is suggested that when women kill their partner, notions of this idea of petty treason remain, albeit not explicitly articulated.⁷ A woman who kills her partner, even when he is abusing her, disrupts everyday understandings of appropriate feminine behaviour in a way that a man, typically viewed as biologically dominant and aggressive, who kills his female partner or ex-partner does not.

It can thus be seen that this is a crime that has historically been perceived as different from that which is included in the traditional framework of criminal law.⁸ It will be demonstrated in this chapter that the crime still is viewed as different and thus excluded from the conceptions of criminal behaviour and the valid excuses and justifications provided by liberal legal theory and criminology under current law and legal decision-making. Women's point of

⁵ McColgan in Nicolson and Bibbings (eds): 2000 p. 148 cites the cases of Noel Calvert (1999), Michael McKeon (1998), Andrew Cable (1999), Paul Hundleby (1999), David Harker (1999), Jason Harper (1999), Jan Bednarczyk (1998), Frank Higginson (1998), Bruno Aggiano (1998), Keri Romans (1998) and Geoffrey Adams (1998), all reported in national or regional newspapers. More recent cases (prior to the abolition of the provocation defence in 2009) are discussed by Burton: 2001 and Burton: 2003 (*R v Smith* [2003] 3 WLR 654 and *R v Suratan, R v Humes and R v Wilkinson* (Attorney-General's Reference No. 74, No. 95 and No. 118 of 2002 EWCA 2982).

⁶ Blackstone's Commentaries of 1897 p. 445

⁷ Taylor: 1986 p. 1698

⁸ Schneider: 2000 p. 113-4

view has traditionally been excluded from the legal understandings found in statute and case law, meaning their explanatory accounts of their behaviour have not been advanced in the courtroom and therefore have not been part of the voiced or received excusatory narratives which have informed and shaped the development of the law.⁹ Schneider notes that scholars have ‘amply documented that situations involving battered women who kill fall within traditional frameworks of defences or excusable action, but are nonetheless viewed as different or exceptional by judges who apply the law to these cases.’¹⁰ She further asserts that until battered women, like all criminal defendants, are included within the traditional framework of criminal law their equal rights to a fair trial will not be guaranteed.¹¹

There appears to be a great deal of public and legal misunderstanding concerning abused women who kill their assailants, alongside deep societal resistance to perceiving the circumstances and legal treatment of women who kill their assailants as a problem of gender equality’.¹² Invisible gender bias operates to question the reliability of the testimony of female witnesses which has led to the need for ‘expert witnesses’ and the medicalisation of the impact ongoing abuse can have. This has meant that the concept of ‘battered woman syndrome’¹³ (BWS) needed to be developed and utilised in the courtroom in order to explain the reasons abused women can end up using lethal force against their partners. Abused women’s experiences, and the impact that these experiences had on them, have rarely been sufficient to explain, excuse or justify the killing.

Legal Construction of Narratives

Despite the likelihood of the violence escalating over time or if the woman attempts to leave, and the impact that on-going abuse can have on the victim, it

⁹ Edwards attributes this to the fact that killing has never been a woman’s vice either within or outside the family, but additional reasons can be seen for this; women’s experiences have generally been excluded from the development of legal frameworks and other social institutions. [On this point also see Griffiths’s discussion of anger in relation to abused women who kill and her claim that ‘the power to define what constitutes provocation, whom it is allowed to affect, and when and how they can be expected to respond, has been largely outside women’s sphere of influence.’ (Griffiths: 2000 p. 135).

¹⁰ Schneider: 2000 p. 115

¹¹ Schneider: 2000 p. 114

¹² Schneider: 2000 p. 112

¹³ Walker: 1984, revised most recently in 2009. The previous chapter contained a full analysis of Walker’s ‘battered woman syndrome’ and is discussed again at pp.207-210, below.

seems that women need to be presented as irrational and lacking in agency for their actions to become legally understandable¹⁴ and to enable them to invoke the most likely partial defence to succeed under these circumstances - diminished responsibility. Chapter Two examined the legal construction of gender and demonstrated how, even when written legislation is not directly discriminatory, legal personnel 'disseminate frequently sexist and oppressive ideas of what it means to be a "real woman", how she behaves and what social role she performs'.¹⁵ This legal construction then affects women who kill their abusers by constructing them in terms of how well they conform with 'appropriate femininity' and punishing them accordingly. The consideration of how female experiences may differ from men's are often now considered by the courts but this is frequently in the form of 'sexist stereotypes which reinforce the oppression and control of women in general'.¹⁶

It is open to the judge in any case to construct the perpetrator's story in the way he or she feels appropriate when presenting the "facts" of the case; these facts do not exist 'pre-packaged for judicial recital... Facts have to be selected, interpreted and communicated. This process is neither mechanical nor neutral, but is aimed at persuading the reader of the logical and emotional force of the judge's decision'.¹⁷ It is further suggested by Bibbings that judges '*first* arrive at a conclusion as to the desirable outcome of a case and *then* seek to rationalise this by looking for a means to justify it in terms of statute and case law'.¹⁸ This makes it possible to select and present the facts in a way that further supports the decision and also convinces others that it is correct.¹⁹ This means that a trial judge can construct a narrative for a jury, but also that an appeal judge can be seen to construct a version of events (the 'facts') that justifies the decision reached. It is thus necessary, when reading judgments, to consider 'what extra-legal factors were influential'.²⁰

This "manipulation" is very clear when the judicial constructions of Kiranjit Ahluwalia²¹ and Sara Thornton²² – two of the most commonly-discussed defendants in the context of the partial defences for abused women who kill –

¹⁴ Rollinson: 2000 in Nicolson and Bibbings (eds): 2000 p. 109

¹⁵ Nicolson: 1995 p. 186

¹⁶ Nicolson: 1995 p. 186

¹⁷ Nicolson: 1995 p. 190

¹⁸ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 239

¹⁹ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 239

²⁰ Bibbings: 2000 in Nicolson and Bibbings (eds): 2000 p. 239

²¹ *R v Ahluwalia* [1993] Cr App R 133

²² *R v Thornton* [1993] 96 Cr App R 112 and *R v Thornton* [1995] EWCA Crim 6

are analysed. In these two cases, the narrative of their stories given by the Court of Appeal judges used fact organisation and rhetoric to ‘construct the two women at opposite ends of the scale of appropriate femininity’²³ meaning they were presented as killing their husbands in very different circumstances and were thus not equally deserving of sympathetic treatment. The opening statement by Lord Taylor in *Ahluwalia* – [t]his is a tragic case²⁴ – can be contrasted with that of *Thornton* in her first appeal where Lord Bedlam provides a detached list of Sara Thornton’s personal details.²⁵ Throughout the *Ahluwalia* judgment, Kiranjit is portrayed by Lord Taylor as a victim of ‘grievous ill-treatment’ and he builds a story that posits a sympathetic subtext portraying her as passively borne along by events that outline her irrationality and lack of agency.²⁶ However, in *Thornton*, where diminished responsibility failed at the first appeal, Lord Bedlam can be seen to paint the defendant as a calculating woman²⁷ and ‘little of the narrative is given over to recounting the abusive nature of the matrimonial relationship.’²⁸ Rollinson contends that Sara Thornton was not being tried as a defendant but as a woman, and as a woman she was found wanting because she did not conform to the behaviour expected of her sex.²⁹ Instead she continued to exercise her autonomy and agency by acting as she did, rather than giving in and accepting her situation.³⁰ Nicolson asserts that the treatment of *Ahluwalia* and *Thornton* depended on ‘a judgement, not so much of their actions, but of their character and the extent to which it accords with social constructions of appropriate femininity.’³¹

The contrasting cases of *R v Tandy*³² and *R v Moloney*³³ provide a clear example of the way that the legal construction of narratives can influence judicial perceptions of the defendant’s actions. The decision of the Court of Appeal in *Tandy* emphasises the difficulties with invoking the partial defences to murder for women who act in response to male violence and highlights the

²³ Nicolson: 1995 p. 190

²⁴ [1993] Cr App R 133 at para 134

²⁵ [1993] 96 Cr App R 112 at para 113

²⁶ Rollinson: 2000 in Nicolson and Bibbings (eds): 2000 p. 114

²⁷ For example the use of short, clipped sentences and detailed factual descriptions of the step-by-step process by which she stabbed her husband give the impression that she was in control of her actions; ‘She then brought it [the knife] down towards him’ and ‘She only brought the knife down slowly’ (see paras 113-115 of *R v Thornton* [1993] 96 Cr App R 112).

²⁸ Rollinson: 2000 in Nicolson and Bibbings (eds): 2000 p. 115.

²⁹ Rollinson: 2000 in Nicolson and Bibbings (eds): 2000 p. 115

³⁰ See Chapter Seven, pp. 183-8 for a discussion of how Walker’s concept of learned helplessness has led to the exclusion of women’s experiences of abuse when they do not exhibit the behaviours associated with the concept and thus do not fit the criteria of BWS.

³¹ Nicolson: 2000(b) p. 172. For a discussion of constructions of appropriate femininity within the legal system see Chapter Four.

³² [1989] 1 WLR 350

³³ [1985] AC 905

effect of ‘the artificial construction of fact in legal trials and appeals’³⁴ The ‘facts’ that are presented by Lord Bridge relate only to the defendant’s alcoholism, not the fact that the defendant had just found out her daughter was being sexually abused by her step-father, thus indicating a lack of understanding of the emotional trauma of this discovery. In contrast, the House of Lords seem able to clearly ‘identify with the mess which Moloney, a soldier, had got himself into while drunk’.³⁵ The way that the ‘biography of the defendant is presented thus reveals a great deal about judicial empathy with the defendant and whether or not the judges in any given case are able to relate to the situation in which the defendant found themselves. This in turn will influence the outcome, thus providing a potential way of accommodating the limitations inherent in the strict doctrine of *mens rea* and the intention needed for murder, considered below.

Part Two

The Criminal Law: Abstraction, De-Contextualisation and Autonomy

One of the reasons that women who kill their abusers need to raise the partial defences is that, due to the foundational principles of criminal law and the ways in which the definitional elements of offences are constructed, the *actus reus* and *mens rea* of murder will usually be established in these situations. The practical application of liberal political philosophy and notions of individual justice that lie at the heart of the criminal law³⁶ mean external factors which may have undermined a defendant’s ability to freely choose their actions, such as poverty and years of abuse, are typically ignored and, as the ‘ultimate arbiter of [her] will and of [her] own actions, little or no regard is had to the context and circumstance of [her] behaviour’. Hence, the motive is ‘theoretically ostracised’ from the action.³⁷ One of the fundamental issues affecting the criminal justice system’s treatment of abused women who kill is the ‘construction of the abstract individual in legal discourse.’³⁸ The context and the impact of on-going abuse becomes masked by this rhetoric of individual liberty, and the social world is

³⁴ Wells and Quick: 2010 p. 771

³⁵ Wells and Quick: 2010 p. 771

³⁶ Norrie: 2001 p. 10

³⁷ Rollinson: 2000 in Nicolson and Bibbings (eds): 2000 p. 110. Of course evidential problems would arise if background factors such as these were considered, the intention here is merely to demonstrate that these will have impacted upon the defendant’s actions.

³⁸ Norrie: 2010 p. 109

presented as resting on the consensus of individuals regarded in isolation from the social and moral context in which their actions occur.³⁹ Two aspects of Norrie's critique of the criminal law can be utilised to analyse the criminal justice system's response to abused women who kill; the narrow concept of involuntariness in relation to the *actus reus*, and the separation of motives and intentions in the construction of the *mens rea*.

The *actus reus* consists of the behaviour which the defendant engages in seen from an external point of view and therefore abstracted of meaning or significance for the defendant herself.⁴⁰ This is seen first of all in relation to the requirement that the *actus reus* be performed voluntarily, and the way in which the law 'adopts a very narrow notion of involuntariness. It does not take much for something to be freely chosen; merely that the mind was in control of the body.'⁴¹ According to Ashworth, this approach is grounded in 'the principle of autonomy: individuals are regarded as autonomous persons with a general capacity to choose among alternative courses of behaviour'.⁴² This technical criterion serves to exclude 'subjective excuses based upon a broader moral conception which might incorporate the social context of action.'⁴³ All considerations relating to the social context and broader judgments about whether the accused could have helped doing what she did - such as fear of escalating violence, desire to protect her children, inability to leave due to the erosion of autonomy and self-esteem resulting from the abuse - are deemed irrelevant at this point; all that needs to be proved to establish the *actus reus* of murder is that the act was a conscious one.⁴⁴ The reliance of this doctrine on de-contextualised acts of atomistic individuals means that abused women who can be seen to have acted under compulsion and thus could not act freely, are still held to have acted voluntarily for the purpose of the *actus reus* of the offence.⁴⁵ A broad, moral concept of involuntariness would challenge the idea of individual responsibility in a way that this narrow conception of physical involuntariness does not. This reflects Hart's account which can be seen to crystallise the liberal conception of a world of free individuals; it is justifiable to

³⁹ Norrie: 2001 p. 21-9

⁴⁰ Wells and Quick: 2010 p. 99

⁴¹ Rollinson: 2000 in Nicolson and Bibbings (eds): 2000 p. 104. Even for an unconscious act to be involuntary it must be totally involuntary; *Broome v Perkins* [1987] Crim LR 271 and *Attorney General's Reference (No. 2 of 1992)* [1993] 3 WLR 982

⁴² Ashworth: 2006 pp. 158-9

⁴³ Norrie: 2001 p. 110

⁴⁴ Norrie: 2001 p. 110

⁴⁵ Norrie: 2001 p. 113

hold people accountable only for actions which they could have avoided in the sense that they knew and understood what they were doing and had the capacity and fair opportunity to control their actions.⁴⁶

Due to the foundational principles of autonomy and agency, the legitimacy of modern criminal law is fundamentally premised upon the notion of individual responsibility and this has led to a division between motive and intention when considering the existence of the *mens rea* of an offence.⁴⁷ Whilst motive is not allowed, it remains central to human agency and, in practice, it is impossible 'to imagine people forming intentions without having motives'⁴⁸ and vice versa. However, the criminal law views the motive, such as jealousy or fear, as a consequence ulterior to the *mens rea* and *actus reus* and therefore as no part of the crime; 'each individual is seen as a separate monad operating according to discrete personal motivating characteristics or emotions... No thought is given to the social context within which 'jealousy' or 'greed' are stimulated'.⁴⁹ In the context of women who kill their abusers it is clear that their individual actions, intentions and motives are formed within the context of the abuse, and yet when it comes to prosecution this is not seen as relevant to the forming of the necessary *mens rea*.⁵⁰ The effect of this is that, for the purposes of *mens rea*, no legal difference is drawn between circumstances that are vastly morally different; the contract killing of a third party is seen to be as culpable as a women who kills her abuser in order to escape and protect herself and her children.⁵¹ The assertion that motive is legally irrelevant to *mens rea* within criminal law doctrine is a political decision which allows the courts to appear to treat essentially political issues apolitically, and thus exclude moral and political challenges to the order of things.⁵²

Lord Bingham's judgment in *R v Kennedy (No. 2)*⁵³ affirms that the conventional position on individual responsibility continues to be the acceptance of the doctrine of psychological individualism; '[t]he criminal law generally assumes the existence of free will... certain exceptions... But, generally

⁴⁶ Wells and Quick: 2010 p. 114

⁴⁷ Wells and Quick: 2010 p. 105

⁴⁸ Norrie: 2001 p. 36

⁴⁹ Norrie: 2001 p. 37

⁵⁰ The partial defences of diminished responsibility and loss of control are only available once the *actus reus* and *mens rea* of murder are established so it is only at this point that the context of the abuse may be taken into account.

⁵¹ Norrie: 2001 p. 39. Specific defences may take account of these things, but *mens rea* does not.

⁵² Norrie: 2010 p. 226. Norrie suggests the exclusion of motive from the consideration of legal fault is due to the link between social causes and individual motives. During the time in which this area of the law developed, the ruling elite wished to exclude consideration of individual motives linked to social causes as a result of the social conflicts happening during this period. See Norrie: 2010 pp. 37-9 in particular, but in particular Chapter One and Conclusion.

⁵³ [2008] 1 AC 269

speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions about how they will act'.⁵⁴ He then quotes Glanville Williams statement that 'I may suggest reasons to you for you doing something; I may urge you to do it tell you to do it, tell you it is your duty to do it... My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it' and it is this 'voluntary' act that sets a new 'chain of causation' going, irrespective of what has happened before.⁵⁵ The weakness of this approach is its inability 'to produce a synthesised conception of the relationship between individual agency and social and political structures;' drawing upon the 'isolated, asocial individual alone with his private emotions' ignores the reality that 'individual agency is fundamentally constructed and constituted within pre-existing social relations.'⁵⁶

Central to the overarching principles and practices of the criminal justice system is the concept of the abstract psychological individual because this removes social conflicts from the courtroom, making the psychological individual at the heart of criminal law a political and ideological construction.⁵⁷ This construction has been especially pernicious in terms of removing the context of the abuse from the plight of the victim when she kills her abuser. Viewing the definitional elements purely as voluntary action (the *actus reus*) performed with intention (the *mens rea*) regardless of motive or the context in which she has committed the act means many women will be found guilty of murder. Unless she can raise self-defence (discussed below) or one of the other criminal law defences, she will need to then raise one of the partial defences in order to avoid the mandatory life sentence. Motive is considered when it comes to sentencing, provided the sentence is reduced from murder – requiring a mandatory life sentence - to voluntary manslaughter through the successful plea of either diminished responsibility or loss of control. However, this is a judicial decision, not a jury one, and will be made 'according to an individual view of the defendant,' therefore keeping the decision over whether the motive was 'good' or 'bad' 'politically safe with the judges'.⁵⁸

⁵⁴ [2008] 1 AC 269 at para 14

⁵⁵ [2008] 1 AC 269 at para 14

⁵⁶ Norrie: 2001 pp. 139-140

⁵⁷ Norrie: 2001 p. 223

⁵⁸ Norrie: 2001 p. 45

Part Three

Self-Defence

A strong case can be made for this defence being used to provide battered women who kill with a full acquittal when their life and bodily integrity was in danger as a result of the continued abuse they were suffering, and when they honestly couldn't see a way out. This is because it permits the use of such force as is reasonable to defend oneself or another.⁵⁹ However, the law of self-defence evolved in the context of patterns of male behaviour because women are less violent than men⁶⁰ and therefore their behaviour did not impact upon the development of the law in this area.⁶¹ It is suggested that statute and case law only succeeds in comprehending and including paradigmatic male responses to paradigmatic male violence.⁶² Therefore, masculine bias pervades the operation of this defence and women are typically excluded from relying on it – to date not a single battered woman in this country has successfully been able to plead self-defence in the context of a homicide charge appeal.⁶³

The operation of the defence was clarified by the Criminal Justice and Immigration Act 2008 and allows the question of whether the degree of force was reasonable to be determined by reference to the circumstances as the defendant believed them to be.⁶⁴ The defendant should be judged on the facts as she saw them, whether or not her perception of the threat was reasonable. The reasonableness of the force is then to be judged on whether it was necessary and whether it was proportionate to the threat perceived by her. Battered women who kill often fail on both standards which can, in part, be attributed to the abstraction and decontextualisation evident in the foundational principles of individual responsibility of the criminal law. In not situating behaviours in the context of a person's life, the impression is created that their behaviours are irrational or unintelligible.⁶⁵ Even if it is found that the use of some force was necessary, the defence fails in its entirety if the jury find that the

⁵⁹ Section 3 Criminal Law Act 1967

⁶⁰ The most recent British Crime Survey found that 91% of violent incidents perpetrated in general in Great Britain in 2009-10 were perpetrated by men.

