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## **Defences to Murder: A Woman-Centred Analysis**

**Anna Catheryn Gausden**

### **Material Abstract**

This thesis has developed a woman-centred analytical framework and accompanying court room strategy to critically evaluate the legal construction of abused women who kill and their reactions to abuse in the context of the defences to homicide. This builds upon the existence of extensive empirical evidence which explains the defensive nature of female perpetrated intimate partner homicides. Despite such information, the recognition of abused women's reactions as reasonable within the context of domestic violence is not reflected within the defences to homicide. Instead, abused women must fall within masculine constructions of appropriate reaction, or else be constructed within a psychological framework premised upon the existence of a mental abnormality.

In order to challenge the legal construction of abused women who kill, this thesis evaluated the strategic possibilities apparent within the admissibility of expert testimony concerning domestic violence. It used abused women's narratives and social contexts to demonstrate the reasonable nature of their reaction. The potential of such testimony was explored when the strategy was applied to the current partial and complete defences to homicide. Upon application, it became clear that the defences to homicide are implicitly gender biased, making the admissibility of such testimony insufficient to challenge prevailing and masculine notions of appropriate behaviour.

Therefore, this thesis has argued that it is necessary to implement a partial defence of excessive force in self defence. This would recognise the defensive nature of abused women's reactions to abuse whilst enabling abused women's narratives and social contexts to be used as a means of challenging the current legal constructions of abused women who kill. It is hoped that these narratives will be used to facilitate further legal reform until abused women's reactions to abuse can appropriately be incorporated into the complete defence of self defence.

# **Defences to Murder: A Woman-Centred Analysis**

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**2011**

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For my loving family.



## Introduction

### 1. Domestic Violence and Intimate Partner Homicide

Domestic violence exists within society as a pattern of controlling behaviour, which includes physical, emotional, sexual, financial and psychological abuse of one person by another.<sup>1</sup> Government statistics indicate that around twenty eight percent of women have experienced some form of domestic violence since the age of sixteen. This is the equivalent of four and a half million women.<sup>2</sup> Statistics also indicate that seventy seven percent of the victims of domestic violence are women, and that repeat victimisation occurs in sixty six percent of these incidents.<sup>3</sup> Domestic violence has a detrimental impact on an abused woman's physical health and wellbeing, as the effects of domestic violence include acute and chronic pain, bruises, broken bones, facial trauma and skeletal injuries.<sup>4</sup> Domestic violence can also cause a loss of appetite, eating binges, self induced vomiting, headaches, and fainting.<sup>5</sup> There are also physical symptoms from sexual violence, including menstrual problems, urinary tract infections and sexual dysfunction.<sup>6</sup> Sexual abuse also leads to pregnancy. In certain cases, pregnancy can escalate the severity of abuse, as it is estimated that women are four times more likely to experience heightened abuse as the result of an unplanned pregnancy. Consequently, any of the abuser's stress or frustration is directed back at the mother and her unborn child, as they are perceived to be the source of the tension.<sup>7</sup>

Despite the severe effects of domestic violence, some abused women still find it very difficult to terminate an abusive relationship, as some women are held in abusive relationships by a network of interrelated behaviours, including social and economic

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<sup>1</sup> K.M. Digirolamo, 'Myths and Misconceptions about Domestic Violence' (1995-1996) 16 Pace L.Rev. 41, 44

<sup>2</sup> A. Walker, J. Flatley, C. Kershaw and D. Moon, 'Crime in England and Wales 2008/09: Findings from the British Crime Survey and Police Recorded Crime' (Volume 1). Home Office Statistical Bulletin, No. 11/09. (Home Office, London, 2009)

<sup>3</sup> A. Walker, J. Flatley, C. Kershaw and D. Moon (n2)

<sup>4</sup> Grisso et al, 'A Population-Based Study of Injuries of Inner City Women'. (1991) 143 (1) American Journal of Epidemiology 59, 63

<sup>5</sup> P.W. Sharps and J. Campbell, 'Health Consequences for Victims of Violence in Intimate Relationships' in X.B. Arriaga and S. Oskamp (eds) 'Violence in Intimate Relationships' (Sage Publications 1999) 167

<sup>6</sup> B. Bergman et al, 'Utilization of Medical Care by Abused Women.' (1992) 81 American Journal of Public Health 1486, 1488

<sup>7</sup> L. Heise, 'Reproductive Freedom and Violence Against Women: What are the Intersections?' (1993) 27 The Journal of Law, Medicine and Ethics 206, 212

deprivation.<sup>8</sup> These behaviours reinforce a level of dependency upon the abuser and render the abused woman unable to leave. According to the Psychologist Lenore Walker, remaining in an abusive relationship is further encouraged by the psychological effects of domestic abuse, which she likens to symptoms similar to those of Post Traumatic Stress Disorder, (PTSD).<sup>9</sup> These symptoms include, flashbacks, difficulty sleeping, nightmares and blackouts. The implications of such symptomology on the ability to terminate an abusive relationship were investigated by Arias. From a study of sixty eight abused women residing in a shelter, it was found that the relationship between psychological abuse and the intention to leave the relationship would be stronger among women who did not suffer from PTSD symptomology than among those who did.<sup>10</sup> Therefore, when a woman is subjected to extreme emotional abuse, she may feel as though she cannot leave the relationship. She is effectively controlled by her abusive partner, keeping her sufficiently low, isolated and unable to seek help.

It is estimated that two women per week are killed by their current or former partners,<sup>11</sup> which accounts for forty percent of all female homicide victims.<sup>12</sup> Brown and Aldridge claim that the link between domestic violence and intimate partner homicide is well established with these links being consistent over the past ten years.<sup>13</sup> Research conducted on intimate partner homicide suggests that men often kill their intimate partners after subjecting them to lengthy periods of coercive abuse and assaults.<sup>14</sup> A key feature of male perpetrated spousal homicide methodology is overkill. This involves inflicting much more injury to the victim than is needed to kill them. Although it can be present in both male on female and female on male intimate partner homicides, Cazenave and Zahn found that men were more violent when they

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<sup>8</sup> H. Abrahams, *Supporting Women after Domestic Violence: Loss, Trauma and Recovery*. (Jessica Kingsley Publishers 2007) 20

<sup>9</sup> L. Walker, *The Battered Woman Syndrome* (Springer 1984) 111

<sup>10</sup> I. Arias, 'Women's Responses to Physical and Psychological Abuse' in Arriaga X. B and Oskamp, S. (eds) *Violence in Intimate Relationships* (Sage Publications 1999) 150

<sup>11</sup> D. Povey (Ed) (2004). Crime in England and Wales 2002/3: Supplementary Volume 1 - Homicide and gun crime. Home Office Statistical Bulletin. Home Office: London. D. Povey (Ed) (2005). Crime in England and Wales 2003/2004: Supplementary Volume 1: Homicide and Gun Crime. Home Office Statistical Bulletin, No. 02/05. Home Office: London. Home Office (1999). Criminal statistics, England and Wales. Home Office: London. Department of Health 'Responding to domestic abuse: A handbook for health professionals.' (Department of Health 2005)

<sup>12</sup> D.Povey (2005) (n11).

<sup>13</sup> M.L. Aldridge and K.D. Browne, 'Perpetrators of Spousal Homicide. A Review.' (2003) 4 Trauma, Violence & Abuse 265, 266

killed their spouse than when they killed any one else, whether known or unknown to them.<sup>15</sup> Crawford and Gartner found that in sixty percent of cases of male perpetrated intimate partner homicide, men strangled or beat their victims using violence that went far beyond what was needed to kill them.<sup>16</sup>

The methodologies of male perpetrated intimate partner homicide can be contrasted against cases of female perpetrated intimate partner homicide, as data obtained by Swatt and He demonstrates that when women commit intimate partner homicide two key variables are engaged. These are evidence of pre-homicide injury and the use of a knife,<sup>17</sup> demonstrating that when women kill, they usually do so in response to violence and with a weapon to alleviate the power imbalance between themselves and their abuser.<sup>18</sup> The pre-homicide injury variable was further evidenced in Trotman's study of thirty women who were incarcerated in a California prison for killing their partners. Of the thirty women studied, twenty nine had been battered and exposed to other types of physical and mental pre-homicide injury, and twenty said that when the homicide occurred, they were trying to protect either themselves or their children.<sup>19</sup>

In contrast to the motivations underpinning many female perpetrated intimate partner homicides, research on male perpetrated intimate partner homicide motivation finds that the two most commonly stated intentions for men killing their female partners are to punish her for ending the relationship, or to stop her from leaving.<sup>20</sup> Research conducted by Hart indicates that women who leave their abuser are seventy five percent more likely to be killed than those who stay with their abuser,<sup>21</sup> as the act of leaving serves as a form of emotional abandonment and killing the woman for leaving

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<sup>14</sup> M.L. Aldridge and K.D. Browne, 'Perpetrators of Spousal Homicide: A Review' (n 13) 266.

<sup>15</sup> N.A. Cazenave and M.A. Zahn, 'Women, Murder and Male Domination: Police Reports of Domestic Violence in Chicago and Philadelphia' in E.C. Viano (Ed) *Intimate Violence: Interdisciplinary Perspectives* ( Hemisphere Publishing Group 1992) 83-97

<sup>16</sup> M. Crawford and R. Gartner, *Women Killing: Intimate Femicide in Ontario 1974-1990* (Government of Ontario Ministry of Social Services, Women's Directorate, Toronto, 1992)

<sup>17</sup> M. Swatt and N. He, 'Exploring the Difference Between Male and Female Intimate Partner Homicides: Revisiting the Concept of Situated Transactions' (2006) 10 *Homicide Studies* 279, 286

<sup>18</sup> C. R. Silver and D. B. Kates, 'Self- Defense, Handgun Ownership, and the Independence of Women in Violent Sexist Society' in D. B Kates (Ed) *Restricting Handguns: The Liberal Sceptics Speak Out* (Croton-on-the-Hudson 1979) 75-90

<sup>19</sup> J. Trotman, *The Murderess: A Psychological Study of Criminal Homicide* (R and E Research Associates, 1978)

<sup>20</sup> D. Adams, *Why Do They Kill? Men Who Murder Their Intimate Partners* (Vanderbilt University Press 2007) 728

<sup>21</sup> B. Hart, 'National Estimates and Facts about Domestic Violence' (1989) *NCADV Voice* 12, 12

is a way of regaining control. When control is lost, the risk of femicide can increase nine-fold by the ‘combination of a highly controlling abuser and the couples’ separation after living together.’<sup>22</sup> The implication of separation is further reflected in Wilson and Daly’s research findings, which demonstrate that men will often track down their partners and kill them as punishment for trying to terminate the relationship,<sup>23</sup> demonstrating that this sense of proprietariness renders women unsafe in violent relationships, but more so upon termination due to the fundamental belief that one partner is entitled to possess and control the other.<sup>24</sup>

### 1.1 Abused Women Who Kill and the Defences to Homicide

Despite the defensive motivation, and the need for self preservation underpinning the commission of female perpetrated intimate partner homicides,<sup>25</sup> abused women who have killed their abusers have found it very difficult to fall within the ambit of the complete defence of self defence. Abused women who kill have been expected to conform with the rigidly proscribed legal requirements of imminence, necessity, reasonableness and proportionality in order to satisfy the defence. Although these are prima facie gender neutral legal requirements,<sup>26</sup> upon application, they are better suited to situations in which two adversaries of equal size and strength have fought.<sup>27</sup>

This ignores the substantive differences in the commission of male perpetrated and female perpetrated intimate partner homicides, demonstrating that the complete defence of self defence is not structured in a way which reflects the experiences of battered women who kill.<sup>28</sup> It adopts the experiences of men and does not consider

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<sup>22</sup> Campbell, J, et al. ‘Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study’ in Mangai Natarajam (Ed) *Domestic Violence: The Five Big Questions* (Ashgate 2007) 136

<sup>23</sup> M. Wilson and M. Daly, ‘Till Death do us Part’ in Radord, J, and Russel D (eds) *Femicide: The Politics of Woman Killing* (Oxford University Press 1992) 97

<sup>24</sup> C. R. Silver and D.B. Kates, ‘Self- Defense, Handgun Ownership, and the Independence of Women in Violent Sexist Society’ in D. B Kates (Ed) *Restricting Handguns: The Liberal Sceptics Speak Out* (Croton-on-the-Hudson 1979) 75-90

<sup>25</sup> see E. Pizzey, *Scream Quietly or the Neighbours Will Hear* (Penguin 1974)

<sup>26</sup> C. Ewing, *Battered Women Who Kill: Psychological Self Defence as Legal Justification* (Lexington Books 1987) 61

<sup>27</sup> see E. Kenny, ‘Battered Women Who Kill: The Fight Against Patriarchy’ (2007) UCL Jurisprudence Review 17, 30

<sup>28</sup> S. Cubbon, ‘The Dismantling of Patriarchy’ (2000) UCL Jurisprudence Review 253, 271

experiences which depart from these standards as reasonable.<sup>29</sup> By requiring both men and women to adhere to the same standard in the context of self defence, the law seeks to treat equally those whose positions are fundamentally unequal, thus furthering inequality.<sup>30</sup>

In addition to the difficulties abused women face in pleading self defence, the partial defences to homicide have also posed problems for abused women who kill. Before the partial defences to homicide were modified by the Coroners and Justice Act 2009, abused women had to satisfy the requirements of the partial defences of provocation and diminished responsibility as set out in the Homicide Act 1957. The partial defence of provocation as it existed under s3 of the Homicide Act 1957, required abused women to demonstrate that they had been provoked by things said or done to lose their self control, and that a reasonable man might have responded in the same way to the provocation faced by the accused. However, the manifestation of a loss of self control became synonymous with the angry and violent responses typical of male perpetrated intimate partner homicides.<sup>31</sup> Reactions of this nature were recognised as legally and socially reasonable.<sup>32</sup> This left many abused women who killed their abusers outside of the understanding of the legal system, despite empirical evidence demonstrating that abused women do not necessarily suddenly lose control and will often delay the fatal strike and wait until their abuser is off guard before using a weapon to commit the homicide.<sup>33</sup>

Consequently, the legal construction of the partial defence of provocation under the Homicide Act 1957 and the pivotal legal concept of loss of self control, misrepresented abused women who killed their abusers. This enabled misconceptions that abused women actually like violence, provoke violence,<sup>34</sup> are equally as violent and are free to leave the relationship at any time,<sup>35</sup> free to permeate both the social

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<sup>29</sup> P.L. Crocker, 'The Meaning of Equality for Battered Women who Kill Men in Self Defense' (1985) 8 Harv. Women's L.J. 121, 123

<sup>30</sup> H. Kennedy, *Eve Was Framed* (Chatto and Windus 1992) 212-213

<sup>31</sup> E. Kenny, 'Battered Women Who Kill: The Fight Against Patriarchy' (n27) 21.

<sup>32</sup> S. Edwards, *Sex and Gender in the Legal Process* (Blackstone, 1996) Chapters 6, 8, 9

<sup>33</sup> see J. Horder, 'Sex Violence and Sentencing in Provocation Cases' (1989) Crim LR 546

<sup>34</sup> E. Gondolf and E. Fisher, *Battered Women as Survivors: An Alternative to Treating Learned Helplessness* (Lexington Books 1988) 13-15

<sup>35</sup> M.M Dempsey, 'The Use of Expert Witness Testimony in the Prosecution of Domestic Violence' (Crown Prosecution Service 2004) 9

and legal conscious and act as a foundation for understanding abused women who kill. Therefore, social myths have been able to legitimatise legal views about the appropriate nature of women's reactions, resulting in the abused woman and her response to violence being detached from social and legal understanding.<sup>36</sup>

Accordingly, abused women who kill have been able to fall within the legal ambit of the partial defences to homicide if their actions can be excused, as opposed to being recognised as justifiable responses to violence.<sup>37</sup> In order to be excused, abused women have pleaded diminished responsibility. This partial defence requires abused women who kill to demonstrate that their reaction to abuse was the consequence of a mental abnormality.<sup>38</sup> This is achieved through the use of expert testimony on psychological syndromes such as Battered Women's Syndrome (BWS), which exists as a sub-category of PTSD.<sup>39</sup> BWS seeks to demonstrate that many abused women respond to abuse in the same way as others who have been 'repeatedly exposed to different kinds of trauma.'<sup>40</sup> It is applied to help the jury understand the psychological impact of abuse, and explain why the abused woman may have reacted in the manner that she did.<sup>41</sup>

Although BWS aims to explain the reasonable nature of the abused woman's reaction through psychology, the syndrome is highly controversial. BWS constructs abused women who kill according to a pathological interpretation,<sup>42</sup> rather than focusing on the actual abuse sustained and how this shaped the abused woman's eventual reaction to abuse. This further compliments social myths concerning abused women who kill, legitimising the perception that women must be weak, passive and dysfunctional for staying with their abuser and responding the way that they did.<sup>43</sup>

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<sup>36</sup> M.J. Mossman, 'Feminism and Legal Method: The Difference in Makes' (1987), 3 Wisc. Women's L.J. 147, 158

<sup>37</sup> see D.R. Loseke and S.E. Cahill, 'The Social Construction of Deviance: Experts on Battered Women' (1984) 31(3) Social Problems 296

<sup>38</sup> see The Homicide Act 1957, s2(1) which required the defendant to be suffering from an 'abnormality of mind' and The Coroners and Justice Act 2009, s52(1) which requires the defendant to be suffering from an 'abnormality of mental functioning.'

<sup>39</sup> L. Walker 'Battered Women and Self Defense' (1992) 6 Notre Dame J.L.Ethics & pub.pol'y 321, 326

<sup>40</sup> L. Walker 'Battered Women and Self Defense' (n39) 326.

<sup>41</sup> L. Walker, 'Battered Women and Self Defense' (n39) 327.

<sup>42</sup> H. Kennedy, (n30) 200.

<sup>43</sup> M.R. Mahoney, 'Legal Images of Battered Women: Redefining the Issue of Separation' (1991) 90(1) Michigan Law Review 1, 64



Consequently, the inability of both the complete and partial defences to homicide to incorporate the experiences and realities of abused women who kill has led to feminist claims that the law is masculine,<sup>44</sup> as it creates, constructs and reinforces patriarchal assumptions about women.<sup>45</sup> The legal system functions as both a source and reflection of men's patriarchal power by reinforcing patterns of male domination and thus subordinating women.<sup>46</sup> Any deviation from the prescribed masculine behavioural categories is perceived as a disease.<sup>47</sup> This renders abnormal women's reactions to violence as they do not fall within masculine constructed legal categories and ensures that the law plays a continued role in women's subordination, as law shapes societal attitudes as to whether a problem exists.<sup>48</sup> This ensures that the law operates as a form of power with an undisputed claim to truth, which has the effect of disqualifying other discourses.<sup>49</sup> The powerful nature of law and legal knowledge disqualifies abused women's alternative social realities,<sup>50</sup> rendering irrelevant experiences which do not fall within its relevant context. This legal legitimacy claimed by the law extends to every issue in social life and ensures that feminist considerations become discounted.<sup>51</sup> This enables stereotypes concerning abused women who kill to continue to influence legal and social decision making, as society accepts the resulting structure which appears to value men more than women.<sup>52</sup>

## 1.2 The Coroners and Justice Act 2009

In order to try and counter the prevailing gender bias within the defences to homicide, the Coroners and Justice Act 2009 was implemented,<sup>53</sup> abolishing the partial defence

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<sup>44</sup> L.M. Finley, 'Breaking Women's Silence on Law: The Dilemma of the Gendered Nature of Legal Reasoning' (1989) 64 Notre Dame L. Rev 886, 887

<sup>45</sup> J. Rifkin, 'Toward a Theory of Law and Patriarchy' (1980) 3 Harvard Women's L.J 83, 85

<sup>46</sup> V. Bryson, *Feminist Debates. Issues of Theory and Political Practice*. (Macmillan 1999) 72, N.

Levit and R.R.M. Verchick, *Feminist Legal Theory* (New York University Press 2006) 22

<sup>47</sup> G.T. Kaplan and L.J. Rogers, 'The Definition of Male and Female. Biological Reductionism and the Sanctions of Normality' in Sneja Gunew(ed) *Feminist Knowledge. Critique and Construct*' (Routledge 1990) 222

<sup>48</sup> L.M. Finley, (n44) 887.

<sup>49</sup> C. Smart, *Feminism and the Power of the Law* (Routledge 1989) 26

<sup>50</sup> C. Smart, (n49) 4.

<sup>51</sup> C. Smart, (n49) 13.

<sup>52</sup> S.H. Pillsbury, 'Crimes Against the Heart: Recognizing the Wrongs of Forced Sex' (2002) 35

Loy.L.A.L.Rev 845, 848

<sup>53</sup> The Coroners and Justice Act 2009 was implemented in October 2010

of provocation and reforming the partial defence of diminished responsibility.<sup>54</sup> In doing so, it was hoped that abused women who killed their abusers would be able to fall within the ambit of the partial defences to homicide,<sup>55</sup> as the Coroners and Justice Act 2009 recognises that women often commit intimate partner homicide because of fear. The legislation therefore includes fear as well as anger as a justifiable basis for a loss of self control.<sup>56</sup>

Despite the intentions of the Coroners and Justice Act 2009 to better reflect the circumstances in which abused women kill their abusers, this thesis will argue that the retention of the concept of loss of self control ensures that the legislation privileges angry and masculine responses to violence, without being able to fully accommodate the reactions of abused women who kill. Although the recognition of fear is a positive step for abused women, the retention of loss of self control continues to force abused women who kill to explain themselves in accordance with pathological syndromes. This continues to portray those who remain in battering relationships as more pathological and troubled than the men who batter them.<sup>57</sup>

Consequently, the legal framework of the defences to homicide and the relative exclusion of abused women who kill continues to reinforce the belief that what is acceptable for men, is not acceptable for women and vice versa.<sup>58</sup> Therefore, men and masculinity continue to inform the appropriate standard and the legal norm, creating the perception that certain behaviours and responses are more desirable and highly valued.<sup>59</sup> The legal system's treatment of abused women who kill in response to domestic violence reinforces traditional patriarchal attitudes, such as the notion of masculine ownership, control and dominance.<sup>60</sup> The law reflects and subsequently reinforces the unequal power relations within society, and men's comparative

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<sup>54</sup> The Coroners and Justice Act 2009, s54 abolishes the partial defence of provocation as it existed under the Homicide Act 1957, S3, and the Coroners and Justice Act 2009, s52, reforms the partial defence of Diminished Responsibility as it existed under the Homicide Act 1957, s2.

<sup>55</sup> see S. Yeo, 'English Reform of the Partial Defences to Murder: Lessons for New South Wales' (2010) 22(1) Current Issues in Criminal Justice 1

<sup>56</sup> The Coroners and Justice Act 2009, s55(3) 'This subsection applies if D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.'

<sup>57</sup> E. Schneider, *Battered Women and Feminist Law Making* (Yale University Press 2000) 23

<sup>58</sup> S.L. Bem, *The Lenses of Gender: Transforming the Debate on Sexual Inequality* (Yale University Press 1993) 12

<sup>59</sup> A. S. Wharton, *The Sociology of Gender: An Introduction to Theory and Research* (Blackwell Publishing 2005) 34



economic and physical power, which facilitates the use violence as a means of controlling the powerless.<sup>61</sup>

It will be argued that despite the intentions of the legislation to incorporate the social realities of abused women who kill, that the Coroners and Justice Act 2009 leaves abused women who kill in much the same position as before. Abused women's reactions to abuse and behaviours render them unable to fall within the complete defence of self defence. Further, the retention of loss of self control ensures that although the Coroners and Justice Act 2009 recognises that abused women kill out of fear, any gains for abused women who kill have been taken away by the retention of such a legal concept.<sup>62</sup> This leaves abused women with a partial defence of diminished responsibility, which continues to construct reactions to abuse through a narrow psychological lens.

The implementation of the Coroners and Justice Act 2009 and the resulting situation for abused women who kill strengthens feminist claims that the complete defence of self defence is more appropriate for abused women who kill, and that battered women's actions should be understood as justifiable acts of self defence, rather than excusable acts resulting from a mental abnormality.<sup>63</sup> In order to challenge the current defensive framework, feminists have developed numerous strategies to explain why abused women may reasonably perceive danger and use a deadly weapon under circumstances in which a man or a woman who has not been abused might not.<sup>64</sup> This would help the jury to understand that the abused woman's actions are reasonable, rather than abnormal,<sup>65</sup> and demonstrate that the Coroners and Justice Act 2009 is not the only means of reforming the defences to homicide.

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<sup>60</sup> H. Barnett, *Introduction to Feminist Jurisprudence* (Cavendish Publishing Limited 1998) 256

<sup>61</sup> H. Barnett, (n60) 258.

<sup>62</sup> C. Withey, 'Loss of Control, Loss of Opportunity' (2011) *Criminal Law Review* 263, 267

<sup>63</sup> P.L.Crocker, (n29) 131.

<sup>64</sup> E. Schneider and S. Jordan, 'Representations of Women who Defend Themselves in Response to Physical or Sexual Assault' (1978) 4 *Women's RTS. L. REP* 149, 155-158

### 1.3 Chapter Outlines

In response to the implementation of the Coroners and Justice Act 2009 and the development of feminist strategies for reforming the complete defence of self defence, this thesis will further explore the ways in which the complete and partial defences to homicide are structured, and how the resulting structure fails to accommodate the reactions of abused women who kill. The defences neglect to acknowledge the empirical evidence which demonstrates that women and men respond to violence in different ways, and are driven by different motivations. Instead, when women do not fall within masculine constructions of appropriate behaviour and wait until their abuser is off guard before acting, their reactions are perceived as calm, deliberate,<sup>66</sup> and legally abnormal.<sup>67</sup> This ignores abused women's social realities,<sup>68</sup> and neglects to consider the reasons why the abused woman may have responded in such a way.<sup>69</sup>

Therefore, this thesis will argue that the defences to homicide must accommodate a better conception of the reactions of abused women who kill in cases of intimate partner homicide by considering how domestic violence and the relationships between the abuser and the abused<sup>70</sup> shape reactions to violence in cases of intimate partner homicide. A greater recognition of the defendant's factual context is required, ensuring that the courts consider the circumstances of abuse and recognise responses which do not fall within normative masculine constructions as reasonable responses.<sup>71</sup>

Consequently, this thesis will argue that a woman-centred understanding of reaction in domestic violence is required to challenge the current construction of abused women who kill within the defences to homicide. Woman-centred for the purposes of this thesis, requires defences to homicide which are capable of reflecting the gender sensitive social realities of abused women who kill and an incorporation of an

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<sup>65</sup> E. Schneider and S. Jordan, 'Representation of Women who Defend Themselves in Response to Physical or Sexual Assault' (n64) 156.

<sup>66</sup> S. Yeo, 'The Role of Gender in the Law of Provocation' (1997) 26 Anglo-Am L. Rev 431, 433

<sup>67</sup> D. Nicolson, 'Telling Tales: Gender Discrimination, Gender Construction and Battered Women who Kill' (1995) 3 Feminist Legal Studies 185, 201-205

<sup>68</sup> see K. O' Donovan, 'Law's Knowledge: The Judge, The Expert, The Battered Woman and her Syndrome' (1993) 20 Journal of Law and Society 427

<sup>69</sup> see A. McColgan, 'In Defence of Battered Women who Kill' (1993) Oxford Journal of Legal Studies 508

<sup>70</sup> S. Yeo, 'The Role of Gender in the Law of Provocation' (n66) 439.

awareness of women's experiences of abuse within the gender discriminate context of domestic violence.<sup>72</sup>

In order to substantiate the above position, chapter one will critique the current legal construction of abused women who kill through the framework of BWS. It seeks to demonstrate that the current legal framework used to understand the reactions of abused women who kill serves as a means of reinforcing stereotypical assumptions about abused women's social realities and reactions to abuse. The legal reliance upon BWS as a mechanism for interpreting the reactions of abused women who kill has developed from a masculine point of view, and therefore reiterates masculine standpoints and interests to the exclusion of the recognition of abused women's experiences and narratives and how these shape reactions to domestic violence.<sup>73</sup>

In order to challenge the adoption of masculinity as the prevailing legal standpoint, chapter one will develop a woman-centred analytical framework for understanding abused women who kill. It will draw upon existing feminist epistemologies to identify the gendered implications of apparently neutral and objective legal requirements and establish how the law fails to take into account the experiences of abused women who kill.<sup>74</sup> The analytical framework will also be used to develop a sufficiently woman-centred court room strategy, which utilises expert testimony concerning abused women's experiences of abuse. It uses these experiences as a central category upon which to build and dispel existing stereotypes concerning abused women who kill.

