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# Battered Women: Loss of Control and Lost Opportunities

Amanda Clough

**Abstract:** Battered women who kill their abuser and the problem they create in regards to access to justice has been discussed for many years by many academics. The English legal system has attempted to update partial defences to murder to remedy the situation, through the abolition of the problematic and gendered provocation defence, replacing it with another based upon loss of control contained within the Coroners and Justice Act 2009. This work considers these updates, how effective they may be, and considers through comparative analysis with other jurisdictions if other solutions are available, and how English law should proceed.

**Key Words:** *Murder, loss of control, battered women, partial defences, manslaughter, comparative reform options*

## I. Introduction

The issue of battered women who kill was unarguably one of the most compelling reasons for replacing the law of provocation in England and Wales.<sup>1</sup> The new defence contained in the Coroners and Justice Act 2009 is the first attempt made to give these women an adequate defence to murder, albeit partial. In order to understand if these issues have been resolved by the new provisions,<sup>2</sup> it is important to recognise the problems the provocation defence caused for such cases, and question if there were other, more appropriate, avenues for change. For example, by considering the efforts made by other jurisdictions to address the problem battered women who kill present. This work will consider these routes to justice in such cases of self-preservation, and question if the partial defence of loss of control is the solution it claims to be, with recommendations for more suitable reform.

Battered women who kill their abuser, often in non-confrontational circumstances, has long been discussed, debated and deliberated over.<sup>3</sup> It is the assumption being made by the defendant in such cases that is most problematic; in a pre-emptive attack, how can we be sure there would have been further violence? Even with self-defence, we are dealing with actions that are “inherently

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<sup>1</sup> See generally Susan Edwards, “Mr Justice Devlin’s Legacy: Duffy – a Battered Woman “Caught” In Time” (2009) 12 Criminal Law Review 851; Celia Wells, “Provocation: The Case For Abolition” Chapter 6, Barry Mitchell and Andrew Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 87

<sup>2</sup> Both Edwards and Norrie, for example, speculate that they have not, Susan Edwards, “Anger and Fear as Justifiable Preludes For Loss of Self-Control” (2010) 74 Journal of Criminal Law 223; Alan Norrie, “The Coroner’s and Justice Act 2009 – Partial Defences To Murder (1) Loss Of Control” (2010) 4 Criminal Law Review 275

<sup>3</sup> Elizabeth Kenny, “Battered Women Who Kill: The Fight Against Patriarchy” (2007) 13 UCL Justice Review 17; Amanda Clough, “Loss of Control as a Defence: The Key to Replacing Provocation” (2010) 74 Journal of Criminal Law 118; Susan Edwards, “Descent Into Murder: Provocation’s Structure – The Prognosis For Women Who Kill Men Who Abuse Them” (2007) 71 Journal Criminal Law 342

predictive”, and so seeking to excuse or justify her actions proves difficult.<sup>4</sup> Of course, it would seem that deeming these women murderers is completely inappropriate; but no complete or partial defence seemed to cover them in even a remotely adequate manner before the attempts made by the Coroners and Justice Act 2009.<sup>5</sup> Their plight would mostly fall short of the rules of self-defence, because battered women who kill their abuser tend to act when no immediate physical threat is present. Diminished responsibility would deem them irrational beings, which is an erroneous label to apply to such situations.<sup>6</sup> The most likely candidate did seem to be the partial defence of provocation. However, even this defence was impractical for the circumstances of these cases, and a great driver in its abolition and replacement. We must remember that battered women killing their abuser have not created a problem in the law; they have simply prompted us to consider problems with the law which have always existed.<sup>7</sup>

To explore the issues surrounding battered women who kill, one must ask not only what problems they have experienced in the past in trying to defend their actions under the old law, but what other solutions have been applied to the problem, not only in this jurisdiction but others too.<sup>8</sup> This work theorises how a battered woman might use the partial defence of loss of control, and aims to challenge two misconceptions. The first is that the fear of serious violence trigger to the new partial defence provides an adequate pathway for battered women who kill to have murder reduced to manslaughter. The second is that it is this first qualifying trigger alone which is applicable to cases of battered women who kill their abuser. From a theory demonstrating their heightened sense of fear to the acceptance of cumulative provocation, the road to justice in this area of the law has been a long one.<sup>9</sup> The aim of this article is to deduce if we are at the destination yet, based on how satisfactorily the new partial defence of loss of control will deal with battered women who kill after a prolonged period of abuse.

## II. The Problem

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<sup>4</sup> Kimberley Ferzan, “Justifying Self-Defence” (2005) 24 Law and Philosophy 711, 715

<sup>5</sup> See (n.3)

<sup>6</sup> As Edwards has noted, abused women should not be constructed in court through a psychological prism, Susan Edwards, (n.3) p346

<sup>7</sup> The provocation defence was always a concession to anger-related killings, and has long attracted criticism due to its various components, before the most famous of battered women who kill cases came to light in the early 1990s. See case comment ‘You Started It’ (1989) 62 Police Journal 343; case comment ‘Provocation – Not Part of Defence’ (1989) Criminal Law Review 831

<sup>8</sup> For example, Queensland’s partial defence Killing for Preservation in an abusive domestic relationship, contained within Queensland Criminal Code Act 1889, section 304B

<sup>9</sup> The first notable case of a battered women who killed her abuser being convicted of murder is that of *Duffy* [1949] 1 All ER 932, over 65 years ago

One of the biggest problems with the old provocation partial defence was its gender-biased nature, resulting in many women being denied access to legally relevant defences.<sup>10</sup> Most notably; the defence lending itself towards men acting out of anger. Women acting out of fear and desperation were left without adequate protection from a murder conviction and accompanying mandatory life sentence. In particular, the most significant problems to emerge were cases of battered women killing their abuser. The early 1990's saw a stream of appeal cases involving women acting in such circumstances<sup>11</sup>. In most cases, the appeals were allowed and the murder verdict was substituted for one of manslaughter, although not necessarily on grounds of provocation. This situation was not unique to English law. A Canadian judge's report found cause for concern noting that some women serving life sentences may have actually killed in self-defence, with some entering a guilty plea due to feeling remorseful rather than based on the merits of the case.<sup>12</sup> Regardless of that, it seemed that finally, in English law, the plight of the battered woman killing in a final and desperate act of self-preservation was being noticed<sup>13</sup>.

The reason as to why women in such cases had not originally been convicted of manslaughter stemmed from various components of s3 of the Homicide Act 1957, barring them access to a successful partial defence plea of provocation. Not only was a loss of self-control mandatory, but the objective element to the defence required that a reasonable person might have taken the same actions.<sup>14</sup> Add to this the "suddenness" requirement that remained good law since the case of *Duffy*<sup>15</sup>, and the situation for battered women was unfair and capricious. As Hemming has asserted:

*"Why Should the Defence of provocation put a premium on homicidally violent anger through the requirement to have lost self-control?"<sup>16</sup>*

Each case of battered women killing their abuser is unique, but there is much common ground. For example, the outwardly calm manner displayed by the woman when she commits the fatal act. She does not necessarily go berserk or wild, and she does not fly at him in a rage<sup>17</sup>. She most likely does

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<sup>10</sup> Rebecca Bromwich "Defending Battered Women on Trial" (2014) 5 Western Journal of Legal Studies 3, 9

<sup>11</sup> See *Thornton* (No1) [1992] 1 All ER 306, *Thornton* (No2) [1996] 2 All ER 1023, *Ahluwalia* [1992] 4 All ER 889, *Rossiter* [1994] 2 All ER 752, *Humphreys* [1995] 4 All ER 1008.

<sup>12</sup> Judge Lynn Ratushny *Report on Sentencing for Manslaughter in Cases Involving Intimate Relationships*, Department of Justice Canada, March 2003 @84

<sup>13</sup> Although the first important case where such issues were discussed was long before this – see *Duffy* [1949] 1 All ER 932

<sup>14</sup> Homicide Act 1957 s3 states "the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury"

<sup>15</sup> *Duffy* [1949] 1 All ER 932, despite being left out of the wording of the act eight years later

<sup>16</sup> Andrew Hemming, "A Totally Flawed Defence That Has No Place In Australian Criminal Law Irrespective of Sentencing Regime" (2010) 14 University of Western Sydney Law Review 1, 18

<sup>17</sup> See Kenny (n.3)

not even act during a confrontation<sup>18</sup>. She might wait until he is sleeping<sup>19</sup>. She might arm herself<sup>20</sup>. These things negate both the 'suddenness' and the loss of self-control requirements without much more thought. In relation to the objective test, it would be difficult for a jury to say that she acted the way a reasonable person would have without any immediate threat; without any final provocative act. Unless the reasonable person had been subject to prolonged abuse, and could therefore accurately predict a violent episode, they would be highly unlikely to attack a person as they slept. She is therefore deemed irrational. On closer inspection we can see that such cases cannot be taken at face value. What is actually happening is a very different state of affairs. Possibly, her response is a slow-burn reaction to the straw that broke the camel's back, and rather than the time between the last provocative act and the fatal act being one of cooling down and reflection, it may well have been a period of heating up as her fear and anger consume her. Immediate threat is also a concept open to interpretation, as we shall discuss. Convicting battered women who kill their abuser could readily be said to be, in reality, the result of the state's failure to protect women leaving an abusive relationship.<sup>21</sup>

Another problem was the courts' reluctance to adequately accommodate the domestic violence history<sup>22</sup>. After all, the history of such a case reads much the same as a history of violence and turbulent affairs.<sup>23</sup> One answer could be for these women to try and use the diminished responsibility defence<sup>24</sup>, but it seems unfair to try and compel these women to say they are not rational beings<sup>25</sup>. Why should they be labelled sick or unstable for defending their physical and emotional selves?<sup>26</sup>

The law had seemed to make some minor progress with the early 1990's appeal cases, mostly by bringing their predicament to the courts' attention, but the fact remained that the cases of battered women killing their abusers were still being shoe-horned into a defence which was much more

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<sup>18</sup> If she did, the complete defence of self-defence would most likely be successful

<sup>19</sup> See *Ahluwalia* [1992] 4 All ER 889. In this case the defendant waited until her husband was sleeping before pouring petrol over his feet and setting it alight.

<sup>20</sup> See *Thornton (No1)* [1992] 1 All ER 306. Sarah Thornton fetched a knife from the kitchen before returning to her partner in the living room.

<sup>21</sup> Debra Parkes and Emma Cunliffe "Women and Wrongful Convictions: Concepts and Challenges" (2015) 11 *International Journal of Law in Context* 219 @224

<sup>22</sup> Rebecca Bradfield, "Women Who Kill: Lack of Intent and Diminished Responsibility As The Other Defences To Spousal Homicide" (2001) 13 *Current Issues Criminal Justice* 143

<sup>23</sup> Alex Kirsta, *Deadlier Than The Male: Violence and Aggression in Women* (London, HarperCollins, 1994)

<sup>24</sup> Previously accommodated by Homicide Act 1957, s2

<sup>25</sup> See John Gardner, 'The Mark of Responsibility' (2003), 23 *Oxford Journal of Legal Studies* 157

<sup>26</sup> Kirsta (n. 23) 192

readily associated with anger<sup>27</sup>. Above all, the requirement of an outward display of loss of self-control was wholly inconsistent with the traits of fear and despair. There was a progression from the *Duffy* suddenness requirement to a slow-burn response, which was a small victory. As Kirsta has noted:

*“They may be slower to arouse to anger, but once enraged the fire may smoulder and burn longer”<sup>28</sup>*

This was still a far stretch from accommodating the desperate emotions felt. This development was described by Yeo as a movement towards allowing an eruption of loss of control rather than an instant reaction to provocative conduct<sup>29</sup>; providing an instructive interpretation of practical reality. Alongside these cases of battered women which were reaching the headlines, instances of provocation being accepted in cases of male defendants over the most trivial of matters made for an unjust backdrop to compare against the predicament of battered women. For example, in 1991, Joseph McGrail was found guilty of manslaughter on the grounds of provocation and given a suspended sentence. He killed the victim, his partner of ten years, by kicking, punching and beating her. She was an alcoholic who could be violent on occasion, and in his judgment Justice Popplewell claimed that the victim would have tried the patience of a saint.<sup>30</sup> This occurred two days after the failed appeal of Sara Thornton, a woman routinely and cruelly subject to physical and mental abuse. Equally as appalling, in 1987, Thomas Corlett killed his wife and was sentenced to a mere three year imprisonment for manslaughter by reason of provocation after she put the mustard on the wrong side of his dinner plate.<sup>31</sup> In the most heinous of circumstances, Nicholas Boyce killed his wife for nagging him in 1985. After the fatal act, he then proceeded to dismember her body. He cooked parts so that it would not look like human flesh, before dumping it in several bags around London. Provocation was accepted, and his sentence was a meagre six year custodial sentence.<sup>32</sup> Sentences have at times been lenient for battered women, or at least reduced upon appeal,<sup>33</sup> but this kind of regard for the nonsensical reasons men have often given as provoking conduct shows the doctrinal hindrance the partial defence of provocation had become.

