An examination of Defences in Scots Law Where Homicide has been Preceded by Domestic Abuse: The Potential Introduction of a Specific 'Domestic Abuse' Defence

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Abstract

This thesis provides an examination of legal defences to homicide in Scots law, focussing specifically on their operation and application in the context of intimate partner homicide which has been preceded by domestic abuse. Approached from a perspective informed by the theory of coercive control as a form of abuse, it provides a review of existing defences - considering self-defence, provocation and diminished responsibility - and how these are accessed by victims of abuse who kill their abusers.

There are a number of issues with the current formulation of homicide defences which prevent an accused in this context from successfully relying on them. These issues will be presented, leading to a consideration of how defences may be reformed in order to address current shortcomings. This involves a consideration of how homicide defences have been reformed in other jurisdictions, and the potential introduction of a specific 'domestic abuse' defence for such cases.

A central aim of this thesis is to appropriately contextualise cases in which victims of abuse kill their abusers. Throughout, it is argued that both general understanding of and legal responses to such cases are not informed by empirical reality. It is intended that the contextualisation provided in this work – namely that women's experiences of homicide occur within an overarching context of male violence, and that the majority of cases where women kill their abusers occur during an ongoing attack - informs more robust legal analysis and consideration of these cases, thus providing preferable outcomes for victims of abuse. This work offers an account cognizant of gender and gender inequality, and how this influences legal responses to domestic abuse – as such, the extent to which legal change alone can address the gender inequality which is central to domestic abuse will also be discussed.

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Author's Declaration

I declare that this thesis is the result of my own work and has not been submitted for any other degree at the University of Glasgow or any other institution. Where information or ideas are obtained from any source, that source is acknowledged in the footnotes and/or text.

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Introduction

In recent years, there has been significant legal and policy change in terms of responding to domestic abuse.[1] Legal developments addressing domestic abuse culminated in the introduction of the Domestic Abuse (Scotland) Act 2018, which has been described as setting the 'gold standard' for legislation criminalising domestic abuse.[2] This created a specific offence of domestic abuse,[3] which encapsulates a range of abusive behaviours.

Homicide is a gendered phenomenon. Looking to the general landscape of the offence, men commit the majority of homicides.[4] While men also account for the majority of homicide victims,[5] where women are victims of homicide, they are significantly more likely to be killed by a partner or ex-partner.[6] Scottish data collected over a ten-year period (2010-11 to 2019-20) illustrates the relationship homicide victims to the main accused: 44% of women were killed by a partner or ex-partner.[7] These trends in gendered homicide victimisation are reflected globally.[8]

Women's experiences of homicide, therefore, predominantly occur within the context of male violence and aggression. This is also true of intimate partner homicides where a victim of domestic abuse kills their abuser, which are typically preceded by significant male violence, as will be explained throughout this work. In spite of positive progress in responding to domestic

[1] For an outline of key developments in Scotland, see Rachel McPherson, 'Legal change and legal inertia: understanding and contextualising Scottish cases in which women kill their abusers' (2021) 5(2) JGBV 289

[2] Evan Stark, 'The 'Coercive Control Framework:' What Makes Law Work for Women?' in Marilyn McMahon and Paul McGorrery (eds.) *Criminalising Coercive Control: Family violence and the criminal law* (Springer 2020) 34

[3] s1 Domestic Abuse (Scotland) Act 2018

[4] In 2020-21, 92% of persons accused of homicide were male. 'Homicide in Scotland 2020-2021' Available at: <https://www.gov.scot/publications/homicide-scotland-2020-2021/pages/2/>

[5] Of 58 homicide victims in 2020-21, 48 were male (*Ibid).*

[6] 30% of female homicide victims in Scotland in the period 2020-21 were killed by a partner or ex-partner (*Ibid).* In the period 2019-2020, the figure was 37%. 'Homicide in Scotland 2019-2020'Available at: <https://www.gov.scot/publications/homicide-scotland-2019-2020/pages/3/>

[7] *Ibid*

[8] United Nations Office on Drugs and Crime, 'Global Study on Homicide' (2019) Available at: <https://www.unodc.org/documents/data-and-analysis/gsh/Booklet1.pdf>

abuse, this particular type of intimate partner homicide remains characterised by both public and legal misunderstanding. A central argument of this work will be that homicides where a woman kills her abusive partner are not understood within their appropriate context, which precludes her from successfully relying on defences to homicide.

Chapter 1 will set out theories of coercive control, considering the gendered power dynamics and characteristics of domestic abuse, and how it is enacted. The relationship between coercive control and intimate partner homicide will then be considered though a discussion of coercive control as a precursor to homicide.

Chapter 2 comprises a discussion of defences to homicide – specifically self-defence, provocation and diminished responsibility. The specific requirements of each of will be presented, considering how these defences are accessed by an accused who has killed their abuser. It will be argued that each individual defence presents a number of challenges for an accused in this context.

Chapter 3 will review how defences have been reformed in other jurisdictions in order to better apply to this particular type of intimate partner homicide. The effectiveness of these reforms will be considered, as will the introduction of a specific domestic abuse defence. It will be concluded that, if cases are taken within their appropriate context, circumstances are more likely to be indicative of self-defence, and any reforms to defences in this area should reflect this. Ultimately, a significant caveat to the recommendations and discussion of this final chapter is the inability of the law to independently bring about meaningful change – this must be coupled with a broader social change, with the reform of existing law constituting just one element of addressing domestic abuse and women's access to justice.

Throughout this work, reference is made to 'women' who kill their abusive partners. The offence of domestic abuse is gender neutral, and it is accepted that persons of any gender may be victims of domestic abuse. However, domestic abuse is overwhelmingly a gendered offence, the majority of victims being female.[9] In addition to the empirical basis for this distinction,

[9] In 2020-21, where domestic abuse incidents reported to police recorded gender-related information, 80% of incidents had a female victim and a male accused. Domestic abuse recorded by the police in Scotland 2020-21, Available at: <https://www.gov.scot/news/domestic-abuse-recorded-by-the-police-in-scotland-2020-21/>

much of the discussion will be underpinned by a theme of structural gender inequality, and how this is a key component of coercive control. Understanding gender difference, gendered norms and stereotypes, and gendered perceptions of violence are crucial to understanding the current application of defences to homicide, and how these can be reformed to better serve victims of abuse who kill. It will be shown that this gender inequality both makes the abuse possible and influences the operation of the law in responding to domestic homicides where a victim has killed their abuser. Notwithstanding terminology, it is recognised that, in keeping with recent legal developments, any reforms to homicide defences made in the context of domestic abuse are likely to be gender neutral.

Chapter 1: Theory of Coercive Control

This section will examine theories of a particular, gender specific pattern of control, known as 'intimate partner terrorism'[10] or 'coercive control.[11]' The theory and definition of coercive control will be explored, as well as how this pattern of controlling behaviour has developed depending largely on the socio-political context in which it occurs. This includes the gendered dynamic of its occurrence; the stereotypes it relies upon and perpetuates; the tactics most commonly deployed in the course of coercive control; and how the definition, typology and technology[12] of this course of behaviour interact with the current law on domestic abuse. Specifically, consideration will be had for the implications of our understandings – and indeed the understanding of victims of this type of behaviour – of how abuse and violence are experienced more generally, and how this shapes (or indeed distorts) responses to retaliation and resistance, particularly where women respond fatally.

1.1 Distinguishing 'Coercive Control' from 'Domestic Violence'

When considering the theories and peculiarities of coercive control as a specific course of conduct, it is important to distinguish them from the broader, more general term of 'domestic violence' so not to conflate what is largely a more social concept with the specific nature of the conduct in question. Recent legal developments have correctly identified coercively controlling behaviour as constituting domestic abuse, and have accordingly reflected this in definitions of relevant offences. The Domestic Abuse (Scotland) Act 2018 makes reference to isolation, controlling and regulating day-day activities, and frightening, degrading or humiliating a partner as all being relevant effects in constituting abusive behaviour.[13] Outside of the legal sphere, similar developments have been made acknowledging coercive control as being a significant to defining domestic abuse.[14] The purpose of the distinction to be made is

[10] Michael P. Johnson, *A Typology of Domestic Violence* (NUP 2008)

[11] Evan Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP 2007)

[12] *Ibid* 228

[13] Domestic Abuse (Scotland) Act 2018, s2(3)

[14] For example, Scottish Women's Aid define domestic abuse as 'a pattern of controlling, coercive, threatening, degrading and/or violent behaviour, including sexual violence, by a partner or ex-partner' stressing that 'often when people think of domestic abuse they think of physical violence, but domestic abuse is very often so much

not to undermine these very much welcome developments in coming to understand coercive control type behaviour as being a significant component of domestic abuse. Its necessity, however, is drawn from an early understanding of 'domestic violence' as an incident specific paradigm, which attributes much of the harm arising therefrom to physical (and laterally, psychological) harm. As understanding of coercive control becomes more central in policy and interventionist spheres,[15] it becomes more problematic to attribute the 'wrongfulness' of this type of abuse to actual physical (and even psychological) harm. A focus on the approximation and infliction of harm caused by violence alone is contradictory to the nature and defining characteristics of this type of behaviour, as will be shown in the next section.

Both Stark[16] and Johnson[17] distinguish coercive control type behaviour from discrete instances of violence between couples. This distinction was especially pertinent when domestic abuse was generally conceptualised by specific incidences of violence and assault, which applied a 'calculus of harms' to assess the severity of the abuse.[18] Since then (due partly to the influence of their work,) we have seen understandings and definitions of domestic abuse broaden to encapsulate coercive control. In part, then, this distinction becomes less pressing. However, to adequately understand the role of violence in the broader context of coercive control, and in the interest of dispelling any residual notions that abuse solely comprises physical violence, [19] it is one that should nevertheless be drawn, and sets the tone to better define and consider the tactics and mechanisms deployed.

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more than that' See: <https://womensaid.scot/information-support/what-is-domestic-abuse/> Similarly, Refuge define it as 'a pattern of behaviour on the part of the abuser designed to control his partner.' See: <https://www.nationaldahelpline.org.uk/en/What-is-abuse>

[15] This will be discussed in more detail, particularly with regards to risk assessment.

[16] Stark (n11) 104

[17] Johnson (n1) 5

[18] Evan Stark, 'Rethinking Coercive Control' (2009) 15(12) VAW 1509

[19] The 2019 Scottish Social Attitudes Survey showed that respondents did on some level recognise the seriousness of verbal abuse by a partner (68% of respondents aged 18-64 thought this type of abuse caused 'a great deal' of harm), though it was clear respondents held somewhat stronger views on physical violence, with 93% viewing a man slapping his partner as 'very seriously wrong'. The proportions viewing physical abuse as 'very seriously wrong' were higher than the 72% who viewed verbal abuse against a women, and 51% who viewed verbal abuse against a man, as 'very seriously wrong'. Available at: <https://www.gov.scot/publications/scottish-social-attitudes-survey-2019-attitudes-violence-against-women-scotland/pages/4/>

Johnson distinguishes what he refers to as 'situational couple violence' from 'intimate terrorism'.[20] This distinction hinges upon the control context in which violent acts take place,[21] and the role of violence in the dynamics of the relationship. With intimate partner terrorism, violence occurs within a broader context of coercive control. In situational couple violence, however, the violence is not enacted in an attempt to exert control, but is instead 'situationally provoked' with one (potentially both) party responding violently.[22] Johnson considers this latter form to be the most common partner violence.[23] To say that violence is situationally provoked does not undermine the severity or indeed the wrongfulness of this type of violence.[24] Instances of situational couple violence can be frequent and severe. But what distinguishes this violence from coercive control is its context, aims and consequences. The dynamics of intimate terrorism and situational couple violence are different, and as such elicit different consequences. Stark points out that this categorisation of situational couple violence **conflates** 'ordinary fights' deemed between couples as being legitimate means of settling disputes, and assaults where violence is intended to elicit fear, hurt or subordination in a partner, but not carried out alongside control tactics.[25]

In order to distinguish 'fights' or situational couple violence from 'intimate terrorism', it is necessary to consider the aim. According to Johnson's typology, it must be considered whether this violence was enacted with the intention of achieving control. This relates to physical consequences of the violence, its significance to the parties involved, and whether the violence has been enacted in conjunction with any other tactics.[26]

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[20] Johnson's typology deals with four categories of violence: not mentioned above are violent resistance and mutual violent control. For the purposes of this discussion, consideration is only given to situational couple violence and intimate terrorism.

[21] Johnson (n1) 2

[22] Johnson (n10) 11

[23] *Ibid*

[24] Wrongfulness here is generally intended to mean 'wrongs' or 'harms' meriting criminalisation, though there is also an element of moral wrongfulness (there is bound to be some overlap here – even if not approaching criminalisation from a completely moralistic standpoint) See: Joel Feinberg, *Harm to Others: The Moral Limits of the Criminal Law* (Volume 1, OUP 1984); Hamish Stewart, 'The Limits of the Harm Principle' (2010) 4 CLP 17

[25] Stark (n11) 104

[26] Stark (n11) 105

While ‘intimate terrorism’ does adequately reflect the seriousness of the conduct, the term gives rise to relatively unhelpful implications about the nature of the abuse. While it is true that there is an intimate relationship between perpetrator and victim, it is also true that there are significant dangers involved where the partners are separated, which often lead to the heightening of risk factors. In addition, while the intimacy at play allows the abuse to be personalised to a victim, not all of the tactics used are strictly ‘intimate’ or private. Therefore, the language of ‘coercive control’ is preferred here, as it is by Stark, when referring to this type of abuse.[27]

1.2 The Gendered Context of Coercive Control

It has been noted that context and the objective of control are key to identifying violence which is enacted in the course of coercive control. As Stark explains,

> ‘The imposition of control in abusive relationships presupposes the unequal distribution of rights and resources even as the perpetrator takes the substance of inequality as the focus of his abuse, by imposing the victim’s compliance with gender stereotypes.’[28]

Therefore, coercive control relies upon the sexual inequality and imbalance of sexual power between men and women. Clearly, and perhaps obviously, if women were not considered to be in a less favourable socio-political position to their male counterparts, and women’s rights were accompanied by substantive equality, control attempts would not be successful.[29] But they are, and frequently so. A specific aim of coercive control is the enforcement and perpetuation of this inequality. Coercive control exploits social disadvantages inherited by women. In this way,

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[27] The introduction of the Scottish *National Strategy* in 2003 moved away from a focus on physical violence, and used the language of ‘domestic abuse’ as opposed to ‘domestic violence’ McPherson (n1). The focus on physical violence and typification of ‘battered women’ typical of other jurisdictions, including England and Wales, was important and welcome to the extent that it highlighted the need for legal intervention, but counterproductive in the sense that it gives rise to narrow conceptions of abuse and, with the practical effect of overlooking or excluding certain victims whose experiences do not fit this typology. Holly Johnson and others, ‘Intimate Femicide: The Role of Coercive Control’ 2017 14(1) FC 3

[28] Stark (n11) 105

[29] Stark (n11) 381

it centres around the construction and deconstruction of gender identity. In enforcing specific gender roles and stereotypes, structural constraints are imposed which fundamentally degrade not only the notion of femininity, but ultimately the autonomy and personhood of the victim herself.[30] Much of this degradation comes from traditional (and outdated) conceptions of womanhood which are confined to domesticity, servitude and family.[31] In reinforcing women's consignment to these spheres, the control also strips the victim of any ability to positively identify with or derive fulfilment from the domestic and familial duties imposed upon her. In this way, her identity is further broken down by reducing personality and agency.[32] In establishing a nonreciprocal relationship of authority, men cannot only derive direct benefit from the duties imposed (cooking, cleaning, sexual relief), but indirect benefit from her obedience more generally. Coercive control is fundamentally a means of depriving a victim of autonomy; to degrade women into the embodiment of stereotypical femininity against which a man can enact masculinity, as he deems to be appropriate or correct.[33] This is one way in which coercive control as a course of behaviour can be distinguished from other acts of gender-based violence, in that while other forms are concerned with gender, only coercive control seizes the notion of femininity, reinventing and reinforcing itself based on the gendered ideology upon which it is constructed. Unless and until women enjoy full substantive equality, then inequality will serve as the basis for coercive control.

That is not to say that women cannot resist this type of control. As Stark points out, if women were not inclined to resist this and other conceptions of male authority, coercive control as it exists now would not have developed.[34] And indeed, if women were truly subordinate to men,

[30] Stark (n11)

[31] That being said, women undertake three times more domestic and care work than men globally, accounting for 75% of total unpaid care work. 'Progress of the world's women 2019-2020: Families in a Changing World: Caring Families, Caring Societies' (2020) 140 Available at: <https://progress.unwomen.org> A UK study reported an exacerbation by the coronavirus pandemic, finding that women accounted for roughly two thirds of housework, and were significantly more likely than men to reduce working hours to accommodate unpaid domestic work during the April-May 2020 lockdown. Baowen Xue, Anne McMunn 'Gender differences in unpaid care work and psychological distress in the UK Covid-19 lockdown' (2021) 16(3) PlO. This disparity in domestic settings also contributes to women's vulnerability to abuse and exploitation, particularly where they must reduce working hours to accommodate domestic work, reducing wages.

[32] Stark (n18)

[33] Stark (n11) 378

[34] *Ibid*

then it is unclear why such elaborate control strategies would be required to ensure oppression. One of the peculiarities of coercive control is that it has been born of a context in which women have achieved increased political and social liberation. It has been argued that coercive control is devised in response to the breakdown of traditional patriarchal male privilege that has occurred with women becoming increasingly socially, economically and politically liberated, and that as a result, male domination must be enforced in personal life where it was once an institutional norm.[35] This does not detract from the fact men still enjoy sex-based privilege. But the landscape of male domination and female subordination are dependent upon the structure of sexual power, and how this power is contested.[36] In other words, men must build on the remains of the structural and institutional foundations of their male privilege, grounding coercive control in continued sexual disparity and inequality, and personalising dominance to their relationships with women.[37] The idea of coercive control as a personalised form of dominance will be discussed further in the following section, which outlines the key tactics used in the implementation of coercive control strategies.