In order to build upon the development of a woman-centred analytical framework, it is necessary to apply the resulting woman-centred court room strategy to the current partial defences to homicide in order to critically evaluate the exclusion of abused women's experiences from the ambit of the defences. Chapter two will therefore use the woman-centred analytical framework to critique the way in which legal

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<sup>71</sup> D. Nicolson and R. Sanghvi, 'Battered Women and Provocation: The Implications of R v Ahluwalia' (1993) *Crim. L Rev* 728, 737-738

<sup>72</sup> J. Goodey, 'Sex Trafficking in Women from Central and Eastern European Countries: Promoting a 'Victim-Centred' and 'Woman-Centred' Approach to Criminal Justice Intervention'. (2004) 76 *Feminist Review* 26, 44

<sup>73</sup> D.E. Smith, *The Everyday World as Problematic: A Feminist Sociology* (Northeastern University Press 1987) 200

<sup>74</sup> K.T. Bartlett, 'Feminist Legal Methods' in Katharine T Bartlett and Rosanne Kennedy (ed) *Feminist Legal Theory: Readings in Law and Gender* ( Westview Press 1991) 371

knowledge concerning abused women who kill is reinforced through the partial defences and how this approach encourages and facilitates the continuation of social myths and constructions of abused women's reactions to abuse as abnormal.

Chapter two will argue that the experiences of abused women who kill are incapable of being reflected as reasonable within the current partially defensive framework, due to the legislative affirmation and approval of a legal focus upon objective and apparently gender neutral legal criteria. The retention of the masculine legal concept of loss of self control distorts the experiences and social realities of abused women who kill,<sup>75</sup> confining women who kill to masculine standards of behaviour and expectation and constructions of mental abnormality.<sup>76</sup>

In order to transcend the inadequate construction of abused women who kill within the partial defences to homicide, it is necessary to move towards a woman-centred critique of a complete defence to homicide, that of self defence. Should an abused woman fall within its ambit, then she will be acquitted for the homicide. Chapter three will ascertain whether abused women's experiences and subsequent reactions to abuse can be recognised as reasonable within the complete defence of self defence. It seeks to apply a standard of contextual reasoning to the complete defence to determine why abused women are excluded from its ambit by the objective and justificatory requirements of imminence, reasonableness, necessity and proportionality, despite the defensive nature of their reactions.

However, despite the defensive motivation underpinning female perpetrated intimate partner homicides, the application of a woman-centred analytical framework and accompanying expert testimony are significantly constrained by the complete nature of the defence. Self defence is strongly linked to societal conceptions of appropriate behaviour, which already accept the exclusion of abused women and their reactions from a partially defensive framework, further demonstrating how societal attitudes

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<sup>75</sup> See C.A. Littleton, 'Feminist Jurisprudence: The Difference Method Makes' (1989) 41(3) Stanford Law Review 751, 767 'Much has been made of the maleness of the "reasonable man" standard, which arises in many areas of law, including tort, contract, criminal, and constitutional. Consider the humorous treatment of the "misleading case" of *Fardell v. Potts*, "reported" by A.P. Herbert *Uncommon Law* (Methuan 1935) 1-6 in which the fictional court of appeals announced that "at Common Law a reasonable woman does not exist."

<sup>76</sup> C.A. Littleton, (n75) 767.

towards abused women who kill are able to shape legal practice. Therefore, in the context of the complete defence, the application of a woman-centred analytical framework is unable to change deep rooted and widespread societal perceptions of appropriate behaviour and modify the construction of the defence.

Consequently, chapter four will advocate the introduction of a partial defence of excessive force in self defence. This seeks to pragmatically incorporate the defensive reactions of abused women who kill into a partially defensive framework. This aims to overcome societal resistance to the claims of abused women who kill, and through the partial nature of the defence, modified concepts of self defence are capable of incorporation. This would allow for the gradual recognition and acceptance of the reactions of abused women who kill as reasonable in both a social and legal context, and would encourage the law to move away from objective and context limiting considerations of the defendant's circumstances. A partial defence of excessive force in self defence will be used to argue that the law can move away from traditional defence constructions, whilst still ensuring that the defences to homicide are tightly constructed and regulated.

Chapter four will therefore argue that in order to ensure legal recognition of the reasonable reactions of abused women who kill, it is necessary to adopt a pragmatic stance. Even small legal changes should be embraced if they facilitate the legal and social recognition of abused women who kill as reasonable, provided that these small changes do not end there.<sup>77</sup> It is hoped that the adoption of a partial defence of excessive force in self defence would pave the way for further legislative development, until abused women's claims are seen as legitimate and reasonable in self defence.

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<sup>77</sup> see Editor's Note, 'Privacy or Sex Discrimination Doctrine: Must there be a choice?' (1981) 4 Harv. Women's L.J. 10, 10

## Chapter One

### Abused Women Who Kill and the Legal Construction of a Reasonable Reaction.

#### 2. Introduction

This chapter builds upon the existence of extensive empirical evidence, which already explains why abused women stay in abusive relationships and further demonstrates the increased risk abused women face of becoming a homicide victim themselves should they try and terminate the relationship. Despite the existence of such evidence, abused women are still legally and socially presented as unreasonable when they cannot leave. Further, in cases of intimate partner homicide, should the abused woman commit the homicide in line with evidentiary findings, and kill with a weapon whilst her partner is off guard, then this eventual reaction to abuse is perceived as legally unreasonable.

In response to the current legal framework's exclusion of the typical reactions of abused women who kill from being recognised as reasonable within both the partial and complete defences to homicide, this chapter will develop an alternative legal framework for understanding abused women's reactions to abuse.<sup>78</sup> The framework will critique the current construction of abused women who kill and demonstrate how abused women's reactions can be legally recognised as reasonable reactions in light of the abused woman's social context.

For the development of such a legal framework, this chapter will consider the existing gender bias within the current legal construction of abused women who kill and the legal rules that are currently applied and understood in the context of masculine social norms. In order to fully engage with, and critique the existing gender bias within the criminal justice system, this chapter will draw upon existing feminist epistemologies, which explain why abused women are disadvantaged within the criminal justice system and how gender bias is reinforced and maintained. To move beyond identifying the denial of abused women's social realities within a masculine orientated legal framework, the epistemologies will be used as the basis for an analytical framework for understanding the reactions of abused women who kill as

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<sup>78</sup> S. Yeo, 'The Role of Gender in the Law of Provocation' (n66) 450.

reasonable. The analytical framework will be used as a means of further explaining abused women's reactions to abuse without using and creating confining stereotypes.<sup>79</sup> Feminist legal theory is therefore applied to the law as a means of analysis,<sup>80</sup> in an attempt to challenge the existing legal construction of abused women who kill and articulate new ways of understanding the realities of domestic violence and intimate partner homicide.<sup>81</sup>

To further challenge the current legal construction of abused women who kill, the analytical framework will be used to facilitate the development of a woman-centred court room strategy, which can reflect the reasonable nature of abused women's reactions in cases of intimate partner homicide. The strategy will be applied to both the partial and complete defences to homicide in subsequent chapters in order to ascertain whether the current defences to homicide can be adapted to incorporate the reactions of abused women who kill. It will be used to argue that although 'systematic and institutional remedies' can be developed,<sup>82</sup> the creation of new homicide defences are required to sufficiently incorporate the experiences of abused women who kill and their reactions to abuse.

## **2.1 Abused Women who Kill, Gender Bias and Alternative Feminist Epistemologies.**

In order to challenge the legal exclusion of abused women's typical reactions in cases of intimate partner homicide from both the complete and partial defences to homicide, it is necessary to consider alternative feminist epistemologies which can address the gender biased nature of these defences. Existing feminist epistemologies recognise the need to legally acknowledge and consider the abused woman's social context and individual narrative when legally evaluating cases of female perpetrated intimate partner homicide. Consequently, feminist epistemologies can be used as 'transitional mediations,'<sup>83</sup> which form the foundation upon which to construct an analytical

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<sup>79</sup> E. Schneider, 'Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman Abuse' (1992) 67 N.Y.U.L. Rev 520, 531

<sup>80</sup> C.A. Littleton, 'Equality Across Difference: Is There Room For Rights Discourse?' (1987) 2 *Wisc. Women's L.J.* 28, 30

<sup>81</sup> J.W. Scott, 'Deconstructing Equality- Versus- Difference: Or, the Use of Post Structuralist Theory for Feminism'. Myers, D.T. (Ed) *Feminist Social Thought: A Reader* (Routledge 1997) 758

<sup>82</sup> N. Levit and R.R.M. Verchick, (n46) 24.

<sup>83</sup> S. Harding, *The Science Question in Feminism* (Cornell University Press 1986) 141



framework of understanding and challenge the current legal construction of abused women who kill.

The evaluation of alternative means of constructing and understanding abused women who kill recognises the importance of an active and critical engagement with existing structures and aims to produce a powerful critique of current practices and institutions.<sup>84</sup> The epistemologies are premised upon the position that any social and legal constructions of appropriate behaviour are currently bound with the ruling elite,<sup>85</sup> requiring a subsequent analytical framework to be used as a means of displacing existing structures through the application of feminism as a mode of analysis.<sup>86</sup> This ensures that any ensuing analytical framework is able to go beyond identifying the gender imbalance within the current defences to homicide and can offer effective alternatives capable of challenging the existing homicide defences, rather than existing as an abstract commentary of empirical events.<sup>87</sup>

In order to overcome the gender biased nature of the defences to homicide, it is necessary to draw upon dominance feminism, which can both expose and address the role of domination within society and the legal system. Dominance feminism recognises that the maintenance of masculine privilege and power within society has enabled men to maintain power over the women that they abuse, enabling masculine dominance to filter into structures, such as law, which regulate social life.<sup>88</sup> This results in a failure to link sexual violence in this way to wider issues of gender discrimination and means that the dominance within abusive relationships is ignored and kept in place by the legal adoption of a standard of formal or procedural equality.<sup>89</sup> This reinforces gender inequality within the defences to homicide by appearing as though individuals are treated equally through the adoption of objective and seemingly neutral standards. The defences to homicide therefore assume that the

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<sup>84</sup> E. Grosz, 'Contemporary Theories of Power and Subjectivity' in Sneja Gunew(ed) *Feminist Knowledge. Critique and Construct* (Routledge 1990) 60

<sup>85</sup> S. Gunew, 'Feminist Knowledge: Critique and Construct' in Sneja Gunew(ed) *Feminist Knowledge. Critique and Construct* (Routledge 1990) 20

<sup>86</sup> N. Hartsock, *The Feminist Standpoint Revisited and Other Essays* (Westview Press 1998) 35

<sup>87</sup> E. Grosz, (n84) 69

<sup>88</sup> V. Munro, *Law and Politics at the Perimeter: Re-evaluating Key Debates in Feminist Theory* (Hart 2007) 29

<sup>89</sup> D.L. Rhode, *Speaking of Sex. The Denial of Gender Inequality* (Harvard University Press 1999) 96



individuals concerned are in comparative positions and ignore women's social subordination due to dominance.

This position is supported by a feminist standpoint epistemology, which builds upon the work of materialist feminists who recognise that the positions of women are structurally different from those of men. Consequently, women's social realities are inconsistent from those of men.<sup>90</sup> The adoption of a standpoint epistemology assumes that in certain contexts, the relationships between humans are not completely visible due to the material conditions governing a particular society.<sup>91</sup> This recognises that in certain situations, surface appearances distort deeper social realities. This allows male domination to govern the defences to homicide by excluding the recognition of non-conforming narratives as reasonable, keeping abused women's reactions to abuse legally subordinate.

Therefore, in order to challenge gender bias within the defences to homicide, it is necessary to counter male dominance through the recognition of women's social realities and alternative contexts. Such an approach draws heavily upon feminist postmodern epistemology, recognising that due to the unique nature of experience, there can be no single narrative capable of dominating the legal understanding of what constitutes a reasonable reaction to abuse within the defences to homicide.<sup>92</sup> Such a strategy rejects the meta narratives governing legal constructions of appropriate behaviour,<sup>93</sup> and requires the legal acknowledgement of the importance of the individual context.

A feminist postmodernist approach seeks to displace the current epistemological construction of knowledge by finding a different way of understanding.<sup>94</sup> This is achieved through deconstruction,<sup>95</sup> involving the active use of feminism and women's experiences of violence to critique the way in which legal knowledge is constructed. The outright rejection of the means of legal knowledge production and the way in which abused women are legally and socially constructed would enable abused

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<sup>90</sup> see N. Chodorow, *The Reproduction of Mothering* (University of California Press 1978)

<sup>91</sup> K. Marx and F. Engels. *The German Ideology* (Progressive Publications 1976) 42

<sup>92</sup> V. Munro, (n88) 33.

<sup>93</sup> S.J. Hekman, *Gender and Knowledge: Elements of a Post Modern Feminism*. (Polity Press 1990) 4

<sup>94</sup> S.J. Hekman, *Gender and Knowledge: Elements of a Post Modern Feminism* (n93) 1.

women to reconstruct their own legal and social identities based on their unique narratives and experiences. The realities of abused women who kill their abusers would become the centre of the strategy, enabling the abused woman to demonstrate the reasonable nature of her behaviour in light of her social context. This would enable abused women who kill to resist their pre-given gender identities and use their narrative as a means of social resistance to reject the stereotypical assumptions that have been generated and subsequently applied in legal proceedings.<sup>96</sup>

To further ensure the legal recognition of alternative narratives, abused women who kill must be able to speak about their experiences. This is referred to by feminists as ‘Consciousness Raising,’ and involves groups of women exploring the social world by articulating their experiences. Pamela Allen refers to this as ‘free space,’<sup>97</sup> in which women’s social realities and contexts can inform points of view.<sup>98</sup> The meanings of women’s social experiences can be critically reconstructed with reference to women’s social realities and lived experiences,<sup>99</sup> ensuring that women become aware, through debate about their own and one another’s situations of the disabilities imposed upon them by legal and social structures.<sup>100</sup>

Consciousness raising would recognise the shared realities which often exist between victims of domestic violence and how these realities can provide a basis for identification.<sup>101</sup> This is achieved by unpacking the everyday lives and experiences of women in abusive relationships and recognising that they exist as part of a collective experience of oppression.<sup>102</sup> Such oppression is caused by male domination, facilitating the identification of the gender based consequences that the law creates through the discussion of abused women’s social realities.<sup>103</sup>

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<sup>95</sup> S.J. Hekman, *Gender and Knowledge: Elements of a Post Modern Feminism* (n93) 163.

<sup>96</sup> C.A. Mackinnon, *Towards a Feminist Theory of the State* (Harvard University Press 1989)

<sup>97</sup> P. Allen, *Free Space: A Perspective on the Small Group in Women’s Liberation* (Times Change Press 1970)

<sup>98</sup> J. Freeman, *The Politics of Women’s Liberation: A Case Study of an Emerging Social Movement and its Relation to the Policy Process* (David Mackay 1975) Chapter 4

<sup>99</sup> C.A. Mackinnon, *Towards a Feminist Theory of the State* (n96) 83.

<sup>100</sup> H. Barnett, (n60) 19.

<sup>101</sup> C.A. Mackinnon, *Towards a Feminist Theory of the State* (n96) 83.

<sup>102</sup> L. Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 *Journal of Legal Education* 3, 9

<sup>103</sup> N. Levit and R.R.M. Verchick, (n46) 45

The exclusion of abused women's reactions from the defences to homicide is thereby challenged through the reordering of what women know, as women's experiences reform and change the meaning of a pre-given social problem.<sup>104</sup> Feminist epistemologies challenge what law and society claim to know, through women's experiences and social realities to move the epistemological issue away from stereotypical constructions of abused women who kill and towards the experiences of the social being.<sup>105</sup>

After considering alternative epistemologies, it becomes clear that in order to transcend the gender bias within the current defences to homicide, masculine dominance must be realised and deconstructed through the standpoint of the subordinate. Therefore, abused women's experiences, narratives and social contexts must be used to draw knowledge out and facilitate subsequent legal change. Abused women's experiences must be recognised as a legitimate body of knowledge with perspective transforming capabilities,<sup>106</sup> which can significantly revise the legally conceived notions of what constitutes an acceptable reaction to domestic violence.

## **2.2 Towards a Woman-Centred Analytical Framework and Court Room Strategy**

In order to develop a sufficiently woman-centred analytical framework and court room strategy underpinned by the experiences and narratives of abused women who kill, the analytical framework must be capable of confronting the competing standards of sameness and difference. These standards represent the conflicts in feminist positions and the development of a woman-centred strategy. Under standards of sameness, equal treatment within the legal system pivots upon treating likes alike. The adoption of a position of sameness implies that women are capable of being treated as though they were men,<sup>107</sup> and are able to fall within the ambit of existing structures and frameworks. The advantage of sameness is that it enables feminist strategy to work within existing legal structures, lessening any resistance to incorporating the

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<sup>104</sup> C.A. Mackinnon, *Towards a Feminist Theory of the State* (n96) 96.

<sup>105</sup> C.A. Mackinnon, *Towards a Feminist Theory of the State* (n96) 99.

<sup>106</sup> J. Rifkin, (n45) 85.

<sup>107</sup> V. Munro, (n88) 16

claims of abused women who kill into the legal framework, as women are shown to be the same as men.<sup>108</sup>

Difference on the other hand, requires women to be given special treatment by the law because of ‘uniquely female capacities,’<sup>109</sup> which render women unable to adhere to masculine standards. This recognises that to treat women as though they were the same as men, severely disadvantages women in the context of the law. Mackinnon argues that sameness and difference standards only open up ‘two alternate paths to equality for women.’<sup>110</sup> The first path, requires women to be the same as men. This enables normative legal rules to be extended and applied to women. The second path requires women to be different from men, enabling sex to become a recognised legal difference.<sup>111</sup>

Although both approaches have advantages, neither approach is able to fully address the apparent gender neutrality within the defences to homicide, which adopts masculinity as the normative standard.<sup>112</sup> Consequently, neither standard fully accounts for, or deconstructs dominance. This allows the gender hierarchy,<sup>113</sup> which exists within the defences to homicide and constructs women’s reactions as subordinate to men’s reactions, to remain unchallenged. Therefore, standards of sameness and difference are not sufficient to tackle the gender identity that is imposed upon women,<sup>114</sup> as women are either required to be the same as, or so very different to, men.

Despite being unable to fully challenge dominance, issues of sameness and difference must be confronted by the analytical framework in order to avoid what Minow has labelled ‘the difference dilemma’.<sup>115</sup> This recognises that either focusing on, or ignoring difference between men and women can risk recreating it, as gender

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<sup>108</sup> V. Munro, (n88) 15.

<sup>109</sup> C. Smart, (n49) 82.

<sup>110</sup> C.A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 33

<sup>111</sup> C.A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (n110) 32.

<sup>112</sup> C. Smart, (n49) 82.

<sup>113</sup> See D. Cornell, ‘Sexual Difference, the Feminine and Equivalency: A Critique of Mackinnon’s *Towards a Feminist Theory of the State*’ (1991) 100 *Yale Law Review* 2247

<sup>114</sup> D.Cornell, ‘Sexual Difference, the Feminine and Equivalency’ (n113) 2248.

<sup>115</sup> M. Minow, ‘Learning to Live with the Dilemma of Difference: Bilingual and Special Education’ (1984) 48(2) *Law and Contemporary Problems* 157, 160- 211

difference becomes either exaggerated or denied.<sup>116</sup> In order to avoid this, the analytical framework will acknowledge the problems inherent within sameness and difference standards, but will focus less on gender difference and sameness and more on gender disadvantage,<sup>117</sup> and how this is facilitated within socially constructed unequal power relationships that are subsequently endorsed by the legal system.<sup>118</sup>

### 2.2.1. Sameness

In order to avoid reproducing standards of sameness within a woman-centred court room strategy, the analytical framework must address the pitfalls within this standard. The adoption of a standard of sameness can attempt to squeeze the experiences of abused women who kill into masculine orientated legal defences which simply incorporate feminism into the law's own paradigm,<sup>119</sup> as the defences to homicide remain unchanged and men and masculinity remain the normative legal standard. The adoption of such an approach assumes that the institutions themselves are capable of recognising women's interests and by exposing gender bias, reform will become possible.<sup>120</sup>

Using women's experiences as the foundation for an analytical framework in the context of sameness, must be treated with caution, as these experiences can be used to create a false homogeneity about abused women's realities.<sup>121</sup> This has the effect of treating some experiences as core realities which abused women are supposed to share and others as less significant. This can lead to attempts to develop sufficiently woman-centred practice or to shape a woman-centred agenda, which has the aim of getting as many women as possible to fall within a particular framework. However, if this is the methodological approach taken, then it becomes ill equipped to deal with

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<sup>116</sup> D.L. Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage' in Anne Phillips *Feminism and Politics* (Oxford University Press 1998) 344

<sup>117</sup> D.L. Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage' (n116) 344.

<sup>118</sup> D.L. Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage' (n116) 344.

<sup>119</sup> C. Smart, (n49) 82.

<sup>120</sup> V. Munro, (n88) 14.

<sup>121</sup> J. Mclaughlin, *Feminist Social and Political Theory. Contemporary Debates and Dialogues*. (Palgrave Macmillan 2003) 57

difference as it incapable of recognising any kind of multiplicity within the reactions of abused women who kill.<sup>122</sup>

### 2.2.2 Difference

Alternatively, by ascribing a notion of difference to the reactions of abused women who kill, it can be recognised that women's reactions are often so very different from men's reactions and that without this explicit acknowledgement, any accompanying analysis or legal development will continue to take masculine reactions as the normative standard and will offer little prospect of legal change.<sup>123</sup>

However, if women are presented as so very different from men, then an emphasis on sexual difference can prevail. This enables the continuation of gender stereotypes to inform legal theory and can be especially dangerous for abused women who kill, as any evidence of violent behaviour contradicts prevailing societal perceptions of feminine passivity.<sup>124</sup> An emphasis on difference enables sexual difference to be used as a means of essentialising women and their experiences, expecting women to conform to typical constructions of appropriate feminine behaviour, while masculinity remains the prevailing legal standard as little is done to challenge it.

This can create a false legal abstraction of sexual difference, which presents a homogenised construction of masculinity and femininity. This can make it even harder for abused women who kill to have their reactions legally recognised as reasonable and appropriate as they are not comparable to men and notions of masculinity, or with constructions of femininity. This allows sex characteristics to become a means of ascribing socially constructed gender stereotypes to models of biological difference,<sup>125</sup> resulting in abused women who kill being even further removed from societal and legal understanding, and further constructed as deviant and abnormal.

### 2.2.3 Gender Disadvantage

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<sup>122</sup> S.J. Hekman, 'Truth and Method: Feminist Standpoint Theory Revisited.' (1997) 22(2) *Signs* 341, 343

<sup>123</sup> A. Phillips, *Feminism and Politics* (Oxford University Press 1998) 11

<sup>124</sup> C.A. Mackinnon, *Towards a Feminist Theory of the State* (n96) 130.

<sup>125</sup> C.A. Mackinnon, 'Difference and Dominance: On Sex Discrimination' in Katharine T Bartlett and Rosanne Kennedy (eds) *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 87

Consequently, the analytical framework must be capable of recognising the wider structures and processes of inequality, which exclude the legal recognition of abused women's reactions as reasonable, rather than focusing on the perceived similarities and differences between women's experiences and subsequent reactions.<sup>126</sup> The analytical framework adopts the position that abused women who kill face a common problem, rather than a common outlook.<sup>127</sup> The common problem refers to the exclusion of abused women's reactions as reasonable within the defences to homicide, due to the failure of abused women's typical reactions to abuse to ascribe to masculine legal standards. The analytical framework seeks to avoid the psychological reproduction of gender in the subjective identity,<sup>128</sup> by recognising that many women will react to domestic violence in a similar way, but also recognises that reactions amongst abused women are not always the same. The framework follows Braidotti's 'essentialism with a difference',<sup>129</sup> focusing less on reactionary differences and more upon the failure to legally accommodate abused women's reactions into the defences to homicide and making this of paramount concern.<sup>130</sup>

The incorporation of 'essentialism with a difference' into the framework is achieved by recognising the unequal position of women, both in violent relationships and in relation to the criminal justice system. This position acknowledges that for women, inequality exists as a 'myriad of interlocking forms,'<sup>131</sup> which must be eliminated to ensure that masculine standards do not continue to function as normative legal standards. The framework aims to be less dualistic and more contextual, shifting the focus away from sexual difference,<sup>132</sup> issues of sameness or gender neutrality and onto the legal processes which assign significance to constructions of appropriate masculine and feminine reaction.

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<sup>126</sup> J. Mclaughlin, (n121) 52.

<sup>127</sup> D. Haraway, 'Situated Knowledges: The Science Question in Feminism as a Site of Discourse on the Privilege of Partial Perspective' in Donna Haraway *Simians, Cyborgs and Women: The Reinvention of Nature* (Free Association 1991) 183-201

<sup>128</sup> S.M.Okin, 'Gender, the Public and the Private' in Anne Phillips *Feminism and Politics* (Oxford University Press 1998) 126

<sup>129</sup> R. Braidotti, *Nomadic Subjects: Embodiment and Sexual Difference in Contemporary Feminist Theory* (Columbia University Press 1994) 13

<sup>130</sup> D.L. Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage' (n116) 347.

<sup>131</sup> C.A. Littleton, 'Equality and Feminist Legal Theory' (1986-1987) 48 U.Pitt. L. Rev 1043, 1044

<sup>132</sup> Rhode, D.L. 'The Politics of Paradigms: Gender Difference and Gender Disadvantage' (n116) 344.



The framework moves beyond issues of sameness and difference to ensure that gender bias is tackled at a conceptual level by recognising that masculine dominance came first.<sup>133</sup> Gender differences were subsequently established as a means of maintaining such bias.<sup>134</sup> Following this approach, issues of sameness and difference give way to an understanding that the differences between men and women in abusive relationships are defined by relationships of power.<sup>135</sup> It is this power imbalance which causes the gender inequality within the relationship and the belief that one partner is entitled to control the other. Unchallenged, such dominance has been able to influence legal structures which regulate social life, as issues concerning sameness and difference have been accorded more worth than their social consequences.<sup>136</sup> This has reinforced gender disadvantage through feminine subordination, as the role played by institutional structures in the maintenance of such power imbalances has been overlooked.<sup>137</sup>

The analytical framework can be used to challenge abstract assumptions about women and their social realities by analysing power within the context of oppression and domination within intimate relationships. This operates as part of a double process. It reverses the masculine/feminine dichotomy so prevalent within legal theory by displacing the system within which it functions.<sup>138</sup> Reversal guarantees that the dominant masculine term is not simply substituted for the weaker feminine term, but that the negative term moves from its oppositional role and into the heart of the dominant term through a critique of the institutional hierarchy and accompanying institutions which reinforce gender stereotypes and masculine privilege.<sup>139</sup>

This ensures that women's experiences of abuse and how these experiences shape their behaviour moves from the periphery of social and legal understanding and into the centre. The adoption of such an approach leads to the rejection of certain legal

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<sup>133</sup> C. Smart, (n49) 5.