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<sup>27</sup> The loss of self-control concept meshes well with outward displays of anger rather than emotions such as fear and despair

<sup>28</sup> Kirsta (n.23) 200

<sup>29</sup> Stanley Yeo, “The Role of Gender In The Law Of Provocation” (1997) 26 *Anglo-American Law Review* 431, 437

<sup>30</sup> See [www.bbc.co.uk](http://www.bbc.co.uk) 29<sup>th</sup> July 2008, accessed 4<sup>th</sup> August 2014 and Kirsta (n.23) 195

<sup>31</sup> See [www.theguardian.com](http://www.theguardian.com) 25<sup>th</sup> July 2008, accessed 4<sup>th</sup> August 2014 and Kirsta (n.23) 195

<sup>32</sup> [www.theguardian.com](http://www.theguardian.com) 10<sup>th</sup> Sept 2007, accessed 4<sup>th</sup> August 2014 and Kirsta (n.23) 196

<sup>33</sup> For example, in the case of *Gardner* (1993) 14 Cr App R 364, the defendant's 5 year custodial sentence was reduced to a probation order. She was convicted of manslaughter by reason of provocation after killing her abusive partner during an altercation in which he attacked her and hit her head against the door frame.

Contrasting the facts of the above cases to the stark realities of the lives of battered women who have killed their abuser shows the reality of the provocation problem. Amelia Rossiter had endured sexual abuse and threats from her husband, such as that he would garrotte her.<sup>34</sup> On the day she killed him, he had hit her with a rolling pin. She was initially convicted of murder, although this was substituted for manslaughter on appeal. Emma Humphreys was treated as a prostitute, beaten routinely, and subject to humiliation and excessive taunting after attempting to commit suicide. On the night she killed her abuser she feared he was going to force her to have intercourse with him and others.<sup>35</sup> Kiranjit Ahluwalia was subject to sexual, mental, emotional and physical abuse for a number of years, with her husband having her believe that she herself was to blame for her circumstances. He had knocked her unconscious, and her doctor's notes refer to her having been beaten with a telephone. He had also attempted to run her over in his car at a family wedding, and threatened to burn her face with an iron.<sup>36</sup> These matters were neither trivial nor insignificant. Yet they did not, in the first instance at least, receive the same amount of mitigation afforded to the above mentioned cases of male defendants and 'nagging' female victims.

The final straw seemed to be reached in the case of *Holley*<sup>37</sup>, with the majority acknowledging that battered women would need to use diminished responsibility in order to have a chance at a partial defence, whether this was just or not.<sup>38</sup> This overtook the progress made by the previous decision in the case of *Morgan Smith*<sup>39</sup>, which had allowed attributing characteristics of the defendant when deliberating the reasonable person test. Capacity for self-control was returned to a rigid and uncompromising standard, without any scope for the flexibility the courts had been using to accommodate cases such as battered women. The only variables contributable to capacity for self-control were, once again, age and gender.<sup>40</sup>

With this dilemma now well-known, the solution eluded the courts. The characteristics of cases where battered women had killed their abuser simply did not fit appropriately within any partial defence. Reform of the law was the only solution, and evidently a considerable factor in abolishing provocation in favour of a new partial defence.

### III. Why Not Self-Defence?

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<sup>34</sup> *Rossiter* [1994] 2 All ER 752

<sup>35</sup> *Humphreys* [1995] 4 All ER 1008

<sup>36</sup> *Ahluwalia* [1992] 4 All ER 889

<sup>37</sup> *Holley* [2005] 2 AC 580

<sup>38</sup> *Holley* [2005] 2 AC 580, see G Virgo, 'Provocation Restrained' (2005) 64 Criminal Law Journal 532

<sup>39</sup> *Smith (Morgan James)* [2001] 1 AC 146

<sup>40</sup> GR Sullivan, AP Simester, JP Spencer and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Oxford, Hart Publishing, 2010) 393

The complete defence of self-defence is beyond the reach of the battered woman acting pre-emptively without the setting of an ongoing attack. This is because the defence relies predominantly on three components – imminence, necessity and proportionality. All three of these elements are questionable in the case of the battered woman. Lack of an imminent threat from an abuser who is off-guard or sleeping makes it difficult to show both that there was an immediate threat and that the actions were necessary. Proportionality is equally problematic, with battered women often choosing to arm themselves rather than face their attacker with bare fists<sup>41</sup>. This often makes the violence a battered woman uses to defend herself seem ‘excessive’, when she is really resorting to a form of ‘violent self-help’.<sup>42</sup>

It is unfortunate that self-defence has an all-or-nothing approach. The defence either succeeds, resulting in acquittal, or fails, resulting in a murder conviction. In a 1996 report,<sup>43</sup> the Home Office stipulated that the benefits of introducing the half-way house partial defence of excessive force self-defence are heavily outweighed by the complexities it would introduce. This was refuted by Lacey, who described excessive force self-defence ‘as compelling as the current defences on almost any conceivable conceptual, moral or practical basis’.<sup>44</sup> Without this partial defence to fall back on if a self-defence plea fails because of disproportionate force, it makes it a very risky plea for battered women<sup>45</sup>. Some jurisdictions have been fortunate enough to have a defence of excessive force self-defence, transforming the risky and troublesome self-defence plea into a much more attractive option which may render a defendant guilty of manslaughter if the violence used was merely disproportionate to the threat, as discussed later in this chapter. It is a shame that the defence cannot merely be based on necessity, rather than situations only of an immediate emergency. This urgency of action seems to be the factor which negates all defences, complete or partial, for battered women who kill their abusers.

It has been argued that the courts really should be taking into consideration the difference in size and strength between the defendant and the victim and the affect this would have upon the

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<sup>41</sup> Sara Thornton, for example, retrieved a knife from the kitchen and returned to the living room with it

<sup>42</sup> Elizabeth Sheehy, Julie Stubbs, Julia Tolmie, “Defences to Homicide: Battered Women: A Comparative Analysis of laws in Australia, Canada and New Zealand” (2012) 34 Sydney Law Review 467, 468

<sup>43</sup> *Report of the Interdepartmental Review of the Law on the Use of Lethal Force in Self-Defence on the Prevention of Crime* (Home Office, London, 1996) see also Andrew Ashworth, and Barry Mitchell, ‘Introduction’, Chapter 1, Barry Mitchell and Andrew Ashworth, *Rethinking English Homicide Law*, (Oxford University Press, 2000) 14

<sup>44</sup> Nicola Lacey, ‘Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Perfect Worlds’, Chapter 5, B Mitchell and A Ashworth, *Rethinking English Homicide Law*, (Oxford University Press, 2000) 113

<sup>45</sup> Nicola Wake, “Battered Women, Startled Householders and Psychological Self-Defence: Anglo-Australian Perspectives” (2013) 77 Journal of Criminal Law 433



defendant's apprehension of danger<sup>46</sup>, which would at least account for a woman who arms herself or attacks perhaps when the victim is slightly off-guard. Nevertheless, the imminence requirement will always be of importance to make sure this complete defence succeeds only in cases where the actions were absolutely necessary. In Canadian law, the Criminal Code 1985<sup>47</sup> in regards to self-defence did not refer to imminence, with the Supreme Court instead stating that imminence was merely a proxy for assessing if the act was wholly necessary.<sup>48</sup> This has since been updated,<sup>49</sup> with new self-defence rules stating that person will not be guilty if they believed on reasonable grounds that there was a threat of force, they were defending themselves from that threat and the act was reasonable in the circumstances.<sup>50</sup> To assess if it is reasonable, a list of factors are given, including the nature of the threat, if it was imminent or retreat was available, proportionality, physical abilities of both parties and the nature of any relationship between them.<sup>51</sup> This advancement in the full defence takes a very significant leap forward for battered women who kill their abuser.

#### **IV. Battered Woman Syndrome and Walker's Theory**

Lenore Walker was the first to coin the phrase 'battered women's syndrome'<sup>52</sup>, and explains it through the theory of 'learned helplessness'. In short, the battered woman experiences a perpetual cycle involving three phases. This includes a build up to the violence where she continuously anticipates it, the violent period, and the aftermath in which the abuser appears sorry for his actions and may make false promises not to act that way again. It is seen by most as something akin to post traumatic stress disorder<sup>53</sup>:

*"The theory of learned helplessness explains how people lose the ability to predict whether their natural responses will protect them after they experience inescapable pain in what appear to be random and variable situations"*<sup>54</sup>

In Walker's opinion, the effect of this cycle on the battered woman's mind is that she feels she is in constant risk of danger; it is always imminent. As a result of this, she leaves in a state of constant dread, panic and apprehension. Many academics have sought to explain this state and how the woman herself has such knowledge of her abuser and his habits that she knows when violence is

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<sup>46</sup> Amir Pichhadze, "Proposals for Reforming the Law of Self-Defence" (2008) Journal of Criminal Law 409, 410

<sup>47</sup> Canada Criminal Code RSC 1985 c46 s34

<sup>48</sup> Lavelle (1990) 1 SCR 852, R v Petel (1994) 1 SCR 3

<sup>49</sup> Citizen's Arrest and Self-Defence Act S.C. 2012 c9, replacing s34 Criminal Code

<sup>50</sup> *Ibid* s34(1)

<sup>51</sup> *Ibid* s34(2)

<sup>52</sup> See Lenore Walker, *Terrifying Love – Why Battered Women Kill and How Society Responds* (New York, HarperCollins, 1994). Walker has given evidence at several court appearances in the U.S in cases of battered women who have killed their abuser, relation to battered women's syndrome

<sup>53</sup> Kirsta (n.23) 205

<sup>54</sup> Walker (n.52) 36.

coming; even if there have been no threats. It is this feature of the battered women cases which provokes the most controversy. If a woman strikes when her abuser is sleeping, or at the table eating dinner, how can we say any threat was present? Yes, we may use the battered woman syndrome to say she always feels apprehensive because she knows violence is always just around the corner, but can that ever be an excuse for killing someone while they sleep? It will be left for the courts to determine whether the fear of serious violence qualifying trigger<sup>55</sup> contained within the new partial defence will be met when the abuser could be seen in no way as being a threat at the present time. Evidently, there is no requirement under the new act that the defendant act suddenly after some incidence or threat of violence, however, a loss of self-control is still required, which signifies some impulsive action is still required.

What is troublesome in dealing with the syndrome is that we have no real test for deciding which battered women do suffer from battered women's syndrome, and which are using it in large part to meet the elements of the defence; a difficulty noted by Roberts<sup>56</sup>. It is possible that by using Walker's theory we are merely grouping together all these women without much regard for individual circumstances, as long as domestic violence was the setting in which the defendant and victim lived. We must keep in mind that domestic violence alone does not suffice as satisfying the requirements for a partial defence to murder.

Dressler discusses the immediacy point at some length, deeming these non-confrontational homicides as morally flawed<sup>57</sup>. He speculates that even in the light of Walker's theories; the notion that a sleeping abuser presents an immediate threat to the life of a reasonable woman with battered woman syndrome is still unacceptable from a moral standpoint. He focuses on the premise that, no matter how you put it, what she did was not justified<sup>58</sup>. After all, the victim has rights too. Dressler does point out that duress and coercion, which might be phrases adequately used to sum up the situation of battered women who kill, result in the defendant having no fair opportunity to act in accordance with the law. Although her conduct is wrong, most would deem it rational, and he also speculates that coercion goes further than creating hard choices in that it actually incites some diminished rationality.<sup>59</sup> Let us again consider the new partial defence of loss of control and its first

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<sup>55</sup> Coroners and Justice Act 2009, s54(3)

<sup>56</sup> John W Roberts, "Between The Heat Of Passion and Cold Blood: Battered Woman's Syndrome As An Excuse For Self-Defense In Non-Confrontational Homicides" (2003) 27 Law and Psychology Review 135

<sup>57</sup> Joshua Dressler, "Battered Women and Sleeping Abusers: Some Reflections" (2005) 3 Ohio State Journal of Criminal Law 457

<sup>58</sup> Although she may be partially excused for it, see Dressler n(47) 463

<sup>59</sup> Joshua Dressler, "Why Keep The Provocation Defence: Some Reflections on a Difficult Subject" (2001-2002) 86 Minnesota Law Review, 256

limb, a fear of serious violence<sup>60</sup>. If a woman kills on the basis that he would one day kill her, obviously the courts aren't going to say her actions are justifiable, but will we even be able to excuse them using this trigger? The more we delve into this problem, the more unlikely it seems.

Evidently, not everyone agrees with Dressler's view on non-confrontational homicide. Krause explains that, in her opinion, Dressler's view of imminent danger is much too literal<sup>61</sup>. His contention is that battered women's syndrome effectively explains why she viewed an attack as imminent even in the case of a sleeping abuser, and therefore juries need to hear this to better understand this more liberal analysis of imminence. Naturally, if a woman has frequently been subject to violence after her abuser has had a nap, she would not be deemed unreasonable to fear serious violence the second he awakes, which could be at any moment. She knows the threat he poses to her and she becomes familiar to when violence is most likely to occur. Basically, her survival is dependent upon her knowledge of her abuser<sup>62</sup>. Perhaps all we should be looking for is violence that is inevitable, and we should be open to her account of being in fear of immediate harm. She is an expert of her situation, and better equipped than anyone else to assess when danger is looming, in the same way that a cardiologist might better predict when a heart problem might occur than a general practitioner. The battered woman has an in-depth knowledge of her abuser that a woman without these experiences does not have.