1.3 Implementing Coercive Control

It has been established that coercive control has its roots in sexual inequality, and serves as a means through which men can subordinate women through the personalisation of dominance. The enforcement and perpetuation of stereotypical gender roles as an aim of coercive control is shown through its tendency to relate to women's traditional consignment domestic and familial spheres. Coercive control also serves as a means through which a woman's socio-political participation can be curtailed, reducing agency, organisation, autonomy and freedom over personal choices such as what she wears, who she sees, and if or when she has sex, for example. It is not necessarily a coincidence that each of these examples relate back to women's consignment to domesticity. Coercive control emerged from, and operates within, the dynamics of everyday life.[38]

Against a context of increased liberties, many women move out of the domestic sphere, or at

[35] Stark (n11) 171

[36] Stark (n11) 172

[37] *Ibid*

[38] *Ibid*

least reject the notion that this is their primary domain. As such, many women find ways to express themselves and their personhood in social, political, cultural and economic spheres.[39] However, it is not the case that women's movement from the domestic realm has been met with men's movement therein. With the advancement of capitalism has come the erosion of the male-bread winner gender contract, and it is in many cases no longer to sustain a family on a single wage, regardless of notions of whether it is a woman's rightful place to enter the world of work.[40] Some of the domestic, unpaid labour involved in social reproduction has become increasingly outsourced, being performed predominantly by migrant women and prompting a 'feminisation' of migration.[41] The fact remains, however, that the majority of families cannot afford to domestically outsource in this way, and the work is still predominantly performed by women. What results is a shift in the way this work is valued and perceived, with an expectation that this work will be carried out on top of a job and childcare. Even through its assignment to migrant women, the emotional, physical and temporal demands of this labour are systematically undermined. Where this becomes relevant to the implementation of coercive control is that many control strategies focus on traditional gender roles: the enforcement of exactly how and when reproductive labour is performed not only takes reduces the ability to exercise autonomy elsewhere (i.e., social, economic and political spheres), but also confines a victim to work which is socially demeaned and undervalued. A victim is also stripped of any form of autonomy over how she performs those duties. This undermines her dignity and removes any secondary fulfilment she may have otherwise felt from this labour.[42]

As was alluded to, implementation of coercive control is personalised to individual relationships. This is made possible through the intimate knowledge afforded to an abuser by the nature of the relationship. This offers unique access to information about the victim, which

[39] *Ibid*

[40] The number of women in work in 2021 was an increase of 1.81 million on the previous decade. See 'Women and the UK economy' House of Commons Library 2022 at <https://researchbriefings.files.parliament.uk/documents/SN06838/SN06838.pdf>. On the relationship between economic developments and the feasibility of single income sustainability, see: Helga Maria Hernes 'Women and the Welfare State: The transition from private to public dependence' in Anne Showstack Sassoon (ed.) *Women and the State: The Shifting Boundaries of Public and Private* (Routledge 1987)

[41] Judy Fudge, 'Global Care Chains: Transnational Migrant Care Workers' (2012) 28(1) IJCLLIR 63

[42] Stark (n11) 213

can be weaponised.[43] This, along with normative support for male domination and control, and the regulation of the enactment of gender roles, will dictate the landscape of the control with other relationship-specific factors. A 'trial and error' process of developing tactics[44] results in a fully realised, fully personalised arsenal of control and coercion, which when used together bring about the subordination of the victim, who experiences this relationship of unreciprocated authority as entrapment.[45]

Stark divides the tactics deployed into those meant to coerce and those meant to control the victim. In assessing these tactics, it is necessary not to consider the isolated instances of abusive behaviour as such (such as the monitoring of time spent on the phone or in the bathroom, for example), but rather the relationship between the individual acts, and their oppressive context.[46]

1.3.1 Coercion

Coercive control is designed to target women's agency and resistance. Coercion tactics involve the use or threat of force in order to compel or dissuade the victim from particular responses.[47] The use of control can have physical, behavioural and psychological consequences.[48] Under the broad heading of coercion fall the use of violence, intimidation and isolation.

1.3.2 Violence

While the frequency and extent of violence adopted will depend on induvial relationships, in the majority of cases, effects of violence can be felt cumulatively, resulting from frequent but 'low-level' assaults.[49] Where violence is used as one tactic in a course of coercively controlling behaviour, assaults are more common than where physical violence is used independently.[50]

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[43] Evan Stark, 'Looking Beyond Domestic Violence: Policing Coercive Control' (2012) 12(2) JPCN 199

[44] Stark (n11)

[45] *Ibid* 229

[46] *Ibid* 230

[47] Stark (n43)

[48] *Ibid*

[49] Stark (n11) 245; (n43)

[50] Johnson (n10)

Violence becomes an integrated part of daily life. This does not necessarily mean that abusers are consistently 'beating' victims (though this is not uncommon); routine violence can be more muted, and include pushing, shoving, slapping and wrist-grabbing, for example. This is not to suggest that these forms of violence are not serious or significant, but that the frequent and consistent use of violence contributes to a sense of perpetual and continuous subordination which makes the victim feel constantly at threat of and under force. As a result, victims may consistently anticipate the use of violence. Since the nature of coercive control is personalised, victims learn to anticipate threats and become sensitive to their abusers behaviour.[51]

While routine violence is a common attribute of coercive control, when considering the context in which women kill abusive partners, it is important to note that incidents will typically involve severe violence. Male violence is an important precursor to intimate partner homicide, regardless of the sex of the victim.[52] Women predominantly kill in response to an ongoing attack or confrontation.[53] This means that where women kill, there is likely to be (usually severe) physical violence involved. The progression from routine to more severe and overt violence may be explained by an escalation in risk, dependent upon situational and circumstantial triggers which precede intimate partner homicide, which will be discussed in more detail in the following sections. However, at this stage, it is worthy of note that the escalation from routine to severe or 'sub-lethal' forms of violence (such as strangulation and the use of weapons) will be consistent with patterns of coercively controlling behaviour.[54] Therefore, both routine violence and severe forms of violence are both characteristic of and intrinsically linked to the theory of coercive control as a form of abuse.

[51] Stark (n11) 245

[52] JC Campbell and others, 'Intimate partner homicide: Review and implications of research and policy' (2007) 8 TVA 246

[53] McPherson (n1). The Scottish data is consistent with earlier data from other jurisdictions. For example: Angela Browne, Kirk R. Williams, Donald G. Dutton 'Homicide between intimate partners' in Smith and Zahn (eds.), *Homicide: A sourcebook of social research* (Sage 1998); Emma Morton and others, 'Partner homicide victims: A population based study in North Carolina 1988-1992' (1998) 13(2) VV 91; Neil Websdale *Understanding domestic homicide* (BNEUP 1999)

[54] Andy Myhill, Katrin Hohl, 'The "Golden Thread": Coercive Control and Risk Assessment for Domestic Violence' (2019) 34(21) JIV 4477

Where control tactics intercept opportunities to resist or retreat from attacks (for example, by denying access to a phone or car), this can give rise to a 'cognitive paralysis'.[55] This is why the violence used in coercive control is different from that in partner assaults – because it is employed alongside tactics to disallow practical resistance. As well as making them generally more vulnerable to violence, this reduces autonomy further by removing any realistic options or alternatives (for example, no access to a car may render them unable to leave the home; or even if they can access a car, they are denied access to money, etc). And, as this process continues, coercive control can foreclose the opportunities to resist to such an extent that *any* form of autonomy that could be exercised by a woman, no matter how minor, elicits apprehension and distress. This explains how women become 'entrapped' in their personal lives, where even in the absence of a formal constraints by their partner, they are compelled to submit to the abuse, and also how may continue with their control without requiring physical force. It is this omnipresence of the partner and his control that lead some women to resist the abuse by way of seeking 'control in a context of no control.'[56] Crucially, that victims become privy to the behaviour of their abusers, and learn to draw on contextual cues and predicates in order to preserve themselves, the experience of violence depends less on the use of force itself and more on the context which it is used.[57] How violence is experienced and the implications this has for legal responses will be considered more fully in the proceeding sections.

1.3.3 Intimidation

Intimidation instils fear, compliance and dependence in victims of coercive control, and is used to ensure the abuse remains hidden.[58] Much of the success in bringing about these effects is related in some way to how victims experience violence in the context of coercive control – intimidation works because victims contextualise the threats made based on previous experiences, or what they believes their partner to be capable of.[59] In this regard, intimidation can arouse the fear of consequences, such that the realisation of these consequences – the use

[55] Stark (n11) 424

[56] This concept will be developed in section 1.5.

[57] Stark (n11) 246

[58] Stark (n11)

[59] *Ibid*

of physical violence, for example – might not be necessary to bring about compliance. The main forms of intimidation are threats, surveillance and degradation.

Similarly to violence, threats can be particularly sinister in that they may be implicit and only obvious to parties to the relationship – threats can be drawn from subtle changes in tone or body language, and may be unspecific or ambiguous.[60] Another common tactic is the creation of the 'battered mother's dilemma', where a victim is forced into a choice between her safety and that of her children.[61] Threats need not be of physical force, and can come in the form of passive-aggression such as emotional withdrawal.[62] They can also be tailored to the specific experiences, fears and weaknesses of individual victims, as can the use of 'gaslighting', which is particularly effective given the presumption of intimacy and trust.

The use of surveillance ranges from the monitoring of a victim's everyday activities, such as showering or using the toilet, to monitoring their communications with others, to stalking. While stalking is the most dramatic form of surveillance, having clear links to violence and harassment - particularly when partners are separated[63] - the use of 'micro-surveillance' to monitor the activities of a victim eradicates any autonomy that women may exercise in their personal conduct, and allows abusers to instil in their victims a sense that they are always present.[64]

Degradation is a means through which abusers can assert dominance and superiority over their victims by denying them self-respect.[65] Where coercive control hinges on the enforcement of particular gender stereotypes, the reason that degradation is effective in this context is because it denies the victim the opportunity to express herself and the capacity to validate herself, meaning she becomes dependent her abuser on validation, making her more vulnerable to that degradation.[66] Degradation is used in conjunction with other control tactics which complement its intimidating effect, targeting areas of the psyche which other forms of abuse have made

[60] Stark (n11) 250

[61] Stark (n11) 53; (n43)

[62] *Ibid*

[63] Stark (n11); *Drury v HM* Advocate (2001 SLT 1013) provides a practical example of these dangers.

[64] Stark (n11) 257

[65] Stark (n11) 258

[66] *Ibid*

vulnerable (such as the enactment of femininity being compromised by regulation on what she can wear, or her weight) and reduces capacity to identify with these elements, and to respond to the attacks thereon.[67] This again fundamentally reduces agency and strengthens the abusive power dynamic. Similarly, some abusers use 'shaming' tactics to symbolise ownership over victims.[68]

1.3.4 Control

Control tactics are used to ensure obedience by the micromanagement of behaviour and establishment of strict rules governing day-to-day life, the eradication of choice, and the deprivation of resources and support systems.[69]

1.3.5 Isolation

Isolation helps to ensure that abuse remains secret, that victims become dependent on abusers (be that financially through the prevention of a victim going to work or significantly impacting performance at work and impacting employability, or socially by isolating her from family and friends), and prevents victims from seeking help or support.[70] Not only does isolation have the practical effect of preventing a victim from seeking help to escape the abuse, it too makes her more susceptible and vulnerable to the other tactics used. For example, where an abuser has made his victim dependent on him for information and validation by cutting her off from family and support networks, she becomes increasingly more vulnerable to his insults and degradation. This demonstrates clearly the complexity and the interplay between the different tactics used in the course of coercive control, and how their cumulative effect has a much more significant impact on victims than if these were isolated instances. It is this interaction between tactics and the complementary nature of one tactic to enforce and bolster the effects of the others that significantly reduces a victim's capacity to effectively resist, and that leads to victims experiencing the abuse as entrapment.

[67] Stark (n11) 259

[68] Stark (n11) 260; (n43)

[69] *Ibid*

[70] *Ibid*

1.3.6 Depravation, Exploitation and Regulation

Through isolating a victim, abusers may deprive access to resources such as a phone or vehicle. This increases dependence, and can be coupled with the regulation of everyday activities, including how and when housework should be completed, childcare, and engaging in sexual activities. The materiality of abuse finds its foundations in the control victim's basic necessities.[71] It is no coincidence that the micromanagement of these activities often centres around the stereotypical consignment of a woman to domesticity.

The theme of undermining autonomy and reducing capacity for resistance has recurred throughout the discussion of coercive control. This is because it is the aim of the abuse. In order to resist, women forge what Stark calls 'safety zones', where they can salvage their autonomy, regain a sense of control and self-worth, and plan escape strategies.[72] This can involve enacting the duties imposed by the abuser in such a way that allows a victim to retain a sense of ownership or agency.[73] Because the aim of coercive control is to subordinate women and remove their subjectivity, abusers seek out and invade these safety zones. No clearer is this demonstrated than in the context where an abuser isolates his victim from her friends and family, does not allow her to go to work, or microregulates daily activities. This is an attempt to eradicate resistance and any semblance of agency on the part of the victim, which makes the impacts of isolation more devastating, and indeed advances and solidifies the abuse overall.

1.4 Implications from Theories of Coercive Control

The theory of coercive control as it has been described has implications for the ways in which women experience abuse. Crucially, it reframes the lens through which violence and other control tactics are experienced. The personalisation of abuse and how this impacts its victims also has implications for how they respond, which is particularly relevant where women respond with fatal force.

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[71] *Ibid*

[72] Stark (n11) 216

[73] *Ibid*

It has been noted that victims necessarily become hypersensitive to nuance and the behaviour of their abuser. This, along with the routine nature of violence in many instances of coercive control, has the obvious consequence that individuals subject to this type of abuse perceive threat differently to a person who is not. Even at this stage, therefore, when women react with significant or fatal force to abuse, evaluating the proportionality of their response becomes problematic. If her reaction is abstracted from the context in which the abuse has taken place, it risks misjudging the proportionality of the response. To do so neglects the nature of coercive control as a course of conduct as opposed to a discrete abusive incident, and the impact this has on victims.

By extension, to remove the significance of the predicates to assault or violence infers that instances of abuse are mainly physical. This neglects the context of entrapment, and conceives of violence through a distinctly masculine perspective.[74] The conception of violence through such a perspective has been present in discussion of criminal defences. Provocation, particularly by infidelity, has been argued to favour a particularly male pathology, reflecting predominantly male experiences of violence.[75] This confounds the reality of victims of coercive control, and also runs the risk of failing to appropriately assess their reactions and own use of violence, through a misunderstanding of its dynamics.

Similarly, where instances of intimidation and threat are successful, it may not be necessary to enact actual violence or 'follow through' consequentially on the part of the abuser. Quite obviously, reacting with fatal force to a non-action cannot be proportionate. But even where the law recognises threats as provocative, there is a risk that the deeply contextualised nature of coercive control will mask these threats. Being so personalised, often intimidation and threats are implicit, coming from behaviour would not appear to be threatening to parties outside the relationship.[76] In this way, victim perception of danger in the course of coercive control depends as much on what the perpetrator actually does as the way in which the tactics of control have solidified his dominance and undermined her capacity to resist. As a parallel, the violence and dominance enacted is less about what men actually do, and more about women

[74] Stark (n11) 246

[75] This will be discussed further in Chapter 2.

[76] These are credible threats. Mary Ann Dutton, Lisa A Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52 SR 743

are, by dictating central facets of personhood. Accordingly, evaluating control by too strict a 'calculus of harms' where this pertains solely to physical or even psychological harm, or individual affirmative abusive incidents, risks misunderstanding a key component of this abuse.

1.5 Resistance and 'Control in the Context of No Control'

This fact often leads to the (correct) conclusion by victims that their abuse will persist regardless of their actions. In order to maintain some form of autonomy that coercive control seeks to remove, victims often seek 'control in the context of no control'.[77] This can involve resorting to extreme measures to regain a sense of autonomy. For example, where a victim knows she will indefinitely be hurt, she may attempt to hurt or even kill herself, at least offering some form of agency over the *how* and *when* of her being hurt, where she cannot dictate the *if.*[78] Clearly, this can lead to desperation where victims feel they must resort to extremes in order to maintain personhood, which can hardly be said to be an autonomous choice.

The concept of 'control in the context of no control' is particularly significant where women kill their abusive partners. Of course, at a fundamental level, the options for coercive control victims are severely limited. However, acts of resistance and defiance can only be fully appreciated by an understanding of the broader context in which they occur; that is to say that the response to the abuse is dependent upon the abuse itself, and cannot be represented fairly when severed therefrom. This becomes significant from a legal perspective when considering defence narratives for women who kill their abusers – their response may not be considered proportionate where the context of their action has been misidentified or understated. Misunderstanding of the nature of their actions may carry negative implications for sentencing, and indeed public opinion more generally in cases which receive media attention.

Stark has considered the phenomenon of control in the context of no control through an analysis of a case involving child abuse as tangential spouse abuse - that is, child abuse with the primary

[77] Stark (n11) 245

[78] *Ibid*

aim of subordination of an adult victim (predominantly the female partner).[79] In the case analysed, an abused mother – the primary adult victim of coercive control by her partner – was charged with directly causing the death of her son. Considering the case from a coercive control framework, Stark rationalises the acts of 'abuse' by the mother towards her son – failure to disclose information to clinicians, giving false explanations for injuries, instructing teachers to restrict his diet – as fundamentally something different when viewed from a perspective of victimisation: resistance. It is argued that these acts should be understood as attempts to expose and resist the coercive control both she and her son were subject to. Ignorance to the coercive control here would lead to the conclusion that these acts were fundamentally abusive rather than preservative, and prevents them from achieving their objective of removing the control. Thus, failure to recognise control context is to ensure that no effective intervention can be made. For this same reason, coercive control theory ought to be at the centre of discussion where women kill their abusive partners – so that their reactions and resistance may be properly vindicated. Simply put, the response cannot be understood without understanding the risk from which it arose.

An interesting observation made in this case study is of the process of 'over-contextualisation', whereby the abuse suffered by the mother becomes an intrinsic facet of her personality. She is an 'abused mother', and the abuse she suffers 'reappears as a by-product of who she is, as a mother and woman'.[80] A parallel may perhaps be drawn here with a similar form of 'over-contextualisation' which occurs where women kill their abusive partners. The coexistence of the labels of 'abused woman' and 'accused' is met with conflict in the legal system,[81] and perhaps more obviously, media reporting. Often the narrative afforded to women who kill their abuser will adhere to just one of these archetypes – being either the tragic victim, or the cold, calculated murderer.

For example, Natalie Scott, who killed her boyfriend in response to an attack following a period of domestic abuse in 2012, was reported as the 'abused woman' who admitted to killing her

[79] Evan Stark, 'The Coercive Control of Daniel and Magdalena Lucek: A case of child abuse as tangential spouse abuse' (2020) 17(3) IJAPS 262

[80] *Ibid*

[81] For example, as the accused, they lose specialist knowledge and training they may have benefited from in Specialised Domestic Abuse Courts. McPherson (n1)

boyfriend. Even those reports which made clear that she had killed following domestic abuse highlighted that police complaints of the domestic violence did not result in prosecution due to her 'reluctance' to press charges. It is clear that there was a tendency here to tie her abuse to her identity, but in highlighting the fact she made no report against her abuser, there is an implication that sympathy for her abuse as the *context* of her action is lost, and the abuse becomes more of a fact *per se* – she has been abused, *and* she has killed her boyfriend; the two narratives are presented as parallel rather than being related.[82]

A prominent case in which the latter narrative was employed (which would go on to change the law on diminished responsibility) was that of Kim Galbraith, who killed her abusive husband in 1999. Galbraith was frequently described as a 'cop killer' in the media, with reports describing her as 'scheming' and 'twisted'.[83] Rarely are victim/accused typologies approached with sufficient nuance and sensitivity in this respect.[84]

With Natalie Scott and the 'victim' trope, reducing personhood to the abuse suffered is problematic in itself, and goes ways to furthering gendered conceptions of women as nonautonomous victims who lack agency. But also problematic is accepting the abuse as an essentially tragic fact without considering it as being central in causing her reaction. Abuse is acknowledged, but not considered appropriately. There is a risk here that the abuse becomes a part of *who she is*, rather than a precursor to the homicide, as with the case of tangential spouse abuse above. This is particularly common where women have been in multiple abusive relationships. Over-contextualisation also exacerbates the gendered nature of coercive control, and demonstrates how gendered expectations are weaponised against victims. In the same way that perpetrators use the confines of daily life to enforce gender roles, expectations as to motherhood in the case of tangential spouse abuse, and other familial and cultural gender scripts, and the victim's inability to adhere to these as a result of coercive control, can further

[82] This also demonstrates the high standards victims are held to, and the presumption that there is one 'correct' response (here, pressing charges). See: 'Abused woman admits to killing her partner' The Herald (Glasgow) (2013); 'Woman kills her violent partner with wine glass' Daily Record and Sunday Mail (2013); <http://news.stv.tv/tayside/212328-natalie-scott-killed-james-dornan-with-a-wine-glass-in-stirling/>

[83] 'Cop Killer Kim 'Out In 3yrs' The Sun (2002); 'Cop Killer's Grief' The Sun (2000); 'Scheming Killer Wants Her Sentence Cut Again' Sunday Mirror (2002)

[84] Galbraith's portrayal in the media provides an example of this polarity. One headline displayed this explicitly: 'Victim Of Torture Or Cold-Blooded Killer?; Jury Will Now Decide Gun Wife's Fate' The Mirror (1999)

isolate her from intervention and assistance, and indeed prevent the reality of her situation being realised. As Stark explains, 'an abused mother is a woman who is disqualified because of her poor choices from the deference accorded to motherhood'.[85] A victim's failure to meet the gendered expectations which are socially imposed - be that of motherhood, marriage, or femininity - can be 'held against' the victim. While these 'failures' could be acts of resistance and attempts to expose control, where they are not viewed from the relevant control perspective, they can have the opposite effect by placing victims into particular classes and denoting them as less worthy of sympathy, support and assistance.