<sup>134</sup> C.A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (n110) 8.

<sup>135</sup> V. Munro, (n88) 28.

<sup>136</sup> V. Munro, (n88) 29.

<sup>137</sup> see C.A. Mackinnon, 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7(3) *Signs* 515, C.A. Mackinnon, *Feminism Unmodified: Discourses on Life and Law* (n110) and C.A. Mackinnon, 'Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence' (1983) 8(2) *Signs* 635

<sup>138</sup> E. Grosz, (n84) 96.

<sup>139</sup> E. Grosz, (n84) 97.



constructions of reaction which attempt to limit women to masculine standards of behaviour and expectation. This is followed by a reconstruction of the homicide defences, taking women's reactions in cases of intimate partner homicide as the central category upon which to build,<sup>140</sup> demonstrating that the existing legal structure and the resulting defences to homicide are capable of being replaced by other modes of conceptualisation, which do not reinforce gender discriminate practice.<sup>141</sup>

### **2.3 The Current Legal Construction of Abused Women Who Kill and the Use of Battered Women's Syndrome**

In order to develop a sufficiently woman-centred court room strategy, the analytical framework must engage with the current legal understanding of abused women who kill. Currently, abused women who kill are constructed according to BWS, a psychological theory developed by the American Psychologist Lenore Walker.<sup>142</sup> BWS was developed as a means of explaining to juries why abused women stay in abusive relationships in order to counter damaging social stereotypes. BWS was developed after Walker found patterns in the way abused women described their experiences of violent relationships,<sup>143</sup> which in the context of the defences to homicide could present the abused woman's reaction as reasonable.

BWS was subsequently introduced into the court room in the United States in cases of self defence, in order to justify treating the defendant differently. The existence of the syndrome was used to explain the psychological state of the defendant and how this was influenced by the abusive circumstances leading up to the homicide,<sup>144</sup> making it unfair to hold the defendant accountable under the standards of the reasonable person. Further, expert testimony was admissible to explain to the judge and jury why the abused woman could not leave the relationship and how the abuse sustained impacted

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<sup>140</sup> C.A. Littleton, 'Feminist Jurisprudence: The Difference Method Makes' (n75) 771.

<sup>141</sup> E. Grosz, (n84) 97.

<sup>142</sup> See L. Walker, *The Battered Woman* (Harper and Row 1979), L. Walker, *The Battered Woman Syndrome* (n9)

<sup>143</sup> N. Levit and R.R.M. Verchick, (n46) 190.

<sup>144</sup> C. England, 'The Battered Woman's Syndrome: A History and Interpretation of the Law of Self-Defense as it Pertains to Battered Women who Kill their Husbands' (2007) 3(1) *Vanderbilt Undergraduate Research Journal* 1, 4

upon the defendant's psychological functioning,<sup>145</sup> requiring her to be held accountable under such different standards.

In the criminal justice system in England and Wales, BWS has been used to reduce a finding of murder to one of manslaughter. BWS is most notably used to inform a plea of diminished responsibility. Expert testimony concerning BWS is admissible to explain to the jury the characteristics of abused women, and why abused women often blame themselves for the violence endured. The testimony further clarifies the abused woman's fear for her own life and the lives of her children.<sup>146</sup>

Evidence of BWS in the court room relies upon Walker's cycle of violence, coupled with learned helplessness, to explain why the abused woman was unable to leave the relationship. It adheres to Walker's theory, which claims that the psychological symptoms of BWS develop when women are exposed to a cycle of violence, which she developed as a means of trying to predict the stages of abuse within a relationship. Walker labels the first phase 'the honeymoon phase',<sup>147</sup> where the abuser is charming and goes out of their way to make their partner feel loved. This leads to the second phase, the 'tension building phase'. This involves the abuser becoming jealous, paranoid and short tempered, making their partner alter their behaviour in an attempt to try and ensure that the abuser does not lose their temper. This culminates in Walker's third stage in the cycle of violence, the 'acting out phase', where the abuser actually becomes violent. After all three phases, the cycle of violence starts all over again.

Following Walker's cycle of violence and its application to the partial defence of diminished responsibility, the defendant can receive psychiatric treatment or alternative penal or rehabilitative sentences instead of the mandatory life sentence. The reliance upon BWS therefore demonstrates the benevolent protectiveness that the

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<sup>145</sup> C. England, (n144) 4.

<sup>146</sup> D. Kochan, 'Beyond the Battered Woman Syndrome: An Argument for the Development of New Standards and the Incorporation of a Feminine Approach to Ethics.' (1989) 1 Hastings Women's Law Journal 89

<sup>147</sup> L. Walker, *The Battered Woman* (n142)

legal system has towards women,<sup>148</sup> with the possibility of rehabilitative as opposed to punitive sentences suggesting judicial leniency.<sup>149</sup>

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<sup>148</sup> see O. Pollak, *The Criminality of Women*. (University of Pennsylvania Press 1950)

<sup>149</sup> H. Allen, *Justice Unbalanced: Gender, Psychiatry and Judicial Decisions* (Open University Press 1987) 12

### 2.3.1 The Implications of BWS for Abused Women Who Kill

Despite the perceived strategic advantages for abused women who kill, the cycle fails to explain the realities faced by many abused women, as the cyclical nature of domestic violence is contested. This is because Walker's cycle of violence does not recognise that domestic abuse can have a constant presence in some relationships, as opposed to existing as part of a cycle.<sup>150</sup> In response, the Duluth power and control wheel was developed to recognise that in certain abusive relationships, violence is constantly present.<sup>151</sup> The Duluth power and control wheel recognises physical and sexual violence and details the methods used by abusers to develop a system to keep their partner trapped, isolated and afraid. This includes combining economic abuse with physical and sexual abuse, as well as using masculine privilege to treat the abused woman as a slave and prevent her from making any decisions.<sup>152</sup> This abuse can occur over a prolonged period of time, with the incidents of abuse overlapping, but also existing as components of a comprehensive power and control regime.<sup>153</sup>

Although both interpretations can help to express the experiences of abused women, not all of the aforementioned factors are engaged during abusive incidents. Not every incident of violence is the same,<sup>154</sup> making Walker's development of a one size fits all explanation as to the onset of psychological and behavioural symptomology somewhat controversial.

In addition to the often contextual deficiencies of Walker's cycle, it has also been criticised for the inaccuracy of its data.<sup>155</sup> Walker found in sixty five percent of cases there was evidence of a tension building phase prior to the battering. In fifty eight percent of all cases there was loving contrition afterwards, which demonstrates that

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<sup>150</sup> E.R. Dobash and R.P. Dobash, *Women, Violence and Social Change* (Routledge 1992) 222-23, 225, 229-32

<sup>151</sup> see The Duluth Domestic Abuse Project Intervention Project Power and Control Wheel in J. Hanmer and C. Itzin, (eds) *Home Truths about Domestic Violence. Feminist Influences on Policy and Practice- A Reader* (Routledge 2000) 392

<sup>152</sup> see E. Gondolf, 'Theoretical and Research Support for the Duluth Model: A Reply to Dutton and Corvo' (2007) 12(6) *Aggression and Violent Behaviour* 644, 644-657

<sup>153</sup> M.P. Johnson, 'Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women.' (1995) 57 *Journal of Marriage and the Family* 283, 284

<sup>154</sup> G. Hague and E. Malos, *Domestic Violence: Action for Change* (3<sup>rd</sup> Edition Cromwell Press 2005) 9

the data on the phases does not correlate, as only thirty eight percent of women would experience the full cycle.<sup>156</sup> Therefore, under Walker's theory, only thirty eight percent of these women would be experiencing domestic violence and would be capable of developing the psychological symptoms necessary to conform with BWS. Despite being constructed upon tenuous contextual and scientific foundations, Walker's cycle of violence has been used to inform the judge and jury about abused women's perceptions and behaviours and has been used within the criminal justice system to explain how women can eventually develop 'learned helplessness' in response to abuse.

### 2.3.2 Abused Women and Learned Helplessness

Learned helplessness in abused women who kill is based upon research conducted by both Seligman and Hiroto,<sup>157</sup> in which learned helplessness was found to develop in response to 'inescapable aversive events',<sup>158</sup> which interfere significantly with later instrumental learning.<sup>159</sup> In Hiroto's experiment aversive noise was tested using three control groups. For the pre-treatment, group one were exposed to aversive noise which they could turn off by pushing a button. Group two were exposed to aversive noise with no means of escape and group three were not subjected to any aversive noise. After the pre-treatment, each group received controllable noise. Groups one and three easily escaped. Despite being able to control the noise, group two did nothing.<sup>160</sup> This demonstrates learned helplessness in individuals, as responding becomes independent of reinforcement, suggesting that learned helplessness is an induced trait.<sup>161</sup>

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<sup>155</sup> D.L. Faigman and A.J. Wright, 'The Battered Woman Syndrome in the Age of Science' (1997) 39 Ariz. L. Rev 67, 104

<sup>156</sup> K. Popper, *Conjecture and Refutations: The Growth of Scientific Knowledge* (Routledge and Kegan Paul 1963) 33-59

<sup>157</sup> see M.E.P. Seligman, and S.F. Maier, 'Failure to Escape Traumatic Shock.' (1967) 74 *Journal of Experimental Psychology* 1, 1-9 and M.E.P. Seligman, S.F. Maier and R.L. Solomon, 'Unpredictable and Uncontrollable Aversive Events' in Brush, F.R. (Ed.), *Aversive Conditioning and Learning*. (Academic Press 1971) see further D.S.Hiroto, 'Locus of Control and Learned Helplessness' (1974) 102 *Journal of Experimental Psychology* 187, 187-193

<sup>158</sup> D.S. Hiroto and M.E.P. Seligman, 'Generality of Learned Helplessness in Man' (1975) 31(2) *Journal of Personality and Social Psychology* 311, 311

<sup>159</sup> See J.W. Thornton and P.D. Jacobs, 'Learned Helplessness in Human Subjects' (1971) 7 *Journal of Experimental Psychology* 367, 367-372.

<sup>160</sup> D.S.Hiroto (n157) 190.

<sup>161</sup> D.S. Hiroto and M.E.P Seligman, (n158) 311.

Learned helplessness is used to assist Walker's theory of BWS and why some women stay in abusive relationships, suggesting that domestic violence presents an induced, inescapable aversive event, leaving abused women psychologically trapped and unable to escape.<sup>162</sup> However, BWS and the references to learned helplessness explain why abused women stay in the abusive relationship through a narrow psychological lens, which has the effect of reinforcing stereotypical assumptions that abused women are weak and passive victims.<sup>163</sup> This label is often inaccurate, as Abraham's research suggests that abused women do not always perceive themselves as powerless or passive within these situations.<sup>164</sup> Many take positive action to defuse tension or take any measures they can to protect themselves or their children.<sup>165</sup> Therefore, BWS as a legal and socially reinforced label can create a derogatory and often inaccurate psychological profile of abused women.

Consequently, the abused woman's behaviour becomes even more difficult to legally and socially comprehend as reasonable when she kills her abuser, as learned helplessness, a psychological condition which reinforces passivity, is attributed as the cause of the homicide. Walker's theory of BWS has been used to argue that after developing learned helplessness, abused women can believe that they have no means of escape other than killing their abusers.<sup>166</sup> Although logically inconsistent, this explanation has become entrenched in legal practice and is reinforced through the use of expert testimony on the condition of BWS, which seeks to ensure that abused women who kill are not held accountable under male norms and standards of behaviour by enabling women to share their experiences of violence as a means of assisting the jury in fairly evaluating the reasonableness of their actions.<sup>167</sup>

The testimony that is admissible is on BWS alone, defining the defendant's state of mind and psychology as being of relevance, rather than her circumstances or experiences. The sole focus of the syndrome is on the defendant's state of mind,

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<sup>162</sup> N. Levit and R.R.M. Verchick, (n46) 191.

<sup>163</sup> I.W. Hutchinson and D.J. Hirschel, 'Abused Women: Help-Seeking Strategies and Police Utilization' (1998) 4 *Violence Against Women* 436, 440

<sup>164</sup> see H. Abrahams, (n8)

<sup>165</sup> H. Abrahams, (n8) 28.

<sup>166</sup> N.R. Rhodes and E.B. McKenzie, 'Why do Battered Women Stay?: Three Decades of Research.' (1998) 3(4) *Aggression and Violent Behaviour* 391, 402

<sup>167</sup> E. Schneider, 'Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering' (1986) 9 *Women's Rights Law Reporter* 195, 198

which disconnects the defendant's response to violence from the social context in which it occurs.<sup>168</sup> Consequently, abused women are presented foremost as victims of a psychological condition rather than as victims of abuse. BWS is used to explain that after having lived in a constant state of fear, the abused woman becomes incapacitated by learned helplessness, which causes her to believe that she has no control over her life and her future.<sup>169</sup> BWS is subsequently applied to explain the abused woman's perceptions that she could not leave the relationship while her abuser was still alive, and that she had no safe alternative.<sup>170</sup>

BWS does little to portray the abused woman as a rational agent, as accompanying testimony demonstrates psychological disability and this insinuates a reduced capacity to behave normally.<sup>171</sup> Recourse to a syndrome affirms that the court is dealing with a psychologically damaged victim and not a woman responding rationally or reasonably to a threat,<sup>172</sup> eliminating any need for consideration of her factual context, or the societal and legal mechanisms which kept her trapped in such a violent relationship.<sup>173</sup>

Therefore, the reliance upon BWS as a means of legally constructing abused women who kill exposes the criminal justice system's inability to accommodate abused women who kill and their experiences.<sup>174</sup> Instead, the abused woman is viewed as incapable,<sup>175</sup> with evidence of BWS demonstrating that her actions were wrong, not reasonable, but that her sentence can be mitigated on the basis of her psychological abnormality and her need for professional help.<sup>176</sup> The psychological connotations of BWS invalidate any further understanding of the abused woman's deviance, ensuring

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<sup>168</sup> P.F. Magnum, 'Note, Reconceptualising Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering' (1999) 19 B.C Third World L.J. 593, 609

<sup>169</sup> M. Cascardi and K.D. O'Leary, 'Depressive Symptomology, Self Esteem, and Self-Blame in Battered Women.' (1992) 7(4) Journal of Family Violence 249, 255

<sup>170</sup> J. Robinson, 'Defense Strategies for Battered Women who Assault their Mates: State v Curry' (1981) 4 Harvard Women's Law Journal 161, 200

<sup>171</sup> E. Schneider, *Battered Women and Feminist Law Making* (n57) 210.

<sup>172</sup> E. Schneider, *Battered Women and Feminist Law Making* (n57) 211.

<sup>173</sup> G. W. Bernard et al, 'Till Death Do us Part: A Study of Spousal Murder' (1982) 10 Am. Acad. Of Psychiatry and the Law 271, 280

<sup>174</sup> A. Scales, 'Towards a Feminist Jurisprudence' (1981) 56 Ind.L.J. 375, 379

<sup>175</sup> E. Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense' (1980) 15 Harv. C.R.-C.L. L. Rev. 623, 638

<sup>176</sup> M. Dowd, 'Dispelling the Myths about the "Battered Woman's Defense": Towards a New Understanding' (1991-1992) Fordham Urb. L.J. 567, 572

the preservation of conventional gender stereotypes.<sup>177</sup> By acting out against the traditional female stereotype the defendant is viewed as psychotic, enabling the criminal justice system to determine the outcome of social relations. The abused woman's psychological label ensures that her circumstances do not have to be understood, as her narrative exists within a psychologically impaired framework.

Although BWS and accompanying expert testimony can reduce a defendant's sentence, the social and legal implications of BWS ensure that the defendant is still being punished for their actions, and not completely excused.<sup>178</sup> Consequently, BWS does not challenge the legal way of knowing or require the legal system to accommodate a feminist agenda.<sup>179</sup> This helps to construct the denial of abused women's injustice, and reinforce what social scientists have labelled as 'a belief in the just world,'<sup>180</sup> a belief that individuals deserve what they get. This enables abused women to be blamed for their choices and experiences, and the law is required to reflect the deserved punishment for these choices.<sup>181</sup>

This ensures that the law operates as a 'mechanism for social control',<sup>182</sup> developing a system which outlines the normative standards of behaviour to be expected from members of society. Furthermore, the experiences of domestic violence and how they shape women's reactions to violence remain unnamed, as do abused women's contextual realities. The reality that is not named is unable to inform understanding and is 'powerless to claim its own existence,'<sup>183</sup> ensuring that reactions to violence continue to be forced into fixed categories, which ignore the fluid and contextual social realities pertaining to the crime. The law therefore fails to assign any kind of weight to the social background of the violence, and develops the law according to masculine experience,<sup>184</sup> as BWS is unable to sufficiently accommodate the many

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<sup>177</sup> P. Chesler, *Women and Madness* (Allen Lane 1974) 56-57

<sup>178</sup> S.J. Schulhofer, 'The Trouble with Trials; The Trouble with Us,' (1995) 105 YALE L.J. 825, 838-840

<sup>179</sup> K. O'Donovan, *Sexual Divisions in Law* (Weidenfeld and Nicolson 1985) 59

<sup>180</sup> D.L. Rhode, *Speaking of Sex. The Denial of Gender Inequality* (n90) 9.

<sup>181</sup> G. W. Bernard et al, 'Till Death Do us Part: A Study of Spousal Murder' (1982) 10 Am. Acad. Of Psychiatry and the Law 271, 280

<sup>182</sup> V. Munro, (n88) 41.

<sup>183</sup> Du Bois, 'Passionate Scholarship: Notes on Values, Knowing and Method in Feminist Social Science' in G. Bowles and R. Duelli Klein (eds) *Theories of Women's Studies* (Routledge 1983) 108

<sup>184</sup> H. Barnett, (n60) 270.



ways in which women cope and respond to violence.<sup>185</sup> It ignores the context in which the violence took place and the disparity in power relations and assumes that women have the same autonomy as men in violent situations, and that they have the same levels of power needed to escape from such a situation.<sup>186</sup>

## **2.4 Beyond BWS: Alternative Psychological Constructions of Battered Women Who Kill**

The legal and social preference towards masculinity as the standard of normativity becomes even more evident when alternative psychological constructions of abused women who kill are critiqued. Toffel argues that the psychological effects of domestic violence should be described as Traumatic Bonding Theory (TBT) or Stockholm Syndrome,<sup>187</sup> which characterises the psychological bonding that can often develop between hostages and their captors.<sup>188</sup> The recognition of TBT within the criminal justice system would be more sufficient for abused women who kill from an activist perspective, as TBT manages to go beyond Walker's theory of why strong emotional attachments develop in violent relationships. The theory finds that such attachments develop because of the intermittent, and not the predictable nature of abuse.<sup>189</sup>

Following TBT, domestic violence can be understood as a social trap,<sup>190</sup> with the strong emotional bonding occurring before the victim realises that the abuse will continue and repeat.<sup>191</sup> TBT can also be used to explain why abused women behave the way that they do, as they develop hostage survival strategy.<sup>192</sup> Consequently,

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<sup>185</sup> see M.A. Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women Syndrome' (1993) 21 Hofstra Law Review 1191

<sup>186</sup> H. Barnett, (n60) 270.

<sup>187</sup> H. Toffel, 'Crazy Women, Unharmful Men, and Evil Children: Confronting the Myths about Battered People Who Kill Their Abusers, and the Argument for Extending Battering Syndrome Self-Defences to All Victims of Domestic Violence' (1996-1997) 70 S. Cal. L. Rev. 337, 351

<sup>188</sup> D.L.R. Graham, E. Rawlings, and N. Rimini, 'Survivors of Terror. Battered Women, Hostages, and the Stockholm Syndrome', in Yllo and Bograd (eds) *Feminist Perspectives on Wife Abuse* ( Sage Publications Limited 1998) 220-221

<sup>189</sup> D.G. Dutton and S. Painter, 'The Battered Woman Syndrome: Effects of Severity and Intermittency of Abuse.' (1993) 63 AM. J. ORTHOPSYCHIATRY 614, 615 .

<sup>190</sup> D.G. Dutton and S. Painter, 'Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory', (1993) 8 Violence and Victims 105, 105

<sup>191</sup> D.G. Dutton and S. Painter, 'Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Theory' (n190) 106.

<sup>192</sup> D.R. Follingstad, A.P. Neckermann and J. Vormbrock, 'Reactions to Victimization and Coping Strategies of Battered Women: The Ties that Bind.' (1988) 8(4) Clinical Psychology Review 373, 373-390

abused women actively decide to behave in a certain way in order to avoid harm,<sup>193</sup> as they react to what they perceive to be a hopeless situation.<sup>194</sup>

Although covering most of the tenets of Walker's cycle of violence theory, TBT recognises that the behaviour of the victim is an adaptive way of surviving,<sup>195</sup> not the result of a mental impairment or the onset of learned helplessness. Hostage survival strategy can be used to describe 'what the average, rational person would do in the same abusive situation.'<sup>196</sup> It is situation centred and can be used as a means of explaining why women bond with their abusers and remain in violent relationships which eventually result in the commission of female perpetrated intimate partner homicide. The recognition of multiple psychological theories, such as TBT, as constituting appropriate forms of legal knowledge would force the criminal justice system to consider the situated context in which the reaction occurred, making the abused woman's circumstances, narrative and experiences of direct legal relevance.

However, even with the adoption of TBT as an alternative psychological theory, abused women would still be constructed within a psychological framework. These frameworks, despite being developed to help abused women who kill, are susceptible to masculine bias in the form of legitimising damaging gender stereotypes. According to Kochan, this is reflective not of the work itself, but of the 'intransigent, unchallenged, underlying presumptions of the law.'<sup>197</sup> As such, constructing abused women through any kind of psychological framework continues to allow women to be constructed as men construct women, according to notions of irrationality and unreasonableness.<sup>198</sup> This continues to apply a standard of sameness, as all women must ascribe to the accompanying symptomology of a particular psychological condition in order for their reaction to be perceived as a legally legitimate response to abuse.

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<sup>193</sup> H. Toffel, (n187) 354.

<sup>194</sup> L. Walker, 'Battered Woman Syndrome and Self-Defense' (n39)323.

<sup>195</sup> H. Toffel, (n187) 356.

<sup>196</sup> H. Toffel, (n187) 355.

<sup>197</sup> D. Kochan, (n146) 89.

<sup>198</sup> D. Kochan, (n146) 103.

## 2.5 Towards a Woman-Centred Court Room Strategy: Using Expert Testimony to Overcome Gender Bias in the Defences to Homicide

Therefore, it is strategically necessary to move beyond confining the reactions of abused women who kill to narrow psychological conditions. In order to do so, the strategic possibilities apparent in the use of expert testimony will be considered.<sup>199</sup> Although expert testimony has been used in conjunction with BWS, it is necessary to evaluate the means of using expert testimony to incorporate more of the abused woman's social context, as opposed to utilising expert testimony solely concerning the defendant's mental state.<sup>200</sup> Without such change, abused women will continue to be constructed from a victimised and mentally impaired perspective, which can significantly hinder the legal recognition of their reactions as reasonable.

In order to evaluate the woman-centred possibilities apparent in the use of expert testimony, it is necessary to look to the United States, and the case *State v Wanrow*<sup>201</sup> concerning women who kill in self defence. Yvonne Wanrow was convicted of second degree murder after shooting and killing a man whom she knew to be a child molester when he came up behind her after approaching the child of a friend.<sup>202</sup> During her trial, Wanrow was forced to justify her conduct in accordance with the prima facie neutral, but intrinsically gender biased, legal requirements for self defence of reasonableness, imminence and proportionality. The standard applied to Wanrow, was the same standard that was applicable to circumstances in which two men of equal size and strength had fought.<sup>203</sup> Consequently, the Washington Supreme Court found that the traditional legal standards applied to the defendant had neglected to consider the perspective of women.<sup>204</sup>

Further, the case recognised that the defendant's experiences were distinct and unique and formed a crucial aspect of her perspective. Consequently, they could serve as a foundation for the admissibility of expert testimony surrounding the context of the

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<sup>199</sup> See E. Schneider, 'Describing and Changing: Women's Self Defence Work and the Problem of Expert Testimony on Battering' (n167)

<sup>200</sup> C. England, (n144) 11.

<sup>201</sup> 88 Wash 2d. 221.

<sup>202</sup> D. Kochan, (n146) 99.

<sup>203</sup> See *Wanrow* 88 Wash 2d at 240, 559 P.2d 548 (1977) at 558

defendant's individual experience.<sup>205</sup> The case also recognised that the defendant's experiences were both distinct and shared,<sup>206</sup> and that they were outside the common experience of jurors.<sup>207</sup>

One of the main strategic advantages of the ruling from *Wanrow* was that more of the defendant's social context became admissible. Applied to situations in which battered women had killed their abusers, the testimony would be able to focus on the entire experience of being a battered woman,<sup>208</sup> rather than being confined to a stereotypical psychological narrative. Therefore, the reasonableness of the defendant's conduct could be explained to the judge and jury through expert testimony according to the defendant's circumstances. This would facilitate a consideration of the complete nature of her experience, in addition to her coping strategies, behavioural adjustments and her lack of viable alternatives which could have protected her from her abuser.<sup>209</sup> These considerations would further expose the dominance within abusive relationships, by recognising and directly considering the unequal levels of power in the abusive relationship and how this power imbalance effectively kept the abused woman trapped and controlled.

However, any consideration of the abused women's experiences in the context of being an abused woman, raises issues of difference. It could be perceived that any legal emphasis on the different experiences and actions of abused women who kill is only required to ensure equal treatment within the criminal justice system, as recognition of abused women's experiences as different from men's experiences demonstrates that abused women cannot be expected to adhere to masculine legal standards. This implies that the different experiences of abused women who kill only have to be accommodated in order to address the social discrimination women face.<sup>210</sup> Simply acknowledging difference in the context of abused women who kill and the application of expert testimony would not go far enough, as the recognition of

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<sup>204</sup> D.Kochan, (n146) 99.

<sup>205</sup> *State v. Allery*, 101 Wash. 2d 591, 597, 682 P.2d 312, 316 (1984)

<sup>206</sup> See, e.g., *State v. Kelly*, 97 N.J. 178, 192-93, 478 A.2d364, 371 (1984)

<sup>207</sup> See, e.g., *State v. Kelly*, 97 N.J. 178, 478 192-93 A.2d364 (1984)

<sup>208</sup> C. England, (n144) 10.

<sup>209</sup> C. England, (n144) 10.

<sup>210</sup> See generally L. Krieger and P. Cooney, 'The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality', (1983) 13 GOLDEN GATE L. REV. 513

difference in itself implies unequal legal treatment,<sup>211</sup> suggesting that abused women are incapable of being held accountable under normative legal standards.

Therefore, a sufficiently woman-centred court room strategy must be able to use expert testimony to transcend the sameness/difference dichotomy by using such testimony to inform the judge and jury of the individual's own experiences and reactions and how these are reasonable in the circumstances.<sup>212</sup> It must also use expert testimony to demonstrate that the abused woman's individual narrative and experiences exist as part of an experience of collective discrimination reinforced by masculine dominance. The application of such testimony would distance the abused woman from the damaging connotations associated with BWS, and how the syndrome fails to describe the complexity and reasonable nature of the abused woman's reaction to abuse.<sup>213</sup> The application of such expert testimony to the defences to homicide would go beyond BWS by challenging masculine dominance through the legal recognition of the significance of the experiences of abused women who kill as both individuals and as members of a subordinated group. This would expose gender discrimination in relation to the defences to homicide by recognising that apparently gender neutral legal standards actually disadvantage women by adopting masculinity as the standard of normativity, rather than constructing abused women through a lens of abnormality.