In consideration of the above the ultimate question is do we really need a "syndrome" to explain the actions of such women at all? Should we say her state of mind has been altered because of the eternal danger she feels she is in? Or should we say she is giving a normal and rational response to an abnormal and terrifying situation? The vital thing to remember is whichever of these reasons we use to excuse her actions, neither explains why she appears not to have lost her self-control, and that is the key feature of the new act. As Edwards notes<sup>63</sup>, women will still be required to lose self-control "in the conventional way", and 'learned helplessness' has never managed to explain why the battered woman is suddenly so empowered as to kill<sup>64</sup>. Tolmie asserts that the nature of battered woman syndrome evidence is unlikely to be successful in adapting the self-defence doctrine to

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<sup>60</sup> Coroners and Justice Act 2009 s54(3)

<sup>61</sup> Joan H Krause, "Distorted Reflections of Battered Women Who Kill: A Response To Professor Dressler" (2006) 4 Ohio State Journal of Criminal Law 555

<sup>62</sup> See Edwards (n.2)

<sup>63</sup> Susan Edwards 'Loss of Self-Control': When His Anger is Worth More Than Her Fear' Chapter 6, Reed and Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives*, (Ashgate, Surrey, 2011) 79.

<sup>64</sup> See Kenny (n14) p25

accommodate the experiences of battered women, and it is safe to assume that the partial defences will suffer the same fate.<sup>65</sup>

### **A. Diminished Responsibility**

Diminished responsibility was the partial defence ultimately utilised to have some of the most famous cases see a reduction in conviction from murder to manslaughter.<sup>66</sup> It was also recognised in the judgment of *Holley* as the route to be taken by battered women who kill their abuser.<sup>67</sup> This option does not sufficiently explain the circumstances of a battered woman, and again tries to deem the defendant an irrational being, rather than recognising that it is the situation which is abnormal, and she is merely responding to this egregious situation. Kirsta described diminished responsibility as a defence fundamentally designed to distinguish psychopaths from the insane.<sup>68</sup> It is not a certainty that a battered woman is mentally abnormal simply because she has managed to continue surviving and even living a productive life in the face of the most insufferable odds. A defence of diminished responsibility would also likely negate any plea of self-defence being presented concurrently, because the constraints of self-defence demand some level of reasonableness. A defendant operating at a diminished capacity is not reasonable. This might also be the reason why many battered women themselves are reluctant to plead diminished responsibility, worrying of the repercussions such a formal acknowledgement of irrational actions might have on keeping custody of their children. The defence of diminished responsibility was narrowed by the Coroners and Justice Act 2009, now requiring a recognised medical condition for a successful plea.<sup>69</sup> If battered women who kill are unable to use the partial defence of loss of control due to that very concept, it is likely they will also find diminished responsibility unavailable unless they have had some kind of medical diagnosis to explain their actions.

### **V. Time-Lapse, Considered Desire for Revenge, and Her Reluctance to Leave**

A question many jurors dealing with battered women cases will have asked is why she did not simply leave the abuser and distance herself from the situation. This question is asked as if this is as simple as the ability to retreat as a man in a bar fight might have. There are other courses of action which are available without any certain level of reprisal. The real question we should be asking is whether or not she in fact had fair opportunity to do so. Did she manage to successfully gain help from the

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<sup>65</sup> Julia Tolmie “Battered Defendants and the Criminal Defences to Murder – Lessons from Overseas” (2002) 10 *Waikato Law Review* 91, 99

<sup>66</sup> For example, Ahluwalia’s conviction was substituted for a manslaughter verdict by reason of diminished responsibility

<sup>67</sup> *Holley* [2005] 2 AC 580

<sup>68</sup> Kirsta (n.23) p203

<sup>69</sup> Coroners and Justice Act 2009 s52

authorities, giving her the peace of mind that if he pursued her they would intervene? Was there a woman's refuge in the area? Most importantly, if she had children, where could she take them and how would she support them?<sup>70</sup> Other factors could include harm to her loved ones, lack of money, the belief that the abuser will change, and ultimately, that she still loves him. There is also a significant fear of retribution if she is found, with battered women often being threatened with all kinds of violence, and death, should they try to leave or end the relationship.<sup>71</sup> As Ewing has noted:

*"Violence against battered women often escalates any time they attempt to take any control over their lives or the battering relationship".<sup>72</sup>*

The relationship may be devastating, but she may still love him<sup>73</sup>. Perhaps, rather than asking why she did not leave, what should be asked is why he did not let her go. This is a question which seems to be overlooked time and time again<sup>74</sup>.

This feature to the cases of battered women who kill is not the only one which raises questions. As discussed, one of the key characteristics of cases involving battered women killing their abuser is a lapse of time between the last violent incident and the fatal act. Under the old law<sup>75</sup>, this was most problematic because the retaliation was not sudden<sup>76</sup>, and any period of time between the provocative act and the fatal blow would give the defendant opportunity to calm down and resume rational thinking. It has even been suggested that such a time lapse gives the defendant an opportunity to take another course of action<sup>77</sup>. The Coroners and Justice Act 2009 does not include a requirement that the actions be sudden, but it does still require that troublesome loss of self-control element, even for the fear of serious violence limb. One might ask if it is possible to lose self-control in any manner other than suddenly, as loss of control implies an element of unexpected impulse.<sup>78</sup> Therefore although the new partial defence expressly articulates that 'suddenness' is no longer a requirement, the retention of an emotion-based response which is inherently instantaneous implies that it is still present.

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<sup>70</sup> It seems highly irrelevant to consider a scenario of a woman leaving the children with her abuser, fearing the same fate would befall them.

<sup>71</sup> For example, *State v Kelly*, 478 A. 2d 364, 369 (N.J. 1984) In this case the victim threatened to kill the defendant or cut off her body parts if she left him.

<sup>72</sup> Charles P Ewing, *Battered Women Who Kill* (Massachusetts, Lexington Books, 1987) 13

<sup>73</sup> *Ibid*

<sup>74</sup> See Caroline Forell and Donna Matthews, *A Law Of Her Own* (New York University Press, 2000) 162

<sup>75</sup> Homicide Act 1957, s3

<sup>76</sup> As *Duffy* [1949] 1 All ER 932 set out

<sup>77</sup> Dressler (n.57)

<sup>78</sup> It was also noted in the case of *Dawes* (2013) EWCA Crim 322, that cumulative cases will be dealt with in the same way as cases where the loss of control arose suddenly. See Andrew Ashworth, "R v Dawes: Homicide – Murder – Coroners and Justice Act 2009 ss54, 55" (2013) *Criminal Law Review* 770

For this reason, it has been noted that the considered desire for revenge exclusion<sup>79</sup> might come into play for cases involving battered women, particularly in relation to the ‘sleeping abusers’ scenario<sup>80</sup>. She might be seen as seeking revenge for the way she has been treated, rather than acting in self-preservation. If she arms herself, it might be viewed as evidence of premeditation, rather than seeking to defend her physical self adequately, knowing her fists are no match for his superior strength in retaliation. It may be that she has armed herself for a reason other than planning to kill – to scare him for example<sup>81</sup>. If her emotional state accounts for her picking up a knife, negating not only a desire for revenge but possibly *mens rea*, there is still a question of her intent at the time of plunging the knife in while he lies still and motionless sleeping. A valid point to consider is that, if she had in fact premeditated killing her abuser, it would be reasonable to assume she would attempt to cover her tracks, if she considers his previous violence will prevent her from a murder conviction. In many cases, the woman calls for an ambulance<sup>82</sup>, and gives herself up freely<sup>83</sup>.

We might also contemplate the calm manner the battered woman often appears to portray. Not only does it contrast with the explosive loss of self-control we can all easily identify, but it can also make the act seem even more calculated. The possibility remains that, rather than expressing their anger, these women suppress it until they are so terrified of what will happen if they continue to do so, they realise the situation has reached an ultimatum: kill or be killed.<sup>84</sup> As Kirsta notes, battered women may take a much longer time to become angry than their male counterparts, but “once enraged the fire may smoulder and burn longer”<sup>85</sup>. It might be days, or even weeks, since the last episode of serious violence, but such an incident may stay at the forefront of the battered woman’s mind for a lot longer than the next few moments after it occurred. This point is made by Kiranjit Ahluwalia in her autobiography:

*“I was settling into a pattern. Deepak would be violent, I would cry in response, then after four or five days I would cool down, but I would remain depressed”.*<sup>86</sup>

Not only does she state that it would take her ‘four or five days’ to cool down after a violent episode, but even after that time she would continue to suffer as a result. This means that at any point during

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<sup>79</sup> Coroners and Justice Act 2009, s54(4)

<sup>80</sup> See Edwards (n.2) 89

<sup>81</sup> Bradfield (n.22) p153

<sup>82</sup> *Hobson* (1998) 1 Cr App R 31

<sup>83</sup> *Thornton* (No2) [1996] 1 WLR 1174

<sup>84</sup> Such as the case of *State v Norman* 324 N.C. 253, 378 S.E. 2d 8, 1989, she believes her life is at stake every day, and this belief can result in suicide attempts. See Ewing n(60) 11

<sup>85</sup> Kirsta (n.23) p200

<sup>86</sup> Kiranjit Ahluwalia and Ritu Gupta, *Provoked: The Story of Kiranjit Ahluwalia* ( London, HarperCollins, 2007)

the next few days after the last triggering incident, her emotions were still under the influence of that incident, and she could have reacted to it.

The problem battered woman most commonly encounter is that acting in the middle of a confrontation creates an enormous risk to her; but she instinctively knows that the longer she waits after sensing that there will be another attack soon, the more of a risk she takes that she will not be able to defend herself adequately when the time comes<sup>87</sup>. Assuming, after consideration of the theories surrounding battered woman's syndrome, that she does have a heightened sense of perception when it comes to judging if an attack will be soon, she is sure to assess such risk in a more imperative manner, and this in turn will affect at what point she chooses to act.<sup>88</sup>

## VI. Cumulative Provocation and Loss of Self-Control

One of the issues evident in the courts throughout the break-through cases of battered women<sup>89</sup> is that of cumulative provocation. It was even touched upon in the case of *Duffy*, with Devlin J referring to a "series of acts"<sup>90</sup>. Unfortunately for battered women, the most recent provocative incident is not always the most severe; often it is only the tip of the iceberg.<sup>91</sup> Yet the traditional provocation defence did not allow us to dive under the surface and view it in its entirety.<sup>92</sup> It had failed dismally to consider the cumulative effects of several violent and emotionally abusive episodes over a period of time. These cases demonstrated that it was possible for a series of incidents to build up, eventually resulting in the defendant taking action; and the courts noted not only this but also that loss of self-control could be slow-burning rather than immediate<sup>93</sup>. Rather than loss of self-control, the actuality of the circumstances of a battered woman killing her abuser might be more adequately described as a wearing down of self-restraint until none remains, the last shred being diminished by the most recent provocative incident, however trivial it may seem in comparison to other abusive episodes.<sup>94</sup>

It appears that the cumulative provocation issue is one that has been resolved by the new partial defence. Instead of considering characteristics, we will now look to the "circumstances of D" when

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<sup>87</sup> Ferzan (n.4) p719

<sup>88</sup> See generally, Walker (n.52) also, Edwards (n63) p228

<sup>89</sup> See cases described n(10)

<sup>90</sup> *Duffy* [1949] 1 All ER 932

<sup>91</sup> Edwards has noted that the last incident is often not sufficiently grave to meet the requirements of a qualifying trigger Edwards (n.63) p233; this point was also made by Wells (n.1) p89

<sup>92</sup> Even though a 'series of incidents' was referred to in *Duffy* [1949] 1 All ER 932 by Devlin J, cumulative provocation was not included in the Homicide Act 1957 s3

<sup>93</sup> *Ahluwalia* [1992] 4 All ER 889

<sup>94</sup> See (n.91)

considering the defendant's actions<sup>95</sup> against the gravity of the situation. Surely, any history of domestic violence will be considered as the defendant's circumstances, as 'circumstances' indicates external factors as opposed to the word 'characteristics', which signifies internal traits. This is a victory for battered women who kill their abuser. Statements given by the defendant often show a whole regime of fear, with the defendant's behaviour carefully planned in an attempt to avoid violence. For example, in the Australian High Court case of *Osland*,<sup>96</sup> the defendant and her son would stand at the window every day watching for the victim to come home. His behaviour and demeanour as he got out of the car would indicate to them what kind of mood he was in, and what kind of night they would have. A routine like this is now relevant in trying to establish how someone in the defendant's position might have acted, and the last provocative actions of the victim can now be viewed within the context of the other ways in which the deceased had seriously wronged the defendant and treated them over time.