Fundamentally, it is important to remember that the options available to the abuse victim will be determined by coercive control. It would therefore be inappropriate to consider the action taken without first considering any realistic alternatives – these are likely to be limited, hence the action being 'control in the context of no control'. Coercive control theory is therefore significant where women have killed their abusive partners, since any alternative courses of action will have been dictated and removed by the control.

1.6 Risk Escalation and Coercive Control as a Precursor to Homicide

If coercive control provides the context in which women kill their abusers, then the existence of coercively controlling behaviour should be understood as a precursor to homicide. In all cases of intimate partner homicide, regardless of the sex of the victim, male violence towards a female partner is a significant indicator of risk, with a majority of cases involving a history of violence.[86] This is consistent with the findings that women kill overwhelmingly in response to male violence, usually in the context of an ongoing attack,[87] placing women's experiences with intimate partner homicide within a context of overarching male violence.

It has been established that coercive control consists of patterns of behaviour as opposed to discrete acts of violence. Research has shown that behaviour consistent with coercive control – that is, isolation, intimidation, threats and control – are consistently indicative of domestic

[85] Stark (n79)

[86] Campbell (n52); James Bailey and others, 'Risk factors for violent death of women in the home' (1997) 157(7) AIM 777

[87] McPherson (n1)

abuse responded to by police.[88] Therefore, any assessment of risk should logically focus on the identification of coercively controlling behaviour. This can, and will, involve identifying instances of physical violence, but also the further behaviours which form the pattern of abuse. Of course, women kill most frequently in the course of an ongoing attack, these attacks generally being particularly violent – but it has been shown that severe, or 'sub-lethal' violence such as strangulation and the use of weapons will be consistent with typical patterns of coercive control.[89] Assessment of domestic homicide reviews in England and Wales have demonstrated that homicide may not always be preceded by this type of frequent sub-lethal violence, but increased coercion and control.[90] This obviously makes coercive control relevant when considering the escalation to homicide. This is particularly true when the purpose of the abuse is considered – that is, to control and subordinate the victim. Where this control is threatened or undermined, then this can be linked to a motivation to kill.[91] Where the object of the abuse has been to control the victim, and the abuser feels unable able to exert this control, this may result in a 'changing of the project', from controlling to destroying the victim.[92] Once again is coercive control theory central to understanding the dynamics of intimate partner homicide.

Monckton-Smith considers intimate partner homicide from a coercive control perspective, as opposed to the 'crime of passion' narrative.[93] In the latter, there is a focus on gender, gender difference and female subservience, with risk being dependent upon individual behaviours and provocations by the female victim – for example, sexual infidelity, or the termination of a relationship.[94] This conception of intimate partner homicide is dominant, such provocations by victims even forming legal defences.[95] In contrast, the 'coercive control discourse' frames the motivation to kill in intimate partner homicide not as dependent upon provocation by the

[88] Myhill (n54)

[89] *Ibid*

[90] R Emerson Dobash, Russel P Dobash, *When men murder women* (2015 OUP)

[91] *Ibid* 39

[92] *Ibid*

[93] Jane Monckton-Smith, 'Intimate Partner Femicide: Using Foucauldian analysis to track an eight-stage relationship progression to homicide' (2020) 26(11) VAW 1267

[94] *Ibid*

[95] Notably, provocation by infidelity. This defence demonstrates and reinforces the narrative of intimate partner homicide as a situationally provoked 'crime of passion', placing particularly onerous gendered expectations on the (female) victim, and contributing to a lack of understanding of the risks of domestic abuse. Rachel McPherson 'Legal Responses to Intimate Partner Femicide' [2022] VAW

victim, but as being preceded by a breakdown in the abuser's control.[96] This is consistent with the notion of 'changing the project' from control to destruction. From this, an eight-stage progression of risk is identified: beginning with the pre-relationship stage, to the early relationship and relationship stages, followed by the 'trigger' stage (usually where the control is threatened, for example by separation); this is proceeded by escalation in the abuse, and a subsequent 'change in thinking' (changing the project). The planning stage is then entered, followed by the eventual homicide. Though physical violence is likely to be present in the chronology preceding intimate partner homicide, this escalation suggests that this alone will not be the sole indicator of risk, and contradicts the 'crime of passion' discourse which suggests homicide is situationally provoked through the actions of the female victim. Not only is this preferable in that it refrains from assigning victims blame for the violence they experience, but also as it acknowledges more fully the context of coercive control. Perhaps more importantly, it suggests that these types of intimate partner homicide may be preventable, or at the very least predictable, as adopting a coercive control-oriented perspective in assessing risk will allow earlier identification and opportunities for intervention, before further progression and escalation to more severe violence, which have been shown to be consistent with coercively controlling patterns of behaviour.[97] Furthermore, coercive control provides the context in which 'situational triggers' such as separation become significant,[98] and when these will give rise to risk escalation which precedes severe violence and homicide. Essentially, then, coercive control theory underpins a proper assessment of risk in these circumstances. The notion of 'changing the project' is particularly relevant to understanding women who kill. Though the eight-stage progression may not necessarily always be followed strictly, with some stages potentially repeating, or restarting with a new victim,[99] where there has been a decision to destroy rather than control the victim, her options become even more finite. The threat the abuser feels to their control may be real (she may have taken the decision to leave him, for example) or, imagined (for example, paranoia that the victim is having an affair)[100] - the implication of this is that, even where a victim attempts complying with the demands of the abuse, her actual actions matter relatively little. Where compliance cannot guarantee her

[96] Monckton-Smith (n93)

[97] Myhill (n54)

[98] *Ibid*; JC Campbell and others, 'Risk factors for femicide in abusive relationships: Results from a multisite case control study' (2003) 93 AJPH 1089; Stark (n11); Johnson (n10)

[99] Monckton-Smith (n93)

[100] Dobash (n90)

preservation, and where there has been a change in project, the victim has very few realistic opportunities for escape, and is exposed to a risk of increased violence. Increased violence in itself increases the likelihood of forceful retaliation by the victim, which is exacerbated where she has very little scope to resist through any meaningful alternative course of action.

In considering the theory of coercive control and how this is invoked when victims kill, a fine line is tread between recognising the reality and severity of their situation, and perpetuating their subordination, condemning them to continued victimisation even in the death of the abuser. While it is true that the effects of coercive control entrap victims, to conclude that they are helpless and indefinitely incapable of understanding the consequences of their own actions reaffirms the control's objectives and deprives them of autonomy. It is true that autonomy and agency are broken down by coercive control. But it is also true that the severity of a victim's mistreatment cannot be understated. In considering lethal responses to this kind of abuse, it is symbolically important that this is not overlooked. By reducing the woman who has resisted significant abuse to a nonautonomous, helpless 'battered woman' is to implicitly affirm the object of her abuse. It is not argued here that killing should be commended, but instead, it is hoped that an underlying theme of the coercive control discussion thus far and to follow is made clear – that its context is distinctive and essential to understanding its severity, and requires special consideration.

Chapter 2: Defences to Homicide

This chapter will examine homicide defences in Scots law. Specifically, the defences of self-defence, provocation and diminished responsibility will be considered here. The requirements for a successful plea of each defence will be set out, before considering these defences and their operation in the specific context of female-perpetrated homicide, and how they are accessed by an accused who has killed following domestic abuse. Specific elements of each defence will be examined, as well as more procedural and general constraints. It will be concluded that the current system of defences is inadequate for an accused who has killed following domestic abuse.[101]

2.1 Self-defence

Self-defence is a complete defence, which if pled successfully will lead to an acquittal. A plea of self-defence is not restricted to a charge of murder, and can be pled in relation to other offences, such as assault.

By nature, self-defence involves the commission of an act which satisfies the definition of an offence in order to avoid harm. As Chalmers and Leverick point out, this description is also true of necessity and coercion,[102] however, self-defence can be distinguished on the basis that the defensive act is directed towards the source of threat or danger.[103] Self-defence is a special

[101] It is worthy of note at this stage that a significant number of cases of this type are resolved by way of a guilty plea to a reduced charge. There are a number of pre-trial and procedural issues which impact women's access to justice in this context. An in-depth discussion of these is beyond the scope of this work.

[102] James Chalmers, Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (Thomson W. Green 2006). General defences such as necessity and coercion, and the degree to which they are considered in homicide cases, will not be discussed here.

[103] In other words, '[t]he crucial point here is that for a killing to qualify as a killing in self-defence, it not only must have self-protection as its aim but be directed at the person but for whom we would stand in need of no protection' Tziporah Kasachoff, 'Killing in self-defence: an unquestionable or problematic defence?' (1998) LP 509

defence, and as such there exists a procedural burden on the accused seeking to rely on the defence to give written notice of their intention to do so.[104]

The rationale commonly presented for allowing the use of defensive force to be justified, even where this has been fatal, centres around the right to life being the most significant human right, in turn qualifying a parallel, accompanying right to defend one's life in response to attack.[105] Though the right to life is universally held, the right to life is forfeited by becoming an aggressor.[106]

2.1.1 Requirements of the Defence

The three substantive requirements[107] to be met for a successful plea of self-defence are:

a) that the accused found herself in circumstances of imminent danger to life or limb (the 'imminence' requirement),

b) that there was no reasonable opportunity for the accused to escape the danger (the 'retreat rule'), and

c) that the degree of force used by the accused was proportional to that danger (the 'proportionality' requirement).

These requirements will be discussed in turn, before considering the application of the defence to the specific context of homicide following domestic abuse.

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[104] Criminal Procedure (Scotland) Act 1995, s.78(1). S.70A provides that defence statements must be provided in advance of trial, ss9(a) defining a defence statement as a statement which provides, *inter alia*, the nature of the accused's defence and any particular defences to be relied upon.

[105] Fiona Leverick, *Killing in Self-Defence* (2006 OUP) 45

[106] *Ibid.* This is not indefinite, and applies only as long as the aggressor remains an immediate threat to the life.

[107] See *HM Advocate v Doherty* 1954 JC 1

Requirement of imminent danger

In Hume's account of the defence, the accused must have killed '*to save his life'*.[108] The requirement that the accused was faced with imminent danger to life or limb has been confirmed by a settled line of authority in modern case law. In *Owens v HM Advocate*[109], it was said that

> '…[S]elf-defence is made out when it is established to the satisfaction of the jury that the panel believed that he was in imminent danger and that he held that belief on reasonable grounds.'[110]

An accused seeking to rely on self-defence must have genuinely believed that the threat posed imminent danger to life (or great bodily harm). On the belief of the accused, it was held that '[g]rounds for such belief may exist though they are founded on a genuine mistake of fact.'[111] Therefore, a mistake as to the nature of the danger will not necessarily preclude a successful plea. That is to say, an accused who believes themselves to be in imminent danger who has misinterpreted the imminence of the threat may still be able to rely on the defence. It is necessary, however, that any belief be held on reasonable grounds. The requirement of reasonableness of the accused's belief has been reiterated in a number of cases following *Owens.*[112]

The consideration of the *mens rea* of murder afforded by a Full Bench in *Drury*[113] cast some doubt as to the requirement of reasonableness on behalf of the accused. In *Drury*, it was held

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[108] David Hume, *Commentaries on the Law of Scotland respecting the Description and Punishment of Crimes* (Bell and Bradfute 1797) 223

[109] 1946 SLT 227

[110] 230

[111] *Ibid*

[112] For example, in *McCluskey v HM Advocate* (1959 SLT 215), it was held that 'It is only if you are satisfied that an actual physical attempt was made to such an extent as would involve danger to the accused's life, or would afford him reasonable grounds for thinking that his life was in danger, that you could uphold this defence.'

[113] (n63)

that the *mens rea* of murder was a 'wicked intention' to kill;[114] in other words, even an accused who intentionally kills their victim may not satisfy the *mens rea* of murder in the absence of 'wickedness'. This consideration of *mens rea*, and indeed the Court's consideration of the operation of defences - which suggested that defences ought to be considered as factors which negate *mens rea* as opposed to substantive defences in and of themselves - [115] caused concern among commentators.[116] This is because if, as the exposition of the offence in *Drury* suggested, the *mens rea* of murder required more than mere intention, it would then be open to an accused who had a genuinely held belief that they were in circumstances of imminent danger to argue that they did not possess the requisite wickedness, regardless of how unreasonable that belief may have been.

This was the basis of the appeal in *Lieser*[117], where the appellant had been convicted of murder after arguing at trial that he erroneously, but genuinely, believed the deceased was going to attack him with a knife, and that he had therefore acted in self-defence despite his mistaken belief. It was argued that the direction given to the jury at trial, namely the requirement that any belief as to the imminence of danger must be a reasonable one in line with *Owens* and subsequent case law, was a misdirection, and following *Drury,* the appellant lacked the *mens rea* in the absence of the additional 'wickedness' element, despite having killed intentionally. In spite of this, it was held that 'a person who claims that he acted in self-defence because he believed that he was in imminent danger must have had reasonable grounds for this belief.'[118]

While this clarifies and confirms previous authority which states that any mistaken belief as to the imminence of danger must be reasonably held, the Court failed to fully address post-*Drury* confusion, particularly with regards to how substantive defences should be taken to operate. If, as in *Drury,* defences are considered factors which negate the *mens rea,*[119] then self-defence is not to be taken as a substantive defence at all.

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[114] *Ibid*

[115] Fiona Leverick, 'Unreasonable Mistake in Self-Defence: Lieser v HM Advocate' (2009) 13(1) ELR 100

[116] See, for example, Michael GA Christie, 'The Coherence of Scots Criminal Law: Some aspects of Drury v HM Advocate' 2002 JR 273; Fiona Leverick, 'Mistake in Self-defence after Drury' 2002 JR 35; James Chalmers, 'Collapsing the Structure of Criminal law' (2001) 28 SLT 241

[117] 2008 SLT 866

[118] *Ibid*

[119] Leverick (n116) (2002)

The Retreat Rule

The second substantive requirement is that the accused had no reasonable opportunity to escape the attack. In the context of self-defence, a 'retreat rule' is a requirement that the victim of an attack take any reasonable means of escape available to them. This duty would generally preclude an accused who has employed defensive force while neglecting a reasonable opportunity to retreat or escape from his aggressor from a successful plea.

Scotland's formulation of this requirement is considered a 'strong' retreat rule[120] - that is, a victim of an attack is required to retreat where an opportunity to do so exists. Essentially, this strand of the test exists to ensure that defensive force is used only as a 'last resort'. It has been emphasised that the victim of an attack is only required to retreat where the opportunity to do so is viable and reasonable:

> '[A] person who is under threat cannot be expected to use a means of escape which exposes him to equal or greater danger rather than use force to defend himself. In that sense, it is no doubt correct that, in appropriate circumstances, a jury may have to consider whether any means of escape open to the person under threat were reasonable.'[121]

Thus, the accused who has acted in self-defence will not be expected to have taken *any* opportunity to escape. Relatedly, where self-defence is pled in the context of an accused acting in defence of a third party, there will be no requirement to have taken any reasonable means of escape before employing defensive force.[122]

The Proportionality Requirement

The final requirement to be met is that any degree of force used is proportional to the attack faced. The accused must not have acted in a 'cruel excess' of violence.[123] Some consideration will be had for the accused acting in the course of an ongoing attack in that the degree of

[120] Leverick (n105)

[121] *McBrearty v HM Advocate* 1999 SCCR 122

[122] *Dewar v HM Advocate* 2009 SCCR 548; *McCloy v HM Advocate* 2011 SCL 282

[123] *Fenning v HM Advocate* 1985 SCCR 219

proportionality is not held to too fine a scale, with some allowance being made for 'the excitement of the state of fear or the heat of blood at the moment of the man who is attacked."[124]

2.1.2 Self-Defence in the Context of Women who Kill their Abusers

Having set out the requirements for a successful plea, the issues which arise in the specific context of abused women who kill will now be considered.

The first of these issues pertains to the requirement that the accused be in imminent danger. As has previously been established, with coercive control type behaviour, it is not uncommon for violence to be routine in order for an abuser to exert control,[125] with victims often learning to anticipate violence based on situational and emotional cues which are specific to the individual relationship dynamics.[126] At a very basic level, then, it would be both unrealistic and unfair to evaluate an abuse victim's perspective and interpretation of danger based on an objective (that is to say, non-abusive) pathology of violent behaviour, since she has become accustomed to a particular form of violence, and is required to anticipate it in order to self-preserve. Or, considering the same criticism another way, it would be realistic to consider that a victim is essentially in a perpetual state of imminent danger,[127] at least to some degree. Considering that legal institutions and norms have traditionally reflected male experience,[128] treating the experience of women as exceptional (if indeed it is acknowledged at all), it is difficult to adequately apply this requirement of immediacy, or a reasonable belief therein, to the realities of women whose behaviour is governed by patriarchal and male violence. Fundamentally,

> 'To be a woman - in most societies, in most eras - is to experience physical and/or sexual terrorism at the hands of men. Our everyday behaviour reflects our precautions, the measures we take to protect ourselves. We are wary of going out at night, even in our own neighbourhoods. We are warned by men and other women not to trust

[124] *HM Advocate v Doherty* 1954 JC 1

[125] Stark (n11)

[126] *Ibid*

[127] Or the victim would at least be entitled to reasonably believe this to be the case.

[128] Lucinda M Finley, 'The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified' (1988) 82(2) NULR 352

> strangers…The daily possibility of being threatened by male behaviour is one message women constantly receive.' [129]

It is therefore at best uncomfortable to assess a woman's perception of danger without taking into consideration that her actions are underpinned by an anticipation of male violence. This will ultimately define the ways in which women perceive and react to risk. The danger is that, if the law on self-defence conceptualises violence and risk according to male experience, then it will be ignorant to the ways in which women's behaviour is governed by male violence, and how this must necessarily be anticipated as inherent. This phenomenon is exacerbated when considering the perspective of a victim of coercive control.

Perhaps the question is: when are abuse victims *most* in imminent danger? One might argue that is when living with her abusive partner, on a practical level, given that the abuser will have physical access to her. Considering the existence of the retreat rule, it is presumed that the law would consider any woman not in the immediate vicinity of her abuser not to be in imminent danger. To adopt this stance, however, runs the risk of neglecting a fundamental reality – that risk increases with separation or upon the (attempted) termination of an abusive relationship.[130] The view taken here is not that the law ought to broaden its scope entirely and to allow the self-defence to be plead in simple cases where there is a low-level 'danger', ignoring the immediacy requirement altogether. But what is important is that there is an acknowledgement that the circumstances in which violence, danger and risk exist in an abuse context are unique and distinct from more general violence, and as such any assessment of the immediacy requirement ought to reflect this. This is especially true given that coercive control is a course of conduct with cumulative effects, which are not adequately reflected by applying too strict a calculus of perceived harms.