## **2.6 Towards a Woman-Centred Court Room Strategy: The Use of Expert Testimony and the Implications of *R v Turner***

However, the admissibility of human behaviour evidence in the context of psychiatric and psychological evidence conforms to the admissibility requirements of *R v Turner*.<sup>214</sup> Evidence is admissible only if it furnishes the court with 'scientific information which is likely to be outside the experience or knowledge of a judge and jury.'<sup>215</sup> Following Lawton LJ, this is because 'jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to

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<sup>211</sup> W. W. Williams, 'Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate', (1984-1985) 13 N.Y.U. REV. L. & SOC. CHANGE 325, 327

<sup>212</sup> E. Schneider, *Battered Women and Feminist Lawmaking* (n57) 214

<sup>213</sup> E. Schneider, 'Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering' (n167) 199.

<sup>214</sup> [1975] QB 834

react to the stresses and strains of life.<sup>216</sup> Once deemed admissible, the testimony must satisfy evidence of reliability.<sup>217</sup> This is easily achieved, as there is no formal assessment of the reliability of expert evidence when ascertaining whether it should be admissible.<sup>218</sup>

Following *Turner* and the conditions of admissibility, patterns of behaviour are essentially perceived as transparent<sup>219</sup> and within the knowledge and experience of both judge and jury,<sup>220</sup> unless relating to a mental illness. The *Turner* rule suggests that what constitutes a normal reaction to domestic violence is believed to already be within the experience of the jury.<sup>221</sup> This reinforces the legal and social construction of abused women who kill through medicalised frameworks of abnormality, constructed with reference to social stereotypes.

Nevertheless, it may be possible to admit expert testimony on domestic violence under the *Turner* construction, as there is evidence to suggest that the courts may be adopting a more liberal interpretation of the matters which are beyond the common knowledge and understanding of the jury.<sup>222</sup> The Home Office has already developed proposals to allow more general expert evidence to be admissible in cases of rape, to disparage myths about the behaviours<sup>223</sup> and reactions of victims.<sup>224</sup> Therefore, by

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<sup>215</sup> [1975] QB 834, 841

<sup>216</sup> [1975] QB 834, 841 (Lawton LJ)

<sup>217</sup> C. Tapper, *Cross & Tapper on Evidence* (10th edn Lexis Nexis 2004) 558.

<sup>218</sup> See *Clarke* [1995] 2 Cr.App.R. 425, CA; *Dallagher* [2004] 2 Cr.App.R. 520, CA.

<sup>219</sup> R.D. Mackay, A.M. Colman and P. Thornton, 'The Admissibility of Expert Psychological and Psychiatric Testimony' in A. Heaton-Armstrong, E. Shepherd and D. Wolchover, D. (Eds), *Analysing Witness Testimony: A Guide for Legal Practitioners and Other Professionals* (Oxford University Press 1999) 324

<sup>220</sup> F.E.Raitt, 'Expert Evidence as Context: Historical Patterns and Contemporary Attitudes in the Prosecution of Sexual Offences' (2004) 12 *Feminist Legal Studies* 234, 235.

<sup>221</sup> E. Cunliffe, 'Without Fear or Favour? Trends and Possibilities in the Canadian Approach to Expert Human Behaviour Evidence.' (2006) *International Journal of Evidence and Proof* 280, 290

<sup>222</sup> D.C. Ormerod, 'Expert Evidence: Where Now? Where Next?' (2006) *Archbold News* 5, 7. See p7 for a discussion of the following cases: *Ward* (1993) 99 Cr. App. R. 326, 332 in which the court acknowledged the advantages of hearing expert evidence on personality disorders which were not mental illnesses. *Strudwick* (1993) 99 Cr. App. R. 326 in which the court held recognised that the mental conditions on which juries may require expert assistance did extend to matters of psychological damage. *O'Brien* (2000) Crim. L.R 676 in which the court moved away from a strict interpretation of medicalisation for determining the admissibility of expert evidence.

<sup>223</sup> Office For Criminal Justice Reform *Convicting Rapists and Protecting Victims - Justice for Victims of Rape :A Consultation Paper* (TSO 2006) 19

<sup>224</sup> See R.D. Mackay, A.M. Colman and P. Thornton, (n219) 330. for a discussion of *R v Emery* (1993) 14 Cr. App. R. (S.) 394, which significantly widened the admissibility of psychological and psychiatric evidence pertaining to a wider range of behaviours. Although the testimony related to the condition of

analogy, it is possible that general evidence concerning myths about domestic violence and appropriate reactions to abuse could be admissible. This position would further the aims of the Home Office's proposals on the admissibility of expert evidence to inform the court of the 'acknowledged psychological reactions that occur after a prolonged relationship of abuse and/or after a deeply traumatic event.'<sup>225</sup>

Despite the fact that the Home Office proposals were not carried forward, the objectives of the proposals could be achieved by continuing to follow a more liberal interpretation of *R v Turner*. This would ensure that general evidence on domestic violence would be admissible. This would allow the abused woman's context to be taken into consideration and recognise her reaction as a reasonable response to a traumatic situation.<sup>226</sup> It would further extend the range of testimony available to the jury about behaviours which are commonly misunderstood, but are not states of mental abnormality.

Therefore, the testimony could focus on the abused women's social realities and her lack of alternatives in their own right,<sup>227</sup> enabling the abused woman's experiences to become of central importance.<sup>228</sup> Expert testimony would no longer be shaped against the backdrop of a framework based on abnormality and pathology, allowing the jury to undertake an informed assessment of the defendant's context.<sup>229</sup> This would ensure that the approach outlined in *Wanrow* could be strategically adopted, demonstrating that abused women's experiences are both individual, but exist as part of a wider framework of gender discrimination. This would move expert testimony beyond standards of sameness and difference, allowing the defendant's own reaction to be considered in light of the defendant's own circumstances, thereby recognising multiple reactions as reasonable reactions.

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dependent helplessness, Trial Judge Michael Astill recognised that the effects of abuse described by the defendant might not be within the capacity of a jury to understand unless assisted by expert evidence.

<sup>225</sup> D.C. Ormerod, (n222) 7.

<sup>226</sup> J.R. Castel, 'Discerning Justice for Battered Women Who Kill.' (1990) 48 University of Toronto Faculty of Law Review 229, 258. See further, M. Dowd, (n176) 82.

<sup>227</sup> Martinson, Q.C. et al. 'A forum on Lavallee v R: Women and Self-Defence' (1991) 25 University of British Columbia Law Review 23, 68

<sup>228</sup> M. Dodge and E. Greene, 'Jurors and Expert Conceptions of Battered Women.' (1991) 6 Violence and Victims 271, 282

<sup>229</sup> F.E. Raitt, (n220) 236.



## 2.6 Conclusions

This chapter has sought to develop a woman-centred framework for understanding the typical reactions of abused women who kill in cases of intimate partner homicide. The framework draws upon existing empiricism which details the methods and motivations apparent in cases of female perpetrated intimate partner homicide and applies such empiricism in conjunction with existing feminist epistemologies. These epistemologies reveal the way in which women are constructed within the criminal justice system. The epistemologies expose the patterns of masculine dominance, the unequal levels of power and control apparent within abusive relationships and how this power imbalance is maintained by the resulting legal structure, which adopts prevailing notions of masculinity as the normative legal standard and excludes the non-conforming narratives of abused women who kill.

In order to challenge the legal exclusion of the recognition of the reactions of abused women who kill as reasonable, a woman-centred analytical framework was developed, which incorporated existing feminist epistemologies with the aim of developing a sufficiently woman-centred court room strategy for abused women who kill. Such a strategy would prioritise the individual experiences of abused women who kill in order to facilitate deconstruction, ensuring that the realities of abused women could displace existing stereotypes and overcome masculine dominance. In order to develop such a strategy, the analytical framework had to confront issues of sameness and difference which significantly influence the way in which abused women are constructed and understood, as both standards have the capability to exaggerate gender stereotypes and essentialise both the experiences and reactions of abused women who kill. A preoccupation with such standards fails to challenge masculine dominance. In order to ensure that abused women were neither constructed as the same as men, nor constructed as so very different to men, the analytical framework sought to overcome issues of sameness and difference by focusing on gender disadvantage. This involves positioning abused women who kill within the wider context of gender discrimination, evaluating how abused women are disadvantaged by relationships of power and how the ensuing masculine dominance keeps abused women subordinated.



The effects of gender disadvantage were further explored when the analytical framework was applied to BWS in order to challenge the current legal construction of abused women who kill. The framework recognised that although BWS was developed to overcome common misconceptions about abused woman who kill, that the application of BWS actually perpetuates gender stereotypes. Constructing abused women who kill through a psychological condition crystallises the belief that abused women are mentally ill, and that their behaviours and reactions are actually manifestations of their illness, rather than reactions shaped by the abuse endured and the need for self preservation.

Consequently, the analytical framework was used to move beyond pathological constructions of abused women who kill and evaluated the strategic possibilities apparent within the use of expert testimony. The framework sought to build upon the intentions of BWS and dispel the powerful myths and stereotypes that influence the construction of abused women who kill. In order to move beyond BWS, expert testimony would be used to distance abused women who kill from damaging psychological constructions and would use abused women's actual experiences and reactions to overcome gender stereotypes. This could be achieved by following the position adopted in the United States case of *Wanrow*, recognising that the experiences of abused women are outside of the ambit of common understanding. The testimony could be utilised as a means of addressing the gender disadvantage and dominance that abused women face both as individuals, and as part of a group. Such an approach could expose the wider structures and processes of inequality which perpetuate gender disadvantage and keep masculine dominance in place. This would enable the social realities and experiences of abused women who kill to become central to the testimony, allowing their narrative to dispel the powerful legal and social myths pertaining to their capacity to behave rationally.

In order to critically evaluate the potential of expert testimony as a sufficiently woman-centred court room strategy, this thesis will apply expert testimony to both the complete defence of self defence and the partial defences to homicide in order to ascertain whether such a strategic approach is sufficient to tackle the imbedded gender disadvantage within the defences. The following chapters will critically evaluate whether such a strategy can be integrated into the current defensive framework, or

whether alternative homicide defences are required to ameliorate the existing gender bias and recognise the reactions of abused women as reasonable responses to domestic violence.

## Chapter Two

### A Woman-Centred Analysis of the Partial Defences to Homicide

#### 3.1 Introduction

This chapter seeks to apply the woman-centred analytical framework to the partial defences to homicide in order to critique and deconstruct the partial defences of diminished responsibility and provocation as they existed under the Homicide Act 1957. This chapter will further evaluate the recent legislative modification of the partial defences to homicide under the Coroners and Justice Act 2009.<sup>230</sup> The partial defences are of particular significance for abused women who kill, as until the implementation of the Coroners and Justice Act 2009, the partial defence of diminished responsibility was the defence most often used in cases of female perpetrated intimate partner homicide.<sup>231</sup> The implementation of the Coroners and Justice Act 2009 has altered the operation of the partial defences to homicide, and thereby modified the defensive options available to abused women who kill.

This chapter will evaluate how the legal construction of abused women who kill has evolved, and establish whether abused women's reactions are capable of being recognised as reasonable responses to violence within this modified framework. This chapter will also consider whether further reform is required to sufficiently overcome the gender bias within the defences to homicide and reflect and overcome the wider structures of gender discrimination and dominance which have kept the experiences of abused women who kill legally subordinate to masculine experiences.

#### 3.2 The Homicide Act 1957, s2 and the Partial Defence of Diminished Responsibility

The partial defence of diminished responsibility as it existed under The Homicide Act 1957, s2 was used as a means of reducing a finding of murder to one of manslaughter in cases in which abused women had killed their abusers in contradiction to law and society's comprehension of a reasonable reaction to domestic violence and the

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<sup>230</sup> The Coroners and Justice Act 2009, s54 abolishes the partial defence of provocation as it existed under The Homicide Act 1957, s3 and The Coroners and Justice Act 2009, s52 modifies the partial defence of diminished responsibility as it existed under The Homicide Act 1957, s2.

<sup>231</sup> W. Wilson, 'The Structure of Criminal Defences' (2005) *Criminal Law Review* 108, 108

appropriate nature of female behaviour. Therefore, had the abused woman stayed in the abusive relationship, waited for a window of opportunity before killing her abuser, or used a weapon in the commission of a homicide ultimately motivated by fear, she would be pushed towards a plea of diminished responsibility. Although diminished responsibility could be pleaded alongside the partial defence of provocation, which would increase the likelihood of a manslaughter conviction,<sup>232</sup> provocation was widely thought to be reserved for the mentally normal.<sup>233</sup>

Under The Homicide Act 1957, s2, a verdict of manslaughter would apply if the defendant was suffering from an 'abnormality of the mind.'<sup>234</sup> The abnormality had to have arisen either from a condition of arrested or retarded development of the mind or any inherent causes, or must have been induced by disease or injury at the time of the homicide, resulting in an impaired mental responsibility.<sup>235</sup> The partial defence of diminished responsibility served as a partial denial of the defendant's responsibility. This ensured that the defendant was not judged according to excusatory standards, as was the case under the partial defence of provocation, as the defendant's abnormality of the mind meant that they were unable to adhere to the relevant standards of behaviour expected of the mentally normal.<sup>236</sup>

Abnormality of the mind was described by Lord Parker C.J in *Byrne*, as 'a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal.'<sup>237</sup> The partial defence suggested the existence of formal distinctions between the normal and abnormal mind, sending a very clear societal message that the defendant's mitigated sentence existed on the basis that no normal person would have behaved in the same way, thus reducing the defendant's sentence in line with their reduced capacity to be held fully responsible for their conduct. No consideration was made of the existence of a sliding scale or mental health continuum,<sup>238</sup> or any acknowledgement made of the scientific and psychiatric

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<sup>232</sup> J. Horder, 'Between Provocation and Diminished Responsibility' (1999) 10 K.C.L.J 143, 161

<sup>233</sup> A. Ashworth, 'The Doctrine of Provocation' (1976) Cambridge LJ 292, 312

<sup>234</sup> The Homicide Act 1957, s2(1)

<sup>235</sup> The Homicide Act 1957, s2(1)

<sup>236</sup> J. Horder, 'Between Provocation and Diminished Responsibility' (n232) 144.

<sup>237</sup> [1960] 2 Q.B. 396 at 403

<sup>238</sup> S. Morse, 'Diminished Rationality, Diminished Responsibility' (2003) 1 Ohio State Jo. of Crim. Law 289. In the course of arguing for a generic partial defence of diminished rationality, Morse describes the capacity for rationality as a "continuum concept"; at 295

explanations as to what can happen when individuals are subjected to stress and trauma.<sup>239</sup> Consequently, for the purposes of the law, the abused woman's social context was irrelevant, as the reliance upon diminished responsibility reinforced the 'psychological cul de sac'.<sup>240</sup> This legally prioritised an assessment of the defendant's personality, with the effect of normalising domestic violence and labelling abused women's reactions to it as legally abnormal.

Moreover, it was unclear which conditions the reasonable man would deem 'abnormal' for the purposes of The Homicide Act 1957, s2. This was emphasised by the lack of judicial guidance available on the matter and by the fact that expert testimony and evidence varied as there was, and still is, no consensus within the medical community as to what conditions are mentally abnormal.<sup>241</sup> Additionally, the inherent causes of mental illness are capable of being interpreted in many different ways resulting in a lack of consistency and clarity.<sup>242</sup> This raised problems for abused women who kill, as their reaction to domestic violence would only serve as a partial defence if their actions were the direct consequence of an abnormal mind, which would allow the admissibility of expert evidence to support mental abnormality.<sup>243</sup> This position follows *R v Turner*, in which evidence that does not deal with mental disorders or mental handicaps is not admissible. This is because other psychological functions are apparently matters of common knowledge and experience of the jury and can be understood without the need for expert evidence.<sup>244</sup>

In cases of female perpetrated intimate partner homicide, BWS was considered as a recognised abnormality of the mind. Evidence of the condition became admissible under the Homicide Act 1957, s2, as it was considered beyond the comprehension of the ordinary person who would be unable to detect or appreciate the effect of evidence

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<sup>239</sup> T.J. Shors, 'Learning During Stressful Times' (2004) 11 Learning & Memory 137, 139

<sup>240</sup> D. Nicolson and R. Sanghvi, 'Battered Women and Provocation: The Implications of *R. v. Ahluwalia*' (n71) 734.

<sup>241</sup> J. Butcher et al, *Abnormal Psychology: Core Concepts* (Pearson, Allyn and Bacon 1933) 31- 32

<sup>242</sup> R.D. Mackay, 'The abnormality of Mind Factor in Diminished Responsibility' (1999) Criminal Law Review 117, 120

<sup>243</sup> H.G. Kennedy, 'Limits of Psychiatric Evidence in Criminal Courts: Morals and Madness' (2005) Medico Legal Journal of Ireland 13, 13

<sup>244</sup> A. Colman and R.D. Mackay, 'Equivocal Rulings on Expert Psychological and Psychiatric Evidence: Turning a Muddle into a Nonsense' (1996) Criminal Law Review 88, 88

of the condition without accompanying expert testimony.<sup>245</sup> This became somewhat of a catch for abused women who kill, as they had to further embrace the pathological stereotype that BWS represents. Psychiatric evidence is only available for the abnormal,<sup>246</sup> as jurors do not need experts to inform them of the workings of a normal and reasonable mind.<sup>247</sup> This further fuelled the ‘antediluvian myth,’<sup>248</sup> that experts only concern themselves with the workings of the abnormal mind. The only alternative was to allow the defendant to be assessed according to the common sense standards of the jury.<sup>249</sup> This ignored the complexity of the human mind and individual reaction especially in cases concerning domestic violence and left the abused woman with a stark choice. She had to choose either to allow herself and her reaction to abuse to be constructed and understood as the result of a mental abnormality, or she faced the possibility of the mandatory life sentence.

This had the effect of further limiting societal understanding of abused women who kill their abusers and ignored the possibility that any increased exposure of the jury to alternative psychological alternatives could be advantageous.<sup>250</sup> Instead, the admissibility of expert evidence was dependent on the existence of abnormality and evaluated according to prevailing social standards, which were unable to fully understand or account for domestic violence and its implications and were abstracted from their social context. It also failed to recognise that the homicide was the end result of the abused woman’s personality pattern, which she had developed as a coping strategy within the abusive relationship. The reactive behaviour was situationally determined, and not the result of a personality disorder.<sup>251</sup> This completely overlooked the existence of external factors, failing to recognise that an

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<sup>245</sup> R. Pattenden, ‘Conflicting Approaches to Psychiatric Evidence in Criminal Trials: England, Canada and Australia’ (1986) *Criminal Law Review* 92, 92

<sup>246</sup> R. Pattenden, (n245) 92.

<sup>247</sup> *R. v. Turner*, [1975] Q.B. 834, 841 (C.A.). (Lawton LJ)

<sup>248</sup> F. Bates, ‘Admissibility: Psychiatric Evidence: Towards a Coherent Policy’ [1977] *Can. B.R.* 178, 185

<sup>249</sup> B. Diamond, and D. Louisell, ‘The Psychiatrist as an Expert Witness: Some Ruminations and Speculations’ (1965) 63 *Mich. L.R.* 1335, see p1342 ‘It is obvious that there is a body of knowledge, not generally accessible to lay persons, that is the special province of those trained to be psychiatrists, psychologists and social workers. The knowledge can be used both to explain and to treat behavioural aberrations.’

<sup>250</sup> C. Slobogin, ‘A Rational Approach to Responsibility’ (1975) 83 *Mich.L.R.* 820, 847.

<sup>251</sup> J. Casey, ‘Diminished Responsibility and Battered Women who Kill. Case Comment’ (2001) 38 *Scots Law Times* 311, 317

individual's reaction is significantly influenced by environmental factors.<sup>252</sup> Diminished responsibility therefore focused exclusively on the existence of a mental abnormality instead of recognising and uncovering the reasons and factors behind the reaction. This resulted in findings that were completely abstract, with no consideration of the historical and social context in which the act took place and culminated in the finding that abused women's reactions were not reasonable according to masculine legal standards, so she must therefore be mentally disturbed.

### 3.3 The Homicide Act 1957, s3 and the Partial Defence of Provocation

If an abused woman chose not to plead diminished responsibility, her alternative partial defence was provocation. The partial defence would make reasonable her reaction by moving the focus of the investigation away from concepts of mental abnormality and medicalisation and towards an understanding of the circumstances which triggered the commission of the homicide. The partial defence of provocation as it existed under the Homicide Act 1957, s3 stated as follows:

Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things said or done or by both together) to lose his self-control, 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; and in determining that question the jury shall take into account everything both done and said according to the effect, which, in their opinion, it would have on a reasonable man.<sup>253</sup>

In order to invoke a successful plea of provocation under this statute, the defendant had to show that 'that there was some provocative conduct, that the defendant as a result lost her self control; and that an ordinary person (possibly with the same personal characteristics of D,) might have killed in response to such conduct.'<sup>254</sup> The test was subjective in the sense that it had to be shown that the defendant had been temporarily deprived of the power of self control. This was followed by an objective

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<sup>252</sup> N. Lacey, 'Partial Defences to Murder: Questions of Power and Principle in Imperfect and Less Imperfect Worlds' in Andrew Ashworth and Barry Mitchell(ed) *Rethinking English Homicide Law* (Oxford University Press 2000) 116

<sup>253</sup> The Homicide Act 1957, s3

<sup>254</sup> C. Wells, 'Provocation: The case for Abolition' in Andrew Ashworth and Barry Mitchell (ed) *Rethinking English Homicide Law* (Oxford University Press 2000) 87

analysis of whether the reasonable man would have lost his self control and behaved in the same way. If so, the defendant's sentence could be reduced to manslaughter on the grounds of provocation.

### 3.3.1 The Partial Defence of Provocation and the Loss of Self Control

The requirement that an individual loses their self control in order to fall within the ambit of the partial defence of provocation, sought to ensure that only killings committed in a state of anger arising from some form of provocation were partially excused by the law in an attempt to ensure that killings committed in a controlled and premeditated manner did not fall within the ambit of the partial defence. The concept of loss of self control was problematic for abused women trying to plead provocation, as it required the defendant to be so angry that they were unable to control themselves.<sup>255</sup> This concept privileged angry and violent outbursts, which are not contextually reflective of the circumstances in which abused women kill. Female perpetrated intimate partner homicide is not usually the consequence of an angry loss of self control, as rage is internalised and not manifested in furious outbursts.<sup>256</sup>

Nevertheless, the concept of loss of self control attempted to address the relationship between 'the external factors and the internal capacity for self control,'<sup>257</sup> suggesting that the loss of control mirrored an individual's pathology.<sup>258</sup> However, Edwards argues that this was not often the case, and instead of mirroring pathology and giving way to physiology, the loss of self control requirement followed the 'mirror of nature' principle.<sup>259</sup> This gave exculpation to masculine emotions, like anger, and prescribed situations in which external conditions were allowed to weaken the moral bind.<sup>260</sup> This enabled the law to dictate the circumstances in which provocation applied according to social constructions of acceptable responses in a given situation.

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<sup>255</sup> A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine* (3<sup>rd</sup> edn, Hart Publishing 2007) 355

<sup>256</sup> The paradigmatic case here is *R v Ahluwalia* (1992) 4 All E.R 889

<sup>257</sup> S. Edwards, 'Abolishing Provocation and Reframing Self Defence- the Law Commission's Options for Reform' (2004) *Criminal Law Review* 181, 188

<sup>258</sup> T.N. Pelegrinis, *Kant's Conceptions of the Categorical Imperative and the Will* (Zeno, London, 1980) 25

<sup>259</sup> see R. Rorty, *Philosophy and The Mirror of Nature* (Blackwell 1980)



Gender inequality was the ensuing consequence of the adoption of such a legal stance, as contemporary evidence of loss of self control had depended on ‘outwardly visible signs of outburst,’<sup>261</sup> and words such as ‘snap,’<sup>262</sup> and ‘exploded’<sup>263</sup> became commonplace when describing a loss of self control. Edwards argues that displays of terror, hysteria, isolation or exhaustion often apparent in female perpetrated intimate partner homicides, did not fit within the model of an individual losing their self control,<sup>264</sup> further excluding abused women’s reactions to abuse from the partial defence.

The gender disparate implications of the partial defence of provocation were further codified in *R v Duffy*,<sup>265</sup> when it was held that the loss of self control must occur almost immediately. According to Edwards, Devlin J took the law down a path from which it strained unsuccessfully to recover and with disastrous consequences for battered women who killed their abusers.<sup>266</sup> This was because Devlin J claimed that loss of self control had to be sudden and temporary, and make the accused so subject to passion that they were not the master of their mind.<sup>267</sup> This privileged sudden, angry and violent outbursts often perpetrated by men. It failed to recognise that women delay the fatal strike and use weapons to alleviate the disparities in both size and strength between themselves and their abuser. Instead, weapons signified a ‘significant degree of planning and premeditation,’<sup>268</sup> which again, was inconsistent with the legal interpretation of loss of self control. This made the manner in which abused women kill appear premeditated and controlled, as opposed to a reasonable response to provocative conduct.

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<sup>260</sup> S. Edwards, ‘Abolishing Provocation and Reframing Self Defence- the Law Commission’s Options for Reform’ (n257) 188.

<sup>261</sup> S. Edwards, ‘Abolishing Provocation and Reframing Self Defence- the Law Commission’s Options for Reform’ (n257) 182.

<sup>262</sup> see *R v Warner*, *The Guardian* (May 1, 1982)

<sup>263</sup> see *R v Hinton*, *Daily Telegraph* (March 26, 1988)

<sup>264</sup> S. Edwards, ‘Abolishing Provocation and Reframing Self Defence- the Law Commission’s Options for Reform’ (n257) 183.

<sup>265</sup> (1949) 1 All E.R 932

<sup>266</sup> S. Edwards, ‘Justice Devlin’s Legacy: Duffy- a battered woman “caught” in time.’ (2009) 12 *Criminal Law Review* 851, 852

<sup>267</sup> *R v Duffy* (1949) 1 All E.R 932

<sup>268</sup> Criminal Justice Act 2003, Sched. 21, para. 9(a).

It was not until *R v Ahluwalia*<sup>269</sup> that the criminal justice system attempted to incorporate the situation in which many abused women find themselves in. However, it is essential to note that Ahluwalia's appeal and her subsequent reduction in sentence to manslaughter was on the grounds of diminished responsibility. Although the case succeeded on the basis of there being new evidence that Ahluwalia was suffering from depression, the case did have a significant impact on the partial defence of provocation, as an attack was launched upon the temporal nexus required for the demonstration of a loss of self control. It was held that the sudden requirement for a loss of self control should no longer serve as a legal bar to access the partial defence of provocation and the effect of cumulative provocation, or 'slow burning' provocation should be recognised.<sup>270</sup> This would recognise that an individual who did not respond immediately to provocative conduct, could still have lost their self control and could therefore plead provocation. However, it was expressly noted that 'the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it would be that the prosecution would negate provocation.'<sup>271</sup>

Although the recognition of a time lapse signified that the law was beginning to recognise the plight of battered women who kill, it did introduce problems, as the removal of the immediacy requirement could allow for the penetration of multiple motives. Anything in theory could constitute provocation, provided the accused argued that their delayed response was a reaction to prolonged provocation. Consequently, Horder claimed that the relaxation of the immediacy requirement threw a cloak of legitimacy around cases in which men have plotted revenge on a partner.<sup>272</sup> This demonstrates that although the situation was supposed to improve for abused women, the legal implications were still more beneficial to male defendants due to the adoption of angry and typically masculine responses as the normative legal standard.

Nevertheless, the recognition of cumulative provocation could have been of benefit to those unable to escape from abusive relationships, as Horder claimed that they would

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<sup>269</sup> (1992) 4 All E.R. 889

<sup>270</sup> *Ahluwalia* [1992] 4 All E.R. 889. Also see *Thornton (No.1)* [1992] 1 All E.R. 306; *Thornton (No.2)* [1996] 1 W.L.R. 1174.