The real problem that remains for battered women is the concept of loss of self-control. The updated law in England and Wales has seen the inclusion of this element despite the Law Commission's recommendations to omit it from any reformed version of the provocation defence<sup>97</sup>. It appears this anger-related behaviour is here to stay. It must be seriously questioned whether or not this is necessary. As Wells has observed:

*"An excuse based on loss of self-control seems to imply an underlying aggression in all of us which is capable of release under certain circumstances".<sup>98</sup>*

It is fair to say that most people are capable of an angry outburst in the face of extreme provocation, although not necessarily a violent retaliatory action, and it is fairly straightforward to see its attachment to the second limb of the defence. It would not be considered unusual for someone, in circumstances of extremely grave character with the feeling of being seriously wronged, to act impulsively and rashly in a manner related to losing self-control.<sup>99</sup> It would, however, be erroneous to say this is the course of events for someone who fears they are about to be subject to serious violence.<sup>100</sup> They may act instinctively, but this concept is somewhat different<sup>101</sup>. As Norrie

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<sup>95</sup> Coroners and Justice Act, s54(1)(c)

<sup>96</sup> *Osland* (1998) 73 ALJR 173, 178 statement quoted by Callinan J

<sup>97</sup> Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004), Law Commission for England and Wales, *Murder, Manslaughter and Infanticide* (Report No 304, 2006) See Norrie (n.2)

<sup>98</sup> Wells (n.1) p87

<sup>99</sup> For example, *Camplin* (1978) A.C. 705

<sup>100</sup> See generally, Edwards (n.63)

<sup>101</sup> See Cara Cookson, "Confronting Our Fear: Legislating Beyond Battered Woman Syndrome And The Law Of Self-Defense In Vermont" (2009), 34 Vermont Law Review 415, 441



speculates, the fear of serious violence trigger may be nothing but a tool to encompass cases not covered by self-defence<sup>102</sup>, and self-defence does not demand any kind of loss of control.

It is likely the courts will now need to establish some behavioural markers associated with fear and desperation which can be deemed evidence of her inward loss of control over the situation. It is a much needed course of action if the loss of control concept is to remain. Horder described a woman being left in a state of emotional disturbance which makes her take “retaliatory action” when the provoker is “off his guard”<sup>103</sup>, but how exactly the courts will define fear and terror is yet to be seen. The most effective way would most certainly be to look at previous cases and try to identify some common actions by women acting out of fear. The most common seems their choice, subconscious as it may be, to tackle their abusers while unprepared rather than during one of many altercations. While attacking the sleeping abuser is problematic in itself (as discussed previously), it may simply show the almost universal thought process of the battered woman – she is so affected by terror that she does not dare to approach him at any other time. Another suggested means of discovering evidence of loss of self-control is the defendant’s lack of concern for their own welfare. Why would they commit an act knowing they could spend a considerable amount of time in prison if they were thinking rationally? If the woman had put gloves on before picking up a weapon in order to prevent having her finger prints on it, this person is acting rationally to avoid detection. This differs to a person who takes action to ensure they succeed in killing the victim by loading a gun<sup>104</sup>. Herring offers an excellent explanation of loss of self-control caused by an emotion other than anger:

*“We are not looking for a defendant driven ‘crazy’ by anger, but a defendant battling conflicting emotions and where control is lost over which emotion is to determine her actions”<sup>105</sup>.*

The courts will need to give the concept a very liberal meaning in order to honour such a rationalisation of the very foundation the new defence is built upon. An additional important aspect to cases of battered women who kill their abuser is that they don’t attempt to lie about the situation by pretending he was about to attack her, or that he had just threatened to do so. Such actions would suggest some level of premeditation.

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<sup>102</sup> Norrie (n.2) p284. He notes that this will not only cover battered women but also a householder shooting an intruder, or a policeman shooting an unarmed assailant

<sup>103</sup> Jeremy Horder, “Reshaping The Subjective Element In The Provocation Defence” (2005), 25 Oxford Journal of Legal Studies 123

<sup>104</sup> Richard Holton and Stephen Shute, “Self-Control In The Modern Provocation Defence” (2007), 27 Oxford Journal of Legal Studies 49

<sup>105</sup> Jonathan Herring, ‘The Serious Wrong of Domestic Abuse and the Loss Of Control Defence’ Chapter 5, Reed and Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Surrey, Ashgate, 2011) 68.

## VII. Other Jurisdictions and Their Treatment of Abused Women Who Kill

Clearly we are not the only jurisdiction to experience a problem in trying to deal with battered women who kill their abusers. What is apparent is the way in which we have dealt with it; it seems to differ, in some cases quite vastly, to other jurisdictions. It is certain that law reform in the areas of partial defences to murder and self-defence in many jurisdictions has had a very distinct focus on accommodating battered women who kill.<sup>106</sup>

### A. *The United States of America*

It is extremely difficult to talk of 'America's' position on this issue, as each individual state is a jurisdiction in itself. It would also be just as difficult to examine each state individually so as to establish what kind of defences are available to battered women who kill their abuser, complete or otherwise. Each state has some kind of determinate sentencing, and this is an important factor in what defences are available, having little scope for mitigating factors at the sentencing stage<sup>107</sup>.

It might be more appropriate to look at the most relevant and prevailing schools of thought in the area; one of which is the Model Penal Code's partial defence of extreme mental or emotional disturbance<sup>108</sup>. The Model Penal Code has been described as the 'greatest single influence'<sup>109</sup> on many state codes:

*"The success of the Model Penal Code has been stunning. Largely under its influence, well over half the states have adopted revised penal codes, creating a veritable renaissance of criminal law reform unparalleled in history"*<sup>110</sup>

For this reason, we might look at this Code as the closest thing there is to an American criminal code, even though it is neither the first nor the most ambitious attempt to codify the law<sup>111</sup>. As Robinson has pointed out, the Model Penal Code has served as a platform for updating existing criminal law, "in almost three-quarters of the states"<sup>112</sup>. The other notable concept which has led to much academic debate is stretching the complete defence of self-defence to accommodate battered women who kill, especially in cases of 'sleeping abusers'.

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<sup>106</sup> (n.42) p467

<sup>107</sup> See Caroline Forell, "The Gender Equality, Social Values and Provocation in Canada, Australia and The United States" (2006) 14 American University Journal of Gender, Social Policy and the Law 27, 43

<sup>108</sup> American Law Institute Model Penal Code (1981) 210.3 (1) (b)

<sup>109</sup> Sanford Kadish, "The Model Penal Code's Historical Antecedents" (1988) 19 Rutgers Law Journal 521, 521

<sup>110</sup> *Ibid.*, 538. See Paul H Robinson and Markus D Dubber "The American Model Penal Code: A Brief Overview" (2007) 10 New Criminal Law Review 319, 326 for a list of the 34 states recodifications in the two decades following the Model Penal Code

<sup>111</sup> *Ibid.*, 320

<sup>112</sup> Paul H Robinson, 'Abnormal Mental State Mitigations of Murder: The US Perspective' Chapter 17, Reed and Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Surrey, Ashgate, 2011) 292

### ***B. The Preoccupation with Extending Self-Defence***

In the United States, the majority of states seem to be dealing with such cases in the same manner – stretching self-defence to accommodate the circumstances, even to the extent of acquitting in cases of non-confrontational homicides<sup>113</sup>. In some states there are even specific guidelines for jury instructions in a case where a battered woman claims she acted in self-defence<sup>114</sup>. Not only this, but several women have in fact been granted clemency after being convicted of killing their abuser<sup>115</sup>. In one particular case in Manitoba, a woman was acquitted of murdering her abusive partner on grounds of self-defence after almost accepting a twelve year sentence pleading guilty to manslaughter.<sup>116</sup> Perhaps this is the right path. We might take the view that the imminent danger element to self-defence is merely a safeguard in ensuring killing was necessary, and because these women knew their abusers' likelihood of causing them serious bodily harm in the near future, it was prevalent. Nourse describes imminence as the 'quintessential definition of objectivity'<sup>117</sup>.

Consider the moral message this sends, and whether or not we should justify a woman killing a sleeping abuser, rather than agreeing her actions were wrong but excusing them. It must be remembered that there was some element of choice, at least in the literal sense; therefore some level of culpability is warranted<sup>118</sup>. Without getting too deep into the debate over the moral standing for different defences; that is, if they are justificatory or excusatory in nature, it is imperative to keep in mind that self-defence is considered a justificatory defence. We are justifying the actions because they were seen as sensible, good or permissible. Actions which would have been wrong in other circumstances are deemed tolerable. It would be a very far stretch to say this is true of the battered woman who kills her sleeping abuser. Particularly in English law, we much more see this as behaviour as partially 'excused', which is why an acquittal would be unacceptable, even if any tough punishment is not warranted. This is because the defendant acts retrospectively in some sense, to events already occurred, which touches on a form of retribution. Even a battered woman who kills her sleeping abuser in a pre-emptive strike to stop further violence is not acting purely

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<sup>113</sup> For example *Bechtel v State* 840 P. 2d 1,6 (Okla. Crim App 1992), See Dressler (n 37) 458

<sup>114</sup> See California jury instructions – criminal 9.35.1 (2009) and Georgia suggested pattern for jury instruction, Vol II: Criminal cases 3.10.14 //94<sup>th</sup> Edition, 2008)

<sup>115</sup> Ohio Governor Richard Celeste granted clemency to twenty-five battered women in December 1990. See Christine M Belew, "Killing One's Abuser: Premeditation, Pathology or Provocation?" (2009) 59 *Emory Law Journal* 769, 771, and Kirsta (n.23) p204

<sup>116</sup> Kim Kendejewski case, as discussed by Elizabeth Sheehy "Battered Women and Mandatory Minimum Sentences" (2001) 39 *Osgoode Hall Law Journal* 529, 548

<sup>117</sup> Victoria Nourse, "Self-Defense and Subjectivity" (2001) 68 *University of Chicago Law Review* 1235, 1236

<sup>118</sup> Sanford Kadish, "Excusing Crime" (1987) 75 *California Law Review* 257, 259.

prospectively<sup>119</sup>. A remarkably interesting point made by Dressler<sup>120</sup> is the often overlooked issue of why we are excusing – is it because of the victim’s actions causing their own demise, or due to compassion for her passionate outburst?

The true question to ask rather than if violence was imminent was whether violence could have been avoided completely, remembering that the obligation is not for her to leave the relationship, but for him to cease his violent outbursts. Taking this view, violence is inevitable. It would be a definite step forward to view imminence subjectively as to how a battered woman’s perception perceives imminence. It is apparent that courts seeking to extend self-defence in such circumstances are making such allowances.<sup>121</sup> The battered woman feels she lives in a continuing state of confrontation.<sup>122</sup>

This differs significantly to our approach, trying to squeeze these cases into the boundaries of an anger-fuelled partial defence which will still result in a manslaughter conviction. It would seem we are intent on still assigning these women some fraction of culpability which the American courts feel is unnecessary.<sup>123</sup> Our courts are plainly unwilling to bend the rules of a complete defence. Non-confrontational homicides are at the core of this debate because of their outwardly pacifist nature; where the fatal blow is dealt in a situation where the risk of harm appears minimal.<sup>124</sup> Confrontational homicides involving battered women striking their abusers is much more akin to self-defence, depending on the severity of the circumstances.

### **C. EMED**

Despite this approach being adopted in some cases, there is also a partial defence which will reduce murder to manslaughter. Contained in the Model Penal Code<sup>125</sup>, it is applicable if a person commits homicide whilst under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation. Whether or not there is reasonable explanation is then determined from the viewpoint of the defendant’s situation. Eleven states have adopted the Code with this partial

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<sup>119</sup> See Jeremy Horder, “Reasons For Anger: A Response To Narayan And Von Hirson’s Provocation Theory” (1996) 15 Criminal Justice Ethics 63

<sup>120</sup> Joshua Dressler, “Foreword – Justifications and Excuses: A Brief Review of The Concepts And The Literature” (1987) 33 Wayne Law Review 1155

<sup>121</sup> For example, *Bechtel v State* 840 P.2d 1,6 (Okla Crim App 1992) a case which, happened very close to the time Kiranjit Ahluwalia was convicted of murder, *Ahluwalia* [1992] 4 All ER 889 *Ahluwalia* [1992] 4 All ER 889

<sup>122</sup> Walker (n.52) also, Edwards (n.63) 228

<sup>123</sup> *Bechtel v State* 840 P.2d 1,6 (Okla Crim App 1992)

<sup>124</sup> Wells (n.1) 89

<sup>125</sup> The Model Penal Code 5 states adopted this provision omitting the word ‘mental’, whilst a dozen more adopted at least some features but requiring a provocative act. See Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004) Appendix F by Sanford Kadish, in particular Annex A

defence specifically<sup>126</sup>, while a further twenty-three adopted the Code without extreme mental or emotional disturbance, but retaining variations of the common law provocation defence<sup>127</sup>.