⁶¹ O'Donovan: 1991 p. 221

⁶² Conventional uses of 'acceptable' self-defence include barroom brawls, fistfights with strangers, protecting home and family and so on.

⁶³ This means no contested cases have been successful for women claiming self-defence, it is possible that cases have been dropped because self-defence was accepted by the Crown.

⁶⁴ Section 76(3) Criminal Justice and Immigration Act 2008

⁶⁵ Noonan: 1996 in Bottomley and Conaghan (eds): 1996 p. 197

force used was excessive⁶⁶ in the circumstances as the defendant believed them to be.⁶⁷ Edwards identifies a problem for women pleading self-defence where their fatal act follows on from a lesser attack (which is, of course, often the case and why the woman survives it).⁶⁸

Due to the requirement of imminency, unless the woman was fearing for her life at the actual time she killed her abusive husband, the force will often be found unnecessary; it will be unreasonable for a woman to use force if she has other options available to her at that particular point in time, regardless of whether the violence is likely to continue or increase to a fatal level in the future. It is possible for the force to be judged non-proportionate, and thus unreasonable again, if her partner attacks her with bare hands and she uses some kind of weapon, regardless of the fact that men typically have superior strength and combat skills.⁶⁹ It is also usually overlooked that the scores of women killed by their partners every year are most likely to die at their hands rather than at the receiving end of a weapon.⁷⁰ If women were able to respond in a proportionate way it can be assumed that they would not be being repeatedly battered and abused. All of the factors limiting women's options are typically ignored, for example the economic and social constraints upon women, the fact that a fatal attack is most likely to occur when women try to escape their abusers, that domestic violence typically follows a pattern of escalation, and that it is almost impossible to entirely disappear from the sight of an abusive partner, especially when, as seen in Chapter Five, there is the concern that the courts generally grant abusers access to their children.⁷¹

This analysis of self-defence in the context of abused women who kill demonstrates that the criminal law's reliance on abstraction and the way in which it isolates individual cases from their social context is failing women when they come before the courts. The masculine bias towards reasonableness in the assessment of criminal liability and a failure to understand the reality of women's lived experiences is having a detrimental effect upon women in practice. It also emphasises the way that legal institutions do not fully comprehend domestic violence and are often blind to its underlying social

⁶⁶ *R. v. Clegg* [1995] 1 AC 482

⁶⁷ Section 76(6) Criminal Justice and Immigration Act 2008

⁶⁸ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 94

⁶⁹ There is also an irony apparent here; men's ability to kill with their bare hands often appears to result in their conviction for manslaughter rather than murder because prosecutors and jurors are more likely to accept such killings as unintentional or not premeditated.

⁷⁰ McColgan: 2000 in Nicolson and Bibbings (eds): 2000 p. 153

⁷¹ McColgan: 2000 in Nicolson and Bibbings (eds): 2000 p. 153

context of gender inequality and female subordination, thus making quite reasonable actions 'unreasonable'. This goes some way to explaining why legal reforms have not been able to adequately address the issue.

In the 1990s, campaigners, such as the Southall Black Sisters and Justice for Women, proposed a new defence of self-preservation that would contextualise the experiences of violence of women who kill their abusers.⁷² However, work in this area has proved unsuccessful to date, and analysis of the proposed defence indicates that even those developing it focused on an act-based approach encompassing only continuing physical and sexual violence, rather than recognising, as argued in the previous chapter, that the dynamics of domestic violence are best understood as a programme of coercive control.⁷³

Part Four

The Partial Defences to Homicide

Loss of Control

After years of campaigning by women's organisations such as the Southall Black Sisters, the Law Commission finally recognised that the defence of provocation 'elevated the emotion of sudden anger above emotions of fear, despair, compassion and empathy.'⁷⁴ This served to privilege 'male angered states but excluded from its ambit abused women who killed out of a state of fear or of self-preservation'.⁷⁵ The lack of a defence related to fear or despair has been seen as one of the biggest obstacles to the provision of a homicide defence for abused women who kill.⁷⁶ The Law Commission in 2005 highlighted the lack of a partial defence for a defendant who, 'fearing serious violence from an aggressor, goes too far in deliberately killing the aggressor in order to repel the feared attack.'⁷⁷ This led to the introduction of the new partial defence of loss of control, which came into force in 2009 with the intention of amending the common law defence of provocation to provide a defence for battered women

⁷² See Griffiths: 2000 pp. 147-150

⁷³ Griffiths: 2000 p. 148

⁷⁴ The Law Commission, Partial Defences to Murder (Consultation Paper No. 173): 2003 at para 4.163

⁷⁵ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 79

⁷⁶ McColgan: 2000 in Nicolson (ed): 2000 p. 155

⁷⁷ The Law Commission, Partial Defences to Murder (Consultation Paper No. 177): 2005 at para 125

who kill.⁷⁸ However, it will be argued that it is highly unlikely that this new legislation will be any more successful for battered women who kill than provocation was under the old law.

Difficulties with the Qualifying Triggers

Under the new legislation, the charge will be reduced from murder to voluntary manslaughter if the defendant can prove that one of two qualifying triggers provides an explanation for her loss of self-control. These are either fear of serious violence⁷⁹ or things done or said⁸⁰ which constituted circumstances of an extremely grave character⁸¹ and caused the defendant to have a justifiable sense of being seriously wronged.⁸² It was anticipated that this new formulation would enable abused women who kill to rely upon the defences as the qualifying triggers go beyond anger to encompass fear. However, there are several difficulties with the requirements under the qualifying triggers.

The first is that the central requirement remains a loss of self-control. The government failed to adopt the proposal of the Law Commission to remove this aspect of the defence and found it simply upon fear of serious violence.⁸³ It could be argued that abolition of the need for the loss of self-control to be 'sudden'⁸⁴ represents a departure from a traditional understanding of loss of self-control as a form of 'partial insanity through anger'⁸⁵ to include loss of self-control through fear, outrage and despair. It has also been claimed that the requirement of loss of control is not regarded by the government as central to the philosophical basis of the defence and is only there to ensure that the defence is not available to those acting out of revenge or in a cold-blooded way.⁸⁶ However, it can be asserted that in maintaining the requirement of a loss of self-control, the new partial defence will continue to be unable to accommodate women who kill out of fear, rather than in anger. The defence is

⁷⁸ See Horder, *Provocation and Responsibility* (Oxford University Press, 1992), The Law Commission *Summary of the Present Law of Provocation and Analysis of its Defects*, Carline: 2009 *Reforming Provocation: Perspectives from the Law Commission and the Government*, Burton: 2003(c), Burton: 2001 and Edwards: 2004.

⁷⁹ Section 55(3)

⁸⁰ Section 55(4)

⁸¹ Section 55(4) (a)

⁸² Section 55(4)(b)

⁸³ Law Commission Report No. 290, 2004, para. 391.

⁸⁴ Coroners and Justice Act 2009 Section 54 (2)

⁸⁵ Herring: 2009 p. 67

⁸⁶ Herring: 2009 p. 67. The government expressed concern over the use of the partial defence in the context of 'honour killings' or gang-related violence (see MoJ CP No. 19, 2008 (n. 6) 62).

predicated on an understanding of loss of control being fuelled by anger and it will be hard for the judiciary to understand women's fear and why she did not lose control in the conventional way. Edwards suggests that the law will continue to infer a particular state of mind from an outward behavioural expression so that understandings will continue to be fixed, with anger as the 'signature' of a loss of self-control.⁸⁷ An observable physical reaction is regarded as evidence of an inner state which caused the loss of self-control. This is because, within the law of excuses, provoked anger, which typically manifests in a physical reaction, has become the core justification or excuse for failing to exercise control over human conduct. Under the new law, the establishment of a loss of self-control is likely to continue to be based upon the dominant – if not exclusive – template of loss of self-control: anger.⁸⁸ Edwards claims that this inherent contradiction within the fear defence threatens and undermines its very purpose and potential so that the battered abused woman in fear 'has to conform to an outward expression of loss of self-control predicated on the vehement passion of anger when her emotional state and her state of mind are intractably one of a state of fear... her state of mind and manifestation of behaviour at the time of the killing are not a loss of self-control in the traditionally masculinist sense at all'.⁸⁹

Notwithstanding the removal of the requirement for a 'sudden' loss of control, there is still a risk that if abused partners kill after a period of delay they will be excluded from the new defence, even though they do actually experience a loss of self-control in being unable to refrain from killing.⁹⁰ The jury will be able to take into account a delay between the qualifying trigger and the killing when deciding whether the defendant did actually lose their self-control and a longer delay may make them more likely to view the killing as pre-mediated or out of a desire for revenge. Withey claims that the intention behind the legislation – to provide a defence for abused women who kill out of fear rather than due to anger - is undermined by the fact that the government opted not to formulate a separate defence for domestic abuse and excessive force cases. This would have no requirement for loss of control. The Government expressed the desire to prevent undeserving cases from succeeding with the defence. Cases where

⁸⁷ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 87

⁸⁸ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 88

⁸⁹ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 88

⁹⁰ Withey: 2011 in Reed and Bohlander (eds): 2011 pp. 265-279

there was a lapse in time between the trigger and the killing were seen as potentially undermining the claim that there was a loss of self-control.⁹¹ Withey further suggests that it is illogical to remove the requirement of suddenness but to keep the requirement of loss of self-control when loss of self-control is, by its nature, sudden.⁹² The term loss of self-control is ambiguous, and, as Lord Thomas of Gresford noted, could be used to mean 'either a failure to exercise self-control or an inability to exercise self-control'.⁹³ This could mean that a victim of intimate abuse who kills their partner does experience a loss of self-control even in the absence of a physically 'sudden' loss of control before the killing because they cannot see a way out and feel unable to refrain from killing. For example, if an abused woman kills her partner whilst he is asleep because she fears for her safety and is aware of the likelihood of serious violence in the future, the fact that her actions do not seem to be out of control does not mean she could refrain from doing what she did. It could be the only way she could envisage being free without risking further serious violence. Whether or not this will be the position adopted when the legislation is interpreted by the courts, however, remains to be seen.

As well as the likelihood that an outward expression of anger will be required to provide evidence of a loss of self-control, it is also likely that the requirement for a fear of serious violence itself will be misunderstood. This is because the context and dynamics of abusive relationships are often not fully comprehended, and, as has been shown, this has led to a misplaced focus on physical violence as the defining characteristic of an abusive relationship.⁹⁴ As discussed previously, abused women's awareness of the likelihood of the violence intensifying means that they often learn to recognise the signs of escalating violence, meaning that 'subtle motions or threats that might not signify danger to an outsider or trier of fact acquire added meaning for the battered woman whose survival depends on an intimate knowledge of her assailant'.⁹⁵ An abused woman may be in fear of serious violence despite there not having been any physical violence for a period of time because of the continued use of other coercive tactics. The use of credible threats and other

⁹¹ Hansard, HC, Public Bill Committee, Maria Eagle, col. 434 (March 3 2009)

⁹² Withey: 2011 p. 268

⁹³ Hansard, HL, Vol. 712, col. 572 (July 7, 2009)

⁹⁴ It was argued in the previous chapter that this focus is misplaced due to the range of methods the abuser typically uses in order to gain power and control over the victim.

⁹⁵ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 93

intimidating and controlling behaviour may be keeping her in the relationship, and she may be aware that were she to attempt to leave there would be a strong likelihood of serious violence being inflicted. Without understanding the typical dynamics of an abusive relationship and its programmatic nature, a judge or jury may not believe that there really was a fear of serious violence. Her perception of the likelihood of future serious violence is assessed as reasonable – or not – by a jury with, probably, no experience at all of abuse of this kind, and who have incorporated many of the prevalent misconceptions about domestic abuse into their assessment of her behaviour. Edwards questions the selection of the experts who are called upon to make this assessment, highlighting the often overlooked fact that the abused woman herself is the expert on her own situation. In relation to self-defence it is recognised that ‘a person acting for a legitimate purpose may not be able to weigh to a nicety the exact measure of any necessary action’⁹⁶ and it is contended that without an understanding of the coercion and fear a woman can face in an abusive relationship, the actions of women pleading fear under the loss of control defence may not be understood.⁹⁷

There is a further difficulty inherent in the written legislation that is likely to act as a barrier to abused women being able to rely upon the partial defence. Fear is qualified by ‘serious violence’ and not ‘extremely grave circumstances’, which means that an “inequity [is] embedded in the two types of defence.”⁹⁸ The implication of this inequity is that it raises the evidential bar for the part of the defence intended for abused women to rely upon. Edwards suggests this demonstrates insufficient understanding of the circumstances that abused women face and thinks it may lead courts to take a restrictive view of what constitutes ‘serious’ violence so that common types of abusive and coercive treatment such as ‘a woman who is constantly humiliated by a partner, who is tied up and has water poured over her, or is made to sleep in the bath or outside, or is subjected to cruelty, may not satisfy the threshold of ‘serious violence’.⁹⁹ In addition, it will be for the courts to determine what amounts to ‘fear’ and, because fear reduces the capacity for rationality, an extremely fearful woman may not be capable of reasoning, thus reinforcing the stereotypical view

⁹⁶ Section 76(7) Criminal Justice and Immigration Act 2008

⁹⁷ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 94

⁹⁸ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 91

⁹⁹ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 91

of women as irrational and unreasonable. If a female defendant is thought to be acting irrationally due to fear, this may undermine her claim that a person of her age and sex, in her circumstances, with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way. It is difficult to see how someone will be regarded by a jury as having a normal degree of tolerance and self-restraint, when they also appear to be acting irrationally.

Despite efforts to provide a defence for abused women, little attempt seems to have been made in the legislation to understand the impact of fear on the human will or on an abused woman's thinking and behaviour. The way fear is constructed in the new partial defence is inadequate and maintaining the requirement for a loss of control continues to authorise anger and an 'outward manifestation of loss of control.'¹⁰⁰ The Law Commission envisaged that fear of serious violence was sufficient *per se*, provided that the objective test was also established, and there was to be no added requirement that the defendant also lost their self-control¹⁰¹. That this requirement was nevertheless maintained impacts on the 'fear trigger' and means the defence is likely to fail some of those intended to benefit from the new provisions.¹⁰² This supports the argument that the legislature still fails to adequately comprehend domestic violence, not understanding the complexities and power dynamics of the situations abused women find themselves in. As emphasised in the previous chapter, abused women usually cannot simply leave in order to escape the violence and therefore the fear of serious violence should be a sufficient trigger in itself, whether or not the defendant lost her self-control.

It was envisaged that the most suitable qualifying trigger for abused women who kill would be fear of serious violence. However, the second qualifying trigger could still be invoked under these circumstances. For this second one to be available there must have been something said or done that was of an extremely grave character and left the defendant with a justifiable sense of being seriously wronged.¹⁰³ This has a significantly different philosophical underpinning than provocation because it is based on righteous indignation or moral outrage rather than angry loss of control and it could therefore be more successful than the old partial defence of provocation in

¹⁰⁰ Edwards: 2011(b) in Reed and Bohlander (eds): 2011 p. 94

¹⁰¹ Law Commission Consultation Paper 304: 2006 para 5.19

¹⁰² Withey: 2011 in Reed and Bohlander (eds): 2011 p. 271

¹⁰³ Sections 55(4), 55(4)(a) and 55(4)(b) Coroners and Justice Act 2009

providing a defence for abused women who kill.¹⁰⁴ For this limb of the defence to be available, as with fear of serious violence, the defence must establish that a person of the defendant's age and sex 'with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.'¹⁰⁵ It is therefore imperative that the wrongfulness of domestic abuse be considered in order to make an accurate assessment of how the hypothetical woman might react. Herring believes that this limb of the defence will shift the focus from the defendant's psychological state and on to the wrongfulness of the abuse they are suffering, meaning that a woman need not be presented as suffering from a psychological disorder, as with diminished responsibility, and can be presented and perceived as responding in the same way as any ordinary person might when facing a grave wrong.¹⁰⁶ However, analysis of the context and dynamics of domestic violence indicates that until the impact of domestic violence and its programmatic nature are fully understood by the judiciary and by society more generally (as they make up jury panels), the wrong of domestic violence may not be sufficiently understood. In addition, whilst this qualifying trigger is predicated on being seriously wronged rather than being in fear of serious violence, and as domestic violence is typically understood as being incidents of physical violence, judges and juries may not see the abuse as being sufficiently grave as to explain or justify killing.

Diminished Responsibility

Due to the exclusion of abused women who kill from relying on self-defence, and the masculine bias that still pervades the partial defence of loss of control, the partial defence of diminished responsibility continues to be the one most likely to be invoked in these circumstances. This partial defence was reformed recently¹⁰⁷ and now contains the statutory requirement for a 'recognisable medical condition'¹⁰⁸ (a requirement reflective of the changed state of medical science since the Homicide Act of 1957). Thus, for an abused woman to rely on

¹⁰⁴ Herring: 2011 p. 66

¹⁰⁵ Section 54(1)(c) Coroners and Justice Act 2009

¹⁰⁶ Herring: 2011 p. 67

¹⁰⁷ Section 52 of the Coroners and Justice Act 2009 amended S.2 of the Homicide Act 1957 relating to diminished responsibility.

¹⁰⁸ Section 52(1)(a) Coroners and Justice Act 2009

this defence she must be found to be suffering from PTSD, or a sub-category of it: 'battered woman syndrome' (BWS).¹⁰⁹ As seen in the previous chapter, this was a concept developed by psychologist Lenore Walker in an attempt to dispel the myths and misconceptions about domestic violence and to explain how battered women may come to commit violent crimes. Due to the fact that it is a medicalised specialist term, it can allow into court crucial evidence of the context in which an abused women may come to kill their abusive partners and why they did not leave the relationship. The potential for the syndrome to allow the introduction of the context of the abusive relationship could be viewed as useful given that generalised evidence concerning domestic violence is difficult to bring before the court. Without a medical explanation requiring expert witnesses, domestic violence becomes merely a part of the 'normal' world which courts are assumed to need no help in understanding.¹¹⁰ There is also an internal inconsistency within BWS as an explanation of how a woman came to kill her abusive partner: it suggests that a woman was helpless, but then killed.¹¹¹

Difficulties with Diminished Responsibility for Abused Women Who Kill

Unlike loss of control, the legal burden of proof is on the defendant to satisfy, on the balance of probabilities, the terms of the partial defence under Section 2. The reform also means that she must prove that the recognised medical condition *caused* the killing, whereas the old law on diminished responsibility allowed the defence if it was shown that the condition existed at the time of the killing. Even if a defendant can prove that she has BWS, if it only explains why she did not leave the relationship, and cannot be seen as the cause of the killing, the partial defence will fail.

It has been shown that one of the main misconceptions, perpetuated by individualised understandings and responses to domestic violence, is that this type of abuse occurs because of deviant individuals or relationship dynamics, carrying the implication that this abuse is *abnormal*.¹¹² Utilising a homicide

¹⁰⁹ See Chapter Seven for a full analysis of this concept.

¹¹⁰ Wells and Quick: 2010 p. 782

¹¹¹ Wells and Quick: 2010 p. 782

¹¹² See Chapter Seven at pp. 181-8

defence requiring expert evidence of a 'recognised medical condition' makes domestic violence seem unusual, when in reality, as shown by the statistics and broader prevalence indications, domestic violence is commonplace. As Taylor has emphasised, 'female homicide defendants may be exceptional because they are rare, but they may not be exceptional women; they may be ordinary women pushed to extremes.'¹¹³ The use of a medical syndrome to explain why women kill their abusers helps to perpetuate the myth, rather than the reality.