It is true that the law does not necessarily require that the danger be *factually* imminent, and does allow for mistaken belief so long as the belief is reasonable. However, there is again a potential danger arising out of a failure to consider fully the dynamics and realities of abuse. A common argument advanced against victims of abuse who remain in abusive relationships is

[129] Elizabeth A Stanko, *Intimate Intrusions: Women's Experience of Male Violence* (London Routledge 1985) 11

[130] Dobash (n90) ; Monckton-Smith (n93)

that if the abuse were genuinely severe, she would leave.[131] This argument reveals a general lack of sympathy and compassion for victims. While attitudes towards domestic abuse appear to be changing, being considered more broadly a 'very serious wrong',[132] it is nevertheless a risk that victims of abuse will, again, be held to a standard of reasonableness which fails to adequately reflect its dynamics. Going further, this criticism may be levelled at the law in general, for all women. Indeed, it has been argued by feminist legal scholars that the 'language and process of reasoning are built on male conceptions of problems and of harms' and that the law has imposed conceptions of 'neutrality' and 'objectivity' which are inherently male.[133]

Another well-rehearsed concern surrounding self-defence in the context of an accused who kills their abuser is the retreat rule, which has been considered extensively in feminist literature.[134] The retreat rule is problematised in this context as there are a number of constraints a victim will face in attempting to escape from an abuser. These include the possibility that the victim will be financially dependent upon her abuser; that she has become alienated from family, friends or other support networks as a result of the abuse; or that she is concerned about the consequences of a failed attempt to escape. It has been well-established that risk to the victim increases significantly when separation is attempted.[135] In addition, there are more immediate considerations to be made by the victim of abuse which may complicate her opportunities for escape, which will relate to the incidence of violence. For example, if an

[131] On common domestic abuse myths and how these perpetuate damaging narratives and deter victims from self-identifying experiences of abuse, see Katherine Jenkins 'Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices' (2017) 34(2) JAP 191. For a detailed discussion of various social beliefs on domestic abuse and depend on varying socio-economic and personal factors, see Lisa A Harrison, Cynthia Willis Esqueda, 'Myths and Stereotypes of Actors involved in Domestic Violence: Implications for omestic violence culpability attributions' (1999) 4(2) AVB 4

[132] Scottish Social Attitudes Survey 2019: attitudes to violence against women : <https://www.gov.scot/publications/scottish-social-attitudes-survey-2019-attitudes-violence-against-women-scotland/pages/4/>

[133] Finley (n128)

[134] See for example: Celia Wells, 'Battered woman syndrome and Defences to Homicide: Where now?' (1994) 14(2) LS 266; Nanci Koser Wilson, 'Gendered Interaction in Criminal Homicide' in Anna Victoria Wilson (ed.) *Homicide: The Victim/Offender Connection* (Anderson 1993); Cristina Messerschmidt, 'A Victim of Abuse Should Still Have a Caste: The Applicability of the Castle Doctrine to instances of Domestic Violence' (2017) 106(3) CLC 593

[135] As discussed in Chapter 1. See specifically Monckton-Smith (n93); Drury (n63); Dobash (n90)

abused woman has children, she is more likely to be reluctant to employ a means of escape where this is reasonable for her, but would leave her children with her abuser. In more objective terms, it would be unsafe for a woman in a vulnerable and distressed state to be expected to flee outside, for example, and potentially expose herself to greater risk. In spite of these criticisms, a reiteration of the retreat rule as it is formulated in Scots law (i.e., a 'strong retreat rule') places a duty on the accused to employ a means of escape only where this is *reasonable.* A proper application of this rule, then, would not expect an accused to expose herself to further danger in order to avoid an attack. That being said, there remains the potential of placing particularly onerous obligation on abuse victims in particular, especially if the attack occurs within the context of the home.

A further issue relates to the final requirement, namely that any force used must have been proportionate. Most women who kill their abusive partners do so in the context of an ongoing attack using a weapon, usually a knife.[136] In a heterosexual relationship, there are likely to be at least some physical disparities between a male abuser and a female victim. A difference in height and weight, coupled with violent behaviour on the part of the abuser, would undoubtedly increase the likelihood that a female victim would need to make use of some kind of weapon in order to successfully defend herself. In fact, however, in a number of cases the weapon used was introduced by the male abuser, who is usually the initial aggressor in this context.[137] Regardless of this fact, it is problematic to prove that the use of a knife, or indeed any kind of weapon, has been used proportionately against an unarmed deceased. It is also true that this requirement would not favour an accused who had 'snapped' as a result of the cumulative effects of abuse, and killed her abuser in their sleep or while in a passive state.[138] While it is intended that a need for a more comprehensive and realistic consideration of coercive control and its effects be a clear narrative throughout the considerations presented here, and this would be welcomed in cases where women are driven to kill their passive abusers, this should not

[136] McPherson (n1)

[137] For example, in Leza Neil's case (January 2000), her boyfriend handed her a knife in an altercation during which he had slapped her, and encouraged her to use it against him. Similarly, Julia Hartley's (April 2002) abuser taunted her with a knife which he gestured towards himself, having raped her.

[138] Such as in cases like that of June Greig (1979) or Wendy Graham (*Graham v HM Advocate* 2018 SCCR 347*)*. A more general criticism here would suggest that, together with the immediacy requirement, the defence is not adequately formulated to serve victims by failing to account for these types of reaction.

detract from the empirical reality that overwhelmingly, women in this context kill in response to an ongoing attack.

A final observation to be made on the law on self-defence as it applies to victims of abuse relates to the possibility of permissibly using fatal force in defence of rape. The historical entitlement of a woman to kill in response to a threat of rape has been reiterated in modern case law.[139] Commentators have suggested that the most comfortable explanation for justifying fatal self-defence in response to rape is that the offence 'approaches the standard of a wrong equivalent to a deprivation of life itself'.[140] It has been submitted that this wrong is rooted in the social significance of sexuality and sexual penetration, with sexuality being 'central to our sense of self'.[141] Rape, then, is to be understood as a denial of humanity and personhood,[142] equating to wrongdoing against a victim so severe that it would be permissible for her to kill in response. Sexual violence is, of course, an element of coercive control,[143] particularly in those cases which result in intimate partner homicide. Considering the theory and dynamics of coercive control, it becomes clear that this form of abuse centres around sex and gender difference, being produced and reproduced in the confines of everyday life in order to reinforce gender inequality and subordination of a female victim. The success of this control is dependent upon heterosexual and patriarchal gender norms and stereotypes, which are intrinsically linked to sexuality, femininity and gender difference. There is, undoubtedly, a social significance attached to these gender norms – which in part explains why this form of control is effective. Denying a victim's humanity, and removing subjectivity and autonomy, is essentially the aim of coercive control. If these arguments form the basis for a justification of killing in defence of rape, a logical extension of this reasoning would be that this defence is both relevant and

[139] McCluskey v HM Advocate 1959 JC 39. At the time of this case being heard, it was held that this plea would not extend to a male victim of the common law offence of sodomy. However, given the reform of sexual offences by the Sexual Offences (Scotland) Act 2009, and the new definition of the offence of rape applying to male and female victims, it would be most logical for the law to allow this claim to extend to male victims. See: Rachel McPherson 'Fatal Self-Defence Against Rape: A Call for Clarification in Scots Law' (2012) JR 111

[140] Leverick (n105)

[141] Jean Hampton, 'Defining Wrong and Defining Rape' in K Burgess-Jackson (ed), '*A Most Detestable Crime: New Philosophical Essays on Rape* (OUP 1999)

[142] Leverick (n105)

[143] This is especially true given that reported sexual offences are among the highest rate since recording began: Recorded Crime in Scotland 2019-2020 <https://www.gov.scot/publications/recorded-crime-scotland-2019-2020/pages/3/>

appropriate in cases of coercive control. The view taken here is that self-defence seems to most adequately reflect the context in which most women kill their abusive partners;[144] this is true on both a practical and empirical level, but also a theoretical level, if fatal self-defence is to be permissible in response to a deprivation of humanity and autonomy. That this is not reflected in practice once again suggests a misunderstanding of this type of abuse, and a failure of the law to be informed as to the nature of abuse.

2.2 Provocation

Provocation is a partial defence which reduces a murder charge to that of culpable homicide. For a successful plea, there must have been a recognised provocation, which can take either the form of violence or sexual infidelity. The requirements to be met will depend upon the type of provocation (i.e., whether the accused was provoked by violence or sexual infidelity).

A clear exposition of the requirements of the defence of provocation can be found in *Copolo v HM Advocate:*[145]

> (1) an accused must have been attacked physically, or believed he was about to be attacked and he must have reacted to that;
>
> (2) he must have lost his temper and self-control as a consequence;
>
> (3) he must have retaliated instantly in hot blood, or in other words without having time to think; and
>
> (4) there must be some equivalence between the retaliation and the provocation so that the violence used by the accused is not grossly disproportionate to the violence constituting the provocation.'

This four-component formulation of the defence is a slightly more intricate and extended account of the requirements for the defence as they were set out in the earlier cases of *Drury* and *Gillon v HM Advocate,*[146] which state that the requirements of the defence are a violent

[144] i.e., in the course of an ongoing attack.

[145] (McIntosh) 2017 JC 143

[146] 2007 JC 24

attack (or a threat of such); an immediate loss of self-control,[147] and proportionality of the response on the part of the accused.[148] Where the provocation has been by sexual infidelity, it will be logically impossible for the conduct of the accused to have been considered proportionate[149] – as such, the relevant test is whether the 'ordinary man' would have been liable to react as the accused did.[150]

Whether the requirements are displayed in a three or four-component formulation does not impact the substantive requirements to be met for a successful plea – the test set out in *Copolo* elaborates on the loss of self-control of the accused with two distinct requirements, however, the practical effect is identical. In summary, then, there must have been a provocation by either violence or sexual infidelity; where the provocation is by violence, the accused must have been physically attacked, or there must have been an immediate threat thereof; the accused must have suffered a loss of self-control; and the conduct of the accused must not have been 'grossly disproportionate' to the provocative act.[151]

2.2.1 Provocation by sexual infidelity

Given the context in which women kill their abusive partners, attention will be focused here on provocation by violence. It is worthy of note, however, that the existence of provocation by sexual infidelity is problematic at best. The plea has been the subject of repeated criticism in feminist legal commentary, reflecting as it does outdated and misogynistic notions of womanhood and male ownership.[152] The expansion to include killing not only the 'paramour', as Hume had written, but also the accused's partner, where the infidelity has been merely verbally confirmed to the accused[153] significantly extends the scope of the defence, and certainly makes room for the law to cater to increasingly violent and possessive male behaviour. Indeed, the use of the defence in *Drury*, where the relationship had ended and the

[147] Both of these requirements were outlined in *Drury*.

[148] *Gillon* confirmed that where provocation is by violence, the appropriate test is of proportionality.

[149] *Ibid.* It is unlikely that any reasonable person would consider killing proportionate to sexual infidelity.

[150] *Ibid*; *Drury* (n63)

[151] *Ibid*

[152] See, for example: Clare McDiarmid, 'Drury v HM Advocate 2001 SLT 1031' in Sharon Cowan, Chloë Kennedy, Vanessa E. Munro (eds.) *Scottish Feminist Judgments: (Re)Creating Law from the Outside In* (Hart 2019)

[153] HM Advocate v Hill 1941 JC 59

victim was being stalked by the accused, is particularly worrying, with an assumption of fidelity withstanding Drury's abusive behaviour. To overlook the victim's experiences of domestic abuse is to deny that they were a central factor in her death.[154] This contributes to a social and legal misinterpretation of domestic abuse. Additionally, while it is open to an accused of any gender to plead provocation on this basis in theory, the fact is that sexual infidelity is intrinsically linked to partner homicides, of which women are the predominant victims, and therefore this strand of the defence is inherently gendered in its application.[155]

2.2.2 Provocation by violence and women who kill

An initial inconsistency with the plea of provocation by violence and the dynamics of domestic abuse, particularly coercively controlling conduct, is that it again does not encompass the cumulative effects of this type of behaviour. It has been argued that in excluding certain forms of conduct from the scope of an accepted provocation - for example, verbal abuse - is to misunderstand and reinforce perceptions of abuse as involving strictly incidents of physical violence.[156]

Similar concerns that were levelled against the immediacy requirement of self-defence can be applied to the requirement that the accused suffered an immediate loss of self-control. Where a victim of abuse has been subject to prolonged, sustained abusive behaviour, it will be necessary to take into account the experiences of that victim in their entirety. This requirement would prevent access to the defence by women who kill their abusers while they are asleep or passive.[157] It should be reiterated, however, that this does not reflect the context in which the majority of women kill in this context.

A related criticism is that the law on provocation serves as a typification of a strictly male perception of violence. It has been argued that the recognised provocations are based on a male model of violent response,[158] with the law privileging a distinctly male typification of violence. If this is true, then access to the defence of provocation will be restricted for female victims of abuse where their experiences do not adhere to the male norm. As was alluded to in earlier

[154] McPherson (n95)

[155] Ilona Cairns, 'Feminising Provocation in Scotland: The Expansion Dilemma' 2014 JR 237

[156] *Ibid*

[157] For example, June Greig or Wendy Graham, mentioned above in the discussion of self-defence.

[158] Katherine O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18(2) JLS 219

discussions of self-defence, the notion that the law enforces inherent maleness as an objective standard, and assumes male experience to be universal experience, has been discussed at length in feminist literature.[159] This will be discussed further in proceeding sections when considering how the law ought to better reflect female experiences of abuse.

At this stage, however, it is clear that there is an inherent and insurmountable relationship between gender and perceptions and experiences of violence. This relationship is never clearer than when considering coercive control type behaviour, which carries with it implications for the access to both the defences of self-defence and provocation, as it is submitted that it is not possible to sever gender from how violence is perceived, and the risk thereof is assessed and subsequently responded to, which ought to be borne in mind when considering the actions of an accused who has responded with force.

Notwithstanding these issues, however, in practice it would appear that women who kill in this context are indeed able to access provocation. This is the most common defence position, being pled even where a killing has occurred in a context which would be indicative of self-defence. In *Walker v HM Advocate*[160], the accused had stabbed her violent partner to death. Both parties were under the influence of alcohol when the deceased threatened the accused and her son; swore at her, and physically seized hold of her by the throat. In response, Walker retrieved a knife from the kitchen, stabbing the deceased in the chest and arm, before returning the kitchen to retrieve a larger knife, with which she eventually fatally stabbed the deceased in the heart. While there is little doubt that the conduct on behalf of the deceased against Walker was wrongful and would qualify as a violent provocation, the circumstances of this case do not easily lend themselves to the satisfaction of the requirement of an immediate loss of self-control; the retrieval of a larger knife would suggest circumstances other than a 'heat of the moment' visceral reaction. This should not be taken to mean that the opinion advanced here is that Walker was not entitled to plead provocation, but to illustrate that women's access to

[159] See: Carol Smart, *Feminism and the Power of the Law* (Taylor and Francis 2002); Carol Smart, 'Law's Power, the Sexed Body and Feminist Discourse' (1990) 17(2) JLS 194; Lucinda M Finley, 'The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified' (1988) 82(2) NULR 352; Catherine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence' (1983) 8(4) JWCS; Elizabeth A Stanko, *Intimate Intrusions: Women's Experience of Male Violence* (London Routledge 1985) For specific discussion of gender difference in criminal law, see Stephen J Schulhofer, 'The Gender Question in Criminal Law' (1990) 7(2) SPP 105

[160] 1996 SCCR 818

provocation in this context, in spite of the valid theoretical concerns addressed in the preceding section, seems to be relatively unproblematic, as the requirements (at least in this case) do not appear to have been strictly applied. It is important to note, however, that this case was resolved by the Crown accepting a guilty plea to culpable homicide in bargaining, and did not go to trial. And, even where women are able to access the defence, reducing a charge of murder to culpable homicide, it is also true that culpable homicide sentences appear to have increased for women who kill in this context,[161] having an obvious detrimental effect and creating a broader concern for access to adequate justice for victims of abuse more generally.

2.3 Diminished Responsibility

Diminished responsibility, like provocation, is a partial defence, which if successfully pled will reduce a charge of murder to culpable homicide. Before being codified, the law on diminished responsibility was contained in *Galbraith v HM Advocate.*[162] Kim Galbraith killed her abusive husband while he was sleeping, and appealed her murder conviction on the basis that the directions given by the trial judge to the jury on diminished responsibility were unduly narrow. In essence, the misdirection related to a misinterpretation of the conditions as they were discussed in *HM Advocate v Savage*,[163] and that subsequent authority on diminished responsibility had applied too strictly the four categories discussed therein, namely that

> '…there must be aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility'.[164]

It was held in *Galbraith* that it was not necessary that the accused satisfy these categories in a strict sense, but rather that such criteria illustrate the circumstances in which a plea of

[161] This trend can be evidenced by the cases of Margaret Molloy (1992), Brenda Miller (1992), Amanda Grant (2010), Yvonne Lambert (2010) and Susan Colquhoun (2012). Each of these women killed their partners by stabbing them during an altercation. Molloy and Miller received sentences of three and four years respectively; Grant and Lambert received sentences of six years; and Colquhoun received a sentence of nine years (though it should be noted she had a previous conviction for assault to severe injury and lied to police about the killing).

[162] (No.2) 2002 JC 1

[163] 1932 JC 49

[164] *Ibid* 51

diminished responsibility may succeed. Clarifying the test for diminished responsibility, it was held in *Galbraith* that the accused must

a) suffer an 'abnormality of mind', and

b) that this abnormality of mind substantially impaired the accused's ability to control their conduct.[165]

Crucially, the plea did not require a mental disease. Galbraith's appeal was accepted and a retrial ordered. The test, as it was set out in *Galbraith*, was inserted into the Criminal Procedure (Scotland) Act 1995,[166] section 51B of which provides that '[a] person who would otherwise be convicted of murder is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind.'

Evidence led at the *Galbraith* trial to satisfy the requisite abnormality of mind was to the effect that she had been suffering from 'battered woman syndrome', a concept developed in the 1970s by Walker,[167] which encapsulates patterns of male violence and the psychological state of the female victim, often being used to explain why victims of domestic abuse remain in abusive relationships, and the ways in which they respond to violence. Battered woman syndrome comprises two theories: the first being the 'cycle theory', which explains patterns of abuse categorised by heightened tension, a trigger event and a phase of reconciliation, while the second, the 'learned helplessness' theory, relates to the belief on the part of the victim that the violence from her abuser is inevitable, leading to a number of typical characteristics including anxiety, fear, depression and low self-esteem.[168]

[165] *Galbraith* 54

[166] By the Criminal Justice and Licensing (Scotland) Act 2010.