At first glance this defence seems very appealing for battered women. Overwhelmed by emotions of fear and desperation to the point of overriding reason, she commits the fatal act. No final provocative act is necessary; no loss of self-control or behaviour associated with anger is needed. Not only this, but the objective string to this defence's bow appears to allow reasonableness to be judged from the viewpoint of a battered woman. This move away from a 'reasonable man' standard means more attention is paid to the actor's situation. In fact, it almost makes it seem as though it is the situation, rather than the actor, that is the true culprit.<sup>128</sup>

In reality, and unlikely as it may seem in an academic sense, the defence has actually been widely used by men in situations of jealousy and possessiveness<sup>129</sup>. The defence is, therefore, described by Drogin and Marin as "broad", although having in reality a fairly narrow purpose<sup>130</sup>. It has even been suggested that this partial defence might be appropriate for battered women to use in cases where there is an anger element; for example sexual infidelity has played a part and this provokes the woman into finally taking action<sup>131</sup>.

One example of a state which has adopted this defence is Hawaii<sup>132</sup>. Their traditional common law doctrine of heat of passion was much akin to our provocation defence, with both an objective and subjective component. With EMED in this state, there are three real elements to the defence; there are circumstances the defendant is exposed to; that reasonably upsets their emotional state; and this causes a loss of self-control. This loss of self-control element is most interesting. It is not contained in the wording of the Model Penal Code or Hawaii's Revised Statutes; however it has been

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<sup>126</sup> Arkansas, Connecticut, Delaware, New York, Hawaii, Kentucky, Maine, Montana, North Dakota, Oregon, Utah. See Robinson n(65) 302

<sup>127</sup> Alabama, Alaska, Arizona, Colorado, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New Mexico, Ohio, Pennsylvania, South Dakota, Texas, Virginia, Washington, Wyoming. See Robinson n(65)302

<sup>128</sup> Susan Edwards, "Battered Women – In Fear of Luc's Shadow" (1997) 12 *Dennings Law Journal* 75, Edwards notes that the situation for battered women who kill is less about syndromisation and more about common sense.

<sup>129</sup> Stephen J Morse, "The Irreducibly Normative Nature of Provocation/Passion" (2009-10) 23 *University of Michigan Journal of Law Reform* 193, the author also notes that EMED could be available for reckless homicides with no intention

<sup>130</sup> Eric Y Drogin and Ryan Marin, "Extreme Emotional Disturbance, Heat of Passion and Provocation: A Jurisprudential Science Perspective" (2008) 36 *Journal of Psychiatry and Law* 133, 142.

<sup>131</sup> W Lucibelle, "Seeking Truth, Preserving Rights – Battered Women's Syndrome/ Extreme Emotional Distress: Abuse Excuse or Syndrome Defence" (2003) 24 *Pace Law Review* 259, 261

<sup>132</sup> Section 707-702 (2) Hawaii Revised Statutes

established through the courts that the element exists<sup>133</sup>, leading some to describe loss of self-control as being an “indispensable element” to the defence<sup>134</sup>. It is fascinating that this element has become a requirement in this state. It makes Hawaii’s defence virtually an amalgam of the Model Penal Code’s EMED and our loss of self-control defence. One might ask if self-control is really necessary when the defence is wholly based upon someone acting in a frenzied emotional state: the same question we should be asking of our own new partial defence.

EMED is not without criticism. Kadish,<sup>135</sup> whilst commending the wide scope for assessing the “reasonable explanation” aspect (which is not dissimilar from our own flexible approach to the provocation defence under the *Morgan Smith*<sup>136</sup> precedent), is less enthusiastic in regards to the wide scope given in assessing the “actor’s situation”. Nourse<sup>137</sup> is also critical. Whilst noting that the defence has somewhat rejected the reasonable man concept in favour of a much more liberal defence which focuses on the actor’s unique situation, there is still a remaining question of which emotional responses merit the protection of the law:

*“Ultimately, the code offers an institutional solution: It tells us that the jury should decide whether the situation merits compassion”*<sup>138</sup>

As purposeful as this might sound, it remains that there is no instruction in the defence itself on which emotion-fuelled incidents should be left to the jury in the first place, albeit it is obvious it will not be limited to anger-related violence.

Several states adopted some form of the EMED defence, but the outcome of this varied considerably from state to state. At the other end of the spectrum to the approach taken by Hawaii, Kentucky had abandoned their common law provocation defence (much similar to ours) for one of extreme emotional disturbance<sup>139</sup>. Yet after several attempts by the courts to define its parameters, the

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<sup>133</sup> See *State v Knight* 80 Hawaii 318, 909 P.2d 1133 (1996) where the jury convicted of murder even after an EMED instruction was given because there was no loss of self-control; *State v Kaiama* 81 Hawaii 15, 911 P.2d 735 (1996) where the judge did not instruct the jury on EMED as there was no evidence of loss of self-control.

<sup>134</sup> Harold Hall, Caroline Mee and Peter Bresciani, “Extreme Mental or Emotional Disturbance” (2000-2001) 23 University of Hawaii Law Review 431, 442

<sup>135</sup> Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004) Appendix F by Sanford Kadish, in particular Annex A

<sup>136</sup> *Smith (Morgan James)* (2001) 1 AC 146

<sup>137</sup> Victoria Nourse, “Passion’s Progress: Modern Law Reform and the Provocation Defense” (1996-1997) 106 Yale Law Journal 1331

<sup>138</sup> *Ibid.*, 1372

<sup>139</sup> KY Rev Stat Ann 507.020(1) (a) 1974

defence ended up unnecessarily similar to that of insanity, merely without the requirement of a psychiatric disorder<sup>140</sup>. It was defined, in the case of *McClellan v Commonwealth*, as follows:

*“A temporary state of mind so enraged, inflamed or disturbed as to overcome one’s judgement, and to cause one to act uncontrollably from the appealing force of the extreme emotional disturbance rather than from evil or malicious purposes”*<sup>141</sup>

Perhaps it is the word ‘uncontrollable’ that does not belong here, and makes this defence more akin to insanity than provocation. Regardless, it is a very restricted view of the type of situation which would make for a successful plea, and the word ‘enraged’ suggests the only acceptable emotion involved would be anger. Battered women in this state might have been more easily accommodated under the old common law.

The partial defence of EMED best reflects the circumstances of battered women who kill; recognising a level of culpability and choice, albeit a very difficult choice as Dressler noted,<sup>142</sup> whilst allowing a lenient sentence if necessary. Stretching self-defence to include these cases, particularly in non-confrontational situations, creates an inaccurate representation of the defence itself and justification in a case where excuse is much more fitting.

#### **D. Australia**

Australia’s approach is slightly different again, with a much more relaxed take on the traditional provocation doctrine.<sup>143</sup> There are eight territories all with their own jurisdiction and statutory or common law crimes and defences. Yet the way each has dealt with the issue of battered women killing their abusers has made it the “trend-setter” on the law in this area<sup>144</sup>. Most states have reformed to eliminate the imminence requirement of self-defence<sup>145</sup>. Both Tasmania and Victoria abolished the provocation defence<sup>146</sup>, although in varying ways. Whilst Tasmania’s approach was to rely mostly on sentencing discretion, Victoria enacted a new crime of defensive homicide with no minimum sentence<sup>147</sup>. It is important to bear in mind that these states had this luxury afforded to

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<sup>140</sup> See Eric Y Drogin, “To The Brink Of Insanity: ‘Extreme Emotional Disturbance’ in Kentucky Law” (1999) 26 Northern Kentucky Law Review 99, 100

<sup>141</sup> *McClellan v Commonwealth* 715 S W 2d 464 (ky 1986) 468

<sup>142</sup> See (n.59) p256

<sup>143</sup> Aya Griber. ‘A Provocation Defense’ (2014) 103 California Law Review 273, 280

<sup>144</sup> Forrell (n.107) p49

<sup>145</sup> See *Secretary* 131 F.L.R 124 a case of a woman killing her husband as he slept. It was held that all that was required was a continuing threat of future harm rather than imminent danger, at 132. See also Crimes (Homicide) Act 2005 9AH (Vict.), where circumstances of ‘family violence’ can render the conduct necessary even without the threat of immediate harm.

<sup>146</sup> Victoria – Crimes (Homicide) Act 2005, Tasmania – Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003

<sup>147</sup> Crimes (Homicide) Act 2005 No 77/2005 4,9 AD (Austl), later repealed.

them through the process of abolishing the mandatory minimum sentence for murder<sup>148</sup>. Attractive as this seems, it is important to bear in mind that this scenario cuts juries out of the equation. It would be difficult to call this a step in the right direction.

The movement to amend self-defence law rules rather than seeking a modified partial defence to accommodate them seems somewhat idealistic, and does not address the pre-emptive and sometimes premeditated actions taken. Western Australia has extended self-defence so that the defendant can act to protect themselves or another against a harmful act which is not imminent, as long as they have a belief based on reasonable grounds that it is necessary.<sup>149</sup> If it is unreasonable then excessive force self-defence might apply. As suggested earlier, the problem with self-defence is its speculative nature – we can never say with certainty if the force used was in fact necessary to thwart an attack, as there is always the possibility of an intervening act<sup>150</sup>. It might not be likely that something will happen to prevent the attack from happening, but if it is conceivable then it must be questionable whether or not the retaliatory attack was necessary. This is an extremely important question in cases of non-confrontational actions. What we are in fact asking is if we should give the aggressor the benefit of the doubt that he would have changed his ways. In the famous *Susan Falls* case,<sup>151</sup> Applegarth J said that in a case of a battered woman, there would continue to be violence, so the risk is ever present.<sup>152</sup> In the Northern Territory case of *Secretary v The Queen*<sup>153</sup>, it was decided by Mildred J that as long as the person making a threat has the ability to carry it out, there is no need for fear<sup>154</sup> of immediate violence. It is an ability to effect a purpose, having knowledge of the facts. This seems to suggest that there need only be a relationship with a dangerous nature where a serious attack could and would happen in the near future.<sup>155</sup>

### ***E. The Queensland Approach***

Queensland's take on the situation has been extremely distinctive, and they have dealt with the dilemmatic choices presented in a bespoke manner to their territorial counterparts. They have created a partial defence specifically to deal with the battered women issue. It was borne out of realisation that self-defence is very difficult to apply to non-confrontational homicide cases of

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<sup>148</sup> Sentencing Act 2002, Section 102

<sup>149</sup> Criminal Code 1913 (WA) s248

<sup>150</sup> See Paul H Robinson, "Justification Defences in Situations of Unavoidable Uncertainty: A Reply To Professor Ferzan" (2005) 24 Law and Philosophy 775

<sup>151</sup> *Susan Falls and others* (supreme court of Queensland, Applegarth J, 26<sup>th</sup> May 2010)

<sup>152</sup> See (n.42) p471

<sup>153</sup> (1996) SNTLR 96

<sup>154</sup> *Ibid*, 104

<sup>155</sup> (n.42) p476



battered women killing their abuser.<sup>156</sup> Since Queensland, much like English law, have a mandatory life sentence, an accessible route to mitigation was required.<sup>157</sup> As opposed to trying to extend self-defence recently, a level of culpability is retained:

*304B Killing for preservation in an abusive domestic relationship*

- (1) *A person who unlawfully kills another (the deceased) under circumstances that, but for the provisions of this section, would constitute murder, is guilty of manslaughter only, if –*
- (a) *The deceased has committed acts of serious domestic violence against the person in the course of an abusive domestic relationship; and*
  - (b) *The person believes that it is necessary for the person’s preservation from death or grievous bodily harm to do the act or make the omission that causes death; and*
  - (c) *The person has reasonable grounds for the belief having regard to the abusive domestic relationship and all the circumstances of the case*<sup>158</sup>

The explanatory notes accompanying this addition to homicide law asserted that the partial defence is to apply to killings which are committed out of both fear and desperation, when the defendant genuinely believes there is no other course of action to escape the impending danger.<sup>159</sup> The unique element to this defence is that the focus is on what is reasonable to that defendant based upon the whole history of the abusive relationship, and it is to be applauded. The law must explore a battered woman’s reality in order to accurately assess her culpability.<sup>160</sup>

This new route to manslaughter for battered women who kill their abuser came into force just a few months before English law’s partial defence of loss of control. It is not restricted to battered women, but will equally cover family, informal care and intimate relationships, including same-sex.<sup>161</sup>

Comparing this template to the provisions of the new English partial defence of loss of control contained in the Coroners and Justice Act 2009 proves instructive: it is evident that Queensland’s perspective is far more enlightened, and we should learn from comparative precepts. It is tailored closely to the predicament of battered women, without need for what a reasonable person might do or even a reasonable battered woman might do. Yes, she must have reasonable grounds for believing that causing the abuser’s death was necessary in order to avoid death or serious injury herself, but this is having regard only to her relationship’s background and the specific details of this

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<sup>156</sup> Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation* (Report No 64, 2008) 313

<sup>157</sup> Criminal Code Act 1899 (Qld) section 305

<sup>158</sup> Criminal Code Act 1899 (Qld) section 304B, as amended

<sup>159</sup> Explanatory Memoranda, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009 (Qld) 2

<sup>160</sup> Forell and Matthews (n.74) 168

<sup>161</sup> Michelle Edgely and Elena Machetti, “Women Who Kill Their Abusers: How Queensland’s New Abusive Domestic Relationships Defence Continues To Ignore Reality” (2011) 13 *Flinders Law Journal* 125, 127

case.<sup>162</sup> This defence does not concern itself with what a battered woman might have done in this situation. It is concerned with the defendant, her unique knowledge of her partnership, and how this explains her perception of danger. Also note there is no loss of self-control needed; no frenzied attack, and no spontaneous eruption. The fundamental requirement is merely a woman acting in self-preservation.<sup>163</sup>

Queensland's solution to the problem does not go as far as the United States strive to, as the charge is reduced only for murder to manslaughter rather than an acquittal; the grounds for this being that the act was wrongful and not justified, but excused in part. This is due to the lack of triggering assault, and many states in the U.S. would do well to take note. We must remember that the sleeping abuser still has rights; but he violates her rights every day, and this may well be why no triggering assault or immediate danger is deemed necessary.<sup>164</sup> With other territories also accepting self-defence pleas and acquitting women in this position,<sup>165</sup> the decision to retain a partial defence aimed at such cases has not been universally popular. Some academics have claimed that if there has been a history of extreme abuse, even a non-confrontational homicide should be justified based on her 'reasonably-grounded belief' that she had no other option.<sup>166</sup> It has also been pointed out that this has led to Queensland's self-defence doctrine being left unaltered, with the imminence requirement still intact,<sup>167</sup> but was reform necessary? In non-confrontational circumstances, the woman can use the new defence to seek a manslaughter conviction, acknowledging that some level of culpability is necessary. If there was confrontation, the traditional self-defence rules would suffice.