A further potential problem for abused women when utilising the partial defence of diminished responsibility is that it focuses on the pathology of the individual woman. This draws attention away from the behaviour and actions of abusive men. BWS 'shifts the focus of the violent act to the woman, and the use of 'syndrome' suggests that it is she who is emotionally or mentally impaired.'¹¹⁴ It also perpetuates a view of women as irrational and not acting with agency or autonomy, when in reality battered women who kill can be seen to be acting very rationally, doing what they do understandably out of fear and sheer desperation. BWS implies that women wrongly perceive the threat of violence as being more serious than it actually is because of the psychological effects of the abuse. However, the statistics show that their perception of the threat is real; studies on post-separation violence have found that violence and harassment often increase on separation.¹¹⁵ Wilson and Daly also found that women are at the greatest risk of homicide at the point of separation or after leaving a violent partner.¹¹⁶ These statistics do not suggest that women are unreasonable or irrational in their perception of the danger, but the use of BWS to provide a legal excuse for their action in killing their abuser does. As a concept to protect women, BWS is flawed and contentious, attempting to fit all women's experiences of abuse into the criteria of a specific syndrome, rather than looking at the reality of each abused woman's actual experience. If a female defendant does not fit with the expected characteristics and reactions of a woman suffering from this syndrome, then her experience of abuse could be disregarded completely. This is seen particularly in the contrasting judgments in the cases of *R v Ahluwalia* and *R v Thornton*. As discussed above, Sara

¹¹³ Taylor: 1986 p. 1679

¹¹⁴ Schneider: 2000 p. 24

¹¹⁵ These findings are shown by examples of studies such as Kelly et al 1999 - a London-based study which found that one-third of police calls for domestic violence incidents came from women who were separated and being harassed by their ex-partners, and Wilcox 2000 - a study which found that 1/3 of women who had left a situation of domestic violence suffered persistent and systematic violence and a further third experienced continued harassment.

¹¹⁶ Wilson and Daly: 1992

Thornton is presented as a calculating woman,¹¹⁷ complicit in her own abuse and questioned by the trial judge in the court of first instance for not choosing another course of action.¹¹⁸ Her failure to conform to the passive victim envisaged by BWS meant that her first appeal was dismissed and there is evidence of a lack of judicial sympathy or understanding even in the second appeal hearing where a retrial was ordered based on new medical evidence. This can be contrasted with Kiranjit Ahluwalia whose behaviour conformed to the more stereotypical view of abused women envisaged by BWS; a passive and compliant victim of aggression and her own attempts to fill the role expected of her as wife and mother. It was made clear in Chapter Seven that not all battered women experience the entire cycle of violence¹¹⁹ nor do all battered women display all the characteristics of learned helplessness¹²⁰ or just passively accept their fate with no attempt to change their situation. The way in which BWS, and the resulting sympathetic treatment, is withheld from women who don't display all the symptoms of battered women involves an 'absurd and dangerous elevation of the pseudo-scientific syndrome and its symptomology over the reality of battered women's experiences'.¹²¹

This incongruity is particularly noticeable in cases where the defendant pleads both diminished responsibility and loss of control. The defence of loss of control rests upon the *normality* of the mental response that underlies the offence; the defendant is excused because any reasonable subject would have responded in this way and explicitly excluded is recourse to the defence by anyone whose responses fall outside this norm. For diminished responsibility it is the *abnormality* of the response that grounds the exculpation; 'the defendant is to be excused in precisely those cases where *no* reasonable person would have responded in such a way'.¹²²

In the case of *R v Williams, Stephanie*¹²³ a victim of abuse (both domestic abuse from the partner she fatally stabbed and sexual abuse as a child) was not able to rely on either plea. Williams notes the failure of the psychiatrists assessing her to recognise that her responses may have seemed

¹¹⁷ This is seen even in the second appeal hearing where a retrial was ordered with The Lord Chief Justice describing the killing in detail and making it sound cold-blooded and planned (*R v Thornton* [1995] EWCA Crim 6)

¹¹⁸ The trial judge is quoted as stating: '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' [1993] 96 Cr App R 112 at para 117

¹¹⁹ See Chapter Seven at p. 171 and pp. 173-4

¹²⁰ See Chapter Seven at pp. 185-7

¹²¹ Nicolson: 2000(b) in Nicolson and Bibbings (eds): 2000 pp. 167

¹²² Allen: 1987 p. 26

¹²³ [2007] EWCA Crim 2264

misleadingly passive and unaffected by the trauma she had experienced (one of the psychiatrists stated her response to trauma was 'not more severe than one would normally expect to find in someone who had experienced episodes of violence'¹²⁴). An alternative analysis would suggest that her 'propensity for survival'¹²⁵ flowed from the control tactics she had learned as a response to the on-going abuse she had suffered. It can be seen from Williams' examination of this case that because the victim turned perpetrator did not conform to stereotypical views of how women would respond and behave following years of abuse, she was excluded from relying on self-defence or the partial defences to homicide.

In *R v Tandy*¹²⁶ the defendant, an alcoholic, killed her 11-year-old daughter shortly after hearing that she was being sexually abused and suspecting the perpetrator was her husband, the child's stepfather. This case provides an example of the judicial concentration on the defendant's weakness. This results in the absence of the abuser from the presentation of the legal facts. The focus is on the defendant's alcoholism and whether, for the purposes of diminished responsibility, her first drink of the day was 'involuntary'.¹²⁷ The emotionally traumatic events surrounding the case are thus deemed irrelevant. Due to the restrictive criteria needed to prove *actus reus* and *mens rea* there is, of course, no consideration of what led the defendant to become an alcoholic in the first place.¹²⁸

A further problem with diminished responsibility is that even if successful it only provides abused women who kill with a partial defence, reducing their conviction from murder to manslaughter and thus avoiding the mandatory life sentence. The judgment in the case of *R v Howell*¹²⁹ helps to enunciate the drawbacks and inconsistencies inherent in this approach. In this case, in addition to diminished responsibility succeeding in the first instance, the Court of Appeal also reduced Howell's sentence from 6 years to 3 and a half. The original sentence was imposed because she had failed to withdraw to avoid confrontation, but on appeal Lord Justice Brooks says 'One asks rhetorically where could she escape to?' This rhetorical question needs attention, for if

¹²⁴ Williams: 2009 p. 221

¹²⁵ Williams: 2009 p. 222

¹²⁶ [1989] 1 WLR 350

¹²⁷ [1989] 1 WLR 350 at para 356

¹²⁸ The fact that the defendant immediately suspected that it was her husband who had been abusing her daughter implies that there was some level of abuse occurring in the house at the time.

¹²⁹ *R v Howell* [1998] 1 Cr App R(S) 229

escape really was not possible – as even the judges seemed to understand – then it is questionable in what sense imprisonment, for any period of time, can be considered a just outcome. Was Margaret Howell really expected to allow herself to be beaten even when she seriously believed she would die at his hands?¹³⁰ The availability of the partial defence of diminished responsibility for certain types of female defendants gives the impression of a defence for abused women that understands and responds to domestic violence, detracting attention away from the fact that the most appropriate defence, self-defence, is not available for women who kill their abusers and therefore a full acquittal in these circumstances is denied.

Conclusion

In summary, it has been shown in this chapter that, despite the numerous possible defences available to abused women,¹³¹ none of them work in a satisfactory way either to benefit individual women perpetrators in the context of an abusive relationship, or to benefit female defendants as a whole. It has been argued that self-defence provides the most accurate reflection of women's experiences when they kill an abusive partner due to the reality of post-separation violence and the fact that women are most likely to be a victim of fatal levels of violence at the point of separation.¹³² However, due to the law's masculine construction and the way that it views acceptable responses to violence as following a paradigmatic male response, women are excluded from using the defence in this context. The defence of loss of control was amended with the primary intention of providing a partial defence for women who kill their abusers, and yet the defence appears to continue to operate along traditional gender lines and thus privilege male responses, and it is therefore likely that it will fail as a defence for abused women who kill. It is also contended that the

¹³⁰ In this case uncontested evidence of battered women's syndrome was introduced to explain why she had not taken the possibility to escape and avoid further violence. Psychiatrists described how her perceptions of the possibility of escape were 'cognitively distorted' by 'learned helplessness' and that she was 'locked into her abusive situation'. She genuinely believed she would die at his hands and that her body could not take much more violence and pain. (McColgan: 2000 in Nicolson (ed): 2000 p. 150).

¹³¹ Defendants charged with homicide are also able to rely upon defences such as automatism, insanity, mistake, intoxication and duress, and although female defendants seeking to rely upon these defences may suffer a disbenefit as a result of gender bias in the legal system as discussed in this section, these defences are not typically the ones invoked by female defendants in the context of abusive relationships.

¹³² Wilson and Daly: 1992. More recent findings compiled by Bala et al (2007) noted that separation sharply increases the likelihood that a man will kill his former partner: about 50% of women killed in the US, Australia and Canada were murdered in the first two months after separation, and 87% were killed within the year.

way in which the defence of diminished responsibility works in practice is detrimental to all women as a group; it can be very dangerous in terms of the stereotypical view of women it reinforces as suffering from the sort of mental illness or instability to which all women are prone.¹³³

Therefore, it is evident that women's experiences of ongoing abuse continue to be excluded from the traditional conceptions of justifiable criminal actions implicit in the operation of the homicide defences. The legal arguments in the cases of battered women who kill are 'routinely viewed as claims for special and undeservedly lenient treatment for battered women.'¹³⁴ There appears to be a clear tension between equal treatment and special treatment apparent here. The difficulties brought to light by examination of the long enduring equality versus difference dilemma come into play here; treating women by the same standards as men can be seen as desirable because it treats women with dignity and as equal legal subjects. However, practical problems abound due to male patterns of behaviour either being written into the law or operating as informal models governing the requirements that must be established to provide a defence. Therefore, formal equality can be seen to lead to substantive inequality and nowhere is this more apparent in relation to domestic violence than in the context of homicides committed by abused women. The difficulty is that insisting on female specific defences leads to situations that resonate with established stereotypes of women as passive and dependent, as seen in the operation of diminished responsibility which relies on gender constructions which harm women as a group.¹³⁵

One of the possible implications of the use of BWS for the partial defence of diminished responsibility is that, because the syndrome is seen 'to manifest itself, crucially, through a series of unreasonable decisions',¹³⁶ it paints women as irrational as a result of the abuse,¹³⁷ a perception which is carried across and automatically excludes women in this situation from claiming their behaviour was reasonable in order to rely on self-defence. Traditionally, the actions of battered women who kill have not been seen as reasonable, removing the

¹³³ Nicolson: 2000(a) in Bibbings and Nicolson (eds): 2000 p. 15

¹³⁴ Schneider: 2000 p. 115

¹³⁵ Nicolson: 2000(a) in Bibbings and Nicolson (eds): 2000 p. 20

¹³⁶ Noonan: 1996 in Bottomley and Conaghan (eds): 1996 p. 199

¹³⁷ Her victimisation makes her unreasonable in staying in the relationship when she should have left, in continuing to believe his promises of reform after each attack instead of leaving because she had no faith left in him, and in taking lethal action against his violence when she should have called the police, a neighbour, left the room or left the house (Noonan: 1996 in Bottomley and Conaghan (eds): 1996 p. 199)

availability of self-defence. They are thus denied the justificatory defence¹³⁸ and must instead rely on the excuse¹³⁹ of diminished responsibility or loss of control. In order for women's actions when they kill their abusers to be seen as justified – rather than excusable due to some type of deficiency inhering to the woman – the stereotypes that prevent women's acts from being understood in terms of their social context and thus from being justified in their lethal use of force must be challenged. The eradication of BWS is a key way of doing this because it is in tension with the notion of reasonableness necessary to self-defence by emphasising women's defects and incapacity.¹⁴⁰ A plea of diminished responsibility alienates the woman from the claim to have acted justly and prevents attention from being given to appropriate responses to cumulative violence of this type; the act is acknowledged as a crime and the focus is on the defendant's mental state at the time. This does nothing for battered women as a group and even if as a defence it occasionally benefits individual female defendants, it is a defence that should be avoided.¹⁴¹ Therefore, in order to consider whether a battered woman's acts are reasonable in terms of a claim to self-defence, the sex-based stereotypes of reasonableness need to be overcome along with the development of an adequate understanding of the experiences of battered women.¹⁴²

It appears that the criminal law does not yet recognise that in a society which institutionalises male dominance and violence, women's autonomy and agency are frequently constrained by male power and their 'criminal' actions may be a rational and understandable response.¹⁴³ Unless masculine standards of reasonableness are 'adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man''¹⁴⁴ then women will continue to be excluded from defences which have this requirement. It is imperative that abused women who kill their partners be seen as victims of domestic violence first and foremost, rather than as criminals first with the abuse as a 'relevant circumstance' but not a cause.

¹³⁸ Justificatory defences mean the act is deemed legitimate and lawful because of its circumstances.

¹³⁹ Excusatory defences focus on the actor; the act was wrong but is excusable because of the particular characteristics or state of mind of the actor.

¹⁴⁰ Schneider: 2000 pp. 135-139

¹⁴¹ This leaves feminist practitioners with the difficult choice of attempting to get a sentence reduced for an individual client or refusing to use the defence in view of the bigger picture of the social context of intimate partner abuse and the homicide defences.

¹⁴² Schneider: 2000 p. 119

¹⁴³ Nicolson: 2000(a) in Bibbings and Nicolson (eds): 2000 p. 26

¹⁴⁴ Noonan quoting Madame Justice Wilson: 1996 in Bottomley and Conaghan (eds): 1996 p. 199

CHAPTER NINE
THE INTERNATIONAL HUMAN RIGHTS LAW
RESPONSE TO DOMESTIC VIOLENCE

It is contended that international human rights law is a complementary system to the national legal system and thus can be viewed as overseeing the national law and providing a potential means of scrutinising the existing legal, social and policy provisions. This ensures consistency in state implementation of the standards that have been internationally agreed upon, and a method of holding states accountable for fulfilling their obligations regarding these standards. This chapter will assess whether there are aspects of the various international human rights law mechanisms that have the potential to affect the response to domestic violence in England and Wales in a more effective way than the national legal system alone.

There are two strategies by which international human rights law has been implemented at a national level in the UK. The first (discussed in Part Two) has been available since 1998 as a result of the Human Rights Act (HRA) incorporating the European Convention on Human Rights (ECHR) into domestic law. This made it possible for individuals and groups to bring litigation against the various bodies of the State for perceived human rights abuses. As a now integral part of the domestic legal system, consideration of this strategy is needed in any critique of the responses of the national system to domestic violence. The second way (discussed in Part Three) in which international human rights law can potentially influence the legal system and policy measures at a domestic level is through the advocacy approach. This involves incorporating the legislation and other measures called for by the UN human rights treaty bodies into domestic law and policy. These two approaches will be analysed to assess their understanding of the root social causes of domestic violence, whether they go beyond physical violence in their conception of domestic violence – as this thesis has shown to be necessary – and the potential influence the approaches have upon the domestic responses.

First appearances may suggest that international human rights law, with its clear emphasis on tackling violence against women,¹ would have much to

¹ This commitment is explicitly found in the Beijing Platform for Action (United Nations, *Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995*), the Vienna Declaration (UN General

offer both the victims of domestic violence and the groups working to target this widespread phenomenon. However, it will be claimed that, despite the ways in which women's interests and concerns have begun to be incorporated on to the international human rights law agenda over the last twenty or thirty years, women are still only rhetorically included;² on a practical level they are still excluded from many of the protections offered due to the concept of human rights remaining 'entrenched in the world of liberal legalism'³ and thus acting as a barrier to human rights law's ability to work for women.⁴ It will be suggested that the public/private dichotomy remains a powerful ideological barrier that justifies non-intervention by the state at a domestic level.

This is not to say that incursions into the private domain do not occur. A promising willingness to bring the private sphere under scrutiny may be found in the decision of the European Court of Human Rights (ECtHR) in *S.W. v UK*.⁵ It was held that the House of Lords judgment in *R v R*⁶ clarified the scope and progression of the common law in relation to rape within marriage; this meant that such acts were not being retrospectively criminalised which would have violated Article 7 of the European Convention on Human Rights (ECHR). The ECtHR thus shows itself ready to interpret law in accordance with changing societal norms. Of significance is the statement that 'the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom'.⁷ The idea of a 'civilised concept of marriage' is noteworthy in light of the critique of the marital-type relationship contained in previous chapters. The decision arguably represents 'another shift in the boundary between public and private spheres' meaning 'sexual offences committed within the marital home are no longer automatically outside the protection of the law.'⁸ Although progressive on the matter of female autonomy in relation to sexual intercourse, the statement still

Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993, A/CONF.157/23), General Recommendation 19 (UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38), the Declaration on the Elimination of Violence Against Women (UN General Assembly resolution 48/104 of 20 December 1993), and further demonstrated by the appointment of the UN Special Rapporteur on Violence Against Women in 1994.

² Edwards: 2010 p. 306

³ Palmer: 2002 p. 92

⁴ For feminist critiques of human rights and liberalism see Palmer: 2002 and Lacey: 2004

⁵ [1995] 48/1994/495/577

⁶ [1992] 1 A.C. 599

⁷ [1995] 48/1994/495/577 at para 44

⁸ Palmer: 1997 p. 95

appears to 'sentimentalise'⁹ the marital-type relationship and the idea that women need to be protected within it, rather than asserting that no woman should be immune from viewing forced intercourse as rape, regardless of her marital status.

Part One

The Public/Private Dichotomy in International Human Rights Law

The ideology of the public/private divide originates in classic liberal political philosophy and consists of a division between the public, political sphere as the realm of governmental action and intervention, and the private, non-political sphere of the family, home and sexuality where, theoretically, legal regulation is deemed to be inappropriate.¹⁰ According to the liberal tradition, the two spheres also correspond with the two sexes: the public sphere is the realm of men, the traditional breadwinner assumed to be the rational and political sex, and the private is the realm of women, the irrational sex. This divide has been used to justify governmental non-intervention in the private sphere, although it is clear that the government does regulate 'private' issues such as sexuality and family life.¹¹ Some feminists have argued that as well as justifying the exclusion of women from the public arena, the dichotomy has also made it possible to justify the lack of intervention in issues of violence against women within the private sphere. As Charlesworth has argued, lack of intervention "does not signify...neutrality", a state's failure to regulate instead "supports and legitimates the power of husbands over wives."¹²

Although international human rights law initially challenged the public/private divide by making the conduct of states toward its citizens a matter of public international law rather than a domestic issue,¹³ it at first left the public/private dichotomy within each state relatively untouched. This is because the protection it offers is mainly in relation to civil and political rights (indeed the ECHR only contains these rights).¹⁴ These rights essentially create the

⁹ See the discussion of Moller Okin and the sentimental family in Chapter Two

¹⁰ Charlesworth: 1988 p. 190

¹¹ For example, marriage is a highly regulated legal affair, sexuality is regulated through legislation concerning the age of consent, upon divorce or separation the distribution of assets and parental responsibility is legally regulated.