<sup>271</sup> (1992) 4 All E.R. 889 at 896c-d.

be regarded as having their powers of self control ‘naturally diminished’ by the abuse, without the diminution automatically being associated with a mental abnormality.<sup>273</sup> The removal of the immediacy requirement would incorporate abused women’s social realities, recognising that after being subjected to abuse, the defendant’s powers of self control were eroded, culminating in their reaction and the commission of the homicide. The adoption of such an interpretation would bring abused women who killed their abusers within the ambit of the partial defence of provocation, as their reaction could be recognised as a reasonable response to cumulative provocation instead of the product of a mental abnormality.

However, even with the relaxation of the imminence requirement and the possibility of recognising the natural diminution of self control, the subjective nature of loss of self control was still problematic for abused women because it still lacked a sufficient legal definition making it subject to judicial interpretation. Loss of self control was a fundamental legal concept which could continually be reinterpreted on the basis of the existence of deserving cases. This further demonstrated that abused women and their reactions to abuse were not considered to fall within the original parameters of loss of control through anger, and therefore had to be squeezed into the preferentially masculine framework on the grounds of judicial benevolence. This meant that any legal gains for abused women could be taken away, should loss of self control be reinterpreted and the legal parameters redefined. This forced the Law Commission to conclude that asking whether an individual could have exercised self control posed an impossible moral question, as the definition and concept of loss of self control was riddled with such ambiguity.<sup>274</sup> For example, the way in which loss of self control was interpreted assumed that the individual had self control to lose in the first place, as in theory, ‘only an agent who antecedently possesses self control can lose it,’ as one cannot lose what one does not have.<sup>275</sup>

Consequently, the partial defence of provocation did not fully explain and account for what exactly was lost when one loses self control, as surely self control could be lost

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<sup>272</sup> J. Horder, ‘Reshaping the Subjective Element in the Provocation Defence’ (2005) 25(1) Oxford Journal of Legal Studies 123, 127

<sup>273</sup> J. Horder, ‘Between Provocation and Diminished Responsibility’ (n232) 160.

<sup>274</sup> Law Commission, *Partial Defences to Murder*, (Law Com No.290, Cm.6301, 2004) para 3.28

without a person having to lose complete control of their body, or by not being able to understand what they were doing.<sup>276</sup> Further, the interpretation made no consideration of the defendant's capacity for self control prior to the incident, as the defendant could have lacked the self control to deal with the things said or done. This would result in the defendant lacking in the self control and therefore capacity to refrain from submitting to any kind of provocation.<sup>277</sup> Another alternative is that the defendant did have sufficient self control, but that the provocative incident gave rise to inclinations and undermined the level of self control that the defendant already had which had previously restrained them from responding.<sup>278</sup>

In seeking to overcome the uncertainty surrounding the meaning of loss of self control and what it could have entailed, Holton and Shute proposed that self control could have been legally defined and understood as follows: 'self control consists in the ability to bring one's actions into line with one's considered judgments about what it would be best to do, where these judgments depart from one's desires.'<sup>279</sup> This definition claims that strength of will is a crucial factor in maintaining self control, and recognises that judgment can be clouded or corrupted by emotion. This would recognise the role of other emotions besides anger in homicide, recognising that although abused woman had previously been fearful of their abusers and submissive to them, that they still retained the ability to respond with an act of violence, without this necessarily being reflective of a mental abnormality.<sup>280</sup> It would acknowledge that the abuse sustained could erode the capacity to endure it any longer. This would have brought the legal interpretation of a loss of self control in line with empirical literature, as experiments have demonstrated that individuals do not have an unlimited and unwavering capacity for self control, but that self control is quantified and can be used up.<sup>281</sup>

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<sup>275</sup> Holton, R. and Shute, S. 'Self Control in the Modern Provocation Defence' (2007) 27 (1) O.J.L.S 49, 50

<sup>276</sup> Holton, R. and Shute, S. (n275) 52.

<sup>277</sup> Holton, R. and Shute, S. (275) 58.

<sup>278</sup> Holton, R. and Shute, S. (n275) 58.

<sup>279</sup> Holton, R. and Shute, S. (n275) 54.

<sup>280</sup> A. Reilly, 'Loss of Self-Control in Provocation' (1997) 21 Crim LJ 320, 330

<sup>281</sup> See R. Baumeister et al, 'Ego-Depletion: Is the Active Self a Limited Resource?' 74 (1998) Journal of Personality and Social Psychology 1252

### 3.3.2. Provocation, Loss of Self Control and the Ordinary Reasonable Person

Unfortunately, the legal definition of loss of self control did not reach such a state of clarity. Should the abused woman have been able to demonstrate that she had been provoked to lose her self control, it was then left to objectively assess her capacity for self control against the standards of the ordinary and reasonable person. The case of *R v Ahluwalia* was again instrumental in developing the partial defence of provocation so that it could incorporate the claims of battered women who killed their abusers. The case was significant because it enabled BWS to be addressed when assessing the defendant's capacity for self control against the standards of the ordinary and reasonable person. During Ahluwalia's trial, the jury had been asked to consider how a reasonable, educated, Asian woman would respond to the provocation.<sup>282</sup> Although evidence of BWS was not considered in relation to Ahluwalia, as there was no evidence that it was a condition that she had,<sup>283</sup> it was suggested that if there was the right sort of evidence, then the reasonableness ought to be judged from the perspective of the syndrome sufferer.<sup>284</sup>

This moved the standard of the ordinary and reasonable person towards what Horder called 'weak excuse theory.'<sup>285</sup> In effect, this allowed the defendant to be judged by the standard of what could reasonably have been expected of the individual in question. This widened the 'moderate excuse theory'<sup>286</sup> that had been applied under *R v Camplin* when Lord Diplock in the House of Lords stated that:

the reasonable man referred to in the question is having the power of self control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose

<sup>282</sup> D. Nicholson and R. Sanghvi, (n71) 732.

<sup>283</sup> [1992] 4 All E.R. 889 at 898d-e

<sup>284</sup> "Had the evidence which has now been put forward before this court been adduced before the trial judge, different considerations may have applied.": at 898f-g.

<sup>285</sup> J. Horder, 'Between Provocation and Diminished Responsibility' (n232) 145.

<sup>286</sup> J. Horder, 'Between Provocation and Diminished Responsibility' (n232) 145

his self control but also whether he would react to the provocation as the accused did.<sup>287</sup>

This made age and sex the only relevant characteristics, but the jury could consider all other characteristics ‘which have to be the subject of taunts, gestures etc.’<sup>288</sup> In *Ahluwalia* it was not stated whether BWS had to be the subject of taunts, expanding *Camplin* as the defendant had to be ‘a different person from the ordinary run of women’, or ‘marked off or distinguished from the ordinary woman of the community.’<sup>289</sup> This enabled abused women to fall within this construction and use BWS as a characteristic, as by virtue of their commission of the homicide they become distinguished from the ordinary woman of the community.

Despite the legal recognition that BWS impacted significantly upon the capacity for self control, the fact that age and sex were relevant factors in determining the reasonable person’s capacity for self control allowed the legal construction of the reactions of abused women to be influenced by damaging sexual stereotypes. A woman who commits a crime, particularly one of a violent nature, has stepped outside of her gender role expectations and is therefore deviant and deserving of harsh treatment.<sup>290</sup> She has breached the social attitudes that define the legitimate parameters of her behaviour, regardless of the fact that she may have responded out of fear and the need to protect herself or her children.<sup>291</sup> As such, the law must be seen to respond to characterisations of male and female behaviour and render her reaction abnormal.<sup>292</sup>

The concept of a variable or fixed capacity for self control continued to be problematic even after the decision in *Ahluwalia* and the recognition of BWS as a relevant characteristic, and oscillated ambivalently between an objective and

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<sup>287</sup> [1978] A.C. 705, 716

<sup>288</sup> D. Nicholson and R. Sanghvi, (n71) 732.

<sup>289</sup> [1992] 4 All E.R. 889 at 898a-c. See also at 897g-898a

<sup>290</sup> D.M. Phillips and L.B. Defleur, ‘Gender Ascription and the Stereotyping of Deviants’ (1981) 20(3-4) *Criminology* 431, 435

<sup>291</sup> P. Carlen and A. Worrell, (eds) *Gender, Crime and Justice* (Open University Press 1987) 8

<sup>292</sup> W.W. Williams, ‘The Equality Crisis; some Reflections on Culture, Courts and Feminism’ in Bartlett, K. T. and Kennedy, R. *Feminist Legal Theory: Readings in Law and Gender* (Westview Press 1991) 29

subjective interpretation. When the standard was subjective, as in *R v Humphreys*<sup>293</sup> and *R v Thornton (No 2)*,<sup>294</sup> the abuse sustained became legally relevant to the issue of the ordinary and reasonable person, as abuse was not inconsistent with the concept of the reasonable person. When the test was objective, abused women found it much more difficult to fall within the ambit of the ordinary and reasonable person, as this person did not have the characteristics of a battered woman, which pushed abused women towards a plea of diminished responsibility.

The effects of a strict objective test can be witnessed in *Luc Thiet Thuan v Queen*.<sup>295</sup> This case held that the defendant's brain damage, which could reduce or impair his capacity for self control was not a factor to be considered. The ordinary and reasonable person requirement did not enable the consideration of idiosyncrasies, as they were not consistent with the powers of self control expected of the ordinary and reasonable person.<sup>296</sup> Therefore, the defendant's mental abnormality could be considered under diminished responsibility, not provocation. Following the position in *Luc Thiet Thuan v Queen*, characteristics of mental impairment, such as BWS, became relevant only to the gravity of the provocation, and not to the reasonable man's loss of self control.<sup>297</sup> This made a distinction between factors going to the 'provocativeness' and factors going to the 'provocability', holding only the former to be relevant,<sup>298</sup> suggesting that the two can be neatly separated,<sup>299</sup> and rendering the implications of violence upon loss of self control irrelevant.

However, a subjective interpretation of the ordinary and reasonable person returned in *R v Smith (Morgan)*,<sup>300</sup> when it was held that the characteristics personal to the defendant should be considered when deciding whether the objective component of the provocation defence had been satisfied. This enabled abused women to fall within the ambit of the partial defence, but the outcome of this case was controversial as it

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<sup>293</sup> [1995] 4 All E.R. 1008

<sup>294</sup> [1996] 1 W.L.R. 1174

<sup>295</sup> (1997) AC 131

<sup>296</sup> *Luc Thiet Thuan v The Queen* (1997) AC 131, 140

<sup>297</sup> 'Homicide-Murder-Provocation-Characteristics of the reasonable man' (2000) Criminal Law Review 1004

<sup>298</sup> 'Homicide-Murder-Provocation-Characteristics of the reasonable man' (n297) 1008.

<sup>299</sup> A. Norrie, 'From Criminal Law to Legal Theory: The Mysterious Case of the Reasonable Glue Sniffer' (2002) 65 M.L.R. 538, 546

<sup>300</sup> (2001) 1 AC 146 (HL)



allowed the objective, self control requirement to be expanded to the point where abnormal characteristics which had no bearing on the gravity of the provocation became relevant.<sup>301</sup> Although, it was still necessary for the jury to apply an objective standard of behaviour which society was entitled to expect, the approach gave rise to the danger of Dressler's 'oxymoron principle,'<sup>302</sup> in which it was argued that the objective test had been expanded to such an extent that the jury may have had to consider how the reasonable paranoid might have reacted to provocative conduct.

Consequently, objectivity returned in *A-G of Jersey v Holley*,<sup>303</sup> and remained the standard upon which to judge the defendant's capacity for self control up until provocation was abolished under the Coroners and Justice Act 2009. The decision adhered to the school of thought that emotions do not drive individuals, but that individuals retain an ability to assess their reactions and regulate their conduct.<sup>304</sup> The decision in *Holley* therefore appeared to exclude the recognition of a variable capacity for self control, which is apparent in women who have been abused.<sup>305</sup>

However, following Lord Millet's dissenting judgment in *R v Smith(Morgan)*, it became clear that abused women who kill could fall within an objective construction of the standard of self control to be expected from the ordinary and reasonable person. Lord Millet claimed that the objective test recognised that the treatment battered women receive from their abusers had the effect of gradually wearing down their ability to refrain from resorting to violence.<sup>306</sup> Lord Millet's position acknowledged that prior to the abuse, the abused woman had the same standard of self control expected of the ordinary and reasonable person. Lord Millet claimed that under the objective test: 'the question for the jury is whether a woman with normal powers of tolerance and self control, subjected to the treatment which the accused received, would or might finally react as she did.'<sup>307</sup> This recognised that the defendant who

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<sup>301</sup> R. D. Mackay and B. J. Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' (2003) *Criminal Law Review* 745, 750

<sup>302</sup> J. Dressler, 'Why Keep the Provocation Defense? Some Reflections on a Difficult Subject' (2002) 86 *Minn.L.R.* 959, 994.

<sup>303</sup> [2005] UKPC 23

<sup>304</sup> D. M. Kahan and M.C. Nussbaum, 'Two Conceptions of Emotion in Criminal Law' (1996) 96 *Col. L.R.* 269, 274

<sup>305</sup> S. Edwards, 'Justice Devlin's Legacy: Duffy- a Battered Woman "Caught" in Time.' (n266) 857.

<sup>306</sup> (2001) 1 A.C 146, 212 (Lord Millet)

<sup>307</sup> (2001) 1 A.C 146, 213 (Lord Millet)



had been abused was still capable of considering the situation, but that their assessment and evaluation of the situation and how they should respond, could alter because of their heightened emotional state.<sup>308</sup> This ensured that the standard expected recognised that abused women's thinking and judgment can alter due to trauma,<sup>309</sup> abuse,<sup>310</sup> or stress,<sup>311</sup> and as a result, in certain circumstances, the abused woman would find it more difficult than her non abused counterpart to control her reaction in order to conform with the law's expectations.<sup>312</sup>

Despite the woman-centred potential of Lord Millet's construction of the objective test, should the abused woman respond in what objectively appeared to be a considered desire for revenge, then expert evidence would still be required to demonstrate that the abused woman's reaction was the result of a loss of self control triggered by the abuse she had received at the hands of her partner.<sup>313</sup> Should the abused woman wait until her partner was off guard and use a weapon, her reaction could objectively be construed as motivated by a considered desire for revenge. Consequently, her reaction would need to be explained with reference to the damaging stereotypical assumptions that accompany BWS,<sup>314</sup> unless modified standards of expert evidence were introduced to explain the abused woman's conduct in light of her circumstances. Otherwise, the abused woman would technically fall within the ambit of the objective test, but her narrative and context would still have to be explained through a narrow psychological framework. This would move the focus of legal investigation back onto her state of mind, and away from the impact of the abuse.

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<sup>308</sup> R.D. Mackay, B.J. Mitchell and W.J. Brookbanks, 'Pleading for provoked killers: in defence of Morgan Smith' (2008) 124 LQR 675, 679

<sup>309</sup> G. P. Owens and K. M. Chard, 'PTSD Severity and Cognitive Reactions to Trauma Among a College Sample: An Exploratory Study' (2006) 13 Journal of Aggression, Maltreatment and Trauma 23, 24

<sup>310</sup> G. P. Owens and K. M. Chard, 'Cognitive Distortions among Women Reporting Childhood Sexual Abuse' (2001) 16 Journal of Interpersonal Violence 178, 180

<sup>311</sup> J. Miranda, 'Dysfunctional Thinking is Activated by Stressful Life Events' (1992) 16 Cognitive Therapy and Research 473, 480

<sup>312</sup> R. W. Novacco, 'Remediating Anger and Aggression with Violent Offenders' (1997) 2 Legal and Criminological Psychology 77; and earlier L. Berkowitz, 'Towards a General Theory of Anger and Emotional Aggression: Implications of the Cognitive Neoassociationic Perspective for the Analysis of Anger and Other Emotions' in Wyer and Srull (eds), *Perspectives on Anger and Emotion* (Hove 1993) 313 (2001) 1 A.C 146, 212 (Lord Millet)

<sup>314</sup> H. Charlesworth and C. Chinkin, 'Violence Against Women: A Global Issue' in Stubbs, J(ed) *Women, Male Violence and the Law* (Institute of Criminology Monograph Series No 6 1994) 199

The partial defence of provocation as it existed under the Homicide Act 1957, s3, was therefore unable to recognise the reactions of abused women who had killed their abusers as an example of the conduct that an ordinary person may have been driven to commit in light of the abuse sustained. The substantive legal requirements governing the partial defence of provocation demanded abused women to fall within a construction of loss of self control which was shaped according to masculine social context. Angry responses to provocative conduct were recognised as reasonable, but responses motivated by fear and self preservation were not. In order to fall within the partial defence of provocation, abused women had to react like men. This ensured that the wider structures of domination apparent within abusive relationships were not addressed and that abused women's reactions to abuse were still legally constructed through a lens of masculinity, as the morphology of violence was not the 'centrifugal point of focus.'<sup>315</sup>

Consequently, it was the role of the judiciary to stretch and redefine the legal concepts governing provocation in order to accommodate the experiences and reactions of abused women who kill and attempt to present their reactions as examples of behaviour that the ordinary person might have been driven to commit, had they been abused. Although this allowed for some abused women to fall within the ambit of the defence, expert testimony was still required to translate the experiences of abused women into a context that might be understood as reasonable, should she have reacted as many abused women do.<sup>316</sup> Therefore, masculine domination and the masculine context of the defence remained unchallenged, as abused women were still required to fit within a framework which ultimately failed to acknowledge their social context.<sup>317</sup>

### 3.4 The Coroners and Justice Act 2009

Due to the gender disparate application of the partial defences to homicide and the legal failure to accommodate the reactions of abused women who kill, numerous reform proposals were developed to respond to the problems inherent within the

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<sup>315</sup> S. Edwards, 'Descent into murder: Provocation's Stricture-the Prognosis for Women who Kill the Men who Abuse them' (2007) 71(4) *Journal of Criminal Law* 342, 347

<sup>316</sup> J. Horder, 'Sex, Violence and Sentencing in Provocation Cases' (n32) 548.

<sup>317</sup> H. Barnett, (n60) 265.

partial defences of diminished responsibility and provocation.<sup>318</sup> It was seriously questioned whether it was legally appropriate for anger to form the basis of a partial defence, but for fear not to.<sup>319</sup> The legal result of these proposals and considerations is the Coroners and Justice Act 2009, which seeks to overcome the direct rejection of fear as constituting a reasonable reaction,<sup>320</sup> in what has been hailed as a means of ‘avoiding the difficulty in trying to shoehorn killings primarily triggered by fear into a partial defence aimed at killings in anger.’<sup>321</sup>

The recognition of fear builds upon the Law Commission’s proposals, which were envisaged to cover situations in which an abused woman has killed her abuser in order to prevent an anticipated attack which is not immediately imminent.<sup>322</sup> In order to ascertain whether the recognition of fear in the commission of intimate partner homicide is enough to bring abused women who kill within the framework of the partial defences, it is necessary to critically evaluate how the changes made by the legislation will impact upon the defences available to abused women who kill and whether these modifications have sufficiently challenged and addressed the intrinsic gender bias within the partial defences.

### **3.5 The Coroners and Justice Act 2009 and the Partial Defence of Diminished Responsibility**

Although supposed to serve as a modification of the partial defence, the Coroners and Justice Act 2009, s52, substantially alters the partial defence of diminished responsibility as it existed under the Homicide Act 1957, s2. Instead of being required to demonstrate that she was suffering from an abnormality of the mind, the abused woman must now demonstrate that she was suffering from an abnormality of mental functioning.<sup>323</sup> She must then show that the abnormality of mental functioning

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<sup>318</sup> See Law Commission, *Partial Defences to Murder*, (n274), Law Commission, ‘*Murder Manslaughter and Infanticide*’ (Law Com No.304, HC30 (2006) and Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform*, ( Consultation Paper CP19/08, 2008)

<sup>319</sup> Law Commission, *Partial Defences to Murder* (n274) paras 4.166- 4.167

<sup>320</sup> Lord Steyn in *R v Acott* [1997] 1 All ER 706. “A loss of self control caused by fear or panic would not be enough”.

<sup>321</sup> Ed. ‘Adjusting the boundaries of murder: partial defences and complicity’ (2008) 11 Criminal Law Review 829, 830

<sup>322</sup> Law Commission, ‘*Murder Manslaughter and Infanticide*’ (n318) para 5.11 1(a)(ii)

<sup>323</sup> The Coroners and Justice Act 2009, s52(1)

arose from a recognised medical condition,<sup>324</sup> that it substantially impaired her ability<sup>325</sup> to understand the nature of her conduct,<sup>326</sup> to form rational judgment,<sup>327</sup> or to exercise self control.<sup>328</sup> Once an abnormality of mental functioning can be shown to be responsible for her impaired judgment, she can satisfy the last requirement, that the abnormality must provide an explanation as to why she was a party to the killing.<sup>329</sup>

According to s52(1)(b), ‘an abnormality of mental functioning provides an explanation for D’s conduct if it causes, or is a significant contributory factor in causing D to carry out their conduct.’ The provision attempts to avoid the idiosyncrasies that can arise under the pre-existing abnormality of the mind requirement,<sup>330</sup> by requiring the defendant’s abnormality of mental functioning to fall within the World Health Organisations ICD-10 criteria or those specified by the American Psychiatric Association’s diagnostic and statistical manual.<sup>331</sup> Under this stricter construction, evidence that the defendant was suffering from BWS is admissible, as both ‘battered spouse syndrome’ and ‘effects of abuse of an adult’ classify as maltreatment symptoms for the purposes of these criteria. This ensures that BWS can be used as evidence of a mental abnormality resulting from a recognised medical condition.

However, due to the way in which abused women kill, it is uncertain as to whether BWS will be used as a means of demonstrating a loss of self control or as an explanation for not being able to understand the nature of certain conduct. Moreover, it is unclear whether the construction of loss of self control as it existed under the partial defence of provocation and the Homicide Act 1957, s3, will be used to judge whether the defendant had lost their self control. Although the legal concept of self control is evidenced as being malleable enough to cover almost any type of behaviour or reaction through judicial interpretation and redefinition, the application of this legal construct to the partial defence of provocation was clearly shaped by masculine social

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<sup>324</sup> The Coroners and Justice Act 2009, s52(1)(a)

<sup>325</sup> The Coroners and Justice Act 2009, S52(1)(b)

<sup>326</sup> The Coroners and Justice Act 2009, S52(1a)(a)

<sup>327</sup> The Coroners and Justice Act 2009, S52(1a)(b)

<sup>328</sup> The Coroners and Justice Act 2009, S52(1a) (c)

<sup>329</sup> The Coroners and Justice Act 2009, S52(1)(c)

<sup>330</sup> *Hansard*, HL Vol.712, col.177 (June 30, 2009).

<sup>331</sup> Support for this was given by Baroness Murphy during debates in the House of Lords, who was until recently Professor of Psychiatry of Old Age at Guy's Hospital.

context. This had the effect of reinforcing masculine standards of behaviour, such as anger, as reasonable, whilst constructing abused women and their reactions as unreasonable. Should the reformed partial defence of diminished responsibility recognise BWS as being debilitating to self control, then abused women could fall within the modified construction of the partial defence, further demonstrating the fluid and uncertain nature of the pivotal legal concept of loss of self control.

If, however, the masculine informed legal construction of loss of self control remains, the abused woman must be able to show that due to having BWS, her ability to form a rational judgment was substantially impaired. If successful, this further conveys that abused women who kill are irrational and abnormal. It further reduces the need to even consider the reasons why the abused woman behaved the way that she did in light of the abuse that she sustained. s52, makes it very clear that her reaction is unreasonable because of her mental infirmity, as it is her psychological condition that caused her to behave the way that she did. The central focus on the abused woman's psychological condition reinforces the narrow construction of the original partial defence of diminished responsibility, as the abused woman is not held accountable under ordinary standards of behaviour because her mental infirmity means that she falls short of these standards every time. This ensures that abused women continue to be understood both socially and legally as unreasonable and mentally ill.

Moreover, by having to demonstrate a substantial impairment of ability, it is likely that more cases involving diminished responsibility will be contested.<sup>332</sup> Mackay claims that the likeliness increases,<sup>333</sup> as successful diminished responsibility pleas were falling continuously even before the introduction of the Coroners and Justice Act 2009 and the implementation of stricter substantive legal requirements. The figure stood at one hundred and nine successful pleas in 1979 and reduced to apparently thirty five in 2005.<sup>334</sup> This raises significant problems for abused women who kill, as evidence suggests that if diminished responsibility pleas are contested, then juries are

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<sup>332</sup> See R.D. Mackay, 'The Diminished Responsibility Plea in Operation--An Empirical Study', in Appendix 2 of the Law Commission's Final Report, *Partial Defences to Murder* (Law Com No.290 Cm.6301 2004) para.20 which reveals that there was no jury trial in 77.1% of relevant cases.

<sup>333</sup> R.D. Mackay, 'The Coroners and Justice Act 2009-Partial Defences to Murder(2) The New Diminished Responsibility Plea' (2010) *Criminal Law Review* 209, 301

<sup>334</sup> K. Coleman, 'Homicide' in *Homicides, Firearm Offences and Intimate Violence 2008-09*, Table 1.08.

much more likely to convict the defendant of murder.<sup>335</sup> Therefore, it becomes even more important that the abused woman is able to conform to the requirements of BWS, as women who do not adhere to all of the symptoms or demonstrate the behaviour typical of BWS sufferers then they will not fall within the ambit of the partial defence. The modified partial defence of diminished responsibility ensures that BWS continues to be used as a checklist to determine whether abused women have been abused for the purposes of the criminal justice system and continues to render their reactions to abuse as abnormal.

### **3.6 The Coroners and Justice Act 2009 and the Partial Defence of Loss of Control**

The Coroners and Justice Act 2009 replaces the partial defence of provocation with a partial defence based on a loss of control. The new partial defence is underpinned by two qualifying triggers. The first trigger is a fear of serious violence,<sup>336</sup> and the second trigger refers to things said or done,<sup>337</sup> of an extremely grave character,<sup>338</sup> which causes the defendant to have a justifiable sense of being seriously wronged.<sup>339</sup> In order to fall within the ambit of the act, the defendant must now prove that they lost their self control,<sup>340</sup> that the loss of self control had a qualifying trigger,<sup>341</sup> and that a 'person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.'<sup>342</sup> The act also codifies that the loss of self control need not be sudden,<sup>343</sup> and that when considering the circumstances of the defendant, all of the defendant's circumstances can be considered, other than those whose only relevance is that they bear on the defendant's capacity for self restraint and tolerance.<sup>344</sup>

If an abused woman is to fall within the ambit of the new partial defence, she must firstly demonstrate that she lost her self control. The retention of the concept of loss of

<sup>335</sup> See R.D. Mackay, 'The Diminished Responsibility Plea in Operation--An Empirical Study' (n332) para.21

<sup>336</sup> The Coroners and Justice Act s55(3)

<sup>337</sup> The Coroners and Justice Act s55(4)

<sup>338</sup> The Coroners and Justice Act s55(4)(a)

<sup>339</sup> The Coroners and Justice Act s55(4)(b)

<sup>340</sup> The Coroners and Justice Act s54(1)(a)

<sup>341</sup> The Coroners and Justice Act s54(1)(b)

<sup>342</sup> The Coroners and Justice Act s54(1) (c )

<sup>343</sup> The Coroners and Justice Act s54(2)

self control does not automatically mean that abused women who kill cannot fall within its construction, as it is a legal concept capable of judicial modification. However, without any legislative modification, it is unclear how the legal construct of loss of self control can be severed from its previous construction, which privileged angry and violent responses, which were reinforced by societal perceptions of appropriate reaction. The Coroners and Justice Act 2009, s54, therefore fails to clarify the concept of loss of self control and whether the existence of an angry and violent outburst is necessary to demonstrate it. The only clarification that the act provides is that the loss of self control need not be sudden,<sup>345</sup> recognising the effects of slow burn and codifying the judicial developments following *Ahluwalia* and *Thornton No 2* in an attempt to ensure that the partial defence becomes more accessible to abused women.<sup>346</sup> However, a time lapse will still be considered under the act, as it will move from being a question of law, to a question of fact.<sup>347</sup> A time lapse will become significant when considering the background circumstances of the defendant, ensuring that the longer delay, the more evidence there will be of premeditation and consequently a finding of no loss of self control.