What if there was some kind of triggering assault? It is possible that both self-defence and this partial defence could be raised. If this happens, are the jury likely to acquit rather than convict her of manslaughter?<sup>168</sup> In 2010, the first case to see this partial defence in action has all but quashed that notion. Susan Falls<sup>169</sup> bought a gun, and two weeks later she drugged her husband and shot him in the head. She had been subjected to physical and emotional abuse throughout her relationship, and her husband would frequently make threats towards her family and their children. He had killed nine

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<sup>162</sup> See Anthony Hopkins and Patricia Easteal, "Walking in Her Shoes: Battered Women Who Kill in Victoria, Western Australia and Queensland" (2010) 35 *Alternative Law Journal* 132

<sup>163</sup> Ewing n(60) 79; Celia Wells, "Battered Woman Syndrome and Defences To Homicide: Where Now?" (1994) 14 *Legal Studies* 266, 273

<sup>164</sup> The abused woman is not only subject to violence but also made to suffer in other ways, such as degrading treatment. Judy Norman was forced to eat dog food from a bowl on the floor, *State v Norman* 324 N.C. 253, 378 S.E. 2d 8, 1989

<sup>165</sup> For example, the New Zealand case *Wang* (1990) 2 NZLR 529

<sup>166</sup> Hopkins and Easteal (n.162)

<sup>167</sup> Hopkins and Easteal (n.162) p135

<sup>168</sup> See Edgely and Machetti (n.161)

<sup>169</sup> *Susan Falls and others* (supreme court of Queensland, Applegarth J, 26<sup>th</sup> May 2010)

pet dogs throughout their relationship. The defendant had tried to seek assistance from the police on more than one occasion, but found them to be unhelpful. On the day of the fatal act, the deceased had told the defendant that he would kill one of their children if her mother came to visit. She was due to arrive a few days later, and the defendant had not been able to deter her from visiting. The deceased told the defendant he would kill their infant son and make it look like cot death, and she truly believed him. The jury were instructed on both self-defence and the new partial defence, with Applegarth J advising them to take into account the history of the relationship. After hearing the evidence of domestic abuse, the jury were sympathetic to her circumstances. The defendant was acquitted on grounds of self-defence, rather than being convicting of manslaughter by reason of preservation in an abusive relationship, even though a considerable amount of premeditation was present.

This case certainly seems to negate any suggestion that Queensland's abusive relationship defence will deny battered women an acquittal,<sup>170</sup> but it continues to be a concern to some. Enactment of the partial defence does not give consideration to how lenient a jury may be after the facts of the case have been communicated,<sup>171</sup> and it has been referred to as the "second best solution".<sup>172</sup> The sole fact that Susan Falls was acquitted despite the strict self-defence rules in Queensland (hence the need for the partial defence) should bring comfort to such concerns.

#### ***F. The Demise of Excessive Force Self-Defence***

As stated earlier, excessive force in self-defence was, for a time at least, accepted in Australian common law. The partial defence was first recognised in the case of *Howe*<sup>173</sup>, where Mayo J held that if a defendant is found to have used more force than reasonably necessary in self-defence, the defendant will be guilty of manslaughter<sup>174</sup>. However, this doctrine was changed by a Privy Council decision in the Jamaican case of *Palmer*<sup>175</sup>, with the courts refusing to recognise the partial defence and stating that the complete defence of self-defence would either succeed or fail<sup>176</sup>. This would not prove to be the end for excessive force self-defence, as it was yet again recognised when the High Court held that not only that Privy Council decisions would no longer be binding, but that *Howe* was good law<sup>177</sup>. This would mean that juries would be instructed on excessive force self-defence as an

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<sup>170</sup> Edgely and Machetti (n.161) p173

<sup>171</sup> (n.42) p481

<sup>172</sup> (n.16) p1

<sup>173</sup> *Howe* (1958) S.A.S.R.95, 121

<sup>174</sup> *Ibid.*, 122

<sup>175</sup> *Palmer v The Queen* (1971) 2 W.L.R 831

<sup>176</sup> At that time Privy Council decisions (Australian or not) were binding on all courts, including the Australian high court. This was reaffirmed in the case *Edwards v R* (1973) A C 648

<sup>177</sup> *Viro* (1978) 141 C.L.R 88

option in self-defence cases. This position seemed like a solution which should be embraced, with the partial defence filling a gap that the provocation defence had never managed to cover. It was, therefore, astonishing that the partial defence would yet again be retired from common law, rejected by the High Court in the case of *Zecevic*<sup>178</sup>. The reasoning given for this unexpected decision was that the partial defence not only lacked the support of solid precedents, but was also difficult for juries to comprehend<sup>179</sup>. Yeo speculates<sup>180</sup> that the problem was merely how the partial defence was being presented to juries, pointing out that the Irish Supreme Court had accepted excessive force self-defence since approving the *Howe* decision without any comprehension problems for juries<sup>181</sup>.

### **G. New Zealand**

New Zealand have abolished their provocation defence altogether,<sup>182</sup> leaving it to a mitigating factor at the sentencing stage, in similar vein to the Australian territory of Tasmania.<sup>183</sup> Without a mandatory life sentence for murder, abolished in New Zealand in 2002,<sup>184</sup> this may seem like an attractive option. It has merely relegated the issues associated with the defence of provocation to the sentencing hearing. This option for reform does not promote fair labelling of the crime which suits the diminished culpability of the defendant. The New Zealand Law Commission had concluded that the benefits of abolishing provocation outweighed any negative connotations,<sup>185</sup> but this solution to the provocation dilemma is superficial. The mitigating factors in the case still need to be discussed, and the appropriate place for doing so is in front of the trial judge and jury.

The Law Commission's argument was that battered women would be better served by self-defence, with provocation not benefiting such situations enough to warrant its retention.<sup>186</sup> Having studied cases in Auckland and Wexington from 2001 to 2005, they found only one case where a battered woman had successfully used the provocation defence, affording them the opportunity to call such scenarios 'rare'. Another study conducted over a ten year period from 2000 to 2010 showed ten cases of battered women who had killed their abuser, with

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<sup>178</sup> *Zecevic v DPP (Victoria)* (1987) 71 A.L.R 641

<sup>179</sup> *Ibid.*, 461

<sup>180</sup> Stanley Yeo, "The Demise of Excessive Self-Defence in Australia" (1988) 37 *International and Comparative Law Quarterly* 348

<sup>181</sup> *People v Dwyer* (1072) I.R. 416

<sup>182</sup> Crimes (Provocation Repeal) Amendment Act 2009 No64, Section 4

<sup>183</sup> Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003

<sup>184</sup> Sentencing Act 2002, Section 102

<sup>185</sup> New Zealand Law Commission, *Some Criminal Defences With Particular Reference to Battered Defendants* (NZLR R73,2001) [116]

<sup>186</sup> *Ibid.*, [121]

three cases where provocation was successful and a further two where provocation may have been the basis of a guilty manslaughter plea.<sup>187</sup>

There has recently been much debate in New Zealand over reintroducing a partial defence to fill the gap left by provocation, or amending the self-defence plea to encompass cases of family violence. The controversial nature of the provocation plea reached the attention of the media after the case of Clayton Weatherston<sup>188</sup> attempted to raise the partial defence after murdering his girlfriend, with it seeming as though the victim was the person on trial. On closer inspection, it might have been the way the courts have applied the law rather than inept legal rules which should have received such negative press. The kneejerk reaction to abolish the partial defence altogether without replacing it has eventually been realised, with the New Zealand Law Commission eventually releasing an Issues Paper,<sup>189</sup> leading to a report in May 2016.<sup>190</sup>

This New Zealand Law Commission widely recognises the issues faced not only by battered women who kill, but also other kinds of family violence. They refer to family violence as being a ‘gendered phenomenon’ in need of attention.<sup>191</sup> The commission articulate that the types of homicide within their terms of reference account for only two per cent of homicides in New Zealand,<sup>192</sup> but this does not mean there is not an obvious gap left by the lack of partial defences in New Zealand.<sup>193</sup> This hole cannot be filled by mere sentencing mitigations, with the murder conviction stigmatisation remaining,<sup>194</sup> so there is a significant need for reduced culpability. The Commission have also noted that such mitigations are not always functional: *“Sentencing outcomes have been harsher than was intended for victims of family violence who kill their abuser”*.<sup>195</sup>

The New Zealand Law Commission had reflected on recent changes on England and Wales, Queensland, Canada and Ireland, but their conclusion is that reform overseas ‘discloses no best practice’, merely demonstrating that there are a number of avenues to investigate.<sup>196</sup> One thing they do note is that while provocation is ‘notorious’, most jurisdictions have subscribed

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<sup>187</sup> (n.42) p483

<sup>188</sup> Clayton Weatherston v The Queen (2011) SC 81

<sup>189</sup> New Zealand Law Commission, ‘Victims of Family Violence Who Commit Homicide’ (2015)

<sup>190</sup> New Zealand Law Commission, ‘Understanding Family Violence: Reforming the Criminal Law Relating to Homicide’, Report 139 12<sup>th</sup> May 2016

<sup>191</sup> *Ibid.*, 2.14

<sup>192</sup> *Ibid.*, 2.63

<sup>193</sup> At present, there are only two partial defences, those of infanticide and suicide pact.

<sup>194</sup> The mitigations are listed Sentencing Act 2002 s9(2) (a) – (g), including conduct of the deceased, remorse shown and previous good character.

<sup>195</sup> (n.190) 5.35

<sup>196</sup> (n.190) 5.37

to it at some point.<sup>197</sup> Their overall conclusion is that reform should take the shape of either a new partial defence, such as excessive force self-defence, loss of control, diminished responsibility or self-preservation, which would once again allow the jury to take part in assessing the level of culpability,<sup>198</sup> or the creation of a new homicide offence.<sup>199</sup> The Commission do note that no solution would be likely to cover all scenarios of intimate homicides.<sup>200</sup>

#### **H. Canada**

Although Canadian law has very traditional provocation defence and self-defence requirements, the way in which the law has been applied is much more progressive.<sup>201</sup> The provocation partial defence reduces murder to manslaughter if committed in the heat of passion due to sudden provocation, which would deprive the ordinary person of self-control.<sup>202</sup> However, Canada's concept since the early 1990s has been to consider battered woman syndrome a mental state which a normal woman might possess, not only in regards to provocation claims, but also for self-defence.<sup>203</sup> This is to be preferred over the English approach in the early 1990s, which often deemed such women as 'inherently abnormal and impaired'.<sup>204</sup> In *Lavallee*, the courts held that it was not the presence of battered woman syndrome which provided a defence for the defendant, rather that it was a tool for the jury to assess the context of the violence.<sup>205</sup> Although provocation has proved problematic for battered women who kill in Canada at times,<sup>206</sup> and the self-defence statute itself is limiting,<sup>207</sup> the application of self-defence has been relaxed in recent years. Canadian law is not without problems in this area, but the modern approach to the traditional doctrines is refreshing.