[167] L.E Walker, *The Battered Woman* (Harper & Row, 1979)

[168] L..E. Walker, 'Battered Women and Learned Helplessness' as cited in Rachel McPherson, 'Battered Woman Syndrome, diminished responsibility and women who kill: insights from Scottish case law' (2019) 83(5) JCL 381

2.3.1 Graham v HM Advocate

The recent case of *Graham*[169] made use of the language of 'battered person's syndrome', a gender-neutral alternative to the traditional formulation of the concept. In this case, the court considered how the syndrome may be diagnosed, and in particular, what types of evidence could be lead in relation to battered person syndrome and the relevant abnormality of mind. It was noted that, following *Galbraith,* there is a broad potential pool of individuals who may give a testimony relating to the mental state of the accused.[170] On the provision of expert evidence, it was said that

> '…[I]n relation to opinion evidence from whatever discipline, it remains important that the court ensures that the witnesses, who are called to speak to the state of the accused's mind and its effect on his actions, have the appropriate qualifications, by training and experience, to give expert evidence.'[171]

While the Court in *Graham* did not go ways to clarifying in any particular terms an exhaustive list of those types of testimonies which will be admissible, it would appear from the comments made that this will require at least some degree of professionalism, which could lead to an inference that it would not be possible to successfully plead the defence in the absence of medical evidence. In *Macleod v Napier*[172], which dealt with the defence of automatism, it was held that in the absence of expert evidence, the defence may be successfully made out, though this would require evidence of a particularly detailed or specific nature. This will be discussed in more detail below.

[169] 2018 SCCR 247

[170] *Ibid* 115

[171] *Ibid*, citing Kennedy v Cordia (Services) LLP [2016] UKSC 6

[172] 1993 SCCR 303

2.3.2 Use of the Defence

Following the codification of the defence, the effects of which came into force in 2012, four appeal cases have centred around diminished responsibility, with three being referred by the Scottish Criminal Cases Review Commission.[173] While those cases resulted in conviction prior to the change in the law on diminished responsibility, this would nevertheless suggest that diminished responsibility cases require further consideration post codification.[174] McPherson identified an additional 29 unreported cases in which an accused sought to plead diminished responsibility; the defence was successful in over half the cases (62.1%).[175] Of those cases in which the defence was accepted, the most common disposal sanctioned by the court was medical in nature (medical disposals were sanctioned in 52.6% of the cases), which overwhelmingly involved detention at a state facility.[176]

The total number of homicide cases brought in the period during which these diminished responsibility cases arose was 790 – suggesting that the number of accused seeking to plead diminished responsibility is small, and as shown above, the defence has been successfully pled in a majority of cases.[177] It is worthy of note that, despite the defence in Scotland as it is currently formulated being developed in the context of domestic abuse, and the typical association of diminished responsibility with female victims of domestic abuse (or 'battered women'), the defence is often pled by a male accused. Of course, despite the high-profile coverage of cases such as *Galbraith,* and societal understanding of battered woman syndrome, the law of diminished responsibility does not, nor does it intend to, align itself specifically with female victims of abuse, or victims of abuse in general, and there is nothing to preclude a male accused seeking to rely on the defence. Of the three aforementioned appeal cases, two involved a male accused[178] – one of which had been convicted of the murder of his wife.[179] Given that the number of accused persons seeking to rely on the defence is contextually small, the use of

[173] Rachel McPherson, 'Diminished Responsibility Post Codification: Lost Opportunities, Tensions and Gendered Applications' (2021) 25(2) ELR

[174] *Ibid*

[175] *Ibid*

[176] *Ibid.* As pointed out, this would suggest that the 'mental abnormality' was severe.

[177] *Ibid.*

[178] *Lilburn v HM Advocate* 2015 SCL 706 and *Reid v HM Advocate* 2012 SCL 475, 2013 SCCR 70

[179] *Lilburn.* Indeed, *Reid v HM Advocate* also involved the assault and killing of a woman, among other offences.

the defence by a male accused in the context of intimate partner homicide (or indeed male violence against women more broadly) is significant. Discussion of the defence in the context of deaths proceeded by domestic abuse ought to consider this fact, particularly given a common criticism levelled against the notion of a domestic abuse defence is that it would be open to misuse and manipulation by abusers themselves.

2.3.3 Problems with Diminished Responsibility

At a fundamental level, a lack of clarity surrounding the qualifications required in order to give an expert testimony which would satisfy the 'abnormality of mind' requirement is unhelpful. It has been pointed out that the defence is unlikely to be pled successfully without some form of expert evidence.[180] This may make the defence more difficult to plead in practice, creating an additional barrier and making the defence less accessible. To plead diminished responsibility in the context of a homicide preceded by domestic abuse, as opposed to (for example) self-defence, has the potential of implying that women who kill can only do so for 'disordered' reasons – not those which are understandable and justifiable.[181] To require an abnormality of mind, and by extension denote that the behaviour of the victim of abuse is 'abnormal' echoes claims that the law acknowledges a universal and normative male experience, one which women – even when violent – cannot adhere to,[182] and perpetuates the notion that the behaviour of women is illogical and irrational.

A number of concerns have been expressed regarding the concept of 'battered woman syndrome'. Most notably, it has been suggested that the concept lacks sufficient nuance, and fails to adequately reflect the experiences of victims of abuse, going ways to reinforcing stereotypes.[183] Additionally, the operation of the concept in general creates a narrative in which female victims of abuse are central to the abuse that they have faced, placing an undue and unfair focus on their personality and behaviour, rather than that of their abuser.[184] The existence of the concept, which attempts to explain women's behaviour – that is, to say 'this is why she reacted as she did' suggests that the victim of abuse could and probably should have acted in

[180] Chalmers and Leverick n(102)

[181] Fiona Raitt, *The implicit relation of psychology and law: women and syndrome evidence* (Routledge 2002)

[182] *Ibid*

[183] McPherson (n173)

[184] *Ibid*

some other way. The law need not endorse violence, and the seriousness of homicide should not be understated. However, the 'traumatisation model'[185] perpetuated by this narrative suggests that women are passive non-actors whose identity and behaviour are dictated by abuse. It is significant that victims of coercive control become entrapped by partners due to a complex interplay of violence, intimidation, isolation and control – but crucially, it is *also* true that victims seek out means of resistance. To frame the woman who kills her abusive partner in this context as mentally disordered or too traumatised to rationalise her behaviour overlooks her resourcefulness, resilience and autonomy.[186] This fundamentally misunderstands the reality of coercive control, which is made possible by deep-rooted structural and institutional gender inequality – at its core, this type of abuse involves a constant (imbalanced) power struggle between victim and abuser. This model also suggests there exists a universal calculus of harms which can be applied to the abuse,[187] which is unhelpful and ill-fitted to the dynamics of coercive control, in which controlling behaviour is personalised and individualised heavily within the context of an intimate relationship. Assuming that there is a particular reaction which logically can be expected to follow on from a discrete incident of violence confuses the cumulative nature of coercive control. On a related note, the use of battered woman syndrome has been described as a 'cultural compromise', which resists meaningful social change by advancing individualised solutions for domestic abuse rather than combatting the structural and institutional roots from which it stems.[188] It has facilitated the portrayal of an unhelpful archetype of an abuse victim, and who counts as such, while reinforcing the notion that women are passive in their abuse.[189]

When women kill, the social and cultural reaction to their behaviour is dependent upon the subjectivity which is constructed on her behalf, in both media and legal spheres.[190] This construction has the propensity to influence all aspects of her post-offence reality, from public reception to sentencing. Rather than acknowledging the complex circumstances surrounding

[185] Evan Stark, 'Re-Presenting Woman Battering: From Battered Woman Syndrome to Coercive Control' (1995) 58(4) ALR

[186] *Ibid*

[187] *Ibid*

[188] Bess Rothenberg, '"We Don't Have Time For Social Change": Cultural Compromise and the Battered Woman Syndrome' (2003)17(5) GS

[189] *Ibid*

[190] Belinda Morrissey, *When Women Kill: Questions of Agency and Subjectivity* (Routledge 2003)

the woman who kills and the context of her offending (or multiple 'micro-narratives'), the narrative adopted in legal and cultural rhetoric correlates to how the woman has been seen to deviate from stereotypes surrounding gender and femininity.[191] These stereotypes generally communicate that women ought to be passive, submissive, and obliging,[192] and have a tendency to be pathological and weak.[193] These narratives generally take the form of portraying the woman to be 'bad', 'mad' or 'sad' – serving to deny her fundamental femininity and womanhood to explain her actions (the 'bad' woman) or to politically and socially neutralise the woman's culpability and agency in her actions ('the 'mad' or 'sad' woman). These apply exclusively to female offenders, and act as a means through which their offending can be understood and rationalised – only where female killers can be portrayed as 'politically neutered' victims can they be afforded humanity.[194] The 'mad' label removes the agency of the woman who kills in her absence of any ability to logically enact her behaviour, as is the case with the 'battered woman', while the 'sad' woman, though not suffering from an abnormality of mind, is taken to be palatable on the condition that she can be represented as worthy of pity, usually where she expresses significant remorse – in other words, where she can be portrayed as being a non-autonomous victim.[195] Conversely, the 'bad' woman displays an extreme deviance from gendered stereotypes. Of course, the law is taken to presume all offending is 'bad' – but in the context of women who kill, the 'extra element' of bad is that she has acted contrary to gendered expectations, and cannot be typified as 'bad' or 'sad'.[196] This categorisation is damaging to all women, and in the context of women who kill following domestic abuse, overlooks an understanding of abuse and any attempt to meaningfully address the inequality which makes it possible. Further, the ability to be labelled as 'mad' or 'sad' (taken to be preferable to the 'bad' label) depends upon the typical behaviour of the woman before she had killed – advancing the idea that only those who conform to heteropatriarchal

[191] Siobhan Weare, 'Bad, Mad or Sad? Legal Language, Narratives and Identity Constructions of Women Who Kill their Children in England and Wales'(2017) 30 IJSL 201

[192] Jennifer Jones *Medea's daughters: Forming and performing the woman who kills* (OSUP 2003)

[193] These narratives and traditional conceptions of appropriate femininity are exacerbated when the woman is a mother.

[194] Morrisey (n190)

[195] Weare (n191)

[196] Siobhan Weare, "The Mad", "The Bad", "The Victim": Gendered Constructions of Women Who Kill within the Criminal Justice System' (2013) 2(3) Laws 337

stereotypes will be afforded sympathy,[197] reserving social tolerance for particular 'types' of women, who can be seen to have at one point fit these stereotypes. Indeed, an additional categorisation has been proposed, wherein those cases in which violence is socially taken to be 'normal' or anticipated (for example, in areas of deprivation or in the context of alcohol or drug abuse) will not necessarily attract significant media attention.[198] This potentially makes vulnerable those women perceived as 'other', and disadvantages women based on social class, race, sexual orientation, and addiction.[199]

On this note, section 51B[200] explicitly provides that being under the influence or alcohol or drugs will not constitute an abnormality of mind, though it will not necessarily prevent the required abnormality of mind from being established. Despite this, the appeal court has tended to interpret the intersection of abnormality of mind and intoxication narrowly.[201] This is disappointing, given that there is a direct correlation between women's victimisation and behaviours such as substance misuse and self-harm.[202] The misuse of drugs and/or alcohol is likely to be present in many cases of intimate partner homicide, especially where there is a mental health problem or 'abnormality of mind'.[203]

Numerous commentators have expressed concern as to the methodology used in the development of battered woman syndrome and its associated theories.[204] These criticisms have

[197] They only apply where women are deeply traumatised or 'driven mad' thereby preventing them from adhering to appropriate expectations of femininity, which would not be open to women who had previously displayed violent or otherwise socially deviant behaviour.

[198] Holly Pelvin, 'The "Normal" Woman Who Kills: Representations of Women's Intimate Partner Homicide' (2017) 14(3) FC

[199] Stark (n79)

[200] s.51B(3)

[201] McPherson (n173)

[202] Susan Batchelor, 'Prove me the bam!': Victimization and Agency in the lives of Young Women who Commit Violent Offences' (2005) 54(2) PJ

[203] This was the case in *Galbraith* and *Graham*. A case analysis of Domestic Homicide Reviews in England showed that in the context of Intimate Partner Homicides, 73% of perpetrators with mental health problems also struggled with substance abuse. Nicola Sharp-Jeffs, Liz Kelly, 'Domestic Homicide Review (DHR) Case Analysis: Report for Standing Together' (2016)

[204] See for example: David L. Faigman, Amy J. Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39(67)ALR; Regina Schuller, Patricia A. Hastings, 'Battered Woman Syndrome and Other

tended to take the form of scepticism around the collation and presentation of data in the initial research study.[205] Along with these more scientific criticisms, the case has also been made that legal and sociological research ought to consider how findings and results may be interpreted and applied, as opposed to ending the research process when results are reached.[206] This is thought to be particularly important in the context of domestic abuse research, as findings may be interpreted counterproductively and have the effect of exacerbating the challenges faced by victims of abuse – the manner in which battered woman syndrome has developed is a clear example of this.

There is also a risk of stigmatisation of the accused, particularly where there is a greater level of expert evidence required. The terminology of 'battered woman syndrome' is suggestive of a defect within the woman herself, rather than a fault on the part of her abuser.[207] To pathologise and categorise women in this way is to neglect their individual experiences of abuse, and to suggest that there is some inherent or intrinsic quality within them that predisposes them to abuse. This relates to the tying of abuse to a woman's identity, discussed earlier. This once again strips women of a degree of agency, which fundamentally perpetuates and upholds the object of her abuse. If the use of the defence carries with it the probability of a social stigma, this may have a deterrent effect on women seeking to access the defence. After all, where the defence is successfully pled, this is on the basis of an abnormality of mind having been sufficiently evidenced, and not an acknowledgment by the law of the circumtances of the victim of abuse.[208]

Effects of Domestic Violence Against Women' in (David L. Faigman et al. eds) *Modern Scientific Evidence: The Law And Science Of Expert Testimony* (1997); Regina A. Schuller, Neil Vidmar, 'Battered Woman Syndrome Evidence in the Courtroom: A Review of the Literature' (1992) 16(3) LHB; For a more in depth account of Faigman's criticisms, see: 'The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent' (1986) 72 VALR 619

[205] See: Faigman and Wright (n204)

[206] Paula Barata, Charlene Y. Senn, 'When Two Fields Collide: An Examination Of The Assumptions Of Social Science Research And Law Within The Domain Of Domestic Violence' (2003) 4(1) TVA

[207] *Ibid;* Donald Downs, 'More than Victims: Battered Women, the Syndrome Society, and the Law' (1996 UCP)

[208] Raitt (n181)

2.4 Conclusions

Having examined the operation of self-defence, provocation and diminished responsibility, it is clear that the current defences carry a number of difficulties where victims of abuse kill. The requirements of self-defence do not lend themselves easily to the experiences of women who kill, as any fair assessment thereof must take into consideration the individual experience of the victim of abuse in order to understand their perception of violence and risk, and how this informed their use of force. The fact that women most commonly kill within the context of an ongoing attack, but that self-defence is not the most commonly advanced defence position, highlights a discrepancy between reality and legal responses, and would suggest that women's access to self-defence in this context is particularly problematic.[209] Though access to provocation in this context appears to be less problematic, it is true that the existence of the plea of provocation by sexual infidelity serves to perpetuate misogynistic conceptions of womanhood and female subordination and is inherently gendered in application, the plea having the practical effect of underplaying the role of male violence and abuse in intimate partner femicides. Furthermore, the defence is structured around a male pathology of violence, and though women are able to access the defence with greater success, it is nevertheless true that culpable homicide sentences appear to be increasing in this context. As for diminished responsibility, the 'medicalisation' of the defence may serve to make this defence less accessible and create further difficulty in proving the requisite abnormality of mind, as well as 'battered woman syndrome' carrying with it negative connotations and pathologising victims of abuse, lacking sufficient nuance to do more than stereotype and categorise experiences of abuse. Each of the criticisms and concerns raised regarding these individual defences can be unified by one, overarching defect – that the law is not informed by, and does not account for, the dynamics and realities of abuse. This failure will preclude meaningful access to defences for women who kill in this context, as until the law can fully appreciate the nature and circumstances of the context in which victims of abuse have killed, it cannot accurately reflect this in sentencing or censure. This is not to say that victims of abuse cannot access these defences – however, if the legal response does not take into account how this abuse is

[209] Pre-trial decision making can significantly impact women's access to self-defence. For example, consultation with all male legal teams, misconceptions by lawyers as to the nature of domestic abuse and sentencing discounts for an early guilty plea will influence defence positions. Rachel McPherson, 'Women and Self-defence: An empirical and Doctrinal Analysis' (2022) IJLC 12

perpetrated and how victims experience it, then women's access to defences in this context will not depend upon the actual context or motivation for their response, but rather, the defence which is least problematic and most accessible in practice.

Chapter 3: Reforming Defences for Women Who Kill

Having set out the main defences to homicide, and highlighted the shortcomings of these defences as they apply in the context of women who kill their abusive partners, this chapter will explore the possibility of a specific defence intended for an accused who has killed following domestic abuse, and how existing defences may be modified to better suit this unique offending context. This will be done through reference to comparable reforms in other jurisdictions. It will be argued that any defence of this type must necessarily be a full defence, and consideration will be given as to whether such a defence is properly categorised as a justification or an excuse, and the implications of this categorisation. The view taken here is that, regardless of whether it is done through a modification of existing defences or in the form of a new defence, that perspective must be shifted in order to account for the dynamics and nuances of coercively controlling behaviour, and that any reform of the law cannot in and of itself fully address the issues faced by women who kill their abusive partners within the justice system.

3.1 The Structure of Defences: Justificatory and Excusatory Defences

A central, basic function of the criminal law is to communicate which conduct is acceptable. This is done by proscribing certain conduct. In doing so, the law is inherently at risk of being either under-inclusive or over-inclusive.[210] The criminal law cannot accurately account for and prohibit every possible eventuality which may give rise to unacceptable conduct; instead, it provides an 'approximation of society's intuitive judgements'.[211] If the legislature were to attempt to identify all factual situations in which particular conduct should be prohibited, the results would inevitably fail to account for all eventualities.[212] Equally, if the law were to combat this by banning *all* forms of that particular conduct, then this would have the opposite effect of over-inclusivity, thereby prohibiting neutral conduct which should not merit intervention. It has been posited that the role of justifications in law is to address these

[210] Cathryn J Rosen, 'The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill' (1986) 36(1) AULR

[211] Paul H Robinson 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (1975) 23 UCLALR 266

[212] Rosen (n210)

limitations – in other words, to exculpate conduct which is prohibited by the criminal law, but is nonetheless permissible due to the circumstances in which the conduct occurs.[213] Justification defences apply in circumstances in which otherwise criminal conduct will be permissible – a justification defence asserts that while the conduct satisfies the definition of an offence, it was, by virtue of the circumstances, acceptable.[214] Conduct which is justified depends not upon the actor, but on the act itself.[215] Meanwhile, excusatory defences focus on the individual[216] - these defences focus more on the perceptions of the actor.[217] Where justification defences denote that the conduct was permissible, excuse defences involve the commission of an act which is wrongful, but there is a reason that blameworthiness cannot be attributed to the actor.[218] Justification defences are thought to be preferable over excuse defences, as with a justification the conduct is considered acceptable, rather than the actor being excused for conduct which is unacceptable.[219] This relates to the moral and social judgements which are communicated by and interwoven within the criminal law. Aside from the moral preference of justification over excuse, conduct which is justified will obviously merit more favourable treatment than conduct which is merely excused. Most instances of self-defence would be categorised as justified[220] – self-defence results in an acquittal. There is some discomfort around the notion that a woman who kills her abusive partner may be considered justified in her actions, which is evidenced more clearly when discussing the possibility of 'battered woman syndrome' serving as a standalone defence,[221] or by extension the existence of any specific defence intended for victims of domestic abuse who kill. Whether any such

[213] Robinson n(211)

[214] Chalmers and Leverick (n102)

[215] Robinson (n211)

[216] Chalmers and Leverick (n102)

[217] Rosen (n210)

[218] *Ibid.*

[219] Chalmers and Leverick (n102)

[220] *Ibid.* It should be noted that defences cannot necessarily easily be categorised, and will depend on how the defence is formulated in particular jurisdictions.