Without an explicit change to the standard of loss of self control, it is unclear how dominant standards of masculinity will be replaced by alternative conceptions of reasonable reaction. This becomes of particular significance, as loss of self control must now be compatible with fear as a qualifying trigger.<sup>348</sup> The legislation makes no attempt to define how the concept of loss of self control through fear is going to be configured within the existing legal construction of a loss of self control through anger.<sup>349</sup> Edwards questions the relationship between the two concepts, arguing that anger is an eruptive moment, whereas fear is a break down in control due to an inability to control circumstances,<sup>350</sup> suggesting that the two states are actually asymmetrical. Fear is not an explosive state, rather it is one which is endured.<sup>351</sup> Consequently, it is unclear how a loss of self control caused by fear should be

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<sup>344</sup> The Coroners and Justice Act 2009, s54(3)

<sup>345</sup> The Coroners and Justice Act 2009, s54(2)

<sup>346</sup> HL Committee, 7 July 2009, col. 584, *per* Baroness Scotland.

<sup>347</sup> S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self Control' (2010) 74(3) *Journal of Criminal Law* 223, 223

<sup>348</sup> The Coroners and Justice Act 2009, s55(3)

<sup>349</sup> S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self Control' (n347) 223.

<sup>350</sup> S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self Control' (n347) 226.

<sup>351</sup> O. Quick and C. Wells, 'Getting tough with defences' (2006) *Criminal Law Review* 514, 523



manifested for the purpose of the partial defence and whether the reactions of abused women who kill will fall within this legal construction. Due to this legal uncertainty, it will be up to the judge and jury to decide whether the abused woman's reaction constitutes a loss of self control attributed to a fear of serious violence.

This leaves the law in much the same state as before, with it being the responsibility of the judiciary to stretch the legislative requirements of the partial defences to fit the circumstances of abused women who kill in deserving cases and demonstrates that battered women are not appropriately brought within the ambit of the partial defence. The lack of legislative guidance on the definition of loss of self control further risks allowing the judge and jury's own views of an appropriate reaction underpinned by fear to be imposed upon the defendant. This would mean that in certain situations in which abused women have reacted in contravention to the jury's own perceptions of a fearful reaction, that the defendant's reaction, despite being motivated by a fear of future violence, will not be considered as a manifestation of an individual losing their self control.

This leaves the Coroners and Justice Act 2009 open to the Law Commission's criticism that 'loss of self control was a judicially invented concept, lacking a sharpness or a clear foundation in psychology.'<sup>352</sup> Consequently, under their proposals, the Law Commission recommended that the loss of self control requirement be abolished.<sup>353</sup> Instead, the defendant had to demonstrate that they were responding to gross provocation in the form of words and/or conduct which caused them to have a justifiable sense of being seriously wronged,<sup>354</sup> or that the defendant was responding to a fear of serious violence.<sup>355</sup> Horder was critical of this standard, arguing that without the subjective component, juries may have been required to consider clearly premeditated murders under the guise of provocation.<sup>356</sup> Mackay and Mitchell argued that in their haste to remove the troubling concept of loss of self control and the majority approach in *R v Smith (Morgan)* the Law Commission failed to deal with the fundamental issue, that emotion affects human behaviour, as without

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<sup>352</sup> Law Commission, *Partial Defences to Murder*, (n274) para 3.30

<sup>353</sup> Law Commission, *Partial Defences to Murder*, (n274) para 3.115, Law Commission, 'Murder Manslaughter and Infanticide' (n318) para 5.19

<sup>354</sup> Law Commission, *Partial Defences to Murder*, (n274) para 3.70

<sup>355</sup> Law Commission, *Partial Defences to Murder*, (n274) para 3.85



a loss of self control requirement there is a notable absence of reference to the defendant's mental state at the time of the killing.<sup>357</sup> All that is required is that the defendant acted in response to gross provocation and had a justifiable sense of being seriously wronged.

The rationale for retaining the concept of a loss of self control is that without it, killings committed in cold blood could be included, and the partial defence could be used inappropriately to mitigate the sentences received by those killing out of a considered desire for revenge.<sup>358</sup> Although the Law Commission's reform proposals were not a perfect means of accommodating the reactions of abused women who kill as reasonable, they demonstrated that legislative attempts to define loss of self control needed to be made, or that loss of self control in its unmodified state should not remain central the operation of a partial defence to homicide.<sup>359</sup> The Coroners and Justice Act 2009 was the legislative opportunity to address these concerns and provide solutions which did not solely privilege masculine reactions. Instead, in the absence of legislative clarification, self control appears to remain as something that should suddenly snap or break,<sup>360</sup> ensuring that it can continue to be constructed in accordance with masculine social context. This continues to privilege masculine reactions and responses to external events, and fails to recognise that women's experiences of abuse shape their reactions to it.

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<sup>356</sup> J. Horder, 'Reshaping the Subjective Element in the Provocation Defence' (n272) 125.

<sup>357</sup> R.D. Mackay and B.J. Mitchell, 'But is this provocation? Some thoughts on the Law Commission's report on the partial defences to murder' (2005) *Criminal Law Review* 44, 45

<sup>358</sup> 'Murder, Manslaughter and Infanticide: Summary of Responses and Government Position' (Ministry and Justice 2009), para.62. 'The Government believes that it is important that the partial defence is grounded in a loss of self-control. We are not persuaded by the arguments for removing the requirement that the defendant must have lost self-control when they killed: we believe that the danger of opening this up to cold-blooded killing is too great.'

<sup>359</sup> See Law Commission, *Partial Defences to Murder* (n274), Law Commission, 'Murder Manslaughter and Infanticide' (n318)

<sup>360</sup> See, for example, *R v Bratton*, CA, 17 July 1980, [1981] *Crim LR* 119 (*per* Watkins LJ): 'Something in his mind snapped. He attacked his mother ferociously and killed her... For years, so he claimed, the appellant had been subjected to indignities in the home; he had been hectorred and domineered by his mother and treated as though he were still a small child about the house. She had indulged in sexual relations with his dogs. She seems to have been determined either to do away with one or both of the dogs. There then came about the event of the fateful day, when all that had happened before welled up in front of him and suddenly he lost his self control and destroyed her.'

### 3.6.1. The Qualifying Triggers of a Loss of Self Control

If the abused woman cannot demonstrate that her loss of self control was attributable to a fear of serious violence, the defendant can also try and explain their loss of self control as being due to things said or done, or both,<sup>361</sup> which constituted circumstances of an extremely grave character,<sup>362</sup> and caused her to have a justifiable sense of being seriously wronged.<sup>363</sup> However, this raises its own set of legal uncertainties, as it is unclear what constitutes circumstances of an extremely grave character. Furthermore, justifiable for the purposes of the act means in eyes of the jury, rather than the defendant. This could allow for the continuation of social myths concerning domestic violence and acceptable reactions to inform legal interpretation, namely that if the circumstances were so grave, the abused woman could have simply left the relationship resulting in her sense of being seriously wronged being non justifiable.

The potential for social myths to influence the application of the partial defence is furthered by the consideration of the background circumstances leading up to the homicide. If the violence sustained leading up to the homicide is not perceived as objectively severe, there is the possibility that the jury are not likely to perceive these circumstances as giving rise to a reasonable perception of future violence.<sup>364</sup> This ignores the battered woman's perceptions of violence and the threat posed to her future safety, which reveals the reasonable nature of her reaction. It completely disregards her own perceptions of the threats received and the significance of her abuser's behaviour, ignoring the fact that abused women have to be very attentive to the moods of their abusers as their survival depends upon their ability to read and navigate their abuser's temperaments and behaviours.<sup>365</sup> This enables the jury's perception of her situation and the reasonableness of her reaction to become more important than her own perception and understanding of her own circumstances and the consequences of inaction, demonstrating that her experiences do not form any kind of category or consideration upon which to build. This proves that the legislation

<sup>361</sup> The Coroners and Justice Act, S55(4)

<sup>362</sup> The Coroners and Justice Act, s55(4)(a)

<sup>363</sup> The Coroners and Justice Act, s55(4)(b)

<sup>364</sup> S. Edwards, *Sex and Gender in the Legal Process* (n32) 232.

is still trying to fit the experiences of battered women into a model which it has long been established is not sufficient.<sup>366</sup>

### 3.6.2. Sex and Age and the Capacity for Self Control

Furthermore, should an abused woman be able to satisfy the qualifying triggers for a loss of self control, she must then satisfy the objective requirement of the partial defence of loss of control. She must prove that an ordinary person of the same sex and age and with ordinary powers of tolerance and self restraint could have responded in the same way as she did.<sup>367</sup> This construction follows the *Holley* approach, precluding the recognition of BWS as a relevant characteristic. However, the effects of this position can be mitigated should Lord Millet's interpretation of the objective standard of self control following *Holley* be adopted. This could be used to assess whether 'a person with the power of self control of an ordinary person would or might have reacted in the same way to the cumulative effect of the treatment which she endured.'<sup>368</sup> This approach allows for contextual recognition, as it enables the abuse sustained to be considered, as opposed to holding that the abused woman must adhere to the standards of self control reasonably expected of her non abused counterpart. Consequently, there would be little difficulty in taking into consideration the history of abuse as it does not 'necessarily suggest'<sup>369</sup> that the defendant is someone with a reduced capacity to exercise self control.

However, the abused women must still satisfy the evaluative standards of sex and age. This makes sex, and therefore gender,<sup>370</sup> directly relevant to the evaluative standard, thus re-establishing the position under *Camplin*. The position adopted under the Coroners and Justice Act 2009 differs from the Law Commission's proposals, as the Law Commission recommended that only the defendant's age should be of relevance.<sup>371</sup>

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<sup>365</sup> E. Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law of Self- Defence' (n175) 640.

<sup>366</sup> J. Miles, 'The Coroner's and Justice Act 2009: a "dog's breakfast" of homicide reform' (2009) 10 Arch.News 9, 10

<sup>367</sup> The Coroners and Justice Act 2009, s51(1)(c)

<sup>368</sup> (2001) 1 A.C 146, 213 (Lord Millet)

<sup>369</sup> Law Commission, 'Murder Manslaughter and Infanticide' (n318) para 5.45

<sup>370</sup> see S. Yeo, 'The Role of Gender in the Law of Provocation' (n66) and S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self Control' (n347)

<sup>371</sup> Law Commission, *Partial Defences to Murder* (n274) para 3.110

Consequently, the nature of both evaluative positions, whilst both aiming to tackle the gender bias within the previous partial defence of provocation, have significant implications for abused women who kill, as they further raise issues of sameness and difference and how best to legally protect abused women who kill. The Law Commission's decision not to include sex in the evaluative standard demonstrates a reluctance to depart from a standard of formal equality. This raises initial concerns on behalf of abused women who kill, as standards of formal or procedural equality have treated men and women as though they are similarly situated, thus neglecting women's social and legal subordination due to masculine dominance. Formal equality has failed to address the status quo that masculinity has defined and risks the further entrenchment of principles of gender inequality,<sup>372</sup> as women's social realities are disregarded as they cannot be assimilated to masculine social context.

The Coroners and Justice Act 2009 sought to challenge the gender bias within the previous partial defence of provocation by incorporating sex directly into the evaluative standard. By adopting a sexed evaluative standard, the gender bias ingrained in prima facie gender neutral laws could be combated.<sup>373</sup> This would enable the law to better consider the contexts of abused women who kill, as Leigh claims that the recognition of sex would allow for the appropriate consideration of the issues of size and strength and better account for the motivations underpinning the abused woman's reaction.<sup>374</sup>

Although the adoption of a sexed evaluative standard seeks to accommodate the experiences of abused women, it also risks stereotyping abused women who kill and essentialising their experiences of abuse. The legal and social standard of appropriate and reasonable behaviour still adopts masculinity as the normative standard. Therefore, even if the Coroners and Justice Act 2009 adopted Lord Millet's interpretation of the objective test, abused women can still be legally constructed

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<sup>372</sup> V. Munro, (n88) 17.

<sup>373</sup> E. Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law' (n175) 623-647.

<sup>374</sup> See L. H. Leigh, 'Murder, Manslaughter and Infanticide: Proposals for Reform of the Law' (2008) 172 *Justice of the Peace and Local Government Law* 700

according to all the necessary societal stereotypes of domesticity and passivity.<sup>375</sup> This risks rendering abnormal abused women's reactions to abuse, as their experiences can be essentialised through the adherence to social stereotypes which assume that women's experiences are shared, and therefore makes no consideration of the importance of the individual narrative in relation to the shaping of reactions to abuse. Women are held accountable under a uniform standard, which allows for gender based generalisations to be made without a meaningful consideration of the particularity of experience.

Furthermore, the age and sex of the ordinary and reasonable person are only considered in relation to the defendant's capacity to exercise tolerance and self restraint. If the legislation's intention was to incorporate evidence of abused women's social realities, and the implications of abuse, this could arguably have been better considered when evaluating 'all the defendant's circumstances' under s54(1)(c). Instead, the explicit incorporation of sex into the evaluative standard suggests that men and women have different abilities in relation to retaining their self control.<sup>376</sup> Society already accepts angry and aggressive reactions as acceptable masculine responses, suggesting that men can ascribe to a lower standard of self control.<sup>377</sup>

Consequently, the re-emergence of sex based distinctions further encourages apparent judicial benevolence. Instead of looking at the reasonableness of the abused woman's reaction in the appropriate context of her experiences, she will be seen as less responsible on the basis that she has responded in contradiction to typical constructions of femininity and in some way must not be as responsible as her male counterpart would be.<sup>378</sup> This reinforces social and legal perceptions that abused women are abnormal and irrational,<sup>379</sup> and will be reaffirmed if the defendant reacts with objectively excessive force, as this suggests a diminished capacity for self

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<sup>375</sup> A. Worrall, *Offending Women: Female Law Breakers and the Criminal Justice System* (Routledge 1997) 60

<sup>376</sup> S. Yeo 'The Role of Gender in the Law of Provocation' (n66) 450.

<sup>377</sup> See A. Carline, 'Reforming Provocation: Perspectives from the Law Commission and the Government' (2009) 2 Web J Current Legal Issues <<http://webjcli.ncl.ac.uk/2009/issue2/carline2.html>> accessed 29<sup>th</sup> March 2011

<sup>378</sup> see C. Bishop, *Women and Crime* (Chatto & Windus 1931); H. Goodman and J. Price, *Studies of Female Offenders* (HMSO 1967)

<sup>379</sup> H. Barnett, (n60) 269.

control.<sup>380</sup> Such an approach further pushes the abused woman towards legal constructions of mental instability, as the reasonable woman would not behave in such a violent manner.

### 3.7 Conclusions

Therefore, it is possible to conclude that the partial defences to homicide are not sufficiently capable of forming the basis of a woman-centred court room strategy. This chapter sought to apply a woman-centred analytical framework of the legal construction of abused women who kill and their reactions to abuse in order to counter legally imbedded gender stereotypes. The woman-centred analytical framework was used to critically evaluate the partially defensive framework both before and after the implementation of the Coroners and Justice Act 2009 and found that despite legislative modification, the partial defences to homicide still privilege masculine behaviours.

The retention of the ambiguous legal concept of loss of self control ensures that abused women fall outside the ambit of the partial defence of loss of control. This is because it is legally unclear how such a concept, which traditionally favours angry responses can be reconciled with responses underpinned by fear and the need for self preservation without legislative modification and clarification. This suggests that the status quo is maintained, and that it is the role of the judiciary to continue to stretch and reinterpret the requirements of such a fundamental legal concept on the basis of their perception of deserving cases. This does little to ensure that abused women's typical responses to abuse are recognised as responses motivated by fear and that they fall within the ambit of an individual losing their self control due to a fear of serious violence.

Further, the introduction of sex and inevitably gender, into the evaluative standard ensures that abused women can continue to be constructed accorded to socially determined gender stereotypes. This reinforces the societal perception that women are passive. If the abused woman strikes while she can, and uses a weapon to do so, her behaviour can be perceived as aggressive and premeditated according to normative

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<sup>380</sup> J. Miles, (n366) 8.

behavioural standards. In such circumstances, the abused woman has contravened the expectations of her sex, and is deserving of punishment. Moreover, the role of sex within the evaluative standard can be used to demonstrate that men and women have different levels of self control. Consequently, when an abused woman kills her abuser, her behaviour can further be understood as a manifestation of an underlying mental illness. This further pushes abused women towards constructions of mental abnormality, as they are unable to conform to the objective and stereotypical requirements of their sex.

Therefore, in order to distance abused women who kill from the confines of psychological syndromes and constructions of abnormality, it is necessary to move beyond trying to incorporate the experiences of abused women who kill into a partially defensive framework, which is constructed according to masculine standards of behaviour and expectation and evaluate the strategic possibilities available in the complete defence of self defence.

## Chapter Three

### Abused Women Who Kill and the Complete Defence of Self Defence

#### 4. Introduction

The previous chapters have critiqued the ways in which legal knowledge has been constructed and applied according to masculine principles and normative behavioural standards to the extent that the experiences and reactions of abused women who kill are excluded from legal knowledge and societal understanding. This can be witnessed through the application of a woman-centred analytical framework to the partial defences to homicide, which recognises that typically masculine reactions premised upon anger and a loss of self control are held as normative. Responses that do not conform to this masculine construction are rendered as the product of an abnormal mind.

Consequently, masculine concepts and values are deeply imbedded within the legal framework of the partial defences to homicide and this legal and consequently social allegiance to masculine reaction as reasonable reaction is apparent within the Coroners and Justice Act 2009. Although the legislation attempted to incorporate the understanding that abused women react out of a sense of fear when they kill their intimate partners, their reactions still have to conform to masculine standards of behaviour by aligning to the fundamental and paradigmatically masculine standard of loss of self control. This reinforces the legal and social commitment to adopting a standard of masculinity as normative and allows little room for deconstruction and the legal realisation that abused women reasonably respond to threats of future violence.

This chapter seeks to establish whether a woman-centred analytical framework and court room strategy could be applied to the complete defence of self defence to more accurately capture and reflect the defensive nature of female perpetrated intimate partner homicides and demonstrate the reasonableness of the reactions of abused women who kill in light of their social context.

However, reforming the complete defence of self defence poses significant social and legal problems, especially in the context of abused women who kill, as the defence results in complete legal exculpation through an acquittal, and therefore raises



significant legal and social issues as to when an individual can take the life of another without punishment. In order to justify reforming the complete defence of self defence, academics have tried to search for conclusive explanations as to the circumstances in which an individual has the right to take the life of another without punishment. This has resulted in the development of confusing frameworks based on the abdication of rights when things are no longer equal in situations where actions threaten the lives of others,<sup>381</sup> or forfeiture of rights.<sup>382</sup> It has also resulted in attempts to identify morally defective acts, which enable homicide in self defence to be permissible,<sup>383</sup> and examinations into whether self defence can only be applicable in kill or be killed situations.<sup>384</sup>

What has become clear from the development of alternative frameworks and means of interpretation is that the circumstances governing the application of self defence send out clear and seemingly unalterable societal messages as to when homicide can be justified and the defendant exculpated. The values promoted by the current defence are socially ingrained, demonstrating that if the complete defence of self defence can be reformed, any reform proposals must be capable of overcoming the current construction, which has set the legal and social bar to the exclusion of abused women who kill.

Therefore, in order to critically evaluate the complete defence of self defence and ascertain whether the complete defence can be reformed to better reflect the reactions of abused women who kill as reasonable, this chapter will firstly apply the woman-centred analytical framework to current defence of self defence. It will use the framework to critique the way in which the defence is constructed, and argue that the reliance upon objective and justificatory criteria facilitates little consideration of the circumstances of the parties. Despite the current legal exclusion of abused women who kill from the complete defence, it will be argued that defence is theoretically and strategically capable of modification.

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<sup>381</sup> J. Thompson, 'Self-Defense', (1991) 20 *Philosophy and Public Affairs* 283, 310

<sup>382</sup> F. Leverick, *Killing in self defence* (Oxford University Press 2006) 10

<sup>383</sup> P. Montague, 'Self-Defence, Culpability and Distributive Justice' (2010) *Law and Philosophy* 76, 80

This chapter will discuss the theoretical possibility of changing the legal framework to include the reactions of abused women who kill. Two options for challenging the defence will be critically evaluated. The first will consider the consequences of altering the legal framework from one based upon justification, to one based upon excuse and the second possibility will consider amalgamating both excuse and justification to develop an alternative defensive framework. An excuse based framework would enable the defendant's subjective perceptions of the threat posed to her life to carry greater legal weight and enable abused women's reactions to abuse to be legally and socially recognised as reasonable responses in the context of abuse.

After a consideration of the theoretical possibilities apparent in the current legal construction of self defence, this chapter will consider the possibilities available in using the complete defence of self defence to present abused women's reactions to abuse as reasonable. This involves using the purpose of self defence, that of being able to justifiably respond to unavoidable harm, and applying it as a meta concept. Such a construction of self defence could work within the existing conceptual parameters of the current legal construction, whilst using expert testimony about the experiences of abused women who kill to incorporate an awareness of, and a response to gender inequalities apparent within relationships of domination. The adoption of a woman-centred strategy based upon the meta narrative of unavoidable harm seeks to apply feminist methodology directly to the law, by recognising that the context of women's experiences are ignored.

The woman-centred court room strategy takes the primacy of women's experiences as the means upon which to build, leading to a rejection of certain laws on the basis that they are conceptually inadequate and only reflect masculine social reality.<sup>384</sup> However, the validity of this approach is premised upon judges and juries and society as a whole understanding the abused woman's reaction as reasonable and finding her conduct to be deserving of full exculpation. Therefore, this chapter will demonstrate that although the full defence is capable of incorporating the reactions of abused women who kill and recognising these reactions as reasonable, that it is societal

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<sup>384</sup> J. McMahan, 'The Basis of Moral Liability to Defensive Killing' (2005) 15 *Philosophical Issues*, 387, 392

<sup>385</sup> C. A. Mackinnon, *Feminism Unmodified* (n110) 158.

conceptions of appropriate behaviour and justice that prevent the integration of abused women's reactions to abuse into the complete defence of self defence.

#### **4.1 The Complete Defence of Self Defence and a Legal Framework of Justification**

The complete defence of self defence in English and Welsh law is located in a number of different sources.<sup>386</sup> A key statute is the Criminal Law Act 1967, s3(1). This stipulates that an individual can deploy defensive force 'as is reasonable in the circumstances in the prevention of crime, or in affecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.' Due to a successful plea of self defence resulting in a complete acquittal, necessity and proportionality are pre-requisites to the reasonable deployment of defensive force.<sup>387</sup>

The complete defence of self defence is also underpinned by the common law. The case of *R v Palmer*<sup>388</sup> provides an overview of this position. The case held that if the defendant is attacked, or honestly believes<sup>389</sup> she is threatened by an imminent attack, even if this belief is unreasonable,<sup>390</sup> then the defendant is justified in taking as much defensive action as is reasonably necessary to avert the danger. For the purposes of the defence, reasonable force refers to force which is proportionate to the necessity for action in the situation.<sup>391</sup> Further, reasonable force is a question of fact, which is objectively assessed by the jury. The requirements that the force be both reasonable and necessary in the circumstances is further codified under the Criminal Justice and Immigration Act 2008.<sup>392</sup> The legislation serves as a partial codification of the complete defence of self defence and is assisted through the application of common law rules regarding the imminence of the threat and the concept of proportionality to judge the standard of reasonableness. These common law factors help to ascertain whether an individual has legitimately and therefore justifiably acted in self defence.

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<sup>386</sup> J. Casey, 'Self-Defence. *R v Martin* and Scots Law' (2000) 25 Scots Law Times 195, 195

<sup>387</sup> E. Kenny (n27) 28.

<sup>388</sup> [1971] AC 814. The case was approved and followed by the Court of Appeal in *R v McInnes* [1971] 1 WLR 1600

<sup>389</sup> *R v Duffy* [1967] 1 QB 63 at 64

<sup>390</sup> *Solomon Beckford v The Queen* [1988] AC 130.

<sup>391</sup> *R v Owino* [1996] 2 Cr App Rep 128 the court held that a person may only use such force as is objectively reasonable in the circumstances as he subjectively believes them to be.

Consequently, in order to determine a claim of self defence, it must be ascertained whether it was necessary for the defendant to use any force at all, and if so, whether the force was a reasonable response in the circumstances.<sup>393</sup> Self defence is only applicable if the defendant used no more force than was reasonable in the circumstances as they believed them to be.<sup>394</sup> The requirements are tested by reference to the facts as the defendant honestly believed them to be, even though this may have been based on an unreasonable belief.<sup>395</sup> Despite the prima facie willingness to accommodate the perceptions of the defendant, the Court of Appeal in *R v Martin*<sup>396</sup> held that in order to establish self defence, the apprehension of the necessity to use lethal force had to be reasonable. Reasonableness was to be determined according to a purely objective standard.

The implications of a purely objective standard mean that reasonableness is not based on the subjective perceptions of the defendant. Instead, reasonableness is tested by reference to what the ordinary and reasonable person would have done in the same situation and whether the ordinary and reasonable person would have deployed the same amount of force as the defendant.<sup>397</sup> Even if the defendant believed the force to be necessary and reasonable, it will not follow from an objective assessment of the facts that the jury finds this to be the case. This has significant implications for abused women who kill under a justificatory framework, particularly if they strike when their partner is quiescent, as it is difficult to assume from an objective standpoint that the abuser was threatening harm on this occasion.<sup>398</sup>

Consequently, the ramifications of a justification based framework for abused women who kill are significant, as 'justification defences identify objectively determinable external circumstances that render otherwise criminal acts acceptable to society.'<sup>399</sup>

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<sup>392</sup> Criminal Justice and Immigration Act 2008, s76(1)(b)

<sup>393</sup> D. C. Ormerod, 'Case Comment. Self Defence: summing up-subjective element' (2009) *Criminal Law Review* 202, 203

<sup>394</sup> *R v Graham* [1982] 1 W.L.R. 294, 300.

<sup>395</sup> *R v Williams (Gladstone)* (1984) 78 Cr.App.R. 276; *Beckford* (1987) 85 Cr.App.R. 378; *Martin* [2002] 2 W.L.R. 1, 3.

<sup>396</sup> [2003] QB 1

<sup>397</sup> see A. Pichhadze 'Proposals for Reforming the Law of Self- Defence; (2008) 72 *Journal of Criminal Law* 409-440

<sup>398</sup> S. Byrd, 'Till Death Do Us Part: A Comparative Law Approach to Justifying Lethal Self-Defense by Battered Women' (1991) 1 *Duke J. Comp. & Int'l L.* 169, 173

<sup>399</sup> P. Robinson, 'Criminal Law Defences: A Systematic Analysis' (1982) 82 *Colum.L.Rev* 199, 212

As reflected within the partial defences to homicide, abused women's reactions do not often fall within objectively defined conditions, as they leave little room for consideration of personal circumstances and subjective understandings of danger. Instead, the defence assumes that when these objective circumstances exist, then the individual has accomplished 'a socially desirable objective by committing the act or, at least, has not harmed society.'<sup>400</sup>

This results in self defence being based on somewhat of a balancing act, as an act will be justified if the societal harm avoided manages to outweigh the harm that has been inflicted.<sup>401</sup> This sends a clear societal message about the circumstances in which self defence is appropriate. It aims to prevent individuals from acting as both the judge and the executioner,<sup>402</sup> as they have no legal authority to pass judgment and punish each other. It maintains the distinction between an action that is just, and an action that is justified,<sup>403</sup> ensuring that justification depends on adherence to rules and that the defence is based on objective justification in fact, not in mind,<sup>404</sup> as 'beliefs alone cannot justify the infliction of violence on another human being.'<sup>405</sup> This ensures that the circumstances in which a defendant responds with lethal force are limited, aiming to protect every individual's right to life under Article 2 European Convention on Human Rights (ECHR) and leaving little room for mistake, as rigid and prescribed circumstances and substantive requirements limit deviation.