Canadian law allows for discretionary sentencing for a manslaughter conviction,<sup>208</sup> but the mandatory sentence for murder remains rigid, at twenty-five years before parole for first

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<sup>197</sup>(n.190), 6.41

<sup>198</sup> (n.190) 8.18 – 8.31

<sup>199</sup> (n.190) 8.32 – 8.38

<sup>200</sup> (n.190) 8.41

<sup>201</sup> The provocation provisions have been described as 'distinctly traditional and masculine', Forell (n.107) p46

<sup>202</sup> Criminal Code RSC ch C-34 215(1) (2) (1970) (Can)

<sup>203</sup> *R v Lavallee* (1990) 1 S.C.R 852, Alexandra L Wannop, "Battered Woman Syndrome and the Defense of Battered Women in Canada and England" (1995) 19 Suffolk Transnational Law Review 251, 267

<sup>204</sup> *Ibid.*, 271

<sup>205</sup> *R v Lavallee* (1990) 1 S.C.R 852, 889-890

<sup>206</sup> *R v Whynot*, 9 C.C.C. 3d 449 (Can N.S. Ct App 1983)

<sup>207</sup> Criminal Code RSC ch C-34 34(2) (1970) (Can) self-defence is justified if the fatal act is committed under reasonable apprehension of death or grievous bodily harm, and the defendant believes on reasonable and probable grounds they cannot otherwise preserve themselves from such harm.

<sup>208</sup> Canadian Criminal Code RSC ch C46 236(a), (b), with a minimum four year term for use of a firearm, but no minimum for other methods.

degree murder, and ten for second degree.<sup>209</sup> This makes the inclusion of a partial defence vital to accessing justice in this area, with such extreme differences in the sentencing regimes for murder and manslaughter. Currently, there seems to be a disparity from sentencing judges between the punishment for men who kill in a jealous rage and battered women who kill. In a recent case study, it was determined that men pleading provocation typically receive a sentence of six to twelve years, whilst women are likely to get a maximum of two years down to a suspended sentence.<sup>210</sup> This really shows the judicial system to be making decisions based on the merits of the case, ensuring the punishment fits the crime, after a string of cases causing a negative public reaction when provocation was successfully raised in cases of male jealousy.<sup>211</sup>

### **VIII. Ahluwalia v Thornton – Fear of Violence v Justifiable Sense of Being Wronged**

There are two limbs of the English partial defence of loss of control which a battered woman might rely on, having killed her abuser. Which option should she choose? We often group similar cases together into a particular category of homicides, such as ‘battered women who kill’, but the disparity between such cases can be vast. The case might be a confrontational homicide, during an episode in which the deceased is violent towards the defendant, but not serious life-threatening violence which might provide a successful plea of self-defence. It could be a non-confrontational homicide, committed when the defendant is sleeping or eating at the dinner table. The history of the relationship might include physical, sexual, mental or emotional violence, or a combination of these. It could involve threats of violence or actual violence to a third party, such as the defendant’s children, brothers, sisters or parents. For this reason, presuming that only the first qualifying trigger applies to such vast a category of cases as battered women who kill their abuser is a mistake.

Casting aside the loss of control element, which is problematic for battered women in most situations, the circumstances might fit adequately into the fear of serious violence limb in the majority of cases, but in others a justifiable sense of being seriously wronged might be more appropriate. The fear of serious violence concept seems to have been developed for cases such as battered women killing their abuser, but it is not necessarily the only qualifying trigger for which they meet the criteria. This might seem as if the battered women now have more choices than ever before of avenues they can pursue to defend their actions against a charge of murder. Still, no

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<sup>209</sup> Criminal Code 2003 section 745.6

<sup>210</sup> Department of Justice Canada, ‘Report on Sentencing for Manslaughter Cases Involving Intimate Relationships’ (2003)

<sup>211</sup> *R v Stone* (1999) SCR 290, *R v Thibert* (1996) SCR 37

matter which qualifying trigger they put forward, they must have caused a loss of self-control, which is instantly problematic, as discussed earlier.<sup>212</sup>

As stated, it is not necessary; nor is it accurate, to group all battered women together.<sup>213</sup> Most cases have their similarities, but they have their differences too. At first glance, it would appear the fear of serious violence qualifying trigger has been created for battered women who kill, but do not meet the criteria for self-defence, while the 'seriously wronged' trigger is aimed at situations fuelled by anger<sup>214</sup>. Then again, it would be very unfair to say that battered women are not allowed to act out of anger, and even further from the truth to declare that they do not have a justifiable sense of being wronged after years of abuse and suffering. If this history of abuse is indeed grave enough in character, surely this will go a long way towards satisfying the objective test<sup>215</sup>.

Looking back at previous cases, it might be possible to adduce which of the two qualifying triggers they would have been most likely to plead successfully, if we were to remove the loss of control element.<sup>216</sup> In the case of *Ahluwalia*<sup>217</sup>, her husband beat her brutally and advised her that he would do so again later. When he went to the bedroom to sleep, she was desperate to think of a way to prevent that from happening, because she simply could not take any more. She took some petrol upstairs and poured it over his feet, then set it alight. She claimed her intention was not to kill him, merely to prevent him running after her:

*"I'll do something to his feet when he is asleep so that he gets a scar for life, so that he can't run after me."*<sup>218</sup>

This is a case of a woman fearing for her safety acting in self-preservation, and rather than her plan being to kill him, it was merely to fight back in a way which would end his reign of terror and allow her to live without constant fear of his attacks. Sara Thornton's biography tells a much different tale.<sup>219</sup> She suffered similar beatings, and also constantly feared her partner's violent outbursts, but her reaction was much more of righteous indignation. Her breaking point came when she couldn't be a

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<sup>212</sup> Clough (n.3); Edwards (n.63) p89

<sup>213</sup> Just briefly looking at the cases of *Thornton* (No2) [1996] 2 All ER 1023, *Ahluwalia* [1992] 4 All ER 889, *Rossiter* [1994] 2 All ER 752, and *Humphreys* [1995] 4 All ER 1008 shows the disparity between the cases. Some were confrontational, some non-confrontational, and some were somewhere in between with a trivial incident at that very time setting off the fatal act.

<sup>214</sup> Remembering that sexual infidelity is now excluded from forming a qualifying trigger –Coroners and Justice Act 2009, s55(6)(c)

<sup>215</sup> Herring (n.105) p 67

<sup>216</sup> Norrie (n.2)

<sup>217</sup> *Ahluwalia* [1992] 4 All ER 889

<sup>218</sup> See *Ahluwalia and Gupta* (n.86) 200 *Ahluwalia* insists she only wanted to prevent further beatings, and she believed her husband would wake up and put out the fire, saving his life but causing him the kind of pain he regularly subject her to.

<sup>219</sup> *Thornton* (No2) [1996] 1 WLR 1174



victim any longer, and she realised that she was the only one who could save herself from this dreadful situation of violence and abuse. Her case would have been much more likely to succeed as circumstances of an extremely grave character leading her to feel she had been seriously wronged, and justifiably so.<sup>220</sup> It might not seem like an important point to make – as long as the battered woman can meet the requirements of one of the qualifying triggers she has a partial defence. What this does show is that the partial defences are not actually gendered as one might think at first glance, with the first limb being aimed towards women and the latter towards men.<sup>221</sup> Much as a man might act out of fear, a woman may act out of anger.

Bearing in mind that battered women often snap at what seems like trivial provocation, rather than a time when the abuse is at its very worst, this could suggest that these women act when they are angry and frustrated with the dire situation they are in, rather than when they are at their most scared and vulnerable.<sup>222</sup> They live in constant fear from violence, but it is not necessarily what fuels the fatal act, and shouldn't be presumed as such. Wells stated that the old provocation defence conveyed a mixed message. She questioned whether the basis for the defence was a concession to human frailty, or culpability was reduced due to wrongdoing by the victim.<sup>223</sup> Perhaps the qualifying triggers are founded upon both of these concepts, with the first qualifying trigger being established on the idea that the victim has acted in a cruel or violent manner and so contributed to his or her own demise, while the second qualifying trigger is the concession to human frailty, with no fair opportunity to act in the way society would expect due to being confronted with the most grave of situations.<sup>224</sup>

### **IX. Opening the Floodgates**

Recently, new legislation expanded the remit of self-defence to provide access for startled householders using disproportionate force, as long as it is not grossly disproportionate.<sup>225</sup> This sudden jump to include only startled householders in the full defence is peculiar, and already causing debate including when prosecution in such cases is necessary.<sup>226</sup> There is no legal

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<sup>220</sup> It is her emotions and not her actions that were justified.

<sup>221</sup> Horder (n.103) p136

<sup>222</sup> Wells asserted that battered women often snap over something trivial rather than at the worst of the abuse, which could signify that they are acting when they are angry at the situation rather than scared, see Wells (n.1) 89

<sup>223</sup> *Ibid.*, 105

<sup>224</sup> See generally, Stephen P Garvey, "Passion's Puzzle" (2005) 90 Iowa Law Review 1677

<sup>225</sup> Crimes and Courts Act 2013 s43, amending Criminal Justice and Immigration Act 2008 s76

<sup>226</sup> *R (on the application of Collins) v Secretary of State for Justice* [2016] 2 WLR 1303, The Cps decided not to prosecute a householder who caused serious injury to a trespasser by holding him in a headlock until the police arrived, believing a jury would likely have held the defendant to have a genuine belief such actions were necessary.

justification as to why such cases should be put on a pedestal above other categories of cases as warranting justification for their actions. It is easy to speculate on the reason why this extension of self-defence was not also made available to battered women who kill their abusers. It would be seen as giving women a licence to kill in any kind of abusive relationship, and such a provision might also be claimed to represent the lessening of the criminal law as a deterrent.<sup>227</sup> In cases of battered women who kill, the defendant will often have called the ambulance or the police, admitted to the homicide freely, shown great remorse for their actions and be grieving the loss of their partner<sup>228</sup>. Having any kind of custodial sentence deterrent from a guaranteed conviction would be unlikely to have any effect upon their actions, since their actions are barely reflected on at the time.<sup>229</sup> It is also improbable that the threat of prison would have any such effect because their liberty is already severely compromised in the violent relationship:

*“The net result for the battered woman is a life hardly worth living”.*<sup>230</sup>

The reality is that the woman is acting to protect not only her physical self, but her psychological self, almost from instinct. If a battered woman acts to preserve her psychological self in the same way that a startled householder acts to protect themselves and their property, why are they not treated in the same manner when it comes to defences to murder?

### **A. Psychological Self-Defence**

The creation of a new defence of psychological self-defence is an intriguing idea. It has been suggested as both a partial defence<sup>231</sup> and as a full justificatory defence<sup>232</sup>. Earlier in this article it was made clear that in the United States, cases of battered women who kill their abuser are often acquitted on the grounds of self-defence, even in non-confrontational circumstances. Ewing’s belief is that having a full defence of psychological self-defence would merely legitimise the types of cases where the jury have been granting an acquittal, not because the facts met the legal requirements of self-defence, but because they were sympathetic towards the defendant’s situation, and believed the homicide was rightful retribution.<sup>233</sup> He speculates that while such a defence might be difficult to

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<sup>227</sup> In the unreported case of *Mabel Patterson*, 1983, Lord Wheatley said allowing battered women a defence would set a precedent for battered women to take the law into their own hands. See *Kirsta* (n.23) 196

<sup>228</sup> For example, *Rossiter* [1994] 2 All ER 752

<sup>229</sup> In the case *Brown v United States* 256 US 335.343 (1921) Justice Holmes remarked “detached reflection cannot be demanded in the presence of an uplifted knife”. As explained in this chapter, battered women often feel as though they are living with a knife over their head.

<sup>230</sup> Ewing (n.72) p78

<sup>231</sup> Wake (n.45)

<sup>232</sup> Ewing (n.72)

<sup>233</sup> James R Acker and Hans Tock, “Battered Women, Straw Men, and Expert Testimony: A Comment on *State v Kelly*” (1985) 21 Criminal Law Bulletin 125, 147

implement fairly, and would be open to abuse, this could be remedied by having the burden of proof be placed upon the defendant to minimise risk.<sup>234</sup>

Domestic law has made such a provision for startled householders, but considering this premise as a partial defence, as Wake has endorsed, is a much more practical option.<sup>235</sup> Given that grossly disproportionate force is more likely, particularly in the case of an abuser being killed when sleeping or off-guard, this lack of proportionality regarding a present threat does warrant some level of culpability. Whether as a complete or partial defence, the proposal of a psychological self-defence is a sound and attractive suggestion. It would certainly acknowledge the plight of battered women on a symbolic level. There is no plausible reason why 'self' should apply only to one's physical being or body, with complete disregard for psychological attributes and processes. Mental health and psychological well-being are as important to a person as a limb. Just as a person would act to protect losing an arm, a battered woman reaches a point where she must act or risk losing her 'self' altogether. It is a practical need. It is possible the reason why many battered women who ultimately kill their abuser have previously attempted to commit suicide is because they feel they have no 'self' left to speak of, or there is no hope left for their 'self'.<sup>236</sup> Speaking of battered women who kill their abuser acting in this manner, Ewing stated:

*"They kill to prevent their batterers from seriously damaging, if not destroying, psychological aspects of the self which give meaning and value to their lives".*<sup>237</sup>

If this statement is true, it should provide an excuse to homicide. The question is, does the first qualifying trigger of the new partial defence of loss of control cover this concept adequately? Fear of serious violence is not stipulated as being 'physical' violence, so it is safe to assume that this would also include mental, emotional or psychological abuse. Wake's perception of a partial defence of psychological self-defence (or self-preservation) would equally include battered women, startled householders, and even cases like that of *Clegg*<sup>238</sup>. If the first qualifying trigger, a fear of serious violence, includes protection from either physical or psychological violence or abuse, then all three of these situations might amply be included, should the loss of self-control element be removed.