[221] It has been established that while the admission of battered woman syndrome was at one point a positive judicial and social advancement, the theory is significantly flawed and counterproductive in seeking appropriate judicial treatment for women who kill in this context. While some of the literature discussed considers the possibility of the syndrome forming its own, unique defence, this is not endorsed here. Instead the literature is referred to in order to address criticism levelled against a specific domestic abuse defence generally.

specific defence should be categorised as a justification or an excuse, or a full or partial defence, will be elaborated upon in the following sections.

3.2 Approaches taken in Other Jurisdictions

This section will consider how other jurisdictions have approached the reform of defences in order to make the law more accessible for women who kill their abusive partners. The relevant defences will be set out, before a brief outline of their operation in practice and critical consideration of their effectiveness.

3.2.1 Loss of Control Defence

In England and Wales, the Coroners and Justice Act 2009[222] introduced the partial defence of loss of control. If accepted, the defence reduces a charge of murder to manslaughter.[223] To rely on the defence, there must have been a loss of self-control which had a qualifying trigger, and that a person of the defendant's[224] sex and age, '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'.[225] The act explicitly states that the loss of control need not be sudden.[226] The defence may be based on a fear of serious violence against the defendant or another person.[227] Alternatively, the qualifying trigger may be based on a thing said or done which were of an 'extremely grave character' and caused the accused to have a 'justifiable sense of being seriously wronged'.[228] In determining whether a qualifying trigger was present, sexual infidelity is to be disregarded.[229]

Reform following the abolition of the defence of provocation took the form of the loss of self-control defence, which was intended to overcome, among other problems with provocation,

[222] s.54

[223] Coroners and Justice Act 2009, s.54(7)

[224] 'D' in the act

[225] s.54(1)(a)-(c)

[226] s.54(2)

[227] s.55(3)

[228] s.55(4)

[229] s.55(6)(c)

the gendered operation of the law on homicide.[230] It has been suggested that this defence goes further than amending the law of provocation, as it has a different philosophical foundation, which ultimately affects how the defence is interpreted.[231] Recommendations from the Law Commission suggested the element of a loss of self-control be removed completely.[232] These recommendations were not followed, due to apparent concerns over how the defence would be used in the context of 'honour killings, gang-related homicides and some battered spouse cases'.[233] It has been argued however that regardless of the justification of including the self-control element, its purpose is to preclude the defence being accessed in the context of a cold-blooded killings, as opposed to being a philosophical underpinning of the defence.[234] Instead, the defence has been said to hinge on the wrongfulness of the conduct, and once the qualifying trigger has been established, the other elements will be relatively easy to establish.[235] It was thought that in any event, the removal of the immediacy or 'sudden' loss of control requirement would make the defence more accessible to victims of abuse seeking to rely on the defence.[236] If this is true, this is undoubtedly a preferable outcome for victims of domestic abuse who kill their abusers, as focus will shift from the appropriateness of her conduct onto the abuse which has preceded her offending. However, the concept of loss of self-control has nonetheless been argued to be inherently typified by an outward, physical expression of anger.[237] A loss of self-control has been described as 'a typically male reaction to provocation…which women were very unlikely to display'.[238] As a result, so long as the defence involves a loss of self-control

[230] Kate Fitz-Gibbon 'Replacing Provocation in England and Wales: Examining the Partial Defence of Loss of Control' 2013 40(2) JLS 280

[231] Jonathan Herring, 'The Serious Wrong of Domestic Abuse and the Loss of Control Defence' in Alan Reed and Michael Bohlander (eds.) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate 2011) 66

[232] Anna Carline, 'Reforming Provocation: Perspectives from the Law Commission and the Government' (2009) WJCLI

[233] *Ibid*

[234] Herring (n231)

[235] *Ibid*

[236] Fitz-Gibbon (n230)

[237] Allison Wu, 'Going Full Circle: Gender and the 'Loss of Control' Defence under the Coroners and Justice Act 2009' (2019) RLJ 46

[238] B. Mitchell, 'Loss of self-control under the Coroners and Justice Act 2009: Oh No!' in Reed (n231)

element, women who kill their abusers will still be bound to evidencing such a reaction,[239] which is based on fundamentally male experience.[240]

On the face of it, it seems most likely that victims of domestic abuse will rely on the 'fear of serious violence' qualifying trigger,[241] and would have relatively little difficulty in establishing this trigger in circumstances of domestic violence. This is especially true where the killing has taken place in the context of an ongoing attack, though it has been argued that victims may also be able to rely on the concept of cumulative fear in establishing this trigger.[242] Despite this, the recognised qualifying triggers have given rise to some discomfort in considering the defence from a feminist perspective. By placing anger and fear as alternative qualifying triggers under the same defence, the law gives rise to the implication that both triggers be treated as morally and legally equivalent.[243] In other words, a victim of abuse who kills her abuser is treated and viewed in the same way as a violent male who kills out of anger or jealousy.[244] In doing so, the law continues to prioritise male over female experience,[245] continuing to privilege male violence and rage. There has also been doubt among commentators as to whether the removal of the 'sudden' or 'immediate' requirement makes the defence more accessible overall.[246] Additionally, while sexual infidelity should be, in theory, excluded entirely from acting as a qualifying trigger, the Court of Appeal in *R v* Clinton[247] held that sexual infidelity could be relevant to the defence insofar as it was relevant to the consideration of whether a person in the accused's position would have been provoked to kill.[248] This interpretation was at odds with the reasoning for the new defence, which was intended to afford women greater protection. Removing the sexual infidelity provocation was an attempt to reconcile the law with more modern societal views.[249] If sexual infidelity can still be considered under the defence, then

[239] Susan Edwards, 'Loss of Self-Control: When His Anger is Worth More than Her Fear' *Ibid*

[240] Wu (n237)

[241] Andrew Simester and others, *Simester and Sullivan's Criminal Law* (4th edn, Hart 2010)

[242] Susan Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 JCL 223

[243] Wu (n237)

[244] *Ibid*

[245] Edwards (n239)

[246] *Ibid;* Edwards (n242)

[247] [2012] EWCA Crim 2, [2012] 1 Cr App R 26

[248] Dennis J Baker, Lucy X Zhao, 'Contributory Qualifying and Non-Qualifying Triggers in the Loss of Control Defence: A Wrong Turn on Sexual Infidelity' (2012) 76 JCL 254

[249] Edwards (n239)

there was little merit in expressly excluding it, and the reform amounts to little more than legislative virtue signalling. If the law was misinterpreted by the Courts to allow for sexual infidelity to be considered through the back door, then regardless of intentions for the new defence, rather than offering women more protection, it continues to create space for the excusal of violent and possessive men.

3.2.2 Australian Perspectives

Australian jurisdictions, including Victoria, New South Wales and Western Australia, have reformed their laws on self-defence with a view to making the defence more accessible for an accused who kills their abusive partner, while Queensland has introduced a specific domestic abuse-based defence.[250] Victoria also introduced an offence of 'defensive homicide', which operated as an alternative charge to murder in cases where excessive defensive force had been employed, but this was later repealed.[251] There is some support for the creation of a new offence as opposed to a defence, as it is thought to better communicate moral culpability and the agency of the accused.[252] However, as the focus of this work is on homicide defences, these arguments will not be considered at length here. Instead, the reform of defences and their success will be considered.

3.2.2.1 Reform of Self-Defence Law

As with self-defence in Scots law, historically, self-defence in Australian law required an imminent threat of danger, giving rise to the well-rehearsed difficulties in successfully pleading the defence where women have killed their abuser in a non-confrontational setting.[253] Some

[250] Kerstin Braun, '"Till Death Us Do Part": Homicide Defenses for Women in Abusive Relationships—Similar Problems—Different Responses in Germany and Australia' (2017) 23(10) VAW

[251] *Ibid.* Interestingly, some of the criticism was based on the fact that the majority of those convicted of the offence were male, and encapsulated many of the problems associated with the defence of provocation. See: Kate Fitz-Gibbon, Sharon Pickering ''Homicide Law Reform in Victoria, Australia: From Provocation to Defensive Homicide and Beyond (2012) 52 BJC 159

[252] On this argument, see: Brenda Midson, 'Coercive Control and Criminal Responsibility: Victims Who Kill Their Abusers' (2016) 27(4) CLF

[253] Kate Fitz-Gibbon, Julie Stubbs, 'Divergent directions in Reforming Legal Responses to Lethal Violence' (2012) 45(3) ANZJC

development at common law meant that imminence was no longer considered an explicit requirement, though it would be a relevant consideration in determining whether the response was reasonable.[254] A string of subsequent case law saw self-defence being put to juries where women had killed their sleeping husbands, showing that this would not automatically preclude self-defence.[255] Now enshrined in statute, the approach taken in most[256] Australian jurisdictions is not to include an explicit imminence requirement, while some jurisdictions, namely Victoria and Western Australia, have removed the imminence requirement from the statutory defence.[257]

Victorian self-defence law removes the imminence requirement and allows a plea of self-defence in cases of family violence where the defensive force was not in response to a direct attack or excessive force was used,[258] with the legislation setting out that evidence of that family violence may be relevant to determine if there was a reasonable belief that the conduct was necessary, and that the conduct is a 'reasonable response in the circumstances as a person perceives them.'[259] Western Australia's formulation of self-defence expressly provides that a 'harmful act' can be done in self-defence if that person believes the act to be necessary for self-defence against another 'harmful act', including an act which is not imminent,[260] and includes similar reasonableness requirements as Victorian self-defence law.[261] In Queensland, where the imminence of a threat is still a requirement of self-defence, the requirement has been interpreted relatively broadly. In *R v Falls*,[262] in which Susan Falls killed her husband after a particularly extensive catalogue of abuse,[263] the jury were directed as follows:

[254] *Ibid*

[255] See: R v. Kontinnen 1992, R v. Osland 1998

[256] With the exception of Queensland, where there is an explicit imminence requirement.

[257] See Fitz-Gibbon (n253)

[258] Crimes Act 1958 (Victoria), s.332M.

[259] *Ibid*, s.332M(a) and (b)

[260] Criminal Code Compilation Act 1913 (WA) § 248(4)(a))

[261] *Ibid*, s.248(4)(b),(c)

[262] Unreported, Supreme Court of Queensland, Applegarth J (June 2010)

[263] Involving physical, sexual and psychological abuse. Rodney Falls exerted a pattern of coercively controlling behaviour, and threatened to kill one of their children in the period of escalating violence which proceeded the homicide, forcing her to 'draw a lottery' in which she chose the name of their youngest child. The involvement of the children in the abuse caused significant public discomfort – which may have contributed to the jury's

> '[I]t doesn't matter that at the moment she shot Mr Falls in the head he didn't at that moment offer or pose any threat to her. He had assaulted her. There was the threat that there would be another one… It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present.'[264]

The jury found that Falls had acted in self-defence, and was acquitted. This interpretation of the imminence requirement is consistent with an understanding of the entrapment of victims of coercively controlling type behaviour, and is reflective of its cumulative effects.

3.2.2.2 Effectiveness of Reformed Self-Defence

As with the consideration of the loss of self-control defence, there is room for scepticism as to how beneficial the removal of the imminence requirement is in practice. Of course, this will make the defence more accessible for women who kill in their abuser in a passive state - which is positive – however, this is not representative of the broader context in which such killings tend to take place. What is on the one hand a positive development may also represent a misunderstanding of the actual problem with accessing self-defence itself – it is argued here that while the imminence requirement will cause difficulty in *some* cases where women kill, this does not detract from the fact that most women will kill in response to a 'triggering assault' or attack, and that as a result, the proportionality requirement is likely to present comparatively more of an obstacle to a successful plea, particularly where there has been a weapon or excessive force involved.

Each specific formulation of the defence involves an objective test as to whether there was a reasonable belief that the force used was necessary. On the face of it, then, the reforms are still subject to the traditional masculine imperative of the law, with 'ordinary' ultimately reflecting male, heteronormative experience. That being said, a number of jurisdictions (including Victoria, as noted above) interpret this as less of an 'ordinary person' test, and instead on what

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decision making, reflecting in another way how social gender expectations are present (here, relating to motherhood).

[264] *Falls* 471

the accused might have reasonably believed.[265] However, this perspective is by no means infallible, and outcomes will still depend on jury understandings and perceptions (and by extension, broader societal preconceptions) of abuse, which have historically tended to be problematic.[266] The reforms can therefore be of little practical benefit if they are not accompanied by a shift in societal perceptions on abuse. This will be evidenced by way of reference to case law below.

3.2.2.3 Queensland's 'Preservation' Defence

In Queensland, a specific defence of 'killing for preservation in abusive domestic relationship' exists for victims of abuse who kill.[267] A person who would otherwise be liable for murder will be convicted of manslaughter where the deceased has committed acts of serious domestic violence in the course of an abusive domestic relationship. The accused must have believed the act causing death was necessary for the 'preservation from death or grievous bodily harm', and there must have been reasonable grounds for that belief.[268] In determining the reasonableness of that belief, regard shall be had for the abusive relationship and 'all the circumstances of the case'.[269]

This defence was intended to apply where women 'motivated by fear, desperation and a belief that there is no other viable way of escaping the danger' killed their abusive partners.[270] It is worthy of note that this defence is separated from self-defence in only two substantive ways: firstly, that the specific defence does not require a 'triggering assault', and second, that the specific defence is partial, resulting in a conviction for manslaughter as opposed to an

[265] Finlay, Kirchengrast, 'Criminal law in Australia' as cited in (n250)

[266] See: Heather Douglas, 'A Consideration of the Merits of Specialised Homicide Offences and Defences for Battered Women' (2012) 45(3) ANZJC

[267] Contained in s.304B of the Crimainal Code 1899, inserted by s.3 of the Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010

[268] Criminal Code 1899, s.304B(1)

[269] *Ibid*, s304B(1)(C)

[270] Explanatory Memoranda, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 2

acquittal.[271] It is of course conceivable that such a killing would occur with a triggering assault, the circumstances thereby being more suggestive of self-defence, as this is factually the context in which most women kill. These lesser requirements will automatically be met in such a case. In other words, any circumstances which would give rise to self-defence will also automatically trigger the preservation defence. The danger here, then, is that the preservation defence may become the go-to defensive provision, with the effect of preventing an acquittal by way of self-defence. Jeopardising successful self-defence is furthered given that the preservation defence is circumstantially specific to domestic abuse.[272] Being a partial defence, the defence resembles more closely provocation or diminished responsibility. Again, reforms can be seen to afford a victim of abuse's fear for her life or physical integrity equivalency in law to a man's violent or jealous anger.[273] Notably, the Queensland Law Review Commission recommended that consideration rest primarily with the development of a specific defence, rather than considering how existing provisions (i.e., self-defence) might be reformed.[274]

3.3 The Reforms in Practice

Douglas conducted a review of cases subsequent to the introduction of the preservation defence, which went some ways to dispelling the concern that it would preclude a successful self-defence plea: cases, including that of Susan Falls, saw women who killed their abusers acquitted of homicide despite the availability of the partial preservation defence.[275] At the time of the review, three cases directly raised the preservation defence. Two of these cases resulted in acquittal of homicide on the basis of self-defence. The view taken here is that this is the most preferable outcome. However, in terms of assessing the efficacy of the preservation defence, the outcomes of these cases cast some doubt as to the role of the defence itself – if most cases are suggestive of self-defence, then the reform is of little practical weight. And, in spite of the fact self-defence was allowed to be pled, the existence of the preservation defence nevertheless has the potential to 'water down' and undermine a plea of self-defence. This is particularly true

[271] Michelle Edgely, Elena Marchetti, 'Women Who Kill Their Abusers: How Queensland's New Abusive Domestic Relationships Defence Continues to Ignore Reality' (2015) 13 FLJ 125; Douglas (n266)

[272] Edgely (n271)

[273] *Ibid.* This echoes concerns with the 'loss of self-control defence' in England and Wales, discussed above.

[274] *Ibid*

[275] See also *R v Irsliger,* discussed in Douglas (n266)

where the preservation defence is partial as opposed to full, giving rise to a conviction which can easily be translated into the public understanding of a punishment being imposed. Recent years have seen a global shift in perceptions of the role of penal sanctions and punitiveness,[276] as well as the context in which criminal justice systems operate. An increased politicisation of criminal justice leaves systems 'more vulnerable to shifts of public mood and political reaction', centralising public opinion when considering new law and policy.[277] In the UK, research shows that a significant portion of the public believe sentencing in general to be 'too lenient'.[278] There is at present a knowledge gap in terms of how sentencing is perceived in the context of domestic abuse in general.[279] However, research into specific offences (including sexual offences[280] and causing death by dangerous driving[281]) mirrors this general perception

[276] Correlations have been drawn between this and increased globalisation. This is thought to impact the understanding of punishment and penal power. Bosworth, Franko and Pickering examine this phenomenon from the perspective of migration control, which they argue is increasingly dependent upon criminal justice, concluding that this has implications as to how penal power and punishment, and their airms and justifications, are understood. See: Mary Bosworth, Katja Franko, Sharon Pickering, 'Punishment, Globalization and Migration control: 'Get them the hell out of here'' (2017) 20(1) JPS

[277] David Garland, *The Culture of Crime Control: Crime and Social Order in Contemporary Society* (OUP 2001) 172

[278] 56% of people expressed the view that sentencing in Scotland is too lenient, with just three per cent expressing the opposite view that sentencing is on average too harsh. Views on the leniency of sentencing varied by level of education. See: Carolyn Black and others , 'Public perceptions of sentencing: National Survey Report. Public Perceptions of Sentencing by Scottish Courts' 2019, Published by Scottish Sentencing Council Available at: < https://www.scottishsentencingcouncil.org.uk/media/1996/20190902-public-perceptions-of-sentencing-report.pdf>. Research in England and Wales also found that a majority (70%) of the public perceived sentences to be too lenient: Nicola Marsh and others, 'Public knowledge of and confidence in the criminal justice system and sentencing: A report for the sentencing council' Available at: <https://www.sentencingcouncil.org.uk/wp-content/uploads/Public-Knowledge-of-and-Confidence-in-the-Criminal-Justice-System-and-Sentencing.pdf>

[279] Rachel McPherson, Jay Gormley, Rhonda Wheate, 'The sentencing of offences involving domestic abuse in Scotland: Literature Review', Available at: <https://www.scottishsentencingcouncil.org.uk/media/2231/20220624-domestic-abuse-final-report-as-published.pdf>

[280] Hannah Biggs and others, 'Public perceptions of sentencing in Scotland Qualitative research exploring sexual offences' 2021 Available at: <https://www.scottishsentencingcouncil.org.uk/media/2122/public-perceptions-of-sentencing-qualatative-research-of-sexual-offences-final-july-2021.pdf>

[281] Susan Reid and others 'Public perceptions of sentencing in Scotland Qualitative research exploring causing death by driving offences' 2021 Available at:

of leniency in sentencing, and so it would be reasonable to assume that generally 'harsher' sentences might be favoured by the public, and by extension, a risk that the preservation defence or any specific domestic abuse defence which is partial would be elected over self-defence.

There is also a significant caveat before it can be concluded that the reforms set out above are of practical benefit to women who kill their abusers. While some cases which followed the reforms resulted in acquittal, others resulted in convictions for manslaughter (or defensive homicide). Those cases in which an acquittal was not granted were characterised by an accused who in some way failed to meet underlying stereotypes and preconceptions about abuse and how victims ought to respond, and more broadly, about femininity and gender.