#### 4. 1.1 Necessity

In order to be able to plead self defence, an abused woman who kills her abuser must be able to demonstrate that her actions were necessary in the circumstances. In order to demonstrate necessity, the defendant must satisfy the substantive rule of imminence. In *R v Palmer*, Lord Morris held that if the defendant was not in immediate danger, there was a risk that 'the employment of force may be by way of

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<sup>400</sup> P. Alldridge 'The Coherence of Defences' (1983) *Criminal Law Review* 665, 669

<sup>401</sup> C.J. Rosen, 'The Excuse of Self-Defence: Correcting a Historical Accident on Behalf of Battered Women who Kill' (1986-1987) 36 *Am.U.L.Rev* 21, 28

<sup>402</sup> G. Fletcher, 'Domination in the Theory of Justification and Excuse' (1995-1996) 57 *U.Pitt.L.Rev* 553, 559

<sup>403</sup> see J. Feinberg, *Doing and Deserving: Essays in the Theory of Responsibility* (Princeton University Press 1970)

<sup>404</sup> G. Fletcher, 'Domination in the Theory of Justification and Excuse' (n402) 563.

<sup>405</sup> G. Fletcher, 'Domination in the Theory of Justification and Excuse' (n402) 563.

revenge or punishment or by way of paying off an old score or may be pure aggression.<sup>406</sup> Since *R v Palmer*, the standard has been modified to include imminent threats, which are not immediate.<sup>407</sup> However, a strict temporal standard exists, and the defendant must be able to show that the danger they perceived was ‘almost immediately’ going to be inflicted upon them.<sup>408</sup> Such a stance ensures that only in very prescribed circumstances can the defendant decide to be the judge of when to dispense with the requirements of the law, preserving the rule of law argument that a legal system will not work should its authority be optional. Due to the uncertain scope of what is necessary in a particular situation,<sup>409</sup> a rigid and prescribed application of this concept limits its potentially undermining effects on the legal system.

When assessing necessity in self defence, the genuine belief in the need for force will be questioned. This will evaluate whether there were less costly measures available to the defendant,<sup>410</sup> which exists as an assessment of the defendant’s ‘counterfactual conditional response.’<sup>411</sup> Abused women who wait until their partner is incapacitated, will fall outside of the ambit of imminency. They are perceived not to be averting unavoidable peril, as at the precise moment that the attack took place the victim was of no immediate threat and was posing no ‘visible manifestation of aggression.’<sup>412</sup> Fletcher argues that this is important because the imminence requirement is a concept of political and not moral theory, as incidents of self defence signal to society that the incident was one in which the law could not protect the individual from, forcing the individual to take matters into their own hands.<sup>413</sup> This makes the background relationship between the parties of limited importance and makes assumptions about the state of mind of the defendant based on temporal considerations rather than context. It is assumed that if the defendant is objectively responding to an immediate attack or perilous situation then their objective intention is to deflect the attack and not to make the victim suffer.<sup>414</sup> The reasoning behind the adoption of such a stance, is to ensure that those who kill in cold blood have no access to the defence. However,

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<sup>406</sup> *R v Palmer* [1971] AC 814 at 823.

<sup>407</sup> *R v Abdul-Hussain* (1999) Criminal Law Review 570

<sup>408</sup> *R v Z* (2005) UKHL 22, 28 (Lord Bingham)

<sup>409</sup> A.P. Simester and G.R. Sullivan, (n255) 716.

<sup>410</sup> G. Fletcher, ‘Domination in the Theory of Justification and Excuse.’ (n402) 559.

<sup>411</sup> G. Fletcher, ‘Domination in the Theory of Justification and Excuse.’ (n402) 559.

<sup>412</sup> G. Fletcher, ‘Domination in the Theory of Justification and Excuse.’ (n402) 557.

<sup>413</sup> G. Fletcher ‘Domination in the Theory of Justification and Excuse’ (n402) 570.

<sup>414</sup> see Thomas Aquinas, *Summa Theologiae* pt. II-II, q.64, a.7.

this results in many abused women who kill not being able to plead self defence, as their attack is not a response to an objectively perceived and sufficiently proximate threat.

Therefore, under the current construction of the imminence requirement, the interaction between the abuser and the defendant is viewed within a very narrow timeframe, which significantly limits the legal and therefore social understanding of the reactions of abused women who kill. This results in the assessment of imminence becoming contextually divorced from the social reality of the incident. There must be no other option available to the defendant to ensure that their actions are perceived as necessary to avert real peril.<sup>415</sup> According to Fletcher, this is because ‘a pre-emptive strike against a feared aggressor is illegal force used too soon, and retaliation against a successful aggressor is illegal force used too late.’<sup>416</sup>

In order to ascertain whether the defendant was averting real peril, the situation is judged through an objective lens of immediacy, and an observer must be able to objectively see that the attack was just about to happen. This provides a significant indication of the social context of the defendant’s action which is of importance to the law.<sup>417</sup> This immediate timeframe therefore severs from consideration much of the previous abuse and violence that has been endured, as well as neglecting to address any previous efforts to escape,<sup>418</sup> suggesting that this context is not important for the defence. This ignores evidence about the social, cultural and economic conditions surrounding domestic violence and legally reinforces social myths concerning domestic violence and abused women.<sup>419</sup> Society assumes that if a woman can simply walk out, then she is free. It assumes that leaving guarantees protection, and therefore, the only time that she can act is when the attack is imminent and the police cannot intervene. It is also thought that if the defendant had the opportunity to put the matter

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<sup>415</sup> H.M. Hurd, ‘Justification and Excuse, Wrongdoing and Culpability’, (1999) 74 Notre Dame Law Review 1565, 1569

<sup>416</sup> G. Fletcher, ‘Domination in the Theory of Justification and Excuse’ (n402) 556.

<sup>417</sup> See, e.g., *People v. Bush*, 148 Cal. Rptr. 430, 436-37 (Ct. App. 1978) (holding that the trial court should explain the significance of prior threats and that one who has received threats is justified in acting more quickly)

<sup>418</sup> J. Casey, ‘Legal defences and expert testimony on the battered woman syndrome: a focus on self defence’ (2003) Scots Law Times 247, 248

<sup>419</sup> E. Schneider and S. Jordan ‘Representation of Women who Defend Themselves in Response to Physical and Sexual Assaults’ (n64) 153.



into the hands of the police, then the violence is not a response to an immediate danger.<sup>420</sup> It ignores the fact that if the abused woman leaves the relationship, that there is always the chance that her abuser will track her down and harm her, as it is ‘virtually impossible for women to disappear completely from their abusers.’<sup>421</sup>

Without an appropriate consideration of the social context of the act, the law adopts an intentionalist perspective, holding that a person freely chooses their actions and are responsible for what they do.<sup>422</sup> This maintains illusory choice, allowing defendants to become scapegoats and failing to prevent the perpetuation of social myths.<sup>423</sup> An analysis of this kind simply holds that the abused woman assumed the risk, and is therefore responsible for the consequences. It fails to even consider that her choice could have been constrained by the impact of domestic violence, as domination ‘often subverts meaningful choice.’<sup>424</sup>

Willoughby argues that the imminence requirement further neglects to account for the gender based differences between the abilities of men and women towards aggressive conduct,<sup>425</sup> failing to consider why an abused woman may wait until her partner poses no immediate threat before attacking to alleviate the inequalities of strength and size between herself and her abuser. Under the current law, in order to satisfy the imminence requirement, the abused woman must wait until her abuser attacks her before being able to legitimately act in self defence. Willoughby argues that society gains little from this, and the risk that an abused woman will herself be killed by her abuser if she strikes back in the midst of the attack increases.<sup>426</sup> This indicates a gender disparity, as in an attack between two males, their respective sizes and strengths are more likely to be equal, ensuring that they have almost equal capabilities to defend themselves. In an attack between a man and a woman, this is not the case, placing an abused woman at a disadvantage should she choose to defend herself

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<sup>420</sup> A. Reed, ‘Case Comment Self-defence and motive for revenge’ (2006) *Criminal Lawyer* 2, 3

<sup>421</sup> *Newton, The Times 31 October 1992*. The defendant, whose wife had left him after enduring twenty years of abuse, tracked the refuge down where she was staying, broke in and stabbed her to death. He was convicted of manslaughter due to diminished responsibility.

<sup>422</sup> J. Armour, ‘Just Deserts: Narrative, Perspective, Choice and Blame’ (1995-1996) 57 *U.Pitt.L.Rev* 534, 544

<sup>423</sup> J. Armour, (n422) 546.

<sup>424</sup> J. Armour, (n422) 548.

<sup>425</sup> M. Willoughby, ‘Rendering Each Woman her Due: Can a Battered Woman Claim Self Defence When she Kills a Sleeping Batterer?’ (1989) 38 *Kansas Law Review* 169, 182-183

<sup>426</sup> M. Willoughby, (n425) 183.



during an attack. Should the abused woman wait until she has the advantage in strength or opportunity, then the law will punish her for not spontaneously responding with violence, for not risking her life and for striking while she can. This supports the criticism that this substantive legal requirement is defined with men in mind,<sup>427</sup> as the refusal of the law to take women's reactions into account illustrates that objective standards are devised in male terms.<sup>428</sup>

The imminence requirement creates a two-tier system of women who kill because of domestic violence. Those who risk their lives in the middle of an attack are deemed potentially worthy of running the full defence and receiving full exculpation for their actions. Those who wait until they know that they will succeed, striking before their abuser strikes them, are deemed unworthy of the defence and fully accountable for their legally unjustifiable actions and susceptible to the mandatory life sentence.

#### 4. 1. 2 Proportionality

In the event that the abused woman can satisfy the imminence requirement, she must then also demonstrate that her actions were a proportionate response to the danger she believed that she faced. The proportionality requirement 'addresses the ratio of harms emanating from both the attack and the defence.'<sup>429</sup> The harm done in disabling the aggressor must not be excessive or disproportionate relative to the harm threatened and likely to result from the attack.<sup>430</sup> This adopts a human rights approach, upholding respect for life and the integrity of the attacker.<sup>431</sup> This requires balancing competing interests, but the only guidance that the jury has is based on their own view of what is reasonable. Given the limited societal understanding of the wider implications of domestic violence, the jury's judgment is entirely based upon their own core values and ad-hoc evaluations of the situation. This disadvantages abused women who kill when their partner is off guard, as the concept of proportionality has 'developed

<sup>427</sup> S. Zeedyk and F. Raitt 'Psychological Theory in Law: Legitimizing the Male Norm' (1997) 7 *Feminism and Psychology* 543, 545

<sup>428</sup> S. Zeedyk and F. Raitt (n427) 547

<sup>429</sup> G. Fletcher, 'Domination in the Theory of Justification and Excuse' (n402) 559.

<sup>430</sup> G. Fletcher, 'Domination in the Theory of Justification and Excuse' (n402) 560.

<sup>431</sup> See A. Ashworth, 'Self-Defence and the Right to Life' (1975) 34 *CLJ* 282

through cases concerning male defendants and is generally taken to demand parity between attack and defence.<sup>432</sup>

Proportionality would be more appropriate if the adversaries were of comparable strength. In cases of domestic violence, the victim will often resort to weapons to alleviate this inequality of arms. In trying to preserve her own life she will then be punished for her actions. In order to try and overcome the gender biased nature of the proportionality requirement, it was recognised that the defendant cannot ‘weigh to a nicety the exact measure of his necessary defensive action.’<sup>433</sup> However, if the abused woman strikes while her partner is off guard, and with a weapon, the force used will still be deemed excessive and evident of intent.<sup>434</sup>

#### 4.1.3 Reasonableness

The requirements of necessity and proportionality are pre-requisites to a finding that the defendant’s use of force was reasonable. Therefore, the defendant must also be able to demonstrate that their reaction was reasonable according to objective standards. The concept of reasonableness is judged objectively, according to the subjective perceptions of the defendant of the events and the danger that they believe they face. This requires ascertaining whether a hypothetical reasonable person would have perceived the same level of danger that the defendant did, and whether under the same circumstances, the reasonable person would have deployed the same amount of force.<sup>435</sup>

Following Lord Simmonds in *Bedder v Director of Public Prosecutions*<sup>436</sup> the purpose of an objective standard is to allow the jury to ‘consider the act of the accused by reference to a certain standard or norm of conduct and with this object the “reasonable” or the “average” or the “normal” man is invoked.’ This enables the judge and jury to bestow universal characteristics upon the defendant, rather than considering the defendant’s own, personal characteristics.<sup>437</sup> Under such a standard

<sup>432</sup> A. Ashworth (n431) 284.

<sup>433</sup> *R v Palmer* (1971) All ER 1077 (Lord Morris)

<sup>434</sup> S. Edwards, *Sex and Gender in the Legal Process* (n32) 141.

<sup>435</sup> A. Pichhadze (n397) 412.

<sup>436</sup> *Bedder v Director of Public Prosecutions* [1954] 1 WLR 1119 at 1123.

<sup>437</sup> A. Pichhadze (n397) 412.

the jury can consider age and sex, further allowing society to impose stereotypical assumptions upon the defendant.

The consequences of such a standard of reasonableness are reflected in *R v Martin*. In this case, the defendant shot and killed one of the burglars who broke into his house. During his trial, Martin argued that it was reasonable for a person suffering from depression to have perceived a greater threat to their safety than an ordinary person, not suffering from depression would have perceived.<sup>438</sup> However, the Court of Appeal held that reasonableness was not based on the subjective perceptions of the defendant, holding that only physical characteristics could be taken into account when assessing the defendant's perceptions of danger.<sup>439</sup>

The case of *R v Martin* has significant implications for abused women who kill. The objective nature of the complete defence of self defence and its application within a justificatory framework can limit the relevance of evidence of the abuse sustained and the unequal levels of power and control within the relationship, as 'in determining whether conduct is justified, the focus is on the act, not the actor.'<sup>440</sup> Consequently, concerns are raised as to whether a jury are sufficiently capable of determining the reasonableness of the defendant's behaviour without full knowledge of the accompanying context. A jury are very capable of having an awareness of the facts of the incident, but an assessment of the danger that these facts give rise to is a completely different matter.<sup>441</sup> Without information as to the relevant context of the act, their determination of whether force was reasonable will be completely decontextualised and ignorant to the realities of domestic violence. Consequently, the jury are going to look at an idealised model of what is objectively reasonable and assess the defendant according to this standard. According to Crocker, 'together with the incompatibility of aggressive force with stereotypical femininity, this means that the apparently gender neutral concept of reasonableness is actually weighted against the female defendant.'<sup>442</sup>

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<sup>438</sup> *R v Martin* ([2003] QB 1 at 15).

<sup>439</sup> *R v Martin* [2003] QB 1 at 6-7.

<sup>440</sup> P. Robinson, 'Criminal Law Defences: A Systematic Analysis' (n399) 229.

<sup>441</sup> J. C. Smith, and T. Rees, 'Case Comment Homicide: murder - excessive force in self-defence' (2002) *Criminal Law Review* 136, 138

Consequently, the objective nature of self defence can result in the continuation of domestic violence myths, as the reasonableness of force and belief in the need to use force could be influenced by the fact that the defendant stayed in the abusive relationship. This should not occur, as following *Julien*,<sup>443</sup> instead of following the common law principle that the defendant should take any safe avenue of retreat,<sup>444</sup> the question that the jury should answer is whether the defendant's use of force was reasonable. This was followed in *Field*,<sup>445</sup> which ruled that the defendant may remain in a particular place, notwithstanding the knowledge that they may be attacked should they stay. This was confirmed in *Redmond-Bate*,<sup>446</sup> as the defendant will not lose their right to defend themselves by maintaining a lawful voluntary presence and this applies even if the defendant is the initial aggressor. Despite prevailing case law, a failure to retreat is still a factor to be taken into account by the jury when determining the reasonableness of the defendant's conduct.<sup>447</sup>

Consequently, the defendant's continuation of the relationship can be put on trial,<sup>448</sup> as the jury may feel that the force was not reasonable because the defendant had the choice to leave, but chose to stay, making her reaction appear objectively unreasonable. This moves the focus of the trial further away from the abuse, and onto the reasons why the defendant stayed in the relationship. This can make her conduct appear objectively unreasonable without a proper consideration or understanding of her circumstances and the control tactics used by abusers to reinforce dependency and keep the abused woman trapped.

Virgo argues that as a fair concession to human frailty that the defendant's conduct should be assessed according to their circumstances as the existence of certain conditions can reduce the defendant's responsibility for his or her conduct.<sup>449</sup> This is supported by Schneider who claims that the courts should be allowing the question of

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<sup>442</sup> see P. L. Crocker (n29)

<sup>443</sup> (1969) 1 WLR 839 (CA)

<sup>444</sup> A.P. Simester and G.R. Sullivan, *Criminal Law Theory and Doctrine* (4<sup>th</sup> edn Hart Publishing 2009) 706

<sup>445</sup> (1972) Crim LR 435 (CA)

<sup>446</sup> (1999) Crim LR 998

<sup>447</sup> Simester, A.P. and Sullivan, G.R. (n444) 707.

<sup>448</sup> A. McColgan 'In Defence of Battered Women who Kill' (n69) 533.

<sup>449</sup> G. Virgo, 'Are the Defences of provocation, duress and self-defence consistent?' (2003) *Archbold News* 5, 7

reasonableness to be assessed in light of all the circumstances relevant to the defendant to ensure gender equality.<sup>450</sup> Without these considerations, the courts are perpetuating a 'wilful blindness to the realities of private violence,'<sup>451</sup> ignoring that domestic violence has implications on a person's behaviour, their reactions and their motivations. However, consideration of the defendant's circumstances as advocated by Virgo and Schneider would move the legal focus away from the act, and towards the actor, negating the moral blameworthiness of the actor for causing the harm.<sup>452</sup> The adoption of such an approach would be inconsistent with a justificatory framework, as the legal and societal focus rests firmly on the objectively justifiable nature of the act, not the justifiable nature of the act based on the defendant's circumstances. Justifiable conduct is behaviour which is socially viewed as correct or tolerable,<sup>453</sup> and due to the full exculpatory nature of the defence, this societal message cannot be altered by an evaluation of the defendant's circumstances alone.

Therefore, despite the prima facie gender neutral application of the requirements of self defence, and the willingness to consider the defendant's subjective perceptions, the objective and justificatory nature of the complete defence of self defence excludes the reactions of abused women who kill. Due to the way in which abused women commit intimate partner homicide, and how their reactions are often shaped by the abuse sustained and the fear of future violence, abused women are often unable to fall within the justificatory requirements of necessity, proportionality and reasonableness. Instead, the abused woman must wait until she is in danger of becoming a homicide victim herself, before being able to deploy objectively justifiable lethal force to preserve her own life.

The complete defence of self defence excludes the reaction of abused women who kill as reasonable, upholding dominant legal and social standards which privilege masculine reactions. Due to the societal significance of the complete defence, the legal system cannot be seen to deviate from this standard. This exposes a predisposition to, and a deeply imbedded understanding of what constitutes

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<sup>450</sup> E. Schneider, 'Equal Rights to Trial for Women: Sex Bias in the Law of Self-defence' (n175) 630.

<sup>451</sup> S. Edwards, 'Battered Women who Kill' (1990) NLJ 1380, 1385

<sup>452</sup> J. Dressler, 'Justifications and Excuses: A Brief Review of the Concepts and the Literature.' (1987) 33 Wayne Law Review 1155, 1163

reasonable behaviour equating to masculine reaction, which is reinforced by societal conceptions of when it is reasonable to take the life of another. The current defence of self defence constitutes an abstract framework of judgment, failing to incorporate the experiences of those whose interests are not at the centre of the law. Therefore, in order to try and demonstrate the reasonable nature of abused women's reactions, it is necessary to consider alternative theoretical possibilities which can encourage the reactions of abused women who kill to be re-conceptualised in the context of self defence.

#### **4.2 Reforming Self Defence: Changing the Framework from One of Justification to One of Excuse.**

One theoretical possibility would be to change the complete defence of self defence from a framework based on justification, to a framework underpinned by the principles of excuse. Such an approach would ensure that subjectivity played a much larger role.<sup>454</sup> Instead of having to fit within rigid objective categories developed to fit patterns of male behaviour, an abused woman's experiences could be considered in determining whether her actions were excusable. This could not occur under a framework based on justification, as it is inconsistent with the theory that a justified act is either beneficial or not harmful to society.<sup>455</sup>

A theory of excuse would enable the defendant's choice to be assessed in light of her subjective perceptions and circumstances, ensuring that domestic violence and the effects of abuse are exposed and considered. This would enable the jury to make a decision based on an assessment of the defendant's circumstances and life experiences, establishing whether or not she had a fair opportunity to choose meaningfully whether or not to inflict the harm.<sup>456</sup> This would assist the jury in understanding the social reality of domestic violence, as they would be able to

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<sup>453</sup> P. Robinson, 'A Theory of Justification: Societal Harm as a Pre-Requisite for Criminal Liability' (1975) 23 U.C.L.A. Law Review 266, 275

<sup>454</sup> J. Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (1982) 73 Journal of Criminal Law and Criminology 437, 438

<sup>455</sup> P. Robinson, 'Criminal Law Defences: A Systematic Analysis' (n399) 171-184.

<sup>456</sup> J. Dressler, 'Rethinking Heat of Passion: A Defence in Search of a Rationale' (n454) 439.

recognise that in some cases, threats from the deceased can create coercive pressure that can limit freedom of choice, making excuse analysis appropriate.<sup>457</sup>

However, it is important to note that there is not a consensus regarding the proper components of a theory of excuse. This could result in attempts to limit the theory according to prevailing social standards, so that it would only apply if the individual suffered from a disability which would cause an excusing condition.<sup>458</sup> Fletcher claims that a 'limited temporal distortion of the actor's character' is required to satisfy the requirements of an excuse based framework.<sup>459</sup> Although abused women who kill could argue that they were suffering from BWS, this does little to portray the reaction as a reasonable response to domestic violence.

Evidence of such a subjective approach can be witnessed in Canadian jurisprudence. The case of *R v Lavallee*<sup>460</sup> implemented a psychologically individualised standard of reasonableness. This enabled evidence of BWS to be admissible to explain to the judge and jury why an abused woman may have reacted in the way that she did. BWS was used to explain how abused women become attuned to the moods of their abusers, and may respond pre-emptively to their abuser's signals.<sup>461</sup> However, the admissibility of evidence of BWS in English and Welsh law in this context would offer limited legal gains for women. Although prima facie BWS can address the circumstances of abused women who kill, it carries with it an insinuation that the legal system must compensate for the abused women's physical and mental weakness, without realising that often her behaviour is motivated by the need to preserve her own life rather than because she is weak or overemotional.<sup>462</sup>

Therefore, any reliance upon a disability or temporal distortion within an excusatory framework would enable the law to continue to be shaped by masculine social context, as the law would still be able to adopt the masculine point of view through

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<sup>457</sup> D. A. Donovan and S. M. Wildman, 'Is the Reasonable Man Obsolete? A Critical Perspective on Self Defence and Provocation?' (1981) 14 Loy.L.A.L.Rev 436, 437

<sup>458</sup> P. Robinson, 'Criminal Law Defences: A systematic Analysis' (n399) 221.

<sup>459</sup> G. Fletcher, *Rethinking Criminal Law* (Little Brown 1978) 802

<sup>460</sup> *R v Lavallee* [1990] 1 SCR 852.

<sup>461</sup> A. Pichhadze (n397) 414.

<sup>462</sup> C. J. Rosen, (n401) 48.



the recognition of abused women's reactions as abnormal.<sup>463</sup> Battered women would continue to be constructed through a psychological stereotype which distorts their wider experiences so that they could fall within a framework which requires women to justify their reactionary differences through a recourse to a syndrome associated with a mental abnormality.<sup>464</sup> This would detract from any legal consideration of their circumstances and the failure of prima facie gender neutral legal requirements to recognise abused women's social realities. This would ensure that stereotypes about abused women who kill would continue to be recognised as empirically valid,<sup>465</sup> limiting the need to consider alternative reactions as reasonable reactions.<sup>466</sup>

In order to sufficiently reflect the subjective perceptions of the defendant, expert testimony would be required to demonstrate the reasonable nature of the abused woman's reaction. The testimony could be used to explain why the abused women had to act in self defence in light of her circumstances. However, due to the complete acquittal that accompanies a successful claim of self defence, enabling the subjective perceptions of the defendant to carry such significant legal weight would be met with resistance. In *State v Janes*,<sup>467</sup> Chief Justice Durham J, claimed that allowing a subjective test to determine reasonableness would force the jury to evaluate the defendant's actions in a 'vacuum of the defendant's own subjective perceptions.' Provided the defendant believed that they were acting in self defence, there would be a finding of self defence, and therefore a full acquittal.

Consequently, a subjective standard within a theory of excuse could create the perception that the law was granting a licence for abused women to kill their abusers.<sup>468</sup> If one woman is excused for her conduct, it is assumed that anyone who does the same act under the same external circumstances must be excused too.<sup>469</sup> This could inhibit societal understanding of the social reality of domestic violence, as

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<sup>463</sup> C.A. Mackinnon, *Toward a Feminist Theory of the State* (n96) 216.

<sup>464</sup> D. Cornell, 'The Doubly-Prized World: Myth, Allegory and the Feminine' (1990) *Cornell Law Review* 664, 656

<sup>465</sup> C. A. Mackinnon, *Toward a Feminist Theory of the State* (n96) 230.

<sup>466</sup> M.A. Dutton, 'Understanding Women's Responses to Domestic Violence: A Redefinition of Battered Women's Syndrome' (n185) 1192

<sup>467</sup> *State v Janes* 1212 Wash 2d 220, 237, 850 p.2d 495 (1993) at 239.

<sup>468</sup> C.J. Rosen, (n401) 49.

<sup>469</sup> P. Robinson, 'A Theory of Justification: Societal Harm as a Pre-requisite for Criminal Liability' (n453) 300.



instead of furthering an understanding as to the effects of prolonged domestic abuse on a woman's physical and mental wellbeing, domestic violence could be perceived as a tactic to ensure an individual's conduct is excused. Therefore, the possibility of developing an excusatory framework could in fact encourage the adoption of a reactive position.<sup>470</sup> The incorporation of the defendant's subjective perceptions into a complete homicide defence could be seen as threatening the legal credibility of a defence with such social and legal significance.<sup>471</sup> This would make a woman-centred approach to self defence look more damaging than the justificatory framework already in place and could in fact encourage the retention of fixed and unequal gender identities.<sup>472</sup>

### 4.3 Reforming Self Defence: Towards a Theory of Rational Excuse

Therefore, it is necessary to move away from the damaging effects of choosing between justificatory and excuse based frameworks. An alternative reform possibility is presented by Claire Finkelstein, who argues that in order to overcome the problems inherent in both justification and excuse frameworks, the best approach for abused women who kill would be to focus on a theory of rational excuse. This would be a framework based on both justification and excuse to ensure that 'near self defence' claims would fall within the self defence framework.<sup>473</sup> This would include cases in which the defendant is motivated by a desire to protect herself against her aggressor, but her legal claim of self defence fails because she is unable to satisfy one or more of the objective justification requirements.<sup>474</sup> Consequently, a theory of rational excuse would share a characteristic with justification, as it would apply to defensive reactions, but the excuse element of the theory would provide the 'reason for the violation of the prohibitory norm.'<sup>475</sup> This would not endorse the defendant's behaviour, but would recognise that it is important to make legal judgments based on the defendant's reasons for acting. This would ensure that the defendant's motivations became the focus, and would analyse the reasons why she may have acted as she did.