## **X. Conclusion**

With the modern day societal awareness of violence and emotional abuse within relationships, this subject is no longer taboo, and therefore needs to be acknowledged within legal concepts and rules.

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<sup>234</sup> Ewing (n.72) p89

<sup>235</sup> Wake (n.45)

<sup>236</sup> Walker (n.52) p42. More than a third of the 50 women in Walker's study had attempted suicide.

<sup>237</sup> Ewing (n.72) p62

<sup>238</sup> *Clegg* [1995] 1 AC 482

A decent and thorough understanding of intimate partner violence within the criminal justice system is vital to ensure both sexes are treated equitably before the law. There have been important advancements made for battered women by the creation of this new partial defence. Firstly, by swapping the word 'characteristics' for the word 'circumstances', and most importantly, accepting a fear of serious violence as a qualifying trigger. This advancement is further enhanced by the idea that this trigger might not only include physical violence, but psychological violence too.

Unfortunately, the courts are yet to define fear and terror, or how they will fit within the all-important loss of self-control element, which must be evident for the defence to apply. This remains troublesome. The overall concept is certainly a leap forward from the old provocation defence, but we have not come quite far enough. Hopefully, the recent advancements in regards to recognising coercive control within relationships and placing such behaviour in a criminal context will extend how we see the creation of terror.<sup>239</sup>

It is now evident that battered woman syndrome does not serve these women well. It portrays a less than ideal stereotype<sup>240</sup>, and makes her an irrational being. After all, if her reaction to her situation includes a syndrome, it is unlikely it can be deemed as justifiable behaviour, or even excusable.<sup>241</sup> Justifiable behaviour is not merely tolerated, but actually encouraged<sup>242</sup>. Most unfortunate is her predicament to the point where she goes from being a victim of abuse to a victim of the state, her reactions misunderstood and the stigma of a conviction rather than acquittal to deal with<sup>243</sup>. We are yet to see how the courts will define fear and terror. It is always tempting to ask, if she was so afraid of the abuser and the violence, why she did not leave? Rather than focusing on this question, which should probably be irrelevant in the circumstances, we should instead ask if she was living with "a knife held above her head"<sup>244</sup>. A violent background does not excuse offending outright<sup>245</sup>, but unfortunately, it outwardly appears as though her choosing to stay in the relationship means the domestic violence must have been minimal, or at least tolerable. In such circumstances, we could not explicitly say her fear was reasonable. This seeming 'duty' of the woman to avoid the violence before the confrontation rather than taking action with a pre-emptive strike, seems unrealistic and excessive. We would not ask a man to avoid a particular bar because it is renowned for violence, and he may become involved in an altercation. A battered woman should be afforded the right to

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<sup>239</sup> S76 Serious Crimes Act 2015

<sup>240</sup> Rohit Sanghvi and Donald Nicholson, "Battered Women and Provocation: The Implications of R v Ahluwalia" [1993] Criminal Law Review 728

<sup>241</sup> Dressler (n.57) p464

<sup>242</sup> Paul H Robinson, "A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability" (1975) 23 UCLA Law Review 266, 274

<sup>243</sup> Kirsta (n.23) 208

<sup>244</sup> Nourse (n.117) p1280

<sup>245</sup> Janet Loveless, "Domestic Violence, Coercion and Duress" (2010) 2 Criminal Law Review 93, 107

protect not only her physical state, but her psychological state too, and the emotional control the abuser has over the abused in cases of domestic violence does not begin and end like a violent episode. It is continuous. Therefore, acting at any point to break free of the psychological prison a battered woman lives in might be deemed as an immediate reaction to grave conduct. Wells and Wake both promoted a theory of psychological self-defence,<sup>246</sup> based on self-preservation, to form a new partial defence to murder. This is almost certainly akin to the fear of serious violence limb we have now, but without the problematic loss of control concept.

The difficulty caused by the loss of self-control element to the new partial defence, which remains a quandary for these women, will therefore represent an obstacle to justice. As Norrie observes, the loss of self-control concept has remained, but compassion has not<sup>247</sup>. Not only this, but the concept still remains unexplained and indistinct – we are still unsure as to whether the defence operates for those who had an inability to control themselves, or merely failed to do so<sup>248</sup>. Its inclusion, at least in relation to the first limb of the new partial defence, seems redundant when considering not only that there are safeguards in place to prevent revenge killings<sup>249</sup>, but also the essence of the new law was to protect defendants acting from an emotion which *does not* tally with an instant frenzied attack. A much more relevant phrase to use with the fear of serious violence limb would be that the defendant's actions were spontaneous, but not instantaneous<sup>250</sup>. Wells argued that the attempts of battered women to convert the provocation defence to meet their needs is "paradoxical".<sup>251</sup> It appears that with the loss of self-control concept still paramount for both qualifying triggers, this has not changed. As Hemming has noted, if there is no concession for compassionate killings, why should we have one for those borne of a loss of control?<sup>252</sup>

There is much to be gained from continuously observing the reforms of other jurisdictions and their development through the courts. The Australian territories have certainly been making an effort to solve the provocation problem, albeit with several different solutions. Queensland's innovative legislation, opting to create a partial defence designed specifically for battered women who kill out

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<sup>246</sup> (n.163) p273, Wake (n.45)

<sup>247</sup> Norrie (n.2) 288

<sup>248</sup> Barry Mitchell and Ronnie Mackay, "Loss Of Control And Diminished Responsibility: Monitoring The New Partial Defences" (2011) 3 Archbold Review 5

<sup>249</sup> Coroners and Justice Act 2009, s54(4)

<sup>250</sup> See D Thomas, "Sentencing: Manslaughter By Reason of Provocation – Man Stabbing Partner After Lengthy Period of Criticism and Belittling" (2011) 10 Criminal Law Review 801

<sup>251</sup> Wells (n.266) 272

<sup>252</sup> (n.16) p4

of self-preservation<sup>253</sup>, is an optimal pathway for achieving successful reform and should be praised for ingenuity. It is a shame that this unique parliamentary creation is applicable to only one type of emotion-driven killing, although it should be noted that the defence of provocation also exists in this territory, meaning other emotional-response killings, such as mercy killing, also have a chance at a successful partial defence.<sup>254</sup>The American Institute Model Penal Code's notion of Extreme Mental and Emotional disturbance is fairly vague, but it embraces a wide range of emotions, and requires that only those feelings be reasonable, and not the actions they caused. For these reasons, it should be commended. The Law Commission described it as being preferable to a loss of self-control defence,<sup>255</sup> and this was also remarked by Cairns.<sup>256</sup> This partial defence is certainly a much more satisfactory way to deal with battered women who kill rather than trying to fit them into self-defence, which often occurs,<sup>257</sup> with some States even going as far as preparing guidelines for jury instruction in such cases.<sup>258</sup>

Reed promotes extreme emotional distress as a partial defence, without a need for a loss of self-control, whilst still acknowledging that many more emotions than anger and fear would cause severe emotional turmoil:

*“The emotional narrative in terms of disproportionate angry reaction to provoking stimuli, contextualisation of sexual humiliation or breach of trust, and even extreme grief, despair and frustration attached to witnessing the pain and suffering of a cherished individual, ought to be evaluated by the jury as moral arbiters”.*<sup>259</sup>

This is an attractive option for reform, recognising that trying to categorise all the emotions which might sufficiently adduce a partial defence is futile, whilst addressing the fair labelling problem adequately.

In New Zealand, the Law Commission has realised that complete abolition of the partial defence of provocation was a mistake.<sup>260</sup> It may be that if self-defence was more lenient in

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<sup>253</sup> Criminal Code 1899 (Qld) 304B introduced by Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010 (Qld) s3

<sup>254</sup> Criminal Code 1899 (Qld) s302

<sup>255</sup> Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004) [3.49]

<sup>256</sup> Ilona C M Cairns, ““Feminising” Provocation in Scotland: The Expansion Dilemma” (2014) 4 *Juridical Review* 237, 258

<sup>257</sup> See *Bechtel v State* 840 P.2d 1,6 (Okla Crim App 1992)

<sup>258</sup> See California jury instructions – criminal 9.35.1 (2009)

<sup>259</sup> Alan Reed, “Quasi-Involuntary Actions and Moral Capacity: The Narrative of Emotional Excuse and Psychological-Blow Automatism” Chapter 7, Ben Livings Alan Reed Nicola Wake *Mental Condition Defences and the Criminal Justice System* (Cambridge Scholars Publishing, 2015) 184

<sup>260</sup> The Crimes (Provocation Repeal) Amendment Act 2009 abolished section 169 Crimes Act 1961

New Zealand, especially in regards to the imminence requirement, this advancement would have been easier to swallow. As the decision of *Wang*<sup>261</sup> proved, where the defendant killed her violent and abusive husband while he slept, this is not the case. With the strict application of self-defence, this situation is unacceptable, and gives new appreciation for domestic reform rather than a route of abolishing provocation along with the mandatory sentence for murder. This idea seems pragmatic at first glance, however, dealing with mitigating factors only at sentencing would mean that the conviction label would not reflect culpability, as we cannot stigmatize some without stigmatizing all. Wilson cogently sums up this dual demarcation:

*“Conviction-labels are as important as justice in the distribution of punishment. They identify distinctive wrongs underscored by corresponding social obligations”.*<sup>262</sup>

The only way to protect categories of defendants who are less culpable than others is through the partial defences. The place for these mitigations to be debated over is in front of a jury, not the sentencing judge. As Lacey notes,<sup>263</sup> in modern society, there is a good, sound and well reasoned case not only for keeping the partial defences we have, but actually expanding them to cover the likes of mercy killing and excessive force self-defence.

We have not quite grasped the nettle as well as Queensland, who fully take into account and appreciate the reality of a battered woman’s situation and reaction. However, we are on the same page as them, as opposed to other Australian territories, and the trend in the United States to allow these women an acquittal. We may be some way towards having a happy medium between the extremes of acquitting her when she did act in a way which should not be encouraged, yet still recognising the reality of human weakness, and her particular situation, by lessening the conviction from murder to manslaughter. Coupling this with lenient sentencing to reflect the circumstances is the best approach possible. Cases like these are the precise reason why the law needs ‘excuses’. Sometimes we just cannot manage to act in the most rational manner when confronted with an abnormal situation. There is no fair opportunity to do so. Even more important is to bear in mind that when under the influence of strong emotions, anyone can be dangerous, even battered women<sup>264</sup>. The provocation defence was fundamentally flawed, and the partial defence of loss of self-control is by no means perfect, but it does potentially make manslaughter an available outcome

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<sup>261</sup> *Wang* (1990) 2 NZLR 529

<sup>262</sup> William Wilson, “Murder and the Structure of Homicide” Chapter 2, B Mitchell and A Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 34

<sup>263</sup> Nicola Lacey, “Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds” Chapter 5, B Mitchell and A Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 129

<sup>264</sup> Morse (n.129)

for battered women who kill. Yet several barriers appear to remain before the path will be clear to justice, which would only be remedied by further reform. At the very least, the loss of control element to the defence will need to be removed to give battered women who kill the true path to justice they deserve.

We have moved closer to being able to deliberate over a battered woman's experiences when we consider her actions; this much is true. The step from characteristics to circumstances was certainly a victory for battered women killing the men who abuse them. Yet we still need to ask about the reasonableness of the victim: for example, whether or not a reasonable man would make his wife suffer such degradation.<sup>265</sup> It is probably safe to say that, in this area, we have changed the scenery but not the situation. The first limb of the new partial defence is meant to be a solution to the battered woman dilemma, but instead we are still left with an anger related concept which will not meet the needs of those acting out of despair, fear or terror. Recognising and accrediting fear is crucial; it needs to be more than purely an academic exercise, appearing only by name and not by meaning in the new partial defence<sup>266</sup>. Regardless of which qualifying trigger a battered woman pursues, we are still left with one remaining problem: loss of self-control. This needs to be remedied, and pathways to reform are available. Either removing loss of control from the current partial defence, or creating a new partial defence without it as Queensland have are without doubt the most attractive solutions available. It is imperative that such solutions become integrated into English law to continue the road to justice the Coroners and Justice Act has only begun to create.

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<sup>265</sup> Victoria Nourse, "After The Reasonable Man: Getting Over The Subjectivity/Objectivity Question" (2008) 2 *New Criminal Law Review* 33

<sup>266</sup> Yeo (n.29) p438, discussion on fear showing women are targets rather than instigators of violence.