¹² Charlesworth: 1988 p. 193

¹³ Sullivan: 1995 pp. 126-7

¹⁴ Palmer: 2002 p. 105

public/private dichotomy because, by definition, they exist to prevent the public (male) world from intruding into particular areas of private life.¹⁵ It was males who created the traditional canon of rights and, not fearing violations in the private sphere because they were masters of that territory,¹⁶ these rights were not created or intended to cover violence and other deprivations of liberty in that sphere. It can be clearly implied from the wording and content of the UDHR that the drafters did not envisage that human rights could be violated within the home by non-state actors,¹⁷ despite this being the site where women are commonly abused and violated. This oversight lends support to the claim that '[l]iberalism ignores women's subordination by emphasising the danger of state power and protecting, in the name of freedom, the very site of women's subordination.'¹⁸

As recently as 1995 support was still needed for the statement that 'human rights are women's rights – and women's rights are human rights.'¹⁹ The claim itself emanates from a feminist analysis of the human rights canon and its uncovering of the ways in which women are systematically marginalised or excluded. This occurs through a variety of means resulting from the dominant masculine standards of the international human rights regime, and means women are therefore not constituted as fully human for the purposes of guaranteeing their enjoyment of human rights.²⁰ The explicit separation of women's rights from human rights until this time, and the fact that even now there is often 'a specific lack of recognition of women's rights as human rights where women's experience is distinct from that of men,'²¹ is indicative of the secondary status of women.²² The claim can be seen to originate from the critique of the public/private dichotomy and the types of rights and interests deemed worthy of international protection. It thus strikes right at the heart of one of the most fundamental premises enshrined in the Universal Declaration of Human Rights; human rights apply equally, 'without distinction,' to everyone.²³

¹⁵ Mahoney: 1995 p. 845

¹⁶ Bunch: 1995 p. 13

¹⁷ Lloyd: 2007 p. 97

¹⁸ Higgins: 2006 p. 537

¹⁹ Hernandez-Truyol: 1996 p. 606. For an analysis of the ways in which the traditional human rights canon contains rights that are only, or mainly, of relevance to male interests see Bunch: 1995. Moya Lloyd has pointed out that claims for women's human rights appear paradoxical because of the pairing of the particular (woman) with the universal (human). See Lloyd: 2007 pp. 93-5

²⁰ Otto: 2005, p. 105

²¹ Palmer: 2002 p. 92

²² Bunch: 1995 p. 12

²³ Article 2, UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948.

One of the effects of the ideology of the public/private divide is that when the national legal response to domestic violence is under consideration, international human rights issues are rarely raised. If they are invoked, it tends to be in support of a non-interventionist approach; a state-imposed resolution is deemed inappropriate because of the 'private' nature of the incident.²⁴ However, as argued in previous chapters, the state can be deemed to be complicit in domestic violence because it perpetuates many of the social conditions in which the abuse can occur by sustaining the gendered stereotypes and defining the distribution of power in society.²⁵ Thus, the state is arguably not absent from crimes committed against women and is instead 'deeply and actively complicit in the abuses.'²⁶ MacKinnon challenges the operation of the public/private divide in international law and claims that when the same things happen to men but in settings largely reserved for abuses of women, international law regards the violations as private and domestic (in both senses; within homes and within states) and therefore beyond its scope.²⁷ The direct provision of an unregulated domestic sphere reflects state-centric thinking where the power of the state to do harm 'trumps' all other power and minimises the harm private actors can do. The view that State violence is worse than private violence is rooted in the theory that the State will provide redress for private violence,²⁸ which, as the analysis of the limitations of the domestic law demonstrated, is clearly not the case in the context of domestic violence.

Rather than excluding the private sphere entirely, the traditional human rights regimes can be seen to use the divide as a screen or 'convenient tool'²⁹ to avoid addressing women's issues.³⁰ It has been observed that the divide is irrational and inconsistently applied, meaning the public-private distinction is perhaps being used to justify female subordination in the home,³¹ render

²⁴ Choudry and Herring: 2006 p. 753

²⁵ MacKinnon: 1993 p. 22

²⁶ MacKinnon: 2006 p. 23, Higgins clarifies that MacKinnon is not claiming that abusive partners act to promote the interests of the state, but that if human rights were meaningful for women – and didn't just serve male interests – they would include effective remedies against private violence (Higgins: 2006 p. 526).

²⁷ MacKinnon: 2006 p. 21

²⁸ Copelon: 2007-8 p. 238

²⁹ Mahoney: 1995 p. 843

³⁰ Engle identifies two different forms of analyses of the distinction between the public and private spheres in relation to international human rights law; the first is that human rights theory is flawed and not universal due to its exclusion of the space in which women operate; the second is that international law doesn't really exclude the private sphere but uses the public/private divide as a convenient screen to avoid addressing women's issues. Under the first analysis, international law must be reconceptualised to include the private in order for women to be included, whereas under the second the doctrinal tools are already present in international human rights law to include the private. (Engle: 1993 pp. 143-4)

³¹ Bunch: 1991 p. 491

women's concerns invisible, and ensure the preservation of the status quo.³² Binion has argued that it is in state's interests to retain the pre-eminent position of the public/private dichotomy because it shields various institutions from external investigation. She further claims that if a deconstruction of the patriarchal nature of family (or private) life were to be allowed, it may lead to an improved understanding of the patriarchal and hierarchical structures of society by citizens, who may then attempt to reconstruct them.³³ Therefore, the distinction can be seen to exist for political reasons and has been able to continue because female subordination runs so deep that it is viewed as natural, preventing sex discrimination and violence against women being seen as political issues or human rights abuses.³⁴

The exclusion of the private sphere from international scrutiny has meant that international human rights law has been able to see women's oppression and exclusion from public life as rooted in sexuality and private life.³⁵ This has enabled it to disregard the inter-connection between the two spheres. Failing to recognise women's oppression as rooted in the creation, by the state, of a sphere where non-intervention is justifiable, the state's complicity in forms of oppression such as domestic violence is rendered invisible. However, there will be a consideration of whether the public/private divide is beginning to be dismantled due to the imposition of positive obligations on states below.

Part Two

The Litigation Approach

This approach can be broadly divided into the outcomes of cases heard by the European Court of Human Rights (ECtHR) under the ECHR, and the implementation and interpretation of the HRA by the UK courts.³⁶ McQuigg identifies three main categories of measures most strongly highlighted by

³² Charlesworth: 1994 p. 69

³³ Binion: 1995 pp. 516-7

³⁴ Bunch: 1995 p. 14

³⁵ Edwards: 2010 p. 69

³⁶ The HRA only partially incorporates the ECHR into domestic law in the UK due to the Government's desire to preserve parliamentary sovereignty, at the same time as protecting the Convention rights; '[t]he judiciary have been given considerable freedom to develop domestic law in line with the Convention principles while the supremacy of Parliament is preserved as the courts will be unable to strike down any primary legislation which is incompatible with the convention' (Palmer: 2002 p. 100). They can instead make a declaration of incompatibility – a signal to Parliament and the public that in the court's view a violation of fundamental rights has occurred, and it is up to Parliament then whether to amend the law

commentators in the UK as being beneficial if adopted in relation to domestic violence. These would be to improve the criminal justice system to ensure domestic violence is treated in the same way as any other crime, increased social support measures for victims, and efforts to increase awareness of domestic violence. This latter closely reflects the analysis of the underlying causes of domestic violence presented in this thesis. However, McQuigg's research indicates that, at present, the potential of the jurisprudence of the ECtHR in relation to domestic violence may be limited to 'the amelioration of the criminal justice system, for example, ensuring that the police respond effectively to cases of domestic violence'.³⁷ This is because the courts are probably reluctant to hold that the state has a duty to provide accommodation or financial resources and points out that judges themselves do not feel equipped to make decisions about the allocation of resources because this is something that should be left to politicians.³⁸

Although it is now generally accepted that domestic violence is an affront to the physical and moral integrity of women as human beings,³⁹ there is far less agreement over the responsibilities of States for that violence because the public/private divide has operated to exclude state liability for violence and abuse that occurs in the private sphere.⁴⁰ This has meant that in order for domestic violence cases (and other matters deemed 'private') to fall within the scope of the ECHR,⁴¹ the court has needed to take a dynamic approach by establishing positive obligations⁴² from its negative provisions. The ECtHR has imposed positive obligations and extended state liability for privately inflicted violence through the concept of 'due diligence'; states parties are responsible for 'private acts' if they fail to act 'with due diligence to prevent violations of

³⁷ McQuigg: 2011(a) p. 126

³⁸ McQuigg: 2011(a) pp. 67-9

³⁹ In determining whether the UK courts recognise domestic violence as a human rights issue, it is significant that the cases heard in the UK indicating domestic violence is now being recognised as a human rights issue have not attacked the UK's own legal system's dealings with domestic violence. The case of *R v Immigration Appeal Tribunal and another, ex parte Shah* ([1999] 2 All ER 545) involved two Pakistani women who were forced to leave their homes by their husbands and sought asylum in the UK, arguing they were refugees because both had suffered violence in their home country. The House of Lords found that because Pakistan was unable to offer them any protection and it would be pointless for them to complain to the police or courts, they were refugees for the purposes of the ECHR.

⁴⁰ Edwards: 2010 p. 309

⁴¹ Civil and political rights, by their nature, only impose negative obligations on states to refrain from committing certain acts that would violate the human rights of their citizens.

⁴² The Court has derived principle whereby it has been able to impose certain positive duties on states to protect the rights of individuals from threats posed by other private entities from three propositions: Article 1 provides that states must secure the rights to everyone within their jurisdictions, seeming to indicate that positive steps must be taken to ensure private individuals can freely enjoy their fundamental rights, second, it's assumed rights must be effective, not merely rhetorical and as it is likely that a greater percentage of human rights abuses take place in the private arena this has meant the European court has recognised that obligations must be placed on states to protect rights of individuals from threats posed by other individuals. Third, Article 13 requires states to provide effective remedies for violations of rights which also creates a need for the imposition of positive obligations (McQuigg: 2011(a) pp. 43-4).

rights, or to investigate and punish acts of violence, and to provide compensation'.⁴³

The Application of the 'Due Diligence' Standard by the Courts

The ECtHR did not consider a case involving domestic violence until 2007 – itself revealing in terms of the types of cases deemed to be of concern under human rights law – but since this time there have been a series of cases brought before the court which involved domestic violence.⁴⁴ The most significant of these, for present purposes, being *Opuz v Turkey*⁴⁵ where the applicant's mother was killed by the applicant's ex-husband, and the applicant herself suffered ill-treatment amounting to 'a familiar litany of abuse, combined with inaction and ineptitude on the part of the authorities.'⁴⁶ The court held that there were violations of Articles 2 and 3 (the right to life and the right to be free from 'inhuman or degrading treatment') but also Article 14 – the right to be free from discrimination.

By finding that the state had failed in its 'due diligence' duties, the *Opuz v Turkey* ruling extends the positive obligations upon states in respect of cases of domestic violence, requiring a proactive approach by ensuring the criminal justice systems of states parties are 'fit for the purpose.'⁴⁷ By regarding victims of domestic violence as 'vulnerable' for the purposes of Article 3, the Court also puts a greater onus on States to take measures to protect them, including the need for an authority to take action against a perpetrator even without the victims consent and the obligation to provide assistance and support for victims.⁴⁸ However, the implications of this requirement are perhaps of less significance to the UK response than in countries such as Turkey where prosecutorial and judicial tolerance of domestic violence is apparent in the face

⁴³ The ECtHR in *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009) referred to Article 4(c) of the Declaration on the Elimination of Violence against Women (1993) which urges States to "exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons (at para 78).

⁴⁴ *Kontrova v Slovakia* (2007) 4 EHRR 482 293-294; *Bevacqua and S. v Bulgaria*, ECtHR, Applic No. 71127/01 (12 June 2008); *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009); *E.S. and Others v Slovakia*, ECtHR, Applic. No. 8227/04 (15 December 2009); *A v Croatia*, ECtHR, Applic. No. 55164/08 (14 October 2010); *Hajduova v Slovakia*, ECtHR, Applic. No. 2660/03 (30 November 2010).

⁴⁵ *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009)

⁴⁶ Londono: 2009 p. 658

⁴⁷ Londono: 2009 p. 667

⁴⁸ Londono: 2009 p. 667

of the law or policies.⁴⁹ The ‘gap between policy and practice can be enormous’⁵⁰ so, in focusing upon the written laws when assessing whether states are complying with their obligations under Article 3 rather than the practices of the authorities, states may be deemed to be complying even when their practices are significantly failing to protect domestic violence victims. The ECtHR in *Opuz* allowed a contextual approach to the continuation of prosecutions and it is likely that the discretionary approach of the CPS⁵¹ will not violate Article 3. In practice, it has been historically unusual for prosecutors in the UK to proceed without the victim’s support, but the existence of the possibility to continue, whilst not mandatory, means the UK can likely be confident that it is not violating Article 3 in this regard.⁵²

The inclusion of psychological pressure in this case⁵³ indicates that, provided the victim falls into a group of ‘vulnerable’ individuals,⁵⁴ non-physical violence will engage the State’s obligations under Article 3. However, given the 2008 decision by the House of Lords⁵⁵ concerning the amount of discretion to be granted to the police in respect of their positive obligations following *Osman v UK*⁵⁶ (considered below), it seems unlikely that the obligations the police are under will be engaged in the absence of physical abuse or threats to life. It was emphasised in Chapters Five and Six that the judiciary, CPS and police, at present, focus on physical violence, usually of a serious nature, as the defining feature of an abusive relationship. The positive obligations arising under *Opuz* will likely not improve upon this, unless there is clearly visible and understandable psychological pressure. Without examining the context and relationship between the parties, the police are unlikely to deem abuse such as the use of credible threats as indicative of a threat to life or bodily integrity.

It has been argued that *Opuz* does nothing to redefine the scope of the obligation imposed upon States and merely applies the test established in *Osman* where it was claimed that the UK was in breach of Articles 2 and 8 (right to life and right to respect for private and family life).⁵⁷ This case was brought by

⁴⁹ Burton: 2010 p. 137

⁵⁰ Burton: 2010 p. 137

⁵¹ The CPS Policy for Prosecuting Domestic Violence (March 2009) states, at para 5.9, that a prosecution will not automatically be stopped when the victim withdraws.

⁵² Burton: 2010 p. 138

⁵³ *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009) at paras 141 and 161

⁵⁴ *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009) at para 160

⁵⁵ *Chief Constable of the Hertfordshire Police v Van Colle and Smith v Chief Constable of Sussex Police* [2008] UKHL

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⁵⁶ (1998) 29 EHRR 245

⁵⁷ Burton: 2010 p. 134

a pupil and his mother after the pupil's teacher (who had developed an unhealthy attachment to the pupil and committed a series of incidents) injured the pupil and fatally shot the pupil's father. The case was brought on the grounds that the police (a public authority for the purposes of Section 6 of the HRA) had failed to take sufficient measures to protect the lives of the pupil and his father, despite being notified that their lives were at risk. In relation to Article 2, the judgement of the court recognised not only a duty on States to 'refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction... [T]he State's obligations... extends beyond its primary duty to secure the right to life by putting in place effective criminal-law provisions... Article 2... may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual'.⁵⁸

Although the ECtHR here makes it clear that the State may have a positive obligation to prevent the rights of one individual being breached by another, for the duty to become effective the authorities must either know – or ought to have known – 'of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk'.⁵⁹ Even in the case of *Osman* itself, it was held by the ECtHR that on the facts of the case the criteria had not been met and no breach of Article 2 was established.⁶⁰ There was also no breach of Article 8 because the police had taken all the steps they could reasonably have been expected to take. This was despite the fact that they had been aware of the teacher's behaviour and yet did not put the Osman's home under surveillance, and allowed the teacher to abscond.

Osman certainly demonstrates the limitations of the 'due diligence' standard in terms of its ability to dismantle the public/private divide and impose obligations upon states to prevent the human rights of individuals being violated by private individuals. In relation to domestic violence this would mean that 'public authorities could only be held liable for failing to protect a victim if the

⁵⁸ *Osman v United Kingdom* (1998) 29 EHRR 245 at para. 115

⁵⁹ *Osman v United Kingdom* (1998) 29 EHRR 245 at para. 116

⁶⁰ *Osman v United Kingdom* (1998) 29 EHRR 245 at para. 121

authorities were already cognisant of the situation'.⁶¹ The state could be in breach if the police did not take steps to protect known victims, or did not respond adequately when called to an incident of domestic violence, but this duty does not come into existence until the police are alerted and, as seen in previous chapters, the majority of incidents go unreported (the 2004 British Crime Survey found that the police hear of only one in four of the worst domestic violence cases).⁶² Sullivan suggests that establishing the necessary factual record for breach of a due diligence duty will always be difficult due to the extent that the state and society conceal domestic violence.⁶³

The *Osman* ruling and the UK courts' acceptance that the HRA does have indirect horizontal effect (so that there are some circumstances when individuals can rely on Convention rights indirectly in proceedings against private parties under the provisions of the HRA) can be seen to have laid the doctrinal foundations for using the Act to provide assistance to domestic violence victims. McQuigg suggests that this demonstrates that UK judges are willing to transcend the public/private dichotomy in cases involving human rights.⁶⁴ However, it must be emphasised that the effectiveness of the courts depends on the attitudes of individual judges, and, as was shown in the chapters examining the domestic law, judicial attitudes tend to perpetuate traditional roles and expectations of women.

Two cases heard in the European Court since *Osman* have refined the principles with regards to positive obligations. In *Mastromatteo v Italy*⁶⁵ the European Court had to consider whether the decision to grant prison leave to offenders who subsequently killed Mastromatteo's son amounted to the violation of the state's duty to protect life under Article 2. They held that there was no violation of Article 2 on the grounds that a positive obligation only arises when the authorities knew or ought to have known of the existence of a real and immediate risk to the life of an identified individual(s) and had failed to take reasonable measures to avoid that risk.⁶⁶ The Court emphasised that Article 2 may also imply, in certain well-defined circumstances, a positive obligation on the authorities to take preventive operational measures to protect an individual

⁶¹ McQuigg: 2011(a) p. 53

⁶² Walby and Allen: 2004 p. 97

⁶³ Sullivan: 1995 p. 132

⁶⁴ McQuigg: 2011(a) pp. 60-2

⁶⁵ 2002, Application No. 37703/97

⁶⁶ 2002, Application No. 37703/97 at para 68

whose life is at risk from the criminal acts of another individual. It was reiterated that such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

Mastromatteo v Italy was distinguished from *Osman* and *Paul and Audrey Edwards v UK*⁶⁷ (another case concerning positive obligations and police responsibility) because, in those cases, there were specific potential victims identified in advance, whereas in this case the issue concerned the existence of an obligation to afford protection to society in general.⁶⁸ Therefore in this case there was no obligation in the first place, whereas in *Osman* and *Paul and Audrey Edwards* there was an obligation to the identified individuals, but it was found the authorities had done all that could be reasonably expected to discharge this duty.

The requirement that potential victims be identified in advance comes under question following the case of *Maiorana v Italy*⁶⁹ where it was held that there was a violation of Article 2 when a man in prison for a particularly violent crime killed two previously unidentified women when on day release. As it had not been possible to identify the two women as potential targets of a lethal act on his part, the case concerned the obligation for the Italian judicial system to afford general protection to society against potential danger from a person who had been convicted for a violent crime. The Court took the view that the granting of day release to the prisoner despite his criminal record and incidents of violent behaviour in prison constituted a breach of the duty of care required by Article 2 of the Convention. This case indicates that there may be a violation of Article 2 if the state is deemed to have been especially negligent in terms of the lack of protection provided for society in general.

The way in which the scope of the positive obligations arising for police and other authorities have been interpreted by the UK courts following *Osman* can be seen in *Chief Constable of the Hertfordshire Police v Van Colle and*

⁶⁷ 2002, Application No. 46477/99

⁶⁸ 2002, Application No. 37703/97 at para 68

⁶⁹ 2009, Application no. 28634/06

*Smith v Chief Constable of Sussex Police*⁷⁰ (*Van Colle and Smith*). This joint appeal involved one case of fatal non-domestic violence and one case of non-fatal domestic violence where it was alleged that the police had failed to take adequate steps to protect the victims. In *Smith* the victim had complained to the police after a series of threatening communication from his former same-sex partner and was then subject to a serious assault. Although the police had begun to investigate the complaints, they had failed to take any steps to initiate a prosecution against the perpetrator. Despite there being an identified individual at risk and known to the police, the majority of the House of Lords upheld the public policy principle that the police should not be liable in negligence for their inaction. When considering the amount of discretion the police needed to be granted, the majority expressed concern over how the police should respond to domestic violence cases because not every complaint of this kind is 'genuine;' those that are genuine must be distinguished from those that are not. It was felt that if the police were required to treat every report from a member of the public that he or she is being threatened with violence as giving rise to a duty of care to take reasonable steps to prevent the alleged threat from being executed then police work elsewhere may be impeded. They decided that the judgment as to whether any given case is of that character must be left to the police.⁷¹ This judgment has serious ramifications given the misunderstandings that abound concerning the extent, nature and dynamics of domestic violence within the criminal justice system. Victims already suffer from not being believed and having the abuse they are suffering misunderstood, without the courts granting the police further discretion to decide whether or not an alleged threat to life is genuine.

The restrictive application of the *Osman* test applied by the House of Lords in the jointly heard *Van Colle*, whilst not a domestic violence case, suggests that domestic violence victims who want to argue in the domestic courts that the police failed to protect them from a known domestic violence perpetrator will not fare well. This is due to the decision that 'ought to have known' means 'ought to have appreciated on the information available to them', rather than 'ought, had they carried out their duties with due diligence, to have

⁷⁰ [2008] UKHL 50

⁷¹ [2008] UKHL 50 at para 76

acquired information that would have made them aware of the risk'.⁷² Victims would therefore need to bring a great deal of contextual information to the police before it can be said that they knew of a real and immediate risk to life (this was clearly discharged by Ms Opuz and her mother due to the number of times they contacted the police with details of when Mr Opuz had threatened their lives). As Burton emphasises, many domestic violence victims will not be able to bring their cases within the ambit of *Osman* even when the police could have done more if they had exercised due diligence in their investigations.⁷³ These two appeals indicate that the very restrictive test under *Osman* and reaffirmed by *Opuz* is being applied even more restrictively by the UK courts so that even where a victim is known to be at risk by the police, there still might not be an obligation for the police to take action, or to act with due diligence when assessing whether there is a risk.

It is also evident that the concept of 'due diligence' is far removed from the absolute prohibitions on torture, genocide and slavery found elsewhere in international human rights law. Therefore violence against women is treated in a different manner from the most serious human rights violations and is aligned with qualified or limited rights, not the peremptory or non-derogable ones.⁷⁴ The concept both permits and accepts that non-state violence against women isn't *per se* within the scope of international law and only falls within it indirectly; 'non-state acts of violence against women (the predominant kind) are not considered within the scope of international law unless they satisfy a threshold level of failed state behaviour in circumstances where there is no reasonable justification for that failure'.⁷⁵

It seems that in combatting domestic violence, 'due diligence' is not likely to be a very useful standard to engage due to its lack of precision and the suggestion that it is enough that the state has done *something*, whether or not the agreed result has been achieved.⁷⁶ Analysis of cases before the ECtHR (and some of the UN Human Rights Treaty Bodies which also employ the concept) led Edwards to allege that the test is not yet determined with any certainty, has no clear criteria and there is no absolute standard.⁷⁷ Successful

⁷² [2008] UKHL 50 at para 86

⁷³ Burton: 2010 p. 135

⁷⁴ Edwards: 2010 p. 309

⁷⁵ Edwards: 2010 p. 315

⁷⁶ Holtmaat: 2008 p. 88

⁷⁷ Edwards: 2010 p. 309

case law to date that has ‘engaged with the concept is at the extreme end of the state complicity spectrum’ (i.e. cases where it seemed very clear that the State ought to have acted to prevent the violations) and it is therefore unclear where the limits of the concept lie.⁷⁸ Under *Osman*, there is only a requirement that states take reasonable steps,⁷⁹ it is not yet clear what would constitute reasonable measures or a reasonable omission or failure in respect of different forms of violence against women such as domestic violence.⁸⁰ Furthermore, it is hard to establish the failure of state institutions in relation to incidents of domestic violence due to the particularly concealed nature of this form of violence against women.

Therefore, it seems that the due diligence test is likely to be of little significance in terms of holding states responsible for failing to prevent domestic abuse. This is especially apparent when so much of their complicity in these acts is currently denied and the construction of appropriate femininity and masculinity that is created and sustained by constructions within the law, are generally invisible under a patriarchal system which states that differential treatment of the sexes reflects natural biological differences. The requirement for a close link to the state ignores the role and function of male violence in women’s lives and that it is rooted in and perpetuates the culture and structure of the patriarchal state.⁸¹ This contextualisation is crucial to understanding state responsibility for violations of women’s human rights,⁸² especially domestic violence.

The *Stubbings*⁸³ case suggests that states ‘may be granted a wider margin of appreciation⁸⁴ in cases involving their positive obligations to protect the rights of individuals from being violated by the actions of other private entities.’⁸⁵ Combined with *Osman*, where the ECtHR stated the need to take into account ‘the difficulties involved in policing modern societies,’⁸⁶ this is

⁷⁸ Edwards: 2010 p. 315

⁷⁹ Edwards stresses that ‘although reasonableness is a commonly employed legal concept, it is not interpreted and applied in a vacuum but within a social and cultural context and thus is vulnerable to sexism and prejudice’ (Edwards: 2010 p. 315).

⁸⁰ Choudry and Herring emphasise that although Article 3 of the ECHR is drafted in absolute terms, the *duties* that are imposed are not because the ‘police, local authorities and courts are only under a duty to intervene *in so far as is reasonable* to protect a victim of domestic violence’ (2006 p. 763)

⁸¹ Copelon: 1994(b): 297

⁸² Romany: 1994 p. 102

⁸³ *Stubbings and Others v United Kingdom* (1997) 23 EHRR 213.

⁸⁴ This is a concept developed by the ECtHR when considering whether a State is in breach of its obligations under the ECHR. It takes into account the fact that the Convention will be interpreted differently in different States. The concept was first employed in *Handyside v United Kingdom*, 1976, application no. 5493/74).

⁸⁵ McQuigg: 2011(a) p. 58

⁸⁶ *Osman v United Kingdom* (1998) 29 EHRR 245 at para. 116

indicative of a wide margin of appreciation being granted to states in terms of policing decisions and resources, something clearly of enormous import to the handling of domestic violence cases. Therefore, even though the ECtHR is demonstrating a dynamic approach to the Convention rights by extending the doctrine of positive obligations, it is submitted here that the test of 'due diligence', as it is currently applied and interpreted, does not go anywhere near far enough because it does not hold states responsible or accountable for domestic violence in the very circumstances most commonly found in such cases.

It therefore seems that the litigation approach is extremely limited in the context of domestic violence because, although the ECtHR has held that there are positive obligations on the signatory State in certain instances, and that the Convention rights can have effect between private individuals, the ideology of the public/private divide still prevails and prevents the obligations necessary to tackle domestic violence from being imposed. In addition, this approach is predominantly applicable to measures that could be put into place once domestic violence is already occurring, due to the types of rights protected under the provisions of the ECHR,⁸⁷ and the fact that the state is not seen to be responsible or accountable for domestic violence until a particular individual is brought to the attention of the authorities.

Judicial Attitudes and the Restricted Scope of Judicial Comment

As well as the fact that the ECHR does not contain social, economic and cultural rights, the litigation approach is bound to be limited because, as McQuigg has pointed out, 'judges generally must confine themselves to dealing with the precise matter in the actual case that is before them, [and] cannot make sweeping statements on societal matters'.⁸⁸ They will, therefore, always be limited to some extent in terms of what can be achieved as a result of the outcome of a particular case. The correlative point being that legal victories, for example a successful result for a specific victim of domestic violence, don't

⁸⁷ The ECHR only contains civil and political rights, not social, economic and cultural rights which are the ones that would need to be invoked in order for domestic violence to be addressed in a way that addresses the causes rather than just the symptoms of the violence.

⁸⁸ McQuigg: 2011(a) p. 16

automatically or necessarily produce the desired change⁸⁹ in terms of reducing or ending the prevalence of domestic violence generally. The potential of litigation for victims of domestic violence will also inevitably be limited by the fact that this is often an unseen crime with ashamed and frightened victims frequently unwilling to take their case to court; 'Judges... cannot make rights-supportive law unless they have rights cases to decide'.⁹⁰ Overall, the judicial process is slow, costly, and produces legal changes only in 'small increments'⁹¹, if at all, and is hampered by the understanding, acceptance and willingness to adapt of both the judiciary and the legislature, something of especial significance in the context of addressing domestic violence.

Part Three

The Advocacy Approach

Rather than being an attempt to evaluate the whole of the UN Human Rights Treaty Body system's treatment of women,⁹² or even the entirety of its response to domestic violence,⁹³ this section will highlight aspects of the system which engage with the causes, context and consequences of domestic violence, or show some potential in relation to understanding these elements. None of the UN human rights treaties refer specifically to domestic violence – a notable absence - but the issue has been brought within the ambit of the treaty bodies by relying upon other provisions.⁹⁴ The main international human rights instruments of relevance to domestic violence are the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), General Recommendation 19 of the CEDAW Committee, and the Declaration on the Elimination of Violence Against Women (DEVAW) (produced by the CEDAW Committee in 1993 to enable the CEDAW Committee to address violence

⁸⁹ McQuigg: 2011(a) p. 17

⁹⁰ Epp: 1998 p. 15

⁹¹ Epp: 1998 p. 3

⁹² For a detailed explanation and evaluation of the international human rights system in relation to violence against women see Edwards, A., 2010. *Violence Against Women under International Human Rights Law*. Cambridge: Cambridge University Press.

⁹³ For a detailed explanation and evaluation of the international system in relation to domestic violence see Edwards, McQuigg, R., 2011. *International Human Rights Law and Domestic Violence: The Effectiveness of International Human Rights Law*. London: Routledge-Cavendish.

⁹⁴ These include the right to life; the right to equality; the right to liberty and security of person; the right to equal protection under the law; the right to be free from all forms of discrimination; the right to the highest standard attainable of physical and mental health; and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment. (General Assembly Resolution 48/104 (1993) article 3

against women). However, of these instruments,⁹⁵ only the CEDAW is binding on states⁹⁶ and the lack of a free-standing right to be free from violence suggests women will be subjected to additional legal burdens when trying to rely on human rights provisions.

Marginalisation: Implementation and Enforcement Difficulties

The essential difficulty with implementation of any of the human rights provided for under the UN treaty body system is that enforcement may not be considered a priority by State Parties, largely due to the enforcement difficulties that human rights treaties tend to suffer from.⁹⁷ Even though the obligations under the UN treaty body system are legally binding on states that have signed and ratified the Conventions, it is difficult to compel states to comply with their duties. This leads to a lack of compliance, particularly as governments do not yet seem to have accepted that they must act on their commitments.⁹⁸ It has been argued that the enforcement difficulties that are found with the UN system of human rights generally⁹⁹ are magnified when it comes to the treaties and statements that pertain to issues concerning women.¹⁰⁰

Whilst it has been suggested that the work of the treaty bodies overall is less tied to patriarchal competitive paradigms of justice – due to being less dependent on adversarial modes of dispute resolution – it must nonetheless be conceded that women and their experiences are still almost completely excluded from mainstream¹⁰¹ human rights instruments.¹⁰² This has led to the creation of ‘women’s only’ instruments, which, it is suggested, creates the potential for the more mainstream instruments to avoid discussing matters perceived to be only relevant to women.

⁹⁵ In addition to the three here, the reports of the 2nd, 3rd and 4th World Conferences on Women, the reports of the Special Rapporteur on Violence Against Women and the resolutions of the HRC also contain statements and recommendations concerning violence against women.

⁹⁶ McQuigg: 2011(a) p. 78

⁹⁷ McQuigg: 2011(a). For a full discussion of the reasons for non-implementation and the lack of effective enforcement see McQuigg: 2011(a) pp. 11-13.

⁹⁸ McQuigg: 2011(a) p. 11

⁹⁹ For a full discussion of these enforcement difficulties see Edwards: 2010

¹⁰⁰ Ulrich: 2000 p. 638

¹⁰¹ The ‘mainstream’ refers to those institutions entrusted with responsibility for ‘general’ human rights matters and can be contrasted with those bodies which have a ‘specialist’ jurisdiction in relation to ‘women’s issues’ such as CEDAW. (Byrnes: 1988 p. 206).

¹⁰² Charlesworth: 1994 p. 66

There are several features of the CEDAW itself, alongside the working methods of the Women's Committee, which indicate that this treaty is not taken as seriously by the international community as the other treaty bodies are.¹⁰³ It has been argued that the existence of the CEDAW has itself led to a marginalisation of matters perceived to be 'women's issues' and although the CEDAW was intended to tackle inequality and discrimination against women, it has in fact implicitly allowed the other treaty body Committees to ignore issues pertaining only to women, thus relieving them of the responsibility of addressing the concerns themselves.¹⁰⁴ The time allocated to the CEDAW Committee to examine the reports submitted by states parties is significantly less than the time allocated to the more mainstream treaty body committees, with only one day being available for the examination of each report.¹⁰⁵ This is a third less time than is allocated to the monitoring bodies of many of the other human rights treaties, making it extremely difficult to formulate meaningful Concluding Observations.¹⁰⁶ Another important element of the treaty body system which suggests that the CEDAW is deemed less important than the other treaties is that whereas the Convention on the Elimination of all forms of Racial Discrimination (CERD) is '[c]onvinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere', the CEDAW does not at any point state that sexism is a lie or that sex equality is the only position consistent with the evidence.¹⁰⁷ Even the name of the Women's Convention compared with the name of the Convention on Race is evidence of the failure to recognise the gravity of the issues affecting women and the inability to name 'sexism' as a harm that needs to be taken seriously. Furthermore, the large number of reservations that are made to the CEDAW compared with other more

¹⁰³ In its examination of the UK's fifth and sixth periodic reports in 2008, the CEDAW Committee expressed concern over the 'lack of uniformity in the format and content of the reports and the lack of reference to its previous concluding observations of 1999 and its general recommendations' (*Concluding observations of the Committee on the Elimination of Discrimination against Women: 2008, para. 249*). Whilst this does not necessarily mean that the United Kingdom is taking its obligations under the CEDAW less seriously than it does its obligations under the other human rights conventions, it does indicate a lack of commitment and allocation of resources to its UN human rights obligations.

¹⁰⁴ Charlesworth: 1995 p. 110. The concern that even women's issues appeared to have been included within the UN as a central theme there was still the tendency to distinguish between 'women's issues' and 'real politics' led to the gender mainstreaming programme which was established as 'the global strategy for promoting gender equality' (Kuovo: 2005 p. 237) in 1995 by the Beijing Platform for Action. (See Kuovo: 2005 for a full discussion on the implications of the gender mainstreaming programme in relation to this point).

¹⁰⁵ Two sessions of three hours are allocated to the examination of reports under CEDAW, this is the same as under CERD, whereas three sessions are allocated to the examination of reports under the more mainstream treaties such as the Convention Against Torture (CAT) and the Convention on Economic, Social and Cultural Rights (CESCR).

¹⁰⁶ McQuigg: 2007 p. 473

¹⁰⁷ MacKinnon: 2006 p. 11

mainstream instruments, albeit not impacting directly on women in the UK, demonstrate that this treaty is seen as different. Reservations are not necessarily indicative of a lack of importance attributed to the Convention by the State, but, alongside the other differences, the number of reservations certainly implies that the CEDAW is taken less seriously than the other human rights treaties.

It is noticeable that many of the reservations to CEDAW concern the central provisions relating to non-discrimination on the basis of sex, 'obligations to which many states parties are already bound by virtue of their ratification of other human rights treaties, or under customary international law'.¹⁰⁸ This means that the existence of a woman-specific instrument has 'allowed states to register backdoor reservations that they have not otherwise made (or been permitted to make) to mainstream treaties' and although 'this does not affect the obligations of states parties under these other treaties, and therefore many of the reservations to the CEDAW are effectively meaningless in law, they nonetheless serve to undermine the political significance of the CEDAW as an instrument for the advancement of women's rights'.¹⁰⁹ Charlesworth, Chinkin and Wright assert that the pattern of reservations to the CEDAW underlines the inadequacy of the 'present normative structure of international law.'¹¹⁰ The high number of reservations, in particular those that defeat the object and purpose of the Convention as being to eliminate sexual inequality and discrimination, tends to undermine the idea that women's equality and rights are as universal as men's rights.¹¹¹

Domestic Violence: Not a Human Rights Violation Per Se

It is striking that the Women's Convention, implemented in 1970 and intended to cover human rights abuses that are of particular concern to women, does not have a single mention of violence against women in its anti-discrimination provisions. This is concerning given that this abuse is one of the predominant ways in which inequality manifests itself under current gender relations. This

¹⁰⁸ Edwards: 2010 pp. 50-1

¹⁰⁹ Edwards: 2010 pp. 50-1

¹¹⁰ Charlesworth, Chinkin and Wright: 1991 p. 633

¹¹¹ Otto: 2010 p. 358

absence suggests that violence of this type was normalised within the international community at this time. Even where it was acknowledged it was not recognised as an issue that could, or needed to, engage with human rights law – in part due to the public/private divide justifying state’s non-intervention in the private sphere.

Although CEDAW’s anti-discrimination provisions were extended by General Recommendation 19¹¹² of the CEDAW Committee and concretised by the DEVAW¹¹³ which recognised ‘gender-based violence’ to be ‘a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men,’¹¹⁴ it did not create a free-standing right to be free from violence and there is no acknowledgement that violence is a human rights violation *per se*. General Recommendation 19 only explicitly incorporates gender-based violence by holding it to be discrimination within the meaning of Article 1 of the CEDAW when it ‘impairs or nullifies the enjoyment by women of human rights and fundamental freedoms.’¹¹⁵ Although the Preamble of the DEVAW affirms that ‘violence against women constitutes a violation of the rights and fundamental freedoms of women’¹¹⁶ (making violence against women an issue of international concern) there is no standalone right to be free from violence in any of the DEVAW’s operational provisions, leading to a failure to create a nexus between violence against women and human rights.¹¹⁷ This is reflected in Article 4¹¹⁸ of the DEVAW where efforts to end violence against women are framed as policy initiatives, not measures pursuant to human rights standards. Charlesworth submits that this is due to a fear of diluting the traditional notion of human rights which require direct state involvement. It is thought by ‘mainstream’ commentators that extending the concept of human rights to cover private behaviour would reduce the human rights canon as a whole.¹¹⁹ This concern implies a preference for preserving the current status quo, rather than extending the human rights canon to provide more effective protection for women.

¹¹² UN Committee on the Elimination of Discrimination Against Women (CEDAW), *CEDAW General Recommendations Nos. 19 and 20, adopted at the Eleventh Session, 1992 (contained in Document A/47/38)*, 1992, A/47/38

¹¹³ UN General Assembly, *Declaration on the Elimination of All Forms of Violence against Women*, 20 December 1993, A/RES/48/104.

¹¹⁴ Gen. Rec. 19 of the CEDAW Committee, para. 1.

¹¹⁵ Gen. Rec. 19 of the CEDAW Committee, para. 7.

¹¹⁶ Declaration on the Elimination of Violence Against Women, para. 5

¹¹⁷ Charlesworth: 1999 p. p. 382.

¹¹⁸ Article 4 reads: ‘States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women’.

¹¹⁹ Charlesworth: 1999 p. 383

Following this absence, violence against women has typically been declared to be 'sex discrimination'¹²⁰ thus using equality guarantees to 'plug a worrying gap in the law'.¹²¹ Although this assimilation transformed the CEDAW from an anti-discrimination treaty into a gender-based violence treaty¹²² – with clear benefits in relation to the conception of violence against women¹²³ – it has also resulted in enormous practical and theoretical difficulties. The perception of violence against women as a barrier to other human rights, rather than as a violation in itself, leaves subjects marginalised and needing special measures for their protection.¹²⁴ The advantages must not, therefore, be allowed to divert attention away from the potentially worrying consequences of the assimilation, such as the preference for formal over more substantive equality and the use of the language of equality which is rhetorically weaker than the language of violence (because the international community does not condemn discriminatory treatment to the same extent as violence).¹²⁵ Edwards points out that this strategy of framing violence against women as sex discrimination simply because it is the only available remedy almost covers up the violence that has occurred and may trivialise the harm or the rights violation at issue. As Edwards emphasises, '[t]he language of violence conjures up... a different calibre of violation'.¹²⁶ The only thing that's offered to women is indirect protection; they are only protected to the extent that they can establish that the violence was discriminatory.¹²⁷ This requires a link between the act and a discriminatory intent¹²⁸ thus narrowing the scope of protection available and subjecting women to additional legal burdens.¹²⁹

It can further be contended that when it comes to 'private' violence, such as domestic violence, this approach provides *double* indirect protection because a victim must demonstrate first that she suffered *discriminatory* violence and second that the state is responsible owing to its 'due diligence' failures, which

¹²⁰ Violence against women has also been assimilated to the human rights violation of torture and other cruel, inhuman and degrading treatment. An examination of the elements of officially recognised torture compared with domestic violence is in Chapter 3 at 3.6.

¹²¹ Edwards: 2010 p. 140

¹²² Edwards: 2010 p. 180

¹²³ Edwards outlines the advantages as being that the transformation enables the CEDAW Committee to address violence against women in a way that encompasses the structural causes of inequality and violence, contextualising violence as an issue of social justice rather than one of overcoming individual anomalies. This may in turn respond to some of the feminist critiques of international human rights law in relation to its individualistic approach and failure to address underlying causes and structural inequalities. It can also be argued that the assimilation deconstructs the public/private dichotomy to some extent by turning private violence into political violence (Edwards: 2010 pp. 186-9).

¹²⁴ Otto: 2006 p. 346

¹²⁵ Edwards: 2010 p. 141

¹²⁶ Edwards: 2010 p. 194

¹²⁷ Edwards: 2010 p. 194

¹²⁸ Edwards: 2010 p. 192

¹²⁹ Edwards: 2010 p. 141

may or may not be due to discrimination.¹³⁰ Londono has recently criticised the assimilation of violence against women to equal treatment and non-discrimination legislation for this very reason; violence is not a matter of *inequality* of treatment, it is a human rights violation in itself¹³¹ and should be recognised and treated as such. Violence against women as sex discrimination offers a two-tier system of protection whereby violence perpetrated against women outside the context of violence based upon sex discrimination is excluded.¹³² However, it has been claimed that it is important to see violence against women as an issue of inequality, as well as violating other human rights provisions. The case of *Opuz v Turkey*, heard by the ECtHR, has been argued to represent an important change in approach and a move away from the intentions of the original drafters of the Convention by articulating the violations as issues of inequality and thus as violations of Article 14 of the ECHR as well as Articles 1, 3 and 8. Previously, even where a State was found to be in violation due to a positive duty to secure rights between private individuals, this was not articulated as an issue of inequality and Article 14 violations were not generally found in cases involving violence against women.¹³³ In the *Opuz v Turkey* ruling, the discrimination ‘was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities, such as the manner in which the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims’.¹³⁴ It was thus found that ‘the practice of the authorities discriminated against women in light of the ‘general and discriminatory judicial passivity... [which] created a climate that was conducive to domestic violence’.¹³⁵ By engaging Article 14, the ECtHR in *Opuz* acknowledged the extent to which domestic violence is an issue of inequality, and how this impedes the enjoyment of other rights.¹³⁶

¹³⁰ Edwards: 2010 pp. 194-5

¹³¹ Londono: 2009 p. 70

¹³² Edwards: 2010 p. 192

¹³³ Londono: 2009 p. 657. For example it was held in the case of *MC v Bulgaria* (2003-XII; 40 EHRR 20), an acquaintance-rape case, that there was a violation of Article 3 (due to the inadequacies in the Bulgarian law), but it was not seen to be an issue of discrimination against women in the protection of their fundamental rights.

¹³⁴ *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009) at para. 192. Research indicated that there were particularly high rates of domestic violence in the area where the applicant lived, that the police did not investigate domestic violence complaints because they viewed domestic violence as a private, family matter, that there were unreasonable delays in issuing and serving injunctions, with perpetrators not receiving ‘dissuasive punishments’ because of a tendency on the part of the domestic courts to ‘mitigate sentences on the grounds of custom, tradition or honour’ (See *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009) at paras. 195-6).

¹³⁵ *Opuz v Turkey*, ECtHR, Applic. No. 33401/02 (9 June 2009) at para. 198.

¹³⁶ Londono: 2009 p. 667

It seems a positive move to articulate domestic violence as an issue of inequality, as *well as* violations of the substantive rights to life or right to be free from torture and other cruel, inhumane or degrading treatment, as this has symbolic importance by emphasising the gendered and discriminatory nature of domestic violence. However, the preferred approach under the UN treaty body system seems to see domestic violence as an issue of inequality alone, rather than as a direct human rights violation in itself. This continues to measure women's equality against men's enjoyment of rights, and so in turn reinforces the masculinity of the universal subject of human rights law.¹³⁷ This concentration on discrimination places the emphasis not on defining women's rights but on eliminating discrimination within the context of already accepted, male-dominated norms.¹³⁸ It also prevents the Committee from condemning gender violence as a direct human rights violation unless a comparison can be made with men.¹³⁹ There is also the problem that by holding that violence is a matter of inequality, i.e. something that is stopping women being treated the same as men, violence such as domestic violence is transformed from being a serious human rights violation into a 'women's issue'.¹⁴⁰ Women are subjected to additional legal burdens before acts of violence are considered 'worthy of international legal attention'.¹⁴¹ Paradoxically, therefore, human rights regimes can be seen, when addressing domestic violence, to reinforce inequality under international human rights law: the more women work within the existing norms, the more the unequal structures of that system become entrenched.¹⁴²

Approach to the Causes and Consequences of Domestic Violence

The claim has been made that one of the root causes of domestic violence remains the gendered expectations placed upon women and men in a patriarchal society. Furthermore, it was asserted that one of the reasons the legal remedies in England and Wales are unable to adequately address the phenomenon is because they fail to comprehend this. It is therefore necessary

¹³⁷ Otto: 2010 p. 345

¹³⁸ Burrows: 1986 p. 87

¹³⁹ Otto: 2010 p. 356.

¹⁴⁰ Edwards: 2010 p. 141

¹⁴¹ Edwards: 2010 p. 196

¹⁴² Edwards: 2010 p. 183

when examining the response of the international human rights system to assess whether it comes any closer to applying an appropriate conceptual understanding which recognises the functional nature of domestic violence as being to sustain male power and domination.

The CEDAW certainly indicates that, at least on a theoretical level, it understands that the objectification of women – linked to stereotypes and prejudices based on gender – must be tackled in order to end discrimination against women¹⁴³ (although, of course, it does not link this to violence against women because there is no mention of violence in the CEDAW). The mandate of the UN Special Rapporteur on Violence against Women includes information on its causes and consequences. Reports have been issued dealing with the ideologies that perpetuate cultural practices that are violent towards women.¹⁴⁴ Given the vital need to address the underlying causes of domestic violence, it is disappointing that the approach to societal awareness provided in the report does not do this. Although the Declaration of Purpose states that one of the purposes of the legislation is to provide ‘programmes to assist in the prevention and elimination of domestic violence which include raising public awareness and public education on the subject’,¹⁴⁵ there is no recommendation in the substantive document that states adopt measures to raise public awareness. This is a surprising omission given that ‘the report is generally so comprehensive in its approach.’¹⁴⁶ It is disappointing that the person specifically appointed to the role of addressing the causes and consequences of violence against women fails comprehensively to make the point that there is a vital link between domestic violence and the current gender hierarchy and stereotyped roles of males and females.

Also of significance is the recognition in the DEVAW that *‘violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position*

¹⁴³ See Article 5 of CEDAW.

¹⁴⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2001/49

¹⁴⁵ Report of the Special Rapporteur on violence against women, its causes and consequences – A framework for model legislation on domestic violence, E/CN.4/1996/53/Add.2, 2 February 1996, at para. 2(i)(iv)

¹⁴⁶ McQuigg: 2011(a) p. 83

compared with men'.¹⁴⁷ There is also recognition in the Platform for Action that governments should 'raise awareness of the responsibility of the media in promoting non-stereotyped images of women and men, as well as in eliminating patterns of media representation that generate violence'¹⁴⁸ which 'clearly demonstrates an awareness of the need to tackle the root causes of domestic violence by addressing attitudes within society'.¹⁴⁹ However, this awareness is not consistently applied in the recommendations. It is also very different from the awareness-raising campaigns on the *effects* of violence emphasised by the Committee of Ministers of the Council of Europe which requires states to 'mobilise public opinion by organising or supporting conferences and information campaigns so that society is aware of the problem and its devastating effects on victims and society in general, and can therefore discuss the subject of violence towards women openly, without prejudice or preconceived ideas'.¹⁵⁰ General Recommendation 19 of the CEDAW Committee recognises that domestic violence is perpetuated by traditional attitudes and calls for effective measure to be taken to ensure that 'the media respect and promote respect for women'¹⁵¹ and 'to overcome the attitudes and practices' that perpetuate violence against women¹⁵² with the introduction of education and public information programmes to help eliminate prejudices that hinder women's equality.¹⁵³ Yet whilst there is an emphasis on gender-sensitive training for judicial and law enforcement officers and other public officials, with the requirement of an initial course and an annual review, there is no mention of an obligation to educate other professionals such as social workers and doctors,¹⁵⁴ even though these people are the first point of contact for victims of domestic violence in the UK.

The CEDAW Committee has been praised for the substantive approach taken to equality¹⁵⁵ because of its asymmetric nature (its sole aim is the elimination of discrimination against *women*). It has a proactive approach as it does not require a comparison of the situation of women with that of men (in the sense that women only have equal rights with the rights men already have), and

¹⁴⁷ Declaration on the Elimination of Violence Against Women, UN General Assembly Resolution 48/104 (20 December 1993).

¹⁴⁸ Beijing Platform for Action, UN Doc. A/CONF. 177/20 (1995) at para. 125(j)

¹⁴⁹ McQuigg: 2011(a) p. 84

¹⁵⁰ Council of Europe, Committee of Ministers, Recommendation 2002(5), Appendix, para. 7

¹⁵¹ Gen. Rec. 19, para. 24(d).

¹⁵² Gen. Rec. 19, paras. 24(e) and (f).

¹⁵³ Gen. Rec. 19, para. 24(f)

¹⁵⁴ McQuigg: 2011(a) pp. 84-5

¹⁵⁵ See Holtmaat: 2008, Otto: 2005, Edwards: 2010

displays a positive attitude towards ‘temporary special measures’ (affirmative action). The next section deals with the obligation which can be read into Article 5(a) to tackle the root causes of discrimination,¹⁵⁶ and the ability of treaties to ensure the raising of awareness of the need for eradication of gender stereotypes.

Eliminating Gender Stereotypes

It could be claimed that it is now recognised under the UN human rights system that violence against women is both pervasive and also structural.¹⁵⁷ This is reflected in the recognition that ‘the principal causes of this phenomenon lie in social, economic and cultural/religious practices and institutions in which men and women are perceived of as being inherently *unequal* or in which women are being pictured as *inferior* to men.’¹⁵⁸ The Preamble of the CEDAW expresses awareness that a change in the traditional role of not just women but men as well is needed in both society and the family for full equality between men and women to be achieved.¹⁵⁹ Prevention of domestic violence is dependent upon the elimination of these gender stereotypes, and the roles and expectations that accompany them. It will be claimed that the obligations that can be read into Article 5(a) of the CEDAW¹⁶⁰ - when read in conjunction with ‘due diligence’ obligations – can be seen to be aimed specifically at this goal.

Holtmaat interprets the ‘due diligence’ standard (discussed above) as involving the need to move the focus of attention away from the protection of individual victims and on to prevention in the sense of attacking root causes.¹⁶¹ This would overcome one of the central difficulties found in the domestic legal response to domestic violence which is that it is reactive, rather than proactive, and cannot really act until abuse is already occurring. Whilst accepting that the emergence of the ‘due diligence’ standard shows potential in terms of targeting domestic violence and ideally should be interpreted in this way, it is submitted

¹⁵⁶ Holtmaat: 2008 p. 71

¹⁵⁷ The Preamble of the CEDAW expresses awareness that a change in the traditional role of not just women but men as well is needed in both society and the family for full equality between men and women to be achieved (para 8).

¹⁵⁸ Holtmaat: 2008 p. 63

¹⁵⁹ Convention on the Elimination of All Forms of Discrimination Against Women, Preamble, para. 8

¹⁶⁰ The text of Article 5(a) obliges States Parties to take all appropriate measures to ‘modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.

¹⁶¹ Holtmaat: 2008 p. 64

that at present the 'due diligence' obligations imposed do not go far enough in terms of requiring states to take preventive action in a general sense, as opposed to specific measures to deal with domestic violence appropriately once it is occurring.

Article 5(a) of the CEDAW obliges States to take measures aimed at eliminating stereotyped roles and practices based on the idea of the inferiority or superiority of either sex, thus recognising that it is not just negative portrayals of violence against women that need to be addressed but also conceptions of the appropriate roles for men and women more generally. Combining these obligations with those under a more proactive interpretation of the due diligence standard (see above) could impose positive obligations on states to address stereotypes in the media, the law and public life, identified in this research as some of the root causes of domestic violence. Holtmaat believes Article 5(a) of the CEDAW provides a legal basis for a strategy of social and cultural change whereby combating gender stereotypes becomes seen as a legal obligation, rather than just a desirable goal or a good practice.¹⁶² She goes on to identify two obligations that emerge from the Article, both of which can be seen to strike right at the heart of the underlying causes of domestic violence. The first is 'a duty to intervene in those social relations and institutions in which negative and damaging stereotyped images and views about women are expressed and/or used'.¹⁶³ This would cover images and views found in the media and commercial advertising, pornography and negative images that inspire violence against women. This is vital in light of the analysis of the contribution that pornography and degrading portrayals of women found in popular culture make to the continuation and acceptance of domestic violence.¹⁶⁴ It is promising that the CEDAW Committee 'leaves no room for discussion that States Parties are indeed obliged to develop and implement active policies in this field'.¹⁶⁵ The

¹⁶² Holtmaat: 2008 p. 72

¹⁶³ Holtmaat: 2008 p. 73

¹⁶⁴ See Chapter Three

¹⁶⁵ Holtmaat: 2008 p. 74. She provides examples in the Concluding Observations of the Committee when examining the report of Morocco where they give directions as to how States Parties should contribute to the elimination of gender stereotypes in society ('The Committee recommended the establishment of specific machinery located at the highest policy level... that would co-ordinate and guide action in favour of women, would be able to prevent the persistence of attitudes, prejudices and stereotypes that discriminate against women and would narrow the gap between *de jure* and *de facto* equality'. Concluding Comment on Morocco (1997), UN Docs A/52/38. CEDAW/C/SR. 312, 313 and 320, para. 72), and the Concluding Observations on Lithuania where advertising ethics were held to need to include more subtle utilisation of support for traditional role stereotypes in family, employment and society ('The Committee urges the Government to design and implement comprehensive programmes in education and the mass media in order to promote roles and tasks of women and men in all sectors of society. It also recommends the draft Code of Advertising Ethics be amended in order to cover not only the prohibition of the promotion of discrimination against women and men, or of the alleged superiority of one sex over another, but also of the more subtle utilisation of and support for traditional

second duty Holtmaat identifies is for states to ‘take all appropriate measures to track down and eliminate gender stereotypes that are at the basis of law and public policy.’¹⁶⁶ This is based on the acknowledgement that highly stereotyped ideas are to be found in many laws and public policies and thereby sustain certain fixed gender divisions in society, as reflected in the analysis of judicial interpretations of English and Welsh legislation contained in Chapter Four. Although opinions differ widely about how far-reaching this duty is and the Committee has not yet provided a definitive explanation of how far-reaching this obligation is, Holtmaat contends that the statement that there is ‘no such obligation is untenable.’¹⁶⁷ This is due to the many concrete directions issued by the CEDAW Committee where links are made ‘between the continued existence of gender stereotypes and the existence of certain laws in which these stereotypes are affirmed’.¹⁶⁸ These directions are reflective of the dynamic nature of the CEDAW, which has changed from an awareness raising agenda to one requiring structural change, and from equality as sameness to equality as transformation.¹⁶⁹ In assessing whether the CEDAW has the potential to overcome the strictly formal approach to equality as a barrier to an appropriate legal and policy approach to domestic violence, the obligations arising from Article 5(a) are thus an integral part of the transformation that is needed.

It is clear that all these duties, which can be rephrased as a duty to ban systemic or structural gender discrimination,¹⁷⁰ are integral to any approach to legal obligations that hope to tackle domestic violence in a holistic way. This is due to the recognition of the role that gendered stereotypes and expectations play in the continuation of patriarchal systems and the occurrence of domestic violence, and the ways in which they are sustained through the media, pornography, advertising and in judicial constructions of gender roles and behaviours. It is perhaps surprising, then, given its potentially important role, that Article 5(a) hasn’t yet attracted much interest from feminist legal scholars, underlining the lack of awareness both of the CEDAW itself and also, perhaps,

role stereotypes in the family, in employment and in society’. Concluding Comment on Lithuania (2000), UN Docs A/55/38, CEDAW/C/SR. 472, 473 and 480, para. 139).

¹⁶⁶ Holtmaat: 2008 p. 75

¹⁶⁷ Holtmaat: 2008 p. 76

¹⁶⁸ Holtmaat: 2008 p. 76. She identifies the most far-reaching remark in this respect in a Concluding Comment about Ireland; the Committee is of the opinion that the Irish Constitution reflects a stereotyped image of women’s roles and urges the Parliamentary Committee to be ‘fully aware of Ireland’s obligations under the Convention, including Article 5’ (Concluding Comments on Ireland (1999) Un Docs A/54/38, CEDAW/C/S. 440 and 441 paras 193-4). Thus there is direct link made by the Committee between the continued existence of gender stereotypes

¹⁶⁹ Holtmaat: 2008 pp. 77-8

¹⁷⁰ Holtmaat: 2008 p. 76

of the need to address the root causes of violence against women as a priority. However, human rights organisation *Object* (set up specifically to challenge the sexual objectification of women) has raised in public the obligations contained under Article 5 of CEDAW, as in its submission to the Leveson Inquiry in December 2011.¹⁷¹

The CEDAW Committee expressed concern in their 2008 examination of the UK's State Report over the 'stereotyped media portrayals of women and of women's roles in the family and in society'¹⁷² and called for 'policies [to] be strengthened and programmes implemented, including awareness-raising and educational campaigns directed at women and men, and specifically at media and advertising agencies, to help ensure the elimination of stereotypes regarding the roles of women and men in society and in the family... It also recommends that the media be encouraged to project a positive image of women.'¹⁷³ The Committee further recommended the expansion of training to sensitise those working with victims of violence and public awareness-raising campaigns.¹⁷⁴ However, even if implemented, the difficulty remains that if those designing and running the training and campaigns do not have an adequate understanding of the causes and consequences of domestic violence then their activities could be detrimental, especially if public awareness-raising materials contain even subliminal messages of victim-blaming. There is nothing in the official interpretation of international human rights law pertaining to domestic violence that refers to the pervasive lack of understanding of why women remain in violent relationships. This means that even if the measures contained in the advocacy approach could be used to influence the domestic legal response, it would not be able to overcome this central limitation.

¹⁷¹ OBJECT and *Turn Your Back on Page 3*, Joint Submission to the Leveson Inquiry. December 2011. Available at [http://www.object.org.uk/files/The%20Leveson%20Inquiry%20-%20OBJECT%20and%20Turn%20Your%20Back%20on%20Page%203%20Joint%20Submission\(2\).pdf](http://www.object.org.uk/files/The%20Leveson%20Inquiry%20-%20OBJECT%20and%20Turn%20Your%20Back%20on%20Page%203%20Joint%20Submission(2).pdf) [Accessed 23 August 2013]. The organisation also note on their website that The Leveson Report (published November 2012) acknowledged sexism within the press and specifically referenced some of *Object's* recommendations regarding equality. See <http://www.object.org.uk/campaigns/media-sexism> [Accessed 23 August 2013].

¹⁷² Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland, 10 July 2008, para. 274

¹⁷³ Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland, 10 July 2008, para. 275

¹⁷⁴ Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland, 10 July 2008, para. 281

Council of Europe Convention on Violence Against Women

It is suggested by McQuigg¹⁷⁵ that the adoption of the *Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence*¹⁷⁶ is 'a very important development, as it sets new legally binding standards in the area of gender-based violence,'¹⁷⁷ including 'not only criminal justice responses but also areas such as awareness raising and the provision of social support to victims'.¹⁷⁸ However, at the time of writing, this Convention has not been ratified by the required number of European states¹⁷⁹ to enable it to enter into force. For this reason, a brief discussion of the potential benefits and limitations of the Convention appears sufficient at this point.¹⁸⁰ First, the Convention frames violence against women 'in the wider context of achieving substantive equality between women and men and... [therefore] 'as a form of discrimination'¹⁸¹ which means domestic violence would not be considered a human rights violation *per se*. The Preamble does, encouragingly, recognise 'the link between achieving gender equality and the eradication of violence against women' and 'the structural nature of violence against women and that it is a manifestation of the historically unequal power relations between women and men.'¹⁸² It also recognises that 'socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men... reproduce unwanted and harmful practices and contributes to make violence against women acceptable,'¹⁸³ which although not a direct acknowledgement that domestic violence is *caused* by these stereotypes, does at least require 'the eradication of prejudices, customs, traditions and other practices which are based on the idea of the inferiority of women or on stereotyped gender roles as a general obligation to prevent

¹⁷⁵ McQuigg: 2011(b)

¹⁷⁶ Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011

¹⁷⁷ McQuigg: 2011(b) p. 947

¹⁷⁸ McQuigg: 2011(b) p. 947

¹⁷⁹ In August 2013 it had only been ratified by 4 states – Albania, Montenegro, Portugal and Turkey – and it is noteworthy that one of these is not the UK.

¹⁸⁰ For an in-depth discussion of the Convention see McQuigg: 2011(b), although the author's assessment assesses the Convention in a more positive light than would occur if the arguments of the present author were accepted.

¹⁸¹ Council of Europe, 'Explanatory Report to Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', para. 21. Para. 7 also states 'Violence against women, including domestic violence, undermines the core values on which the Council of Europe is based' and therefore suggests violence against women is seen as a barrier to other rights and values being fulfilled, not a human rights violation in its own right.

¹⁸² Council of Europe, 'Explanatory Report to Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', para. 25.

¹⁸³ Council of Europe, 'Explanatory Report to Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', para. 43.

violence'.¹⁸⁴ However, even if this Convention were to enter into force, the same enforcement problems and difficulties with the assimilation of domestic violence to sex discrimination would be encountered as are found with the CEDAW.

Conclusion

This chapter aimed to evaluate responses under the international human rights law mechanisms to domestic violence and to assess their potential to improve the responses under national law in the UK. The ideology of the public/private divide in international human rights law was identified as a barrier to the influence of the international human rights strategies. Some feminists argue that the human rights movement can only accommodate women if the conceptual problem of the public/private divide is overcome.¹⁸⁵ It is argued here that this conceptual problem in fact plays a significant and continuing role in maintaining the current hierarchical gender relations that sustain the patriarchal state. Therefore, unless there is the will to generate true equality for women both in the public and private spheres, the dichotomy will continue to operate as a conceptual tool to justify non-intervention in 'private' issues such as domestic violence.

Even though positive obligations have developed in some areas of human rights through the 'due diligence' standard, the fact that the state is not seen to be complicit in incidents of domestic violence unless the relevant authorities knew that a particular individual was at risk and it could have reasonably acted to protect them¹⁸⁶ continues to act as a significant obstacle to the utilisation of human rights law in the context of domestic violence. There is also no obligation resulting from the litigation approach to take preventative measures to combat the root causes of domestic violence, such as examining the role of the media in objectifying women and promoting the gendered stereotypes that contribute to the context in which domestic violence can occur.

In relation to the advocacy approach, the three instruments containing provisions pertaining to domestic violence, and Article 5 of the CEDAW in

¹⁸⁴ Council of Europe, 'Explanatory Report to Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence', para. 43.

¹⁸⁵ Palmer: 2002 p. 96 refers us to the work of Karen Engle and Noreen Burrows on this point.

¹⁸⁶ See the discussion of *Osman v United Kingdom*, ECtHR, Applic. NO. 87/1997/871/1083 (28 October 1998) at 9.1.2.

particular, are promising due to the concern they demonstrate regarding stereotypical attitudes towards women, their recognition of the persistent power imbalance between men and women, and their requirement of measures including public awareness directed at the media and the general public.¹⁸⁷ However, as was seen the potential influence of the advocacy approach is hampered by the enforcement difficulties found with the treaty body system generally. In addition, even the existence of a specific women's Convention can be seen to reinforce the idea that men's rights are universal and women's are an afterthought¹⁸⁸ and instead of prompting the other human rights treaty body committees to take women's rights more seriously, both the Convention itself and the work of the Committee seem to have reinforced the marginalisation of women's rights.¹⁸⁹ This can be seen as greatly disappointing given that international human rights law, especially within the UN system, works to understand and address the underlying social causes of domestic violence in a way that the domestic law and policy does not yet do.¹⁹⁰

It does seem that the understanding of the causes and consequences of domestic violence displayed by the CEDAW Committee and the UN Special Rapporteur is one to be strived toward by the European and UK courts. Other states have demonstrated a willingness to use international human rights conventions in construing their own domestic laws,¹⁹¹ indicating a willingness unseen in Europe or the UK to date to use international human rights law to secure the rights of domestic violence victims. The European and UK judiciary may defend their failure to use the provisions of CEDAW by claiming that the ECHR (integrated into domestic law by the HRA) includes a clear prohibition on discrimination, but it is clear that the ways the provisions of CEDAW have been interpreted do go much further in relation to domestic violence than the interpretations of the ECHR provisions. The CEDAW Committee expressed concern in 2008 that 'no measures have been taken by the State party to fully incorporate the Convention into domestic law' and noted 'the absence of

¹⁸⁷ McQuigg: 2007 pp. 465-6

¹⁸⁸ Johnstone: 2006 p. 151

¹⁸⁹ Otto: 2010 p. 358

¹⁹⁰ See Chapters One to Eight for a full analysis of the underlying social causes of domestic violence and their impact upon the operation of the legal remedies for domestic violence in England and Wales.

¹⁹¹ For example the Indian judiciary have held that Article 2 of CEDAW places a duty on India to prohibit all gender-based discrimination, informing their dynamic approach to a recent sexual harassment case (*Vishaka v. State of Rajasthan* [1997] 6 SCC 241).

national legislation covering all aspects of the Convention'.¹⁹² It emphasised that 'while the European Convention on Human Rights and Fundamental Freedoms has been incorporated into domestic law through the Human Rights Act (1998), the European Convention does not provide for the full range of women's human rights as enshrined in the Convention on the Elimination of All Forms of Discrimination against Women'.¹⁹³

Although the definition of violence against women provided by the DEVAW¹⁹⁴ is broadly construed and non-exhaustive¹⁹⁵ and should not be held to only include domestic violence of a physical nature, one of the most prominent absences in both of these approaches to implementing international human rights law is that there has been little, if any, recognition that domestic violence is best understood as a programme coercive control rather than a series of isolated incidents.¹⁹⁶ This is emphasised by the House of Lords decisions in *Van Colle* and *Smith* where the amount of discretion to be granted to the police in respect of their positive obligations following *Osman* was considered. Given the high level of discretion and the misunderstanding of the dynamics of domestic violence in evidence in these cases, it does not seem likely that the police will be under an obligation to take action in the absence of serious physical violence or threats to life.

Following the analysis, above, of the obligations that can be seen to arise under Article 5(a) of the CEDAW, and their importance in addressing the root causes of domestic violence, there is a clear need to harness the obligations in a proactive way in the UK. This would provide a legal impetus for acknowledging the impact of gendered stereotypes found in the portrayals of women and men in media and advertising

¹⁹² Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland, 10 July 2008, para. 260

¹⁹³ Concluding Observations of the Committee on the Elimination of Discrimination against Women: United Kingdom of Great Britain and Northern Ireland, 10 July 2008, para. 260

¹⁹⁴ Violence against women is defined in Article 1 of the DEVAW as 'any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women'.

¹⁹⁵ Edwards: 2010 p. 21

¹⁹⁶ See Chapter Seven for a full discussion of the dynamics of domestic violence as coercive control.

CONCLUSION

The intention of this thesis was to provide a critique of the legal remedies pertaining to domestic violence in England and Wales from the perspective of two central arguments concerning its causes, context and dynamics. The aim was to provide a critique of this type of abuse that moved beyond simply identifying the aspects of the legal system that do not work in practice, to an analysis encompassing the broader social and cultural issues that impact upon the operation of the legal and policy reforms targeted at domestic violence. The first of these arguments is that domestic violence is first and foremost a social problem, not one caused by the deviancy of particular individuals and relationship dynamics. The second is that a failure to take account of the root causes prevents recognition of the functional nature of domestic violence and has led to a misplaced focus on incidents of mainly physical violence as the defining feature of an abusive relationship, thus failing to capture the range of other strategies that men use to exert power and control over their female partners.

The statistical and broader societal indications concerning the prevalence of domestic violence against women¹ means that it must be a priority for state and legal institutions to address it. Indeed, it can be seen to have been prioritised in recent years by the police, the CPS, the legislature and the government.² Extensive policy measures and legal reforms have been implemented over the last thirty years, and domestic violence is being taken more seriously than ever before by the government and the legal system. Suggestions as to why these reforms and commitments to tackle domestic violence may not have succeeded in reducing the prevalence will be explored below, drawing on the central findings of this research. Following this there will be a discussion of the implications of these findings and how they may impinge upon existing legal and policy theories and understandings of domestic violence. Alongside this will be suggestions as to how the legal system could better conceptualise domestic violence to reflect the findings relating to the two central arguments of the research. The limitations of this study will also be considered, together with recommendations for future research in this area.

¹ See pp. 14-5

² See pp. 18-21

Research Findings

Through analysis of the period of European history characterised by state and church regulated witch hunts (circa 1550-1750), the argument was made that state-legitimated misogyny and violence against women extends back many hundreds of years and as such is firmly embedded in the patriarchal systems of the state. In demonstrating the witch hunts as predominantly attacks against women, and the control they were able to exercise over their own lives, sexuality and reproductive function, the witch hunts can be seen as a central method of maintaining male domination and control. Patriarchal systems can be seen to rely upon violence against women as a primary means of ensuring male control and female subordination. Support for the claim that we live in a society characterised by patriarchal systems is indicated by how the state and legal system of England and Wales responds to domestic violence in current times. For example, the availability of the civil law remedies for victims of domestic violence can be seen to be limited due to entrenched attitudes that bolster male privilege. The perception that excluding a man from his home, even when he has perpetrated violence against his female partner, is 'draconian' continues to impact upon the granting of exclusion orders.³ Ingrained beliefs concerning the responsibility of women for provoking male violence are also still evident at a lower court level.⁴

For patriarchal systems to be sustained there must be a clear division between the roles and behaviours held to be natural for men and women; one group cannot dominate another group unless they are seen in opposition. It has therefore been argued that gender differences are in part socially constructed. Furthermore, it is claimed that the legal system as a whole is implicated in these constructions, as evidenced by judicial constructions of gender found in case law.⁵ The portrayals of the gender role expectations found in these constructions can be seen to take a hetero-normative stance that privileges the patriarchal family unit.⁶ This provides further support for the claim that the state is patriarchal; a patriarchal state with a strong economic system relies upon the control of women's sexuality and reproductive function in order for male lineage

³ *Re Y (Children) (Occupation Order)* [2000] FCR 470 (discussed at pp. 124-5)

⁴ See *Re H (A Child) (Contact: Domestic Violence)* [2006] 1 FCR 102, discussed at p. 36, pp. 125-6, p. 138 and p. 186

⁵ See Chapter Four, pp. 98-104

⁶ See Chapter Four, pp. 105-114

to be traced and the next generation of workers to be provided. Therefore, some of the objectives of the witch hunts can be seen to have carried through to current times and still appear, albeit implicitly, in the intentions of the state today. State legitimisation of male violence against women in the past is evidenced by the procedures and purpose of the witch hunts. It is argued that there is still implicit legitimisation by the state. For example in *Re H (A Child) (Contact: Domestic Violence)*⁷ and in the first appeal hearing of Sara Thornton⁸ where Lord Bedlam portrays her in a way that serves to impliedly justify the violence she suffers at the hands of her husband.

Polarised masculine and feminine identities are integral to the maintenance of patriarchy, with the expectations placed upon women to be subservient in their role as wives and mothers, taking on the majority of domestic work and child care, creating the context in which domestic violence occurs. Alongside this run the expectations placed upon men to conform to the ideals of hegemonic masculinity,⁹ thus serving to legitimate the infliction of violence in order to dominate and control women. Pornography and the range of pornographic images that pervade popular culture and media were shown as one of the central sources of messages that perpetuate these polarised identities and the subordinate role of women. Under English and Welsh law, pornography has traditionally been viewed as an issue of morality and obscenity, with its harm thought to be its tendency to deprave and corrupt those who consume it. However, when the messages it perpetuates are seen as contributing to the underlying causes of domestic violence, it can be reconceptualised as causing, or contributing to, harm to women. Statutes concerning the regulation of domestic violence in England and Wales continue to be based on an obscenity standard.¹⁰ This itself indicates the patriarchal nature of the state where men's concerns dominate and women's are side-lined or invisible. The failure to move away from this model with the new provisions regulating extreme pornography under the Criminal Justice and Immigration Act 2008 further affirms this argument. Legal responses send out powerful messages; in failing to identify and regulate the harm of pornography as one of discrimination and harm to women, the state is implicitly condoning and

⁷ [2006] 1 FCR 102, discussed at p. 36, pp. 125-6, p. 138 and p. 186

⁸ [1993] 96 Cr App R 112. See the discussion in Chapter Eight, pp. 193-4 and 209-210

⁹ See Chapter Two at pp. 58-62

¹⁰ This is seen in the Obscene Publications Act 1959 and, more recently, in the regulation of 'extreme pornography' under the Criminal Justice and Immigration Act 2008 (CJIA). See the discussion in Chapter Three at pp. 74-9

supporting the harm by sending out the message that it is acceptable to view women in this way.

The expectations of the appropriate roles and behaviours of men and women have also been argued to provide the context in which domestic violence occurs. Expectations that men should be dominant and in control provide the means of legitimating and normalising the control they exercise over their female partner and family life. Studies investigating the context in which violence occurs in the marital-type relationship confirmed that it is frequently caused by men's desire to exert control over their female partner and family life.¹¹ Stark's assertion that domestic violence (or coercive control as he terms it) is a gendered phenomenon is based upon the observation that its main tactics consist of petty rules and restrictions concerning activities that are already consigned to women (such as cooking, cleaning, and child care).¹² This helps to bolster claims that the state is patriarchal and that domestic violence is functional because the institutions of the state can be seen to create and sustain these expectations of the appropriate roles and behaviours of men and women. It was thought that this would impact upon the availability of the legal remedies for domestic violence in England and Wales. Evidence to support this claim was found in judicial understandings,¹³ which can be seen to both reflect and construct these gendered expectations, and thus to bear some responsibility for continuing to create the conditions and expectations in which domestic violence occurs.

It is clear that the legal remedies available to victims of domestic violence in England and Wales are generally only able to respond to already occurring violence. The failure to address the root causes of domestic violence could be seen to result from this and thus it could be claimed that this is an inevitable limitation, simply reflective of the aims and purposes of any legal system. However, it was also argued that failing to see the root causes impacted upon the ability of the existing remedies even when they were responding to already occurring violence. This can be seen to happen in two main ways. The first is the use of gendered assumptions and stereotypes when the police, CPS and courts are dealing with domestic violence.¹⁴ The second is the use of gendered

¹¹ See Dobash and Dobash: 1998 p. 144, Levinson: 1989 p. 33 and Stark: 2009 p. 205, discussed in Chapter Two pp. 64-6

¹² Stark: 2009 pp. 210-211

¹³ See Chapter Four, pp 98-104

¹⁴ See, generally, Chapter Six on the criminal justice's approach to domestic violence

assumptions and stereotypes more generally by the judiciary, as seen particularly in the cases of *R v Smith (Morgan)*,¹⁵ *Attorney General for Jersey v Holley*,¹⁶ and *Bonser v UK Coal Mining Ltd*¹⁷ It is claimed that assumptions such as those contained in these cases contribute to the maintenance of the context in which domestic violence occurs. Alongside this can be seen an acceptability and reluctance to criminalise certain types and levels of male violence against other males because it is seen as a natural and expected part of being biologically male.¹⁸

Analysis of the international human rights law standards under the UN Women's Convention (the CEDAW) indicated recognition that the elimination of these gender-role stereotypes is an essential aspect of targetting domestic violence.¹⁹ Thus the root causes and functional nature of violence against women²⁰ is recognised as being the objectification of women, linked to stereotypes and prejudices.²¹ However, due to the difficulties associated with the implementation of UN treaty body law into domestic law, the potential for this understanding and the obligations entailed to impact upon the national legal system remains limited. Although the CEDAW does show attempts to tackle the underlying causes of violence against women, the majority of the measures called for are still only targeted at already-occurring violence, not the root causes of this violence. The majority of the statements refer to improving the criminal and civil justice response, and many of the measures called for are already in place in England and Wales, it is the interpretation of the obligations under the measures in practice where the issues arise.²² In addition, the CEDAW Committee's work on violence against women shows a predominant focus on physical violence, with insufficient recognition of the other abusive methods that can be used to gain power and control over the victim. This could, in part, be due to the fact that it is an international committee. If Stark's

¹⁵ [2001] 1 AC 146

¹⁶ [2006] UKPC 23

¹⁷ [2003] EWCA Civ 1296. For a full discussion of these three cases see Chapter Four pp. 98-102

¹⁸ See *R v Aitken*; *R v Bennett and R v Barson* [1992] 1 WLR 1006 and *R v Jones*; *R v Campbell*; *R v Smith*; *R v Nicholas*, *R v Blackwood and R v Muir* (1986) 83 Cr App R 375, discussed in Chapter Four p. 102-104 and also by Bibbings: 2000.