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<sup>470</sup> H. Haste, *The Sexual Metaphor* (Harvester Wheatsheaf 1993) 267

<sup>471</sup> A. Oakley and J. Mitchell, (Eds) *Who's Afraid of Feminism? Seeing Through the Backlash* (Hamish Hamilton 1997) 3

<sup>472</sup> See J. Doane and D. Hodges, *Nostalgia and Sexual Difference* (Methuen 1987)

<sup>473</sup> C. O. Finkelstein, 'Self Defence as a Rational Excuse' (1995-1996) 57 U.Pitt.L.Rev 621, 625

<sup>474</sup> J. Dressler, *Understanding Criminal Law* (4<sup>th</sup> Edn LexisNexis 2006) 207

<sup>475</sup> C.O. Finkelstein, 'Duress: A Philosophical Account of the Defence in Law (1995) 37 Ariz.L.Rev 251, 260

The adoption of a framework based on rational excuse would be in contrast to the reliance on a mental abnormality as Finkelstein argues that the theory applies to ‘sane, responsible agents in virtue of a judgment made about the content of their reasons for acting.’<sup>476</sup> This adopts a more subjective approach, as the conduct can be excused if the actor has good reasons for acting, requiring a reasonably held belief that the conduct is permissible.<sup>477</sup>

However, the adherence to such an approach still risks interpretation in accordance with masculine social context despite the adoption of a more subjective approach. The requirement that the actor had good reasons for acting would be assessed according to societal constructions of reasonable behaviour in the context of the deployment of lethal force. It does not necessarily translate that the abused woman’s reasonably held belief in the permissible nature of the conduct will adhere to society’s understanding of such a situation despite the adoption of a more subjective approach. The abused woman’s reaction could still fall prey to the pitfalls of the reasonableness test under a justificatory framework of self defence, allowing social stereotypes which focus more on her reasons for not leaving an abusive relationship to become more important than the abused woman’s particular narrative and social context.

Moreover, although the adoption of a framework based on rational excuse appears to be ideologically desirable by amalgamating excuse based frameworks and justificatory frameworks to benefit abused women who kill, it fails to establish why the defendant is exonerated for her crime. Rational excuse theory assesses the reasons behind the defendant’s actions, but does not explain whether the defendant is not charged because her act was not wrongful in the circumstances, or because she lacked responsibility for the wrongful act because of her circumstances.<sup>478</sup> Although neither frameworks of justification or excuse best serve the interests of abused women in isolation, it is clear in a framework of justification that the defendant is not charged because their act was not wrongful, and in a framework of excuse, the defendant is not charged because they were not responsible for their act.

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<sup>476</sup> C.O. Finkelstein, ‘Self Defence as a Rational Excuse’ (n473) 634.

<sup>477</sup> K. Greenawalt, ‘The Perplexing Border of Justification and Excuse’, (1984) 84 Columbia Law Review 1903, 1910

<sup>478</sup> H. A. Pendleton, ‘A Critique of the Rational Excuse Defence: A Reply to Finkelstein’ (1995-1996) 57 U.Pitt.L.Rev. 652, 656

Pendleton claims that the failure to explain whether the defendant's act is not wrongful, or the actor is excused means that the rational excuse theory involves an incoherent conception of the link between responsibility and punishment,<sup>479</sup> which would be an absolutely crucial feature in a new self defence framework. The law's determination of legal responsibility involves drawing a line on a continuous scale of degrees of criminal responsibility, above that line, one is responsible, below that line, one is not responsible.<sup>480</sup> Without addressing responsibility, it is unclear whether the abused woman is responsible for her conduct under this model, and if so, what conception of responsibility this is based on.<sup>481</sup> This misses the opportunity to look at domestic violence through the lens of responsibility, to establish the parameters of when the defendant is responsible for her conduct, and under what circumstances domestic violence can reduce this responsibility. Responsibility also has a link to intention, as an act is normally an expression of will.<sup>482</sup> This fails to consider the effect of domestic violence on the defendant's ability to make a choice. Although it addresses the reasons why the defendant acted as they did, without addressing responsibility, the defendant's choice cannot be sufficiently scrutinised as the two are linked. A coerced person's choice can be made from a set of circumstances so constricted, that they can no longer be regarded as an expression of will and this mitigates legal responsibility.<sup>483</sup>

Consequently, a theory of rational excuse indirectly ascribes moral responsibility to an act, without clearly defining its parameters. As a result of this, rational excuse theory attempts to squeeze women within a self defence framework which seeks to overcome the problems of a single framework based on justification, and a single framework based on excuse without sufficiently outlining why the defendant would be fully exculpated for their conduct. Although encouraging the full defence of self defence to consider the defendant's actual context and the motivation behind their actions would be advantageous for abused women who kill, it is unclear how the theory of rational excuse could be used to further challenge prevailing constructions

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<sup>479</sup> H.A. Pendleton, (n478) 653.

<sup>480</sup> H.A. Pendleton, (n478) 671. 'This line drawing does not alter the fact that the underlying notion of responsibility admits of degrees'

<sup>481</sup> H.A. Pendleton, (n478) 659.

<sup>482</sup> H.A. Pendleton, (n478) 672.

of masculinity. This is because it is unclear how a theory of rational excuse would be capable of countering social stereotypes about abused women who kill without being able to present a sufficient explanation as to why the defendant's conduct would fall within the reformulated framework.

Therefore, although the complete defence of self defence is capable of theoretical reform, the main theoretical alternatives of a framework based on excuse, and a framework based on rational excuse, do not present viable alternatives for abused women who kill. The theoretical frameworks discussed demonstrate that the complete defence of self defence can be reconstructed according to alternative theoretical frameworks, but that without significant social changes, the theoretical frameworks are constructed according to masculine social contexts and values. The application of a woman-centred analytical framework to the legal construction of the reactions of abused women who kill in self defence, reveals the extent to which women are denied the opportunity to present the circumstances of their behaviour under the traditional self defence framework.<sup>484</sup> The traditional framework is based on male perspectives,<sup>485</sup> and by simply changing the framework from one based on justification, to one based on excuse, little is revealed about the relationships of domination which keep abused women trapped and their reactions legally and socially subordinate to their male counterparts. Any change to the defence must be able to account for and deconstruct the patriarchal nature of the homicide defence. In order to demonstrate the reasonable nature of abused women's reactions to abuse under the complete defence of self defence, abused women must fall within the ambit of a justificatory framework. Consequently, it is necessary to move beyond theoretical interpretations of self defence and towards the possibilities that may exist under a justificatory framework.

#### 4.4 Self Defence and Unavoidable Harm

In order to present abused women's reactions to abuse as reasonable under the complete defence of self defence, it is necessary to demonstrate that the current defensive framework and feminist principles can actually conflate. This can be

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<sup>483</sup> G. Fletcher, *Rethinking Criminal Law*. (n459) 800.

<sup>484</sup> Charles P. Ewing (n26)

achieved by demonstrating that both the current construction of self defence and feminist constructions of self defence are both based on the meta concept of unavoidable harm.<sup>486</sup> They both seek to evaluate the circumstances in which an individual can legitimately respond to unavoidable harm with lethal force. However, the current construction detracts from this meta concept by constructing situations of unavoidable harm in accordance with objective, masculine criteria, which limits any further social or legal understanding of abused women. As such, the current perspective of gender bias, seeks to limit a consideration and acknowledgement of abused women's experiences and their reactions to abuse and excludes this knowledge from the legal framework. The concept of unavoidable harm needs to be able to incorporate the social realities of abused women who kill in order to attempt to eliminate the gender bias.

Therefore, law and society are required to understand a more complex version of social reality, which recognises that choice is constrained by social experience.<sup>487</sup> All action is situated in a particular context and 'not all of the agent's making and much of which may be beyond her or his control'.<sup>488</sup> This is important, as 'the traditional view of self defence must not be allowed to prevent the application of its principles to appropriate cases where battered women kill'.<sup>489</sup> Consequently, redevelopment efforts should be aimed at ensuring that abused women who kill have access 'to generally applicable fair trial determinants',<sup>490</sup> which would require recognising and removing issues of gender inequality apparent within the substantive requirements of the defence and considering the application under an equal rights framework.<sup>491</sup> This requires engaging with notions of equality, moving beyond a standard of formal equality which requires sameness with men, and recognising abused women's experiences as the product of legal and social acceptance of relationships of domination. In order to overcome this, the requirements of self defence should be reinterpreted in accordance with the meta narrative of unavoidable harm.

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<sup>485</sup> S. J. Schulhofer, 'The Feminist Challenge in Criminal Law' (1995) 143 U.P.A.L.Rev 2153, 2157

<sup>486</sup> A. Ripstein 'Self Defence and Equal Protection' (1995-1996) 57 U.Pitt.L.Rev 685

<sup>487</sup> E. Schneider, 'Resistance to Equality' (1995-1996) 57 U.Pitt.L.Rev 480, 497

<sup>488</sup> I.M. Young, 'The Generality of Law and The Specifics of Cases: A comment on Elizabeth Schneider' 1995-1996) 57 U.Pitt.L.Rev 550, 552

<sup>489</sup> A. McColgan, (n69) 514.

<sup>490</sup> H. Maguigan 'Battered Women and Self-Defense: Myths and Misconceptions in Current Reform Proposals' (1991) 140 University of Pennsylvania Law Review 390, 397

<sup>491</sup> E. Schneider 'Resistance to Equality' (n487) 481.

#### 4.4.1 Imminence

One way of ensuring that abused women have equal access to the defence would be to reframe the substantive requirement of imminence. Ripstein argues that this is not beyond the legal construction of imminence as it stands under the current defence of self defence, as the defence is designed to ensure that no one must endure an unreasonable risk of unavoidable harm.<sup>492</sup> As a result, Ripstein argues that imminence is an instantiation of the concept of ‘unavoidable harm’ in self defence law, and therefore fits within the objective of the defence.<sup>493</sup> Regarding imminence as an instantiation of unavoidability would move the focus of the enquiry away from considerations of temporal proximity and towards the defendant’s circumstances, establishing whether the abused woman was in unavoidable danger. This would amalgamate existing self defence theory with feminist legal theory, amending the law so that the defendant can use lethal force on the victim if it is ‘necessary to avoid’ harm.<sup>494</sup>

This would remove any kind of temporal concept, and would express the underlying concept of inevitability or unavoidability.<sup>495</sup> This would ask whether the defendant ‘had any choice but to act as she did in order to avoid grave risk of death or serious harm’<sup>496</sup> at the hands of the victim. This would not threaten the purpose of the defence, given that its ultimate goal is to permit necessary acts of self defence,<sup>497</sup> but would ensure that abused women who kill would be able to fall within its ambit. This would help to recognise that in cases of female perpetrated intimate partner homicide that the defendant is trying to protect themselves from harm and that this is the case even when the defendant does not strike immediately.

However, conceptions of choice would be crucial under this approach, as the defence would need to recognise that notions of free will must be ‘tempered by recognition of

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<sup>492</sup> A. Ripstein (n486) 686.

<sup>493</sup> A. Ripstein (n486) 687.

<sup>494</sup> R. A. Rosen ‘On Self Defence, Imminence and Women Who Kill Their Batterers’ (1993) 71 N.C.L. Rev 371, 380

<sup>495</sup> A.J. Sebok, ‘Does an Objective Theory of Self Defence Demand Too Much?’ (1995-1996) 57 U.Pitt.L.Rev 689, 733

<sup>496</sup> R.A. Rosen, (n494) 375.

<sup>497</sup> A. J. Sebok (n495) 734.

social circumstance.<sup>498</sup> Furthermore, the concept of inevitability would have to be regulated, otherwise any defendant trying to rely on the defence could just claim that the risk of harm was inevitable. A degree of probability would be necessary, requiring the belief that when the defendant killed the victim, it was because the victim intended to inflict serious harm upon the defendant, and this belief must be reasonable.<sup>499</sup> In cases concerning abused women who kill, this could be supported by expert testimony, as this could provide evidence that it was reasonable for the abused women to believe that there was no alternative.<sup>500</sup> This could also enable a greater investigation into the epistemic situation between the defendant and the victim,<sup>501</sup> as the defendant's previous efforts to escape, or involve the police could be considered. It could also enable the burdens placed upon abused women who kill to be evaluated. This would enable consideration of the safety of her children or financial stability, as it would be unreasonable for her to simply leave if these burdens had to be assumed.<sup>502</sup>

An alternative solution would be to relax the requirement of imminence. This would ensure that the legal rule would be general enough to apply to potentially anyone.<sup>503</sup> This could be achieved by requiring the court to specifically direct the jury to consider the history of violence between the defendant and the victim.<sup>504</sup> This would enable the situation to be looked at from an entirely new perspective, and would ensure that the legal definitions used to determine self defence do not exclude battered women from consideration. The recognition of the defendant's circumstances is absolutely essential, as they serve as critical junctures 'for the intersection of law and social attitudes.'<sup>505</sup> This is because issues of domestic violence and the exculpation or perceived special treatment of abused women within the criminal justice system triggers anxiety about the possibility of 'abuse excuse'.<sup>506</sup> This demonstrates the need to understand domestic violence, as it has to stop being perceived as a form of 'special

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<sup>498</sup> E. Schneider 'Resistance to Equality' (n487) 523.

<sup>499</sup> R. A. Rosen (n494) 410.

<sup>500</sup> A.J. Sebok (n495) 735.

<sup>501</sup> A. Ripstein (n486) 707.

<sup>502</sup> R.A. Rosen (n494) 396.

<sup>503</sup> I. M. Young (n488) 552.

<sup>504</sup> *State v Wanrow* 88 Wash 2d. 221, 223,559 p.2d 548 (1977) at 546, *State v. Lewis*, 491 P.2d 1062, 1064 (Wash. Ct. App. 1971))

<sup>505</sup> E. Schneider 'Resistance to Equality' (n487) 529.

<sup>506</sup> A. M. Dershowitz *The Abuse Excuse and other Cop Outs , Sob Stories and Evasions of Responsibility* (Little, Brown and Co 1994)



pleading'<sup>507</sup> and be recognised as a factor that needs to be considered to ensure that women have equal access to self defence.<sup>508</sup> This would not excuse all abused women who kill, but a relaxation of the imminence requirement could help the jury to recognise that just because an abused woman does not retaliate in the middle of an attack, it does not mean that she is not in danger from her abuser.

The adoption of such an approach would go some way towards remedying the gender inequality within self defence, as society would be forced to recognise that the family home is not a place of safety and comfort for all women. It would acknowledge that in certain circumstances, a patriarchal family legitimises male domination over women, ensuring that the violence occurs in a sexist context.<sup>509</sup> By relaxing the imminence requirement, society would recognise that by preserving the ideology of family life and making it difficult for abused women to leave the family home, they are not recognising the social context of domestic violence and its effects.<sup>510</sup> This would force an examination of the social structures and attitudes that keep women trapped in these situations.<sup>511</sup> It would also help to show that in these cases, many abused women are justified when fighting for their lives within the most intimate of relationships. This would not give abused women preferential treatment, but would go some way to addressing the existing prejudice.<sup>512</sup>

#### 4.4.2 Reasonableness

The meta concept of unavoidable harm could be further reinforced through reforming the concept of reasonableness and its requirements. The requirements that the force be both necessary and proportionate should be evaluated in light of all of the defendant's circumstances. This would require recognising that in the circumstances of abused women who kill, it is reasonable to feel the need to use a weapon.<sup>513</sup> This would ensure gender equality as women would not be expected to conform to masculine

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<sup>507</sup> E. Schneider 'Resistance to Equality' (n487) 529.

<sup>508</sup> E. Schneider. 'Describing and Changing: Women's Self-Defence Work and the Problem of Expert Testimony on Battering' (n167) 195.

<sup>509</sup> M. Romero 'A Comparison Between Strategies Used on Prisoners of War and Battered Wives' (1985) 13 Sex Roles 537, 538

<sup>510</sup> S. Edwards 'Battered Women who Kill' (n451) 1382.

<sup>511</sup> S. Edwards 'Battered Women who Kill' (n451) 1382.

<sup>512</sup> A. McColgan (n69) 522.



standards, and would not be condemned for seeking recourse to weapons or for not leaving the abusive relationship. Instead, the approach adopted in *Wanrow*, could be followed to demonstrate that this stance already exists within a comparative framework. In this case, the Washington Supreme Court recognised that any instruction limiting self defence to the equal use of force was denying female defendants their right to equal protection under the law.<sup>514</sup> This is necessary to ensure equal protection in the context of underlying inequalities,<sup>515</sup> as without a full understanding of the circumstances and accompanying social context, abused women would continue to be expected to conform to male standards of behaviour.

In order to achieve this, the objective construction of reasonableness would not need to be significantly altered. Instead, it could be demonstrated through expert testimony that violent relationships change the circumstances in which self defence would be needed,<sup>516</sup> thus allowing the defendant's personal history and the implications of battering upon an individual's reaction to be considered.

#### 4.4.3 Expert Testimony

The meta concept of unavoidable harm could be sufficiently expressed through expert testimony concerning the reactions of abused women who kill their abusers, which could adopt a more subjective standard in determining the reasonable nature of the defendant's response.<sup>517</sup> Expert testimony about the sociology and psychology of battering relationships could help judges and jurors to appreciate and understand the specifics of a particular woman's narrative.<sup>518</sup> This is supported by Schneider, who argues that the psychological stereotypes of abused women who kill have to be minimised and placed in the broad context of a patriarchal society which tolerates and facilitates violence against women.<sup>519</sup>

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<sup>513</sup> E. Schneider and S. Jordan 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault' (n64)

<sup>514</sup> A. McColgan, (n69) 521.

<sup>515</sup> A. Ripstein (n486) 686.

<sup>516</sup> M. Mihajlovich 'Comment: Does Plight Make it Right: The Battered Woman Syndrome, Expert Testimony, and the Law of Self Defence' (1987) 62 Ind.L.J 1277

<sup>517</sup> see K. O' Donovan, 'Defences for Battered Women Who Kill' (1991) 18(2) Journal of Law and Society 219-237

<sup>518</sup> I. M. Young (n488) 551.

<sup>519</sup> L. Walker 'A Response to Elizabeth M. Schneider's Describing and Changing: Women's Self Defence Work and the Problem of Expert Testimony on Battering' (1986) 9 Women's Rts L. Rep 223, 224

Consequently, general evidence concerning the ‘empirically validated behaviours or reactions of victims and witnesses’<sup>520</sup> would need to become admissible, ensuring that the courts acknowledged the psychological reactions that occur during abusive relationships and why some victims find it so difficult to leave these relationships.<sup>521</sup> This could provide the jury with a useful tool in which to understand the defendant’s situation, and whether her apprehension of danger was reasonable,<sup>522</sup> as it would recognise that perception of danger is affected by socialisation.<sup>523</sup> This would also help to eliminate gender bias, as it would show that in a particular set of circumstances, a woman’s response can be reasonable even though it would be different to a man’s response in the same set of circumstances.<sup>524</sup> This explains why, in some situations, a woman could perceive herself to be in danger from an objectively unthreatening man.<sup>525</sup> It could help to contextualise and normalise the behaviour of a battered woman,<sup>526</sup> mitigating the harsh objective approach to reasonableness. It therefore reflects a determinist approach, as it adopts the principle that human behaviour can be understood as a product of prior causal events.<sup>527</sup>

The admissibility of human behaviour evidence in the context of psychiatric and psychological evidence conforms to the admissibility requirements of *R v Turner*, which allows the admissibility of expert evidence provided that it relates to a recognised mental illness. Liberally interpreted, the construction under *R v Turner* could include the experiences of abused women who kill through the admission of social scientific evidence pertaining to a wider range of behaviours.<sup>528</sup> However, the relaxation of any of the requirements of self defence to incorporate the social realities of an excluded group can raise ‘moral panic.’<sup>529</sup> This relates to the social belief that the requirements of a complete defence of self defence were being relaxed to

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<sup>520</sup> See D. C. Ormerod ‘Expert Evidence: Where Now? What Next?’ (n222)

<sup>521</sup> D. C. Ormerod ‘Expert Evidence: Where Now? What Next?’ (n222) 8.

<sup>522</sup> E. Schneider ‘Resistance to Equality’ (n487) 511.

<sup>523</sup> M. L. Marcus, ‘Conjugal Violence: The Law of Force and the Force of Law’ (1981) 69 Calif.L.Rev. 1657

<sup>524</sup> P.L. Crocker (n29) 123.

<sup>525</sup> S. Zeedyk and F. Raitt (n427) 541.

<sup>526</sup> S. Zeedyk and F. Raitt (n427) 541.

<sup>527</sup> J. Armour (n422) 534.

<sup>528</sup> *R v Emery* (1993) 14 Cr. App. R. (S.) 394

<sup>529</sup> E. Kenny (n27) 31.

guarantee the acquittal of a particular group.<sup>530</sup> The introduction of a more subjective standard could be seen to threaten the law's claim to objectivity,<sup>531</sup> undermining the strict objective and justificatory standards that society demands of self defence.

Therefore, even with the relaxation of the *Turner* standard, the testimony would be applied in the context of a masculine society which perceives any concession to the subjective perceptions of the defendant as undermining the legitimacy of the complete defence. However, without a relaxed interpretation of *R v Turner* and the admissibility of behavioural testimony, any admissible testimony would be on BWS, therefore developing the reasonable battered woman.<sup>532</sup> This would not be a sufficiently woman-centred strategy, as due to BWS and notions of learned helplessness, evidence of the abused woman trying to protect herself in a defensive context could be taken to mean that she is not a real battered woman.<sup>533</sup> Therefore, despite the woman-centred potential in adopting a more subjective approach to the admissibility of expert testimony concerning abused women who kill in conjunction with the meta narrative of unavoidable harm, society's adherence to the justificatory framework currently prevents both the admissibility and effectiveness of such testimony.

The development of an alternative framework of self defence based upon the meta narrative of unavoidable harm demonstrates that the underlying rationale of the complete defence of self defence, that of being able to respond justifiably and with lethal force in the face of unavoidable harm, signifies that the current construction of self defence and the theoretical principles of a woman-centred epistemology of the role of reaction conflate. In theory, this meta narrative can be used to reform and expand conceptions of imminence, reasonableness, necessity and proportionality and facilitate the introduction of expert testimony which can present abused women who kill as reasonable.

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<sup>530</sup> E. Kenny (n27) 31.

<sup>531</sup> K. O' Donovan (n517) 236

<sup>532</sup> See P.L.Crocker (n29) E. Schneider 'Describing and Changing: Women's Self Defence Work and the Problem of Expert Testimony on Battering' (n172)

<sup>533</sup> see J. Blackman 'Emerging Issues of Severely Battered Women and the Criminal Justice System' (1990) 8 Behavioural Sciences and the Law 121-130 and M. Shaffer 'R v Lavallee: A Review Essay' (1990) 22 Ottawa Law Review 607-624

However, strategic possibilities of the meta narrative of unavoidable harm are limited by the need to use expert testimony to explain the reactions of abused women who kill as reasonable in order to overcome societal misconceptions of appropriate reaction and behaviour which are endorsed by the current construction of self defence. Although a subjective approach to the requirement of reasonableness is theoretically possible under the meta narrative, strategic possibilities are limited by the application of the complete defence in a masculine society.

#### 4.5 Conclusion

This chapter has applied a woman-centred analytical framework of the legal construction of abused women who kill to the complete defence of self defence in order to analyse how the current construction of the complete defence excludes the recognition of abused women's reactions to abuse as reasonable. Consequently, abused women are excluded from the ambit of the defence due to the reliance upon and adherence to objectively defined justificatory criteria. These criteria cannot accurately reflect the reactions of abused women who kill, as the application of objective standards under this framework exist in abstraction from abused women's social contexts. The focus of the complete defence rests firmly upon whether the defendant's act can be justified, rather than the underlying motivations for the commission of the homicide. The adoption of such a stance ensures that only the most socially determined deserving defendants fall within the ambit of the defence, ensuring that full exculpation is reserved for those who can adhere to the strict justificatory criteria.

This chapter sought to consider the woman-centred possibilities posed by the complete defence of self defence, in order to determine whether reform of self defence could develop a sufficiently woman-centred homicide defence. The theoretical advantages of altering the defensive framework from one based upon justification, to one based on excuse were firstly considered. However, due to the fluid nature of an excusatory framework, and the absence of rigid and prescribed criteria, the theoretical advantages of an excusatory framework were thwarted by perceptions that objective and justificatory requirements would be giving way to the subjective perceptions of the defendant. This would enable a wider range of

behaviours and circumstances to fall within the ambit of the complete defence purely based on the defendant's interpretation of harm, creating the perception that socially undeserving defendants were being given a 'license to kill'.

Consequently, the possibilities within the current complete defence were considered. In order to attempt to incorporate the reactions of abused women who kill within the complete defence of self defence, it was necessary to work within the existing parameters of the defence using the meta narrative of unavoidable harm. Under this construction, the legal criteria underpinning the complete defence could legitimately be reformed to incorporate abused women who kill, as their cases can be perceived as socially deserving as they adhere to the underlying rationale of the complete defence. However, further strategic possibilities were limited by expert testimony. In the context of the complete defence of self defence there exists a conflict between a woman-centred position, which recognises the necessity of expert testimony in order to dispel social myths and inaccuracies about abused women who kill, and a complete defence which upholds societal conceptions that an individual can only take the life of another in limited circumstances. The full acquittal which accompanies the defence suggests that complete exculpation should only be allowed in the most limited of cases, and in situations where at the precise moment the defendant deployed defensive force, the state was unable to protect them. Therefore, even with the admissibility of expert testimony there is no guarantee that the jury are going to embrace the claims of the defendant as legitimate acts of self defence worthy of an acquittal.

In order to incorporate the reactions of abused women who kill into the defences to homicide, alternative homicide defences must be considered. The way in which both the current complete and partial defences to homicide are constructed exclude the reactions of abused women who kill from being legally recognised as reasonable. As such, attitudes concerning abused women who kill are deep rooted and have crystallised to the detriment of abused women who kill. It is necessary to move beyond the current and gender disparate defences to homicide and towards alternative modes of conceptualisation, which can tackle both social and legal attitudes to abused women who kill in order to ensure substantive change.

## Chapter Four

### Abused Women Who Kill and a Partial Defence of Excessive Force in Self Defence

#### 5. Introduction

After applying a woman-centred analytical framework and exploring the strategic possibilities apparent in the use of expert testimony, to both the complete and partial defences to homicide, the inability of the current legal framework to incorporate abused women's experiences of abuse and subsequent reactions to it has been exposed. The defences pivot upon masculine constructions of what constitutes an acceptable reaction to a potentially life threatening situation, whilst the legal preoccupation with objectivity ensures that abused women's experiences have little significance within the decision making process. This makes the possibility of significantly altering the existing defences, particularly self defence, to incorporate the reactions of abused women who kill somewhat unattainable, as the defence reflects and upholds the standards of behaviour and accountability that society demands. Any deviance from this standard encourages claims of special treatment which the legal system cannot be seen to endorse.

Consequently, the social myth that abused women are free to leave the relationship at any time enables the legal system to hold that abused women's reactions to abuse are unreasonable and disproportionate due to the many perceived alternatives and choices available to her. Within the current legal framework, the abused woman cannot be understood as reasonable and is forced to justify her behaviour within the limiting and damaging confines of psychological syndromes as opposed to being able to argue that her reaction was a reasonable response to severe violence. Even with the assistance of expert testimony concerning the reactions of abused women who kill, the psychological focus of the testimony ensures that abused women and their reactions continue to be interpreted within the context of her perceived mental dysfunction.<sup>534</sup>

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<sup>534</sup> J. Stubbs, 'The (Un)Reasonable Battered Woman? A Response to Eastal'. (1992) 3 Current Issues in Criminal Justice 359, 360

This testimony exists as evidence of an excuse,<sup>535</sup> rather than evidence of the justified nature of the abused woman's reaction.