For example, Emma Ney[282] was an accused who was larger than the deceased, who had problems with addiction and a criminal record – this would make her fit easily into the 'bad' woman narrative, or at least a narrative in which the homicide would be considered 'less shocking'. In addition, she was Indigenous – relaying back to the concern presented earlier that the 'ideal' victim of domestic abuse, who will ultimately be worthy of sympathy and compassion from media, social and judicial spheres, favours middle or upper class white women who can be seen as otherwise conforming to heteropatriarchal conceptions of gender and womanhood. This case was heard in Queensland. Ney's defence team advanced self-defence and the preservation defence, but she would eventually be convicted of manslaughter on the basis of diminished responsibility.

In the case of Karen Black,[283] the accused described limited physical violence from the deceased (instead detailing routine sustained violence, including poking and 'jabs'). There was a history of sexual violence in the relationship. This case was heard in Victoria, where, as noted above, reformed self-defence does not require that the defensive act was in response an immediate attack, and the defence will be open even where excessive self-defence was

<https://www.scottishsentencingcouncil.org.uk/media/2088/20210216-perceptions-of-sentencing-for-causing-death-by-driving-final.pdf>

[282] As cited in Douglas (n266)

[283] R v Black [2011] VSC 152. Note that analysis surrounding this case somewhat focuses on the now repealed offence of defensive homicide.

employed.[284] In determining if the accused believed the force to be necessary, and if that conduct was a reasonable response, the legislation explicitly provides that evidence of the 'family violence' is relevant.[285] It was held that her belief in the necessity of her defensive action was not reasonably held, with the sentencing judge commenting that

> '…[A]lthough Mr Clarke had you cornered in the kitchen and, indeed, was intoxicated, he was not armed, and ... to have stabbed him twice may be said to be disproportionate to the threat he then posed to you.[286]

This case calls into question beliefs and prejudices about the actual nature of abuse itself, given the absence of reported physical violence by the accused. Despite express provisions on the importance of the context of the violence being necessary to establish reasonableness, this outcome seems to have completely disregarded the power dynamics of the abusive relationship, the history of violence, and indeed the reformed provisions on self-defence.

These cases both also directly evidence the theoretical concerns surrounding the influence stock-narration and deep-rooted gender stereotyping have on the law in practice, showing that ultimately, regardless of the law on the books, it is exceedingly difficult for women to meet the standard required for acquittal[287] – a standard which is as much socio-cultural as it is legal.

3.4 Responding to Criticisms of a Prospective Specific Defence

Following on from the theory of justification discussed at the beginning of this chapter, it has been argued that the adoption of a 'battered woman syndrome'-esque defence would lead to the justification of any killing in which an accused believed it was necessary and proportionate on a subjective level.[288] This is thought to be especially unhelpful where justified conduct under

[284] Crimes Act 1958, s.322M(1)(a) and (b)

[285] *Ibid*, s.322M(2)

[286]at 22, as cited in Kellie Toole, 'Self-Defence and the Reasonable Woman: Equality before the New Victorian Law' (2012) 736(1) MULR 250

[287] This is discussed in Douglas (n266)

[288] Rosen (n210)

the criminal law is taken to have been affirmatively encouraged as the correct course of conduct or behaviour in a particular set of circumstances, presupposing that any individual who found themselves in such circumstances would be justified in acting in such a way.[289] It is not entirely convincing that any conduct which merits a justificatory defence is actively *encouraged* by the law. It has been argued that affording women who kill in this context a justificatory defence may run the risk of women in this context being perceived to having a 'special right to self-defence based on their victimised status'.[290] But this misunderstands the circumstances of abuse. Women who kill their abusers are not afforded any such right to self- defence as it stands, and in fact, their access to self-defence has been shown to be problematic across jurisdictions. To attribute such a 'right' to provide better access to self-defence would be no solution – the counterproductivity and harmfulness of tying abuse to the identity of the victim, and presenting her as colluded in her own abuse has been established earlier in this thesis. This criticism exemplifies the muddy waters between distinguishing justificatory and excuse defences, as although the justified action depends on the *act*, the act only becomes justified in a particular set of circumstances, and thus, circumstantial evidence will obviously be relevant, as it would be in proving an excuse. To classify this particular form of defensive action as a justification has been argued to be difficult since the forfeiture theory and the balancing of the abused woman's right to life with that of her abuser is complex. This is furthered by a contention that a 'lesser evil' is difficult to evidence where an abuser is killed, as although he is violent, this may be exclusive to the home, and that while their perpetration of abuse obviously speaks to their moral character, this cannot be justification for killing them.[291] A simple application of the forfeiture theory would displace this, as in becoming an aggressor, the abuser (at least temporarily) forfeits his right to life. This specific criticism assumes, however, that women will be mistaken in their belief as to the threat of their abuser.

Such a criticism is problematic for a number of reasons. Much of the conversation is skewed by its dependence upon an erroneous assumption that women most frequently kill their abusers while they are asleep or in a passive state – while this does happen, it does not reflect empirical reality. Most women kill in response to an attack. The forfeiture theory is not especially problematic in 'normal' self-defence cases, and so why it would be in this context is unclear.

[289] Robinson (n211)

[290] Rosen (n210)

[291] *Ibid*

The possibility of mistake in self-defence is not exclusive to cases where women kill, and it is unfounded to assume that women in this context would be unable to accurately assess the threat they are faced with. This is particularly true given that women are subject to routines of abuse which are individualised to her intimate relationship – one might argue that this in fact makes her *more* able to accurately anticipate threats. This may be an unintended consequence of the presentation of 'battered woman syndrome' evidence, which has been shown to irrationalise and pathologise women's behaviour, upholding stereotypical and harmful perceptions of women as illogical and hysterical. To hold women's self-defence in this context to a higher standard than any other accused seeking to rely on self-defence, in any other context, seems to be rooted in a fundamental mistrust and misunderstanding of women who kill, furthering negative gendered stereotypes that women have some inferior cognitive and behavioural defect to men who kill in self-defence. At any rate, reliance upon the defence does not depend on the aggressor having previously presented, or presenting if defensive force was not employed, a threat to the public at large – what is relevant is the attack**,** and so there should be little challenge in applying the forfeiture theory, regardless of if violence is concentrated in the home. To suggest that women would rely on self-defence based on the fact their partners were 'not nice' people is to completely understate the severity of domestic abuse. And, at that, coercive control has been shown to perpetuate and reproduce gender inequality, which is harmful to *all* women.

It has been suggested that having a specific defence, and the presentation of expert evidence where women kill their abusers, may lead juries to consider that the accused's conduct was legal.[292] This misunderstands the contours of the judicial system, and what is actually being decided at trial – the operation of any defence does not make the conduct legal. The question is whether, under those specific circumstances, should be punished. It is also unclear why such a criticism would be specific to the context in which women kill their abusers – if there is a preoccupation with the law sanctioning unacceptable conduct through the operation of defences, then this ought logically to apply to all cases of self-defence, and indeed any defences which lead to an acquittal.

Another concern is that, in offering a defence where women have responded to abuse with

[292] For example, see Acker, Toch 'Battered Women, Straw Men, and Expert Testimony: A Comment on State v. Kelly' (1985) 21(2) CLB 125

violence, the law will encourage and facilitate revenge,[293] self-help and vigilantism.[294] Again, it must be stressed that while some cases involve the killing of an abuser which has been premeditated, the majority of cases occur within the context of an ongoing attack, and so to suggest that women will be given encouragement to participate in premeditated killings completely misunderstands the context of this type of offending. This particular criticism would be particularly unconvincing in Scotland. The requirements for the defence of provocation were set out in the preceding chapter. The current formulation of the defence provides that sexual infidelity is a recognised provocation. This in and of itself is concerning, founded as it is upon institutional writings which vastly predate women's social and economic liberation.[295] More relevant here, though, is the ability of a violent, jealous partner (or, more worryingly, an ex-partner[296]) to rely on the defence of provocation, and to have this excused by the law. Of course, the defence is gender neutral, and is open to be pled by a female accused,[297] women are disproportionately more likely to be the victims of intimate partner homicide than perpetrators, and as such the defence is not apply equally in practice.[298] In a jurisdiction where male jealousy, rage and violent retaliation may already be privileged by the law, it would be difficult to see a genuine concern levelled at a prospective domestic abuse defence on this basis without those same concerns levelled against the defence of provocation. The absence of the latter would be suggestive of a harsher, more restrictive approach being taken towards female offending than comparable[299] male offending – this, though disappointing and fundamentally unfair, would not be overly surprising given existing narratives surrounding women who kill, and its perceived representation of an unacceptable deviance from heteropatriarchal norms pertaining to femininity and gender.

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[293] See for example Linda Kelly, 'Disabusing the Definition of Domestic Abuse: How Women Batter Men and The Role of the Feminist State' (2003) 30(4) FSULR, where it is considered that feminists have strategically presented female perpetrators of violence as victims, having the effect of minimising and justifying their violence and overlooking it as an act of revenge.

[294] Tong, *Women, Sex and the Law*, as cited in Rosen (n210)

[295] McDiarmid (n112)

[296] As was the case in *Drury*.

[297] See *HM Advocate v McKean* 1997 JC 32, 33

[298] McDiarmid (n152); Cairns (n155)

[299] Though it should be recognised that the context in which women kill is generally different to that in which men do, particularly with domestic abuse where women kill within an overarching context of male violence.

3.5 Psychological Abuse as a Basis for Defences

As an extension from the above criticism, it is not difficult to envisage some discomfort surrounding the access to defences in this case broadening and extending what may constitute as a recognised provocation in law. Coercive control is a course of conduct, involving but not consisting solely of physical violence, and the elements of the offence of abusive behaviour towards a partner includes causing (or being likely to cause) psychological harm.[300] Indeed, it has been argued across disciplines that the psychological harm caused by domestic abuse merits 'special attention'.[301] The Scottish Law Commission has given consideration to psychological harm as the basis for a defence to killing in response to domestic abuse as part of their ongoing homicide review,[302] and it has been argued that 'battered women' who kill ought to be able to plead a form of 'psychological self-defence' as a means of overcoming the difficulties in establishing the requirements of other defences.[303] Specifically, it is argued that the law should permit the use of lethal defensive force in order to prevent serious psychological harm.[304] While proponents of such a defence recommend limiting its application to cases where the psychological harm could be evidenced along with physical battering,[305] there are concerns surrounding the practical and administrative difficulties of adopting such a defence would pose, given that the criterion of serious psychological injury is vague and subjective.[306]

There is scope for a related contention that allowing this to form the basis of a defence would

[300] Domestic Abuse (Scotland) Act 2018, s2(a). Psychological harm includes fear, alarm and distress (s.1(3)) s.2(3) further describes relevant effects as including: (a) making B dependent on, or subordinate to, A (c) controlling, regulating or monitoring B's day-to-day activities; (d) depriving B of, or restricting B's, freedom of action; (e) frightening, humiliating, degrading or punishing B.

[301] LT Mega and others, 'Brainwashing and battering fatigue: Psychological abuse in domestic violence' (2000) 61(5) NCMJ 260

[302] Scottish Law Commission, 'Discussion Paper on the Mental Element of Homicide' 2021

[303] CP Ewing, 'Psychological Self-defense: a proposed justification for battered women who kill' (1990) 14(6) LHB See also: Wells (n134)

[304] Ewing (n303)

[305] This distinction is not considered helpful here, as it undermines the underpinnings and central criteria of the defence.

[306] Stephen J Morse 'The Misbegotten Marriage of Soft Psychology and Bad Law: Psychological Self-defense as a Justification for Homicide' (1990) 14(6) LHB 615

extend that which the law recognises as a provocative incident. This may in itself be an argument in favour of a separate, specific domestic abuse defence, as only allowing it to be pled in specific circumstances (i.e., in the context of domestic abuse) would preclude the possibility of far removed psychological harm type provocations being alleged.[307] This concern is not taken to present a credible obstacle to a specific defence for two reasons. Firstly, and in the same vein as the discussion above, the defence of provocation, particularly by sexual infidelity, has already been expanded to account for increasingly abstracted provocative acts. Hume wrote that if the husband catch the adulterer in the act, and kill him on the spot, he is excusable for this transport of passion on such an injury'.[308] Hume notably did not conceive of this defence excusing the killing of the wife, but of the paramour.[309] This is already a considerable expansion of the initial justification of the defence. The defence has been extended further still – in *HM Advocate v Hill*,[310] the defence was allowed to be pled in response to the accused killing both the paramour and his wife, having only had the infidelity confirmed verbally.[311] The law therefore allowed the defence to apply to a greater incidence of violence based on an arguably lesser provocative act. The argument made here should not be taken to endorse this formulation of provocation. Indeed, there is significant support for the abolition of the defence of sexual infidelity provocation[312] and the Scottish Law Commission

[307] The difficulties in evidencing domestic abuse in general by victims is a significant problem in its own right, particularly as a course of conduct, which is exacerbated in the absence of physical harm. See: Spinks v Harrower 2018 JC 177 which held that held that separate incidents of assault would require individual respective corroboration. In Wilson v HM Advocate [2019] HCJAC 36 , Spinks was held to have 'confirmed the well-established principle in the law of evidence that corroboration is required to prove separate, that is distinct, crimes including different episodes of assault'. For an account of how a course of behaviour may be established (pursuant to s.1 of the Domestic Abuse (Scotland) Act 2018) upon application of the *Moorov* doctrine, see Ilona Cairns, 'The Moorov doctrine and coercive control: Proving a 'course of behaviour' under s. 1 of the Domestic Abuse (Scotland) Act 2018' (2020) 24(4) IJEP 396

[308] Hume (n108) 246

[309] McDiarmid (n152) 112

[310] 1941 JC 59

[311] As opposed to discovering them 'in the act' as Hume had conceived of.

[312] See: Juliette Casey, 'Commentary on Drury v HM Advocate in Cowan, Kennedy, Munro (eds.) (n152)**;** Victor Tadros, 'The Scots Law of Murder' in Jeremy Horder (ed.) *Homicide Law in Comparitive Perspective* (Hart 2007); Claire McDiarmid, 'Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law' in James Chalmers, Fiona Leverick, Lindsay Farmer (eds.) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (2010 EUP)

has made recommendations to this effect as part of its review of the law of homicide.[313] Instead, it is intended to demonstrate that any new defence would not be likely to present challenges not already presented by existing defences. To advance such arguments regardless of this fact would be to continue to condone the law's privilege of male violence while holding female violence which overwhelmingly occurs in the context of retaliation to a comparatively unattainable legal standard. Secondly, and more importantly, the argument holds little weight based on the very fact that women's violence in this case is just that – retaliatory.

The recent judgment of the Court of Appeal in the case of Sally Challen, who killed her abusive husband, has been described as a 'landmark' judgment, [314] and garnered widespread public and media attention. Her successful appeal is hoped to have increased understanding of domestic abuse, and 'give hope to other abused women'.[315] Challen killed her husband in 2010 following years of abuse. Much of the commentary surrounding her appeal focused on the emotional and psychological abuse she had suffered at the hands of her husband.[316] At trial, Challen pled guilty to manslaughter on the grounds of diminished responsibility; the defence of provocation was also left to the jury, though not advanced by her defence team. Both defences were rejected, and Challen was convicted of murder, being sentenced to life in prison with a punishment part of 22 years.[317] Leave to appeal was granted in 2018.[318] The appeal was based on two grounds: firstly, that fresh psychiatric evidence and evidence on coercive control demonstrated that she was suffering from an 'abnormality of mind'; and that the fresh evidence on coercive control went to the issue of provocation.[319] The psychiatric evidence was to the effect that she suffered from a severe mood disorder at the time of the killing, and that the symptoms of this disorder

[313] Scottish Law Commission, 'Discussion Paper on the Mental Element in Homicide' 2021

[314] 'Sally Challen who killed 'controlling, abusive' husband wins appeal against murder conviction in landmark ruling', Evening Scotland 2019 < https://www.standard.co.uk/news/crime/sally-challen-wins-appeal-against-murder-conviction-in-landmark-ruling-a4079456.html>; Centre for Women's Justice, 'The Case of Sally Challen' 2019 < https://www.centreforwomensjustice.org.uk/news/2019/12/16/the-case-of-sally-challen>

[315] Sally Challen appeal "gives hope to other abused women"'The Week 2019, <https://www.theweek.co.uk/99928/sally-challen-appeal-gives-hope-to-other-abused-women>

[316] For example, see: 'Sally Challen: Emotional Abuse That Led to Murder' at < https://www.lawyer-monthly.com/2019/05/sally-challen-emotional-abuse-that-led-to-murder/>

[317] This sentence was appealed, reducing the minimum term to be served to 18 years. R v Challen [2011] EWCA Crim 2919

[318] R v Challen [2018] EWCA Crim 471

[319] R v Challen [2019] EWCA Crim 916

had interplayed with the effects of her husband's coercively controlling behaviour.[320] It was submitted that this evidence, had it been available at trial, may have led the jury to conclude differently on the defences of diminished responsibility and provocation.[321] In allowing the appeal, with Challen's conviction being quashed and a retrial ordered,[322] it was explicitly stated that the Court expressed

> '…no view on whether the appellant was the victim of coercive control and no view, if she was a victim, on the extent to which it impacted upon her ability to exercise self-control or her responsibility for her actions.'[323]

It was also stressed that 'coercive control as such is not a defence to murder', and that coercive control was only relevant in the context of diminished responsibility and provocation. Without prejudice to the preferable outcome for a victim of abuse that the appeal offered, and indeed the devoted campaign efforts, the fact that this was stressed by the Court in spite of media attention focusing on her experience of coercive control[324] does make it a somewhat more modest victory for victims of abuse more generally. Nevertheless, this case demonstrates one in which the harm caused by the abuse, and the effects thereof, advanced in pleading defences to murder were of a psychological nature. Of course, intention throughout the discussion in this chapter should not be taken to dispute or undermine the psychological effects of domestic abuse. That being said, it is important to note that while media coverage and indeed legal analysis surrounding the Challen case focused on emotional and psychological abuse, there was also both sexual and physical abuse within the relationship.[325] The intention here is to

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[320] *Ibid*

[321] Evidence on the theory of coercive control from Professor Stark was not accepted, but expert evidence was accepted from Dr Adshead, who diagnosed the mood disorder and discussed the relevance of coercive control. *Ibid*

[322] Challen's guilty plea to culpable homicide was later accepted by the Crown.

[323] *Ibid*

[324] Tony Storey 'Coercive Control: An Offence But Not a Defence' R v Challen [2019] EWCA Crim 916, Court of Appeal' (2019) 86(3) JCL 513

[325] Julie Bindel, *Feminism for Women: The Real Route to Liberation* (Constable 2021); 'Sally Challen on years of abuse that led to killing of her husband' Sky News 2019 <https://news.sky.com/story/sally-challen-i- wish-i-could-turn-the-clock-back-11816779>. Challen reported incidences of physical violence including being pushed down the stairs by her husband, and enduring sexual violence such as being raped as 'punishment' for having a kiss forced upon her by one of her husband's friends.

dispel any temptation to problematise or over-consider cases in which psychological harm forms the sole basis of the abuse. In other words, an attempt is being made by reference to this case to properly contextualise cases where women kill their abusers. There is likely to be psychological harm, however, this does not detract from the fact that women's experiences with intimate partner violence occur within the context of male violence, and where women kill, it is highly likely that there will also be physical and/or sexual violence. Quantifying and evidencing psychological harm may be difficult – but this is not an insurmountable difficulty if these cases are viewed within the appropriate context.