¹⁹ The Preamble of the CEDAW expresses awareness that a change in the traditional role of not just women but men as well is needed in both society and the family for full equality between men and women to be achieved (para 8). Article 5(a) of CEDAW recognises that stereotyped roles must be eliminated in order for women to achieve equality (with General Recommendation 19 of the CEDAW Committee recognising that violence against women is discriminatory and a barrier to women's enjoyment of other human rights). See Chapter Nine pp. 241-4

²⁰ It must be noted that the CEDAW does not directly contain provisions relating to violence against women in its anti-discrimination provisions. The DEVAW and General Recommendation 19 of the CEDAW Committee held violence against women to be an issue of discrimination, and thus extended state's obligations under the CEDAW to cover violence against women.

²¹ See Article 5(a) of CEDAW

²² See Chapter Nine pp. 232-4 for a discussion of the enforcement difficulties

arguments, considered below, are followed, coercive control arises in the context of women's newly found equality in the public sphere (because women are no longer subject to male control to the same extent by society generally, and physical violence is largely condemned in Western states, men have needed to find more subtle ways to exert their control in the private sphere). This means that much of CEDAW's work, targeted at countries where women do not yet have formal equality in the public sphere, needs to remain targeted at physical violence.

Due to the, perhaps inevitable, focus on targetting the symptoms of already-occurring domestic violence, rather than attempting to address the causes, the legal responses overlook the root causes. As Nedelsky emphasises, the majority of the analysis and advocacy on the issue of domestic violence is aimed at improving the situation for women who are already in abusive relationships, and whilst this is a worthy goal, it does not address the question of why so many men are violent and abusive to their intimate partners in the first place.²³ This prevents domestic violence from being seen as functional, and instead perpetuates the view that it is caused by individual relationship dynamics and the deviancy of the individuals involved. The aim then becomes to reduce the prevalence through small alterations to the legal responses available, and through targetting the behaviours and choices of individual men and women. This means that the best that can presently be provided is the offer of safety and security for *some* victimised women, provided their behaviour conforms to that of the stereotypical deserving victim. As long as the reasons for the abuse remain hidden, these small alterations can have little impact. The limited success to date of reform initiatives could thus be seen to be due, in part, to insufficient acknowledgement of the role that the gendered expectations necessary to the maintenance of the patriarchal system play in the continuation of domestic violence.

As a result of failing to see the functional nature of domestic violence, the focus of domestic violence becomes one of isolated incidents of mainly physical violence. Even when other types of violence, such as sexual or psychological, are envisaged, they are still deemed to be incident-based. This then overlooks the purpose of domestic violence as being to dominate and control the victim, leading to an abstraction of each incident of violence from the social context in

²³ Nedelsky: 2011 p. 312

which it occurs. This abstraction can be also seen in the incident-based approach taken to the criminalisation of domestic violence.²⁴ The criminal incident is abstracted from the context in which it occurs, so that a cumulative pattern of many small incidents will not result in the perpetrator being charged with a more serious offence, or any offence at all. The rest of the defendant's abusive behaviour is not considered when assessing the severity of the charge and thus the defendant may be convicted of a relatively minor offence despite years of ongoing abuse.

As an alternative to this conception, the theory of domestic violence as coercive control²⁵ indicated its programmatic nature, providing the means by which to reconceptualise domestic violence as a liberty crime²⁶ or a capture crime,²⁷ not a crime of violence *per se*. In the absence of this, the focus remains incident-based (even when different types of violence such as sexual, economic and psychological are encompassed in understandings of domestic violence) and, due to the assumption based on this that there is space between incidents for a woman to make and act upon the decision to leave, it becomes unclear why women remain in abusive relationships. This results in the commonly heard question, or value judgment, of 'why did she stay?' This misunderstanding permeates legal and societal understandings of responses to violence in intimate relationships. For example, the operation of self-defence and the partial defences to homicide when an abused woman kills her abusive partner. Implicit in the trial judge's summing up to the jury in the case of Sara Thornton were questions of why she did not just leave, rather than using fatal violence on the night she killed her partner.²⁸ Self-defence is deemed an inappropriate defence when there are thought to be other options available at the time – for example going to a different room or leaving the house – or when violence was not being inflicted at that particular time. This ignores the coercion and control that victims of abuse are typically under which prevents them from leaving, and that by trying to leave they are likely to face fatal violence themselves. The woman's actions in killing her violent partner are abstracted from the context in which they occur, thus preventing her actions from being seen as necessary or

²⁴ See the discussion of the OAPA and PHA in Chapter Six pp. at pp. 144-153

²⁵ Stark: 2009

²⁶ Stark: 2009 and Williamson: 2010

²⁷ Herman: 1992

²⁸ The trial judge is quoted as stating: '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' [1993] 96 Cr App R 112 at para 117

reasonable. The operation of Section 5 of the Domestic Violence, Crime and Victims Act 2004 in the context of victims of domestic violence helps to illustrate the ways in which women are both held responsible for ending male violence towards them and their children, and also thought to be able to freely and safely report the violence and exit the relationship if they choose to do so.²⁹

It was shown that Walker's BWS³⁰ strongly influences legal responses and understandings of domestic violence. For example, it was mentioned in the cases of *Ahluwalia* and *Thornton*, and Lord Denning referred to a victim as a 'battered woman' in *Davis v Johnson*.³¹ Walker's model retains the primary focus on incidents of physical violence due to the terminology and concepts she uses. She refers to abusive men as 'batterers' and abused women as 'battered women,' thus drawing attention away from the other methods used to establish male power and control and rendering experiences not characterised by serious physical violence as less worthy of attention. Herman's trauma theory is useful in that it provides an explanation of the impact of ongoing trauma on a person's sense of self and autonomy. However, her findings also retain the focus on serious physical violence as leading to the incidence of PTSD in abused women. Stark's work with abused women leads him to assert that this link between serious physical violence and the psychological, social and emotional problems they face is misplaced. He has found that the majority of women do not experience frequent and serious physical violence and that the impact of the abuse results from a lack of freedom. This is not just physical freedom, but the freedom to make decisions and do things in the way they choose, something denied to them through having every aspect of their life monitored and controlled by their abuser.³²

One of the ways in which a misunderstanding of the essence of the harm of domestic violence manifests is through the medicalising of abused women, particularly through the use of Walker's BWS to explain female behaviour in remaining in an abusive relationship. The syndrome attempts to explain why women may come to use fatal violence against their abuser through the concept of learned helplessness. This implies that their reaction in killing is extreme and irrational due to changes induced by the abuse. When these women are seen

²⁹ Discussed in Chapter Six pp. 161-5

³⁰ Walker: 1979; 2009, discussed at pp.170-1 and pp. 183-8

³¹ [1979] AC 264 at para 271-2

³² See pp. 173-8 in Chapter Seven for a discussion of the dynamics of abusive relationships

as victims of capture or liberty crimes it becomes possible to understand their actions. In addition, BWS perpetuates the view that only certain types of women suffer from abuse. This leads to the individualisation of the phenomena and the seeking of explanations for why the women does not leave from within her personality and characteristics, rather than in the behaviour of the abuser.³³

International human rights law provides a means of scrutinising the national legal responses for domestic violence by holding states accountable for implementing and abiding by standards that have been internationally agreed upon. The mechanisms of international human rights law were assessed to establish the potential impact of these standards on the addressing of domestic violence nationally and whether these standards are likely to respond in a way that takes account of the causes, consequences and dynamics. Aspects of the advocacy approach as a strategy of implementing internationally agreed-upon standards were considered above. However, at present it can be seen that the litigation approach – via the decisions and statements of the European Court of Human Rights (ECtHR) and the national courts implementing the European Convention on Human Rights (ECHR) through the Human Rights Act (HRA) 1998) – is the one most likely to directly impact upon victims of domestic violence. One of the most significant limitations of this strategy is its reliance on the UK judiciary who, as seen above, typically have very traditional views on the appropriate roles and expectations for each gender. As shown by the joined appeals of *Van Colle and Smith*³⁴ the courts continue to operate with prejudices concerning domestic violence, and have taken a limited approach to the fulfilling of their obligations under the ECHR.

The ECtHR has not really extended the obligations the state is already under in this context. The divide between the public and private spheres may be being gradually eroded – with a clear willingness on the part of the courts to impose positive obligations on states in relation to the provisions of the ECHR and the development of the due diligence test³⁵ – but it was shown that this extension into the private sphere currently goes nowhere near far enough in terms of imposing positive obligations on states to protect potential victims and prevent potential violations. This is because, under the *Osman* test,³⁶ the

³³ See pp. 181-3

³⁴ [2008] UKHL 50, discussed in Chapter Nine pp. 226-7

³⁵ See Chapter Nine, pp. 221-230 for a full discussion of the due diligence standard and how it has been applied by the courts

³⁶ The case of *Osman* is discussed in Chapter Nine at pp. 223-9

positive obligations on state bodies, such as the police, are only engaged when they are already aware of the risk to an identified individual and have failed to take taken reasonable steps to prevent it.

Implications

The central arguments discussed above can, therefore, be seen to challenge current understandings of domestic violence found within the legal arena. The harm of domestic violence has traditionally been understood as resulting from serious physical violence. This has led to a misplacement of responsibility on the woman to leave the relationship, alongside judgment and a lack of legal support when she does not. If the root causes and dynamics of domestic violence as coercive control were to be recognised within legal understandings, this focus would be shown to be misplaced and responsible for the exclusion of many women from legal protection. Instead of being seen as victims of violence, women in abusive relationships need to be recognised as victims of capture crimes³⁷ (such as kidnapping) or liberty crimes.³⁸ Stark has pointed out that, compared with other capture crimes, there is a lack of understanding about the duress under which women stay in abusive relationships. He argues that if their predicament were to be reframed as hostage-like much of this ambiguity would be dispelled.³⁹ Making comparisons between domestic violence and capture crimes in the common terminology used in government policy and legislation would help to challenge the common misconception that women choose to be in abusive relationships and could leave if they wanted to. The analogy between domestic abuse and capture crimes can highlight the ‘cruel absurdity of the common tendency to blame the victim of domestic violence – for provoking violence, for failing to satisfy her violent partner, for falling apart, for failing to leave.’⁴⁰ Viewing domestic violence in this way could ‘contribute to shifting the burden of responsibility from victim to perpetrator because these crimes are never excused or held to be ‘deserved.’⁴¹ It does, of course, need to be acknowledged that even if the legal system did begin to recognise the hostage-

³⁷ Herman: 1992

³⁸ Stark: 2009 and Williamson: 2010

³⁹ Stark: 2009 p. 205

⁴⁰ Copelon: 1994(a) p. 144

⁴¹ Copelon: 1994(a) p. 145

like status of abuse victims, there would be huge evidential problems in terms of proving that the psychological difficulties suffered by the victim were caused by abuse, and this would inevitably limit the response that could be provided by the criminal justice system. However, the potential of the state and legal system to respond to domestic violence extends beyond that of merely criminalising already occurring violence, and thus using this terminology in policy and legal definitions could be beneficial in shifting the focus away from the behaviour of the woman and why she remains in the relationship.

If the obligations that can be read into the UN Women's Convention were to be harnessed, this would have a clear impact on many of the aspects of the legal responses found to be contributing to the root causes of domestic violence. Measures under the CEDAW would be targeted toward tackling these causes, thus overcoming one of the central difficulties found in the domestic legal response to domestic violence which is that it is reactive, rather than proactive. Harnessing the obligations claimed by Holtmaat to exist as a result of combining due diligence obligations with Article 5(a) of the CEDAW would make the state responsible for eliminating the gender-role stereotypes and assumptions found in judicial constructions of appropriate masculine and feminine behaviour. This would impact upon the judicial understandings it is claimed contribute to the maintenance of the context in which domestic violence occurs, and also upon the treatment of victims and perpetrators when they come before the courts. The constructions of masculinity and femininity found within pornographic portrayals would also be targeted because portrayals seen to objectify and subordinate women are in violation of Article 5(a) when it is interpreted in this way. This would also have the implication of requiring the understandings of the harm of pornography found in the statutes concerning the regulation of pornography to be shifted from an obscenity standard to one recognising the harmful impact these portrayals have on perceptions of women. One of the difficulties that can be seen in terms of opposing pornography is how to do this without siding with conservative and religious opponents whose arguments against pornography are themselves typically based on patriarchal views about women's role in society.⁴² Calling for an understanding of pornography as being based not on sexual explicitness *per se*, but on whether the material contains representations that degrade, subordinate and objectify

⁴² These are reflected in the conclusions of the Committee in The Meese Commission Report, see pp. 88-90

women in a sexual context, could overcome this difficulty. Accepted as erotica would be all material deemed not to degrade, subordinate and objectify women. One of the implications of this would be that much advertising and popular media portrayals could be condemned as pornographic, as the messages contained in these can be seen to be as damaging as those in more extreme and explicit pornography. Conceptualising the harm in this way could provide a better means of regulating pornography. Problems with harnessing these obligations in a practical way will be considered below.

Limitations and Recommendations for Future Research

One of the difficulties encountered in any critique engaging with the social and cultural causes of a phenomena such as domestic violence is how the insights could be used in terms of bringing about a change in the social structures and relations that contribute to or cause the problem. This research highlights the purposive nature of male violence within intimate relationships, not just in terms of its purpose within the individual relationship, but also in terms of its role in the maintenance of patriarchal systems more generally. The focus should not, therefore, be on ending male violence; men cannot be 'stopped' until there is a change⁴³ in the relations that enable, allow and encourage them to inflict violence and control women. The argument that domestic violence is functional and an integral way of sustaining male control carries the implication that it is the issue of men's need for control that is most in need of addressing. Further research is therefore needed on how to engage men in male violence prevention in a way that takes account of the links between men, masculinity, patriarchal culture and domestic violence.

There is beginning to be recognition (albeit primarily in the policy arena rather than within the legal sphere) that domestic violence is a pattern of coercive and controlling behaviour – a move away from the conception that it is primarily isolated incidents of physical violence. Due to the engrained nature of legal understandings concerning serious physical violence as the defining feature of domestic violence, and that this is seen to dictate how severe the abuse is, it is unlikely that merely extending the legal definition to encompass

⁴³ Nedelsky: 2011 p. 202

coercive control would be sufficient to overcome the prevailing assumptions and misconceptions. In February 2014 the Domestic Violence (Legal Framework) Bill failed to complete its passage through Parliament. This would have criminalised abusive forms of behaviour that are not currently offences, including coercive control.⁴⁴ It is suggested that, whilst representing a potentially significant move toward understanding the harm of domestic violence as resulting from its methods of exerting control over the victim, rather than its infliction of physical violence, the proposed legislation still would not have gone far enough in terms of changing the definition and thus changing understandings. Instead of domestic violence being seen to *include* coercive control, it is suggested that this needs to be the defining feature, with the inclusion of physical violence as one of the means of sustaining that control. Therefore, research is needed on how this definition can be amended and incorporated into any future legislation in this area. Research is also needed into how the understandings of the harm of domestic violence claimed in this research can be incorporated into legal understandings given the engrained nature of judicial attitudes concerning appropriate male and female behaviour and responsibility for violence, and their reliance on finding physical violence in order to justify measures such as occupation orders.

This research has emphasised the importance of the obligations that can be read into Article 5(a) of the CEDAW in combatting the root causes of domestic violence. Further research is therefore needed to ascertain how these obligations could be harnessed and utilised in legal and policy measures concerning domestic violence in England and Wales. Very little attention has been paid to this provision, even by feminist scholars, indicating firstly a lack of awareness but also, perhaps, a lack of confidence concerning the potential of any of the human rights instruments, especially CEDAW due to its marginalised status as a 'women's' Convention. Women in Asia and Africa use the CEDAW as a powerful tool much more frequently than women do in Western states; in the UK there is a distinct lack of awareness amongst domestic violence victims and the groups who work on their behalf about how the provisions of the CEDAW could be used to substantiate claims, and how the international human rights system could be used to benefit victims. How to successfully use Article 5(a) of the CEDAW as a basis to call for a change in the understandings of the

⁴⁴ The text of the Bill can be found at <http://services.parliament.uk/bills/2013-14/domesticviolencelegalframework.html>

causes and consequences of domestic violence found in statute, judicial guidelines, police and CPS policy and practice and other legally-regulated bodies demands further investigation given the potential of the obligations.

The experiences of domestic violence amongst different groups of women will be very different, as will the legal response and support services they receive. It is known that black and minority ethnic women and lesbian women have very different experiences of abuse and responses from helping agencies. Women from lower socio-economic groups may find it more difficult to leave an abusive relationship due to financial restrictions as well as the dynamics of the abusive relationship. Therefore, a limitation of this study is that these differences are not taken into account and all women are discussed as if they are a homogenous group. This is a widely-held criticism of many fields of feminist theory; the tendency to essentialise women's experiences and assume that the word 'woman' can be used to represent all women's experiences. Therefore, research is needed into how the impact of the root causes differs amongst different social, ethnic and religious groups in terms of the different expectations placed upon male and female roles and behaviour to see how the conceptual framework could be mapped onto different experiences.

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<http://www.endviolenceagainstwomen.org.uk/>

Websites showing Glorification of Violence Against Women in Advertising

<http://www.businessinsider.com/sex-violence-against-women-ads-2013-5?op=1>

<http://www.buzzfeed.com/copyranter/violence-against-women-in-fashion-continues-unabated>

The Judicial College's Equal Treatment Bench Book

<http://www.judiciary.gov.uk/publications/equal-treatment-bench-book/>

Article discussing hyper-sexualisation of girls

www.maisonlesther.com/web/doc/pdf/en/Hyper-sexualisation_20121012152746.pdf

The Final Report of the Attorney General's Commission on Pornography

<http://babel.hathitrust.org/cgi/pt/search?q1=violence;id=mdp.39015073491824;view=1up;seq=565;start=1;sz=10;page=search;orient=0>

Family Mediation Council Code of Practice

www.familymediationcouncil.org.uk/us/code-practice

National Policing Improvement Agency Policy Documents

www.acpo.police.uk/policies.asp

DASH Risk Checklist

www.dashriskchecklist.co.uk/

Parliamentary information about witchcraft

www.parliament.uk/about/living-heritage/transformingsociety/private-lives/religion/overview/witchcraft/

Marx and Engel's Communist Manifesto

www.marxists.org/archive/marx/works/download/pdf/Manifesto.pdf

Articles on domestic violence rates:

www.theguardian.com/society/2010/sep/05/men-victims-domestic-violence

www.theguardian.com/commentisfree/2011/jun/07/feminism-domestic-violence-men

Domestic Violence Disclosure Scheme

www.gov.uk/government/uploads/system/uploads/attachment_data/file/260894/DVDS_assessment_report.pdf