3.6 A Specific Defence?: Recommendations for Formulation and Reform

Based on the reforms and considerations above, some recommendations will be made as to features of a specific domestic abuse defence. From there, conclusions will be drawn as to what the most beneficial reforms in this context would entail, and how the implementation of reform of any kind would be successful.

A key narrative which has underpinned discussion throughout this work is the need for understanding of the dynamics of coercively controlling behaviour, and how discrete acts of abuse must be considered in their larger context. It follows on that any specific defence of domestic abuse where a woman has killed her abuser must be understood from this same perspective and be informed by the theory of coercive control. Battered woman syndrome evidence was, around the time of its inception, helpful in providing expert evidence of domestic abuse and improving societal understanding. The problems associated with the syndrome and syndrome-based evidence have been set out in the preceding chapter. The use of battered woman syndrome, and other expert evidence which pathologises and explains away women's acts of retaliation also severs the abuse from the broader context in which it is enacted – that is, in the course of a pattern of male violence and domination. In other words, categorising and theorising on cases of abuse as being discrete or isolated instances of violence overlooks the fact that coercively controlling behaviour is a deliberate and calculated course of conduct.[326] With physical, psychological and emotional impacts on the victim, but also socio-political and cultural implications, coercive control entails the subordination of a victim which is made possible through the exploitation of structural gender inequality. Understanding abuse from

[326] Stark (n185)

this perspective contextualises the behaviour itself, but also a victim's response to it – what may have been explained away as a desperate act by a nonautonomous victim can, when examined from the lens of coercive control, be understood as a form of resistance and agency. Rather than victimising women in their responses to abuse, it acknowledges the entrapment which results from coercive control – a complex interplay of intimidation, isolation and violence against which the defensive act should levelled when considering the 'reasonableness' of her response. This more accurately frames the violence with which abuse is responded to, and the nature of the threat from the abuser in the first instance. To overlook the context of inequality and domination in which the abuse is done, and to explain the woman's response to abuse as a mental defect or loss of control contributes to the same patriarchal constructs which allows the abuse to take place. By recognising the practical and political power dynamics at play in the course of coercive control, women are afforded a sense of agency and autonomy, and the nature of the threat faced by victims of coercive control is properly understood.

In the context of physical and sexual violence, intimidation, isolation and control so severe that victims become entrapped, the view taken here is that any specific defence should be full, resulting in an acquittal if successful. It must be stressed that the cases in which women kill their abusers are characterised by severe abuse, which is typically preceded by an escalation in physical violence.[327] If a woman, who has suffered abuse and most likely an escalation in violence, believes that killing her abusive partner is the only way in which she can avoid her own death, it is unclear why the law would not offer a full defence.[328] The conception of coercive control as a 'liberty crime'[329] which fundamentally undermines a victim's freedom through the combination of these tactics makes this argument more convincing. An attempt to justify the idea that victims of abuse who kill should be entitled to an acquittal has been made through the adoption of 'excuse theory', namely on a claim of no-fair-opportunity.[330] The basis of this argument is that where an external factor on the accused has prevented her from any fair opportunity to conform to the law, then blame should not be attributed. Of course, there is bound to be some disagreement surrounding what exactly constitutes as 'fair' opportunity, but if this is applied to cases in which women who have suffered abuse kill their abusers, being

[327] As was discussed in Chapter 1.

[328] Edgely (n271)

[329] Stark (n11) 13

[330] Joshua Dressler, 'Battered Women and Sleeping Abusers: Some Reflections' (2006) 3 OSJCL 457

cognizant of the violence, entrapment and erosion of freedom as a result of coercive control, it is likely to be increasingly difficult in many cases to argue that any such fair opportunity existed. Where this is true, the only logical conclusion would be an acquittal.

As empirical evidence has shown, and will be addressed more fully in the following section, the circumstances in which the majority of women kill are typically more indicative of self-defence. Support for any such new defence is usually conditional upon the defence being partial, due to the gravity of homicide.[331] The gravity of homicide is not disputed here. However, this does not detract from the fact that self-defence already offers a full defence to homicide. Despite arguments that any specific defence of this kind would offer women a 'license to kill'[332], it is unlikely that any such defence would change the landscape of homicide as it occurs. In order to be plausible, this argument would require that at present, the law and the threat of punishment acts as a deterrent which prevents domestic homicides. The extent to which the criminal law in general acts as an effective deterrent has been the subject of debate.[333] The calculation of interest before any type of offending is based on a number of influences,[334] which contributes to how effective a deterrent the law may pose. Cases where women kill their abusers are often characterised by remorse and guilt; often they will call for medical assistance or the police, and admit to the homicide.[335] These are not generally traits which one might attribute to someone looking for a license to kill, or to 'get away' with a homicide. It is also debatable the extent to which the threat of punishment would pose a deterrent, as even in the absence of a custodial sentence, freedom tends to be severely restricted by way of the coercive control.[336] Such considerations are not even likely to be taken at all where the homicide results from the response to an attack. If the introduction of such a defence would not change the

[331] This is the wording used by the Scottish Law Commission in its Disucssion Paper on the Mental Element in of Homicide, 185.

[332] See for example Steven Rittenmeyer, 'Of Battered Wives, Self-Defense and Double Standards of Justice, (1981) 9(5) 389

[333] See for example: Paul H. Robinson, John M. Darley, 'Does the Criminal Law Deter? A Behavioural Science Investigation' (2004) 24(2) OJLS

[334] Paul H. Robinson, 'The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best' (2003) 91 GLJ 949. These include personality types, drug or alcohol use, and various social influences. The influence and its extent varies across profiles of individuals who offend.

[335] Amanda Clough, 'Battered Women: Loss of Control and Lost Opportunities' (2016) 3 JICL

[336] Charles P Ewing, *Battered Women Who Kill* as cited in Clough (n335)

circumstances in which these homicides occur, and the view advanced here is that it would not, then the 'gravity of homicide' argument holds less weight, due to the fact that no such arguments are made in response to the operation of self-defence generally, which already offers a full defence to homicide.

A specific domestic abuse defence may also go ways to addressing fair labelling concerns, which relate to the communicative and symbolic power of the criminal law. Firstly, if the considerations above are accepted, and any such defence was a full, justificatory defence, then this would be morally preferable to an 'excuse' defence, such as provocation or diminished responsibility.[337] Following this line of argument, and in the interest of the law communicating the actual wrongdoing of the act, it has been posited that women who appeal following convictions for killing their abusive partners are significantly motivated to do so by the unfairness of receiving the label of 'murderer'.[338] Communicating the nature of the offence, or in this case, the defence, is particularly important in this context, as even where this resulted in an acquittal, the nature of the defence is still likely to influence public perception.[339] Cases in which women kill their abusive partners tend to be subject to significant media and public attention, as was discussed in Chapter 2. Offering a specific domestic abuse defence may more accurately convey the nature of the act taken, and indeed the nature of the defence that the law offers in response.

3.6.1 Reframing Self-Defence

The point has been repeatedly made throughout this work that women's experiences of homicide occur within an overarching context of male violence, and in the majority of cases where women kill their abusers, they do so in response to an ongoing attack. While a specific domestic abuse defence could address this, perhaps a more productive modification of the law would be to revisit the law on self-defence in order to make it more accessible, given that the

[337] John Gardner, 'The Mark of Responsibility' (2003) 23 OJLS 157; John Gardner, 'The Gist of Excuses' (1998) 1 BCLR 575; John Gardner, 'In Defence of Defences', in Offences and Defences: Selected Essays in the Philosophy of Criminal Law (OUP 2007) 77

[338] Justice for Women as cited in Chalmers and Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) MLR 217

[339] *Ibid*, 245

circumstances are likely to be suggestive of self-defence. This would prevent any adverse prosecutorial decision-making or over-reliance on a defence which does not most accurately convey the nature of the homicide.[340]

Imminence

Many of the reforms set out in the preceding section centred around a revision, or complete removal, of the requirement that the accused face an imminent danger. The idea of removing or broadening interpretation the requirement is that it would allow self-defence to be pled even where the deceased has been killed while not posing an immediate threat. Different weighting is placed on the imminence requirement in various jurisdictions. In addition to the reforms of self-defence in various Australian jurisdictions, in Canada, the Supreme Court has interpreted imminence as essentially a means by which it can be concluded if the conduct was 'really necessary'.[341] Rather than removing the requirement entirely, it is treated as a 'proxy' for assessing reasonableness of the conduct,[342] and is one of a list of factors to be taken into account when reaching a decision – a list which also includes physical abilities of the parties involved, and the nature of the relationship between them.[343] While proving the imminence requirement is considered not to be the most problematic of the requirements of self-defence in the majority of cases where women kill their abusers, this interpretation is undoubtedly favourable. This is due to the fact that it moves away from a strict application of the requirement, and instead focuses on obtaining a fuller and more context-informed account of the homicide by considering other factors such as the relationship and physical abilities. Such an interpretation

[340] While any new defence would be specific to instances of domestic abuse, the fact that most women kill in response to attack is more suggestive of self-defence. The distinction is of significance in terms of how the defence publicly conveys the homicide, but also since much of the debate surrounding a specific defence focuses on women who kill abusers who are sleeping or otherwise passive. The point is not that there should be no available defence in those cases, but rather that if such a defence were to be introduced with the intention of applying specifically to such cases (which would likely have different requirements to self-defence), the effect could be one in which this defence is used even where there has been an ongoing attack. This would therefore risk failing to communicate the nature and context of the offence properly, which significant where cases are likely to garner media attention.

[341] R. v. Lavallee, [1990] 1 S.C.R. 852

[342] Clough (n335)

[343] Citizen's Arrest and Self-Defence Act S.C. 2012, s.34(2)

is more likely to keep possibility of the defence available in those cases where women kill a sleeping or passive abuser, as reference to the nature of the relationship and indeed the physical abilities of the parties will help to determine why such an action may have been deemed to be necessary depending on the individual circumstances.

If imminence is to pose a challenge to a successful plea of self-defence, an interpretation such as that employed in *Tudhope v Grubb*[344] may also offer some relief. In this case, a requirement of immediate danger was interpreted more broadly, such that the temporary removal of a threat or attack was not taken to denote the removal of the overall danger.[345] Importantly, the defence advanced in this case was necessity rather than self-defence. However, parallels may be drawn on the basis of the requirement of imminence or immediate threat. Furthermore, self-defence was described in this case as being 'itself only an example of the defence of necessity.'[346] Such a perspective on threat and perception of danger may, if applied to self-defence, serve to better understand the nature of the coercive control and its effects, and indeed the gendered difference in assessing threat. Once again, this would have the effect of more accurately contextualising the homicide.

Proportionality and Reasonableness

It is suggested here that while the requirement of imminence may be problematic in some cases where women kill their abusers, and a broader interpretation which allows greater context is welcomed, that proportionality is likely to be a greater obstacle to a successful plea. As set out in the discussion of self-defence in Chapter 2, this is due to the fact that these homicides tend to involve a weapon. As with the Victorian self-defence reform, one possibility would be to make concessions for an excess in self-defence, which are invoked having regard to the nature and circumstances of the abusive relationship. Also of relevance in assessing the proportionality of any force used would be circumstantial evidence where the weapon used was initially used on the accused, threatened, or otherwise introduced to the altercation by the deceased.

[344] 1983 SCCR. 350

[345] As analysed by Vanessa E Munro, 'Ruxton v Lang 1998 SCCR 1' in Cowan, Kennedy, Munro (eds.) (n152)

[346] *Tudhope* (n344)

In England and Wales, the 'householder defence' provides that force used by a householder will not be reasonable where is it 'grossly disproportionate',[347] while in cases other than householder cases, the force will not be reasonable where is 'disproportionate'[348] in the circumstances as the defendant believed them to be. This seems to provide that householders are able to rely on self-defence even where the force has been disproportionate, so long as it has not been 'grossly' so. Justification for allowing the use of force in such cases rests on the principle that the home is one's 'castle' and place of refuge.[349] Of course, this provision is not mirrored in Scots law, where there is a duty to retreat if a safe opportunity to do so exists, and that the force must be proportionate. But why this provision applies exclusively to householders is unclear, even with reference to the 'castle' doctrine. If being the victim of a crime in a place where you should feel most safe and secure is justification for the use of disproportionate force, then this would be bound to apply to cases in which women kill their abusers. The breach of trust and abuse of power in an abusive relationship is salient, and indeed, coercive control should be understood as a deliberate, criminal course of conduct.

The point here is not to endorse the householder provisions and call for their implementation in Scots law; the point is that the law in other jurisdictions can and does already account for situations in which disproportionate force is used in self-defence. To make the law more accessible, a requirement privileging disproportionate force (which is likely to be controversial) may not even be necessary. A proportionality requirement which was fair to women who kill their abusers would be informed by the circumstances in which the force was used. As with the recommendations for the imminence requirement above, what is required is that the homicide is understood in its proper context. This could even take the form of judicial directions on factors that are likely to be relevant to proportionality: for example, the dynamics of the abusive relationship; the context and manner in which any weapons were used; and physical disparity between the accused and the deceased.

[347] Criminal Justice and Immigration Act 2008, s. 76(5A), as inserted by Crime and Courts Act 2013, s.43.

[348] *Ibid* s.76(6)

[349] See: Mark P. Thomas 'Defenceless Castles: The use of Grossly Disproportionate force by Householders in light of R (Collins) v Secretary of State for Justice [2016] EWHC 33 (Admin)' (2016) 80(6) JCL 407; Cheng Cheng, Mark Hoekstra, 'Does Strengthening Self-Defense Law Deter Crime or Escalate Violence? Evidence from Expansions to Castle Doctrine' (2013) 48(3) JHR 821

3.7 The Effectiveness of Law Reform

The recommendations above, as with any law reform, come with an important caveat. Feminists have long been sceptical as to the ability of a change in the law to bring about meaningful change to the structural and systematic inequality that women face.[350] It is possible that, even in spite of any explicit provisions, gendered stereotypes and harmful preconceptions have the ability to influence both prosecutorial and jury decision making,[351] further complicating and ingraining structural inequality. Throughout this work it has been stressed that gender inequality is of central importance when considering domestic homicides where a woman has killer her abuser – because the inequality itself allows the coercive control to be enacted; it influences media and social perceptions of abuse; and it underpins the interpretation of the law. By extension, the suggestions for reform which could make the law in this area more accessible hinge upon placing cases in which women kill their abusers within their appropriate context – that is, one of overarching male violence, and characterised by inequality and power imbalance.

Stubbs and Tolmie suggest that the 'psychological individualism' of the criminal law, as theorised by Norrie,[352] limits considerations of women's agency, responsibility and culpability, constituting a

> political and ideological construction which operates to seal off the question of individual culpability from issues concerning the relationship between individual agency and social context.

[350] See: Carol Smart, Feminism and the Power of the Law (Taylor and Francis 2002); Elizabeth A Stanko, Intimate Intrusions: Women's Experience of Male Violence (Routledge 1985); Carol Smart, 'Law's Power, the Sexed Body and Feminist Discourse' (1990) 17(2) JLS 194; Leslie Bender, 'From Gender Difference to Feminist Solidarity: Using Carol Gilligan and an Ethic of Care in Law (1991) 15 VLR 1; Catherine MacKinnon, 'Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence'

[351] Julie Stubbs, Julia Tolmie, 'Battered Women Charged With Homicide: Advancing the Interests of Indigenous Women' (2008) 41(1) ANZJC 138; Reg Graycar, Jenny Morgan, 'Law Reform: What's In It For Women?' (2007) 23(2) WYAJ 393

[352] Alan Norrie, *Crime, reason and history: A critical introduction to criminal law* as cited in Stubbs (n351)

This prevents actions being understood within their social context, and severs the political from individual agency. Norrie contends that this removal of social relations informing agency is done where their recognition would 'radically challenge' the legitimacy of the criminal law.[353] The complicated social reaction invoked by cases in which women kill their abusers was discussed in Chapter 2, where these cases were demonstrated to represent a gross deviation from social norms on femininity, which calls for the use of stock narratives to rationalise them. The difficult social reaction of these cases may explain why so much of the context has seemingly been ignored. Lacey has argued that 'certain features of context' are excluded and abstracted.[354] The challenge is therefore reframing both the legal and social discussion on domestic abuse so that the all-important contextual factors form the basis of these cases.

3.8 Conclusions

Notwithstanding the recommendations made above, the introduction of new law cannot by itself effectively eradicate abuse, nor can it even adequately address the difficulties faced by women in accessing justice.[355] While the discussion to this point has focussed on difficulties at the trial stage, there are a number of issues which occur pre-trial and at the point of sentencing where the influence of the decontextualization of abuse are clear.[356] An overemphasis on final outcomes which fails to consider the issues which occur throughout the legal process would be counterproductive.[357] Changes in the law are obviously significant in widening women's access to justice, but simply amending statutes or changing judicial directions is insufficient; legal change is just one component in addressing a much larger, much more pervasive social problem. Any effective reform of defences which intends to improve access to justice for women who kill must provide space for coercive control to be understood as a deliberate,

[353] Alan Norrie, *Law and the beautiful soul* (Cavendish 2005)

[354] Nicola Lacey, *Unspeakable subjects: Feminist essays in legal and social theory* (Hart 1998) 200

[355] On this, see for example Sandra Walklate, Kate Fitz-Gibbon, Jude McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence through the Reform of Legal Categories' (2018) 18 CCJ 115

[356] For a discussion on the various issues, including those post-conviction, see Centre for Women's Justice 'Women who Kill: How the state criminalises women we might otherwise 2021, Available at: <https://www.centreforwomensjustice.org.uk/news/2021/2/13/women-who-kill-how-the-state-criminalises-women-we-might-otherwise-be-burying>

[357] Graycar (n351)

criminal course of conduct; recognition of the empirical and political context in which these domestic homicides occur, and an opportunity to be informed by the perspective of victims of domestic abuse.

Conclusion

In conclusion, it is clear that there are a number of obstacles which prevent women who kill their abusers in accessing defences to homicide. As was demonstrated in Chapter 2, each of the substantive defences discussed – namely self-defence, provocation and diminished responsibility - present particular challenges in terms of their formulation and interpretation, evidentiary requirements, and philosophical underpinnings. Along with these issues with individual defences, there is one principal defect which underlies the discussion – that cases in which women kill their abusers are not understood within their appropriate context.

Much of the discussion which has considered the reform of homicide defences to date has seemingly failed to account for the fact that in the majority of cases, women kill in this context in response to an ongoing attack. As such, the majority of these cases are suggestive of circumstances of self-defence. Though a specific homicide defence could potentially offer some benefits, it was argued that its introduction might undermine this crucial fact. As such, it was instead suggested that self-defence be reformed in order to better accommodate cases of this nature. The requirement of imminence was de-problematised to a degree, given that most cases will involve severe violence and an imminent attack, with focus instead turning to the requirement of proportionality and reasonableness. On this point, it was stressed that women's experiences of male violence should inform the defence and any considerations as to its applicability – once again relaying back to the central, overarching theme of male violence which characterises women's experiences with homicide.

Reconciling this misunderstanding and lack of contextualisation surrounding these cases cannot be addressed solely by law reform – coercive control is dependent upon, and reproduces, structural gender inequality. In order to improve access to justice for victims of abuse who are driven to kill, any reform in the law must be accompanied by a change in social attitudes towards domestic abuse, as these are inextricably linked to the interpretation and operation of the law.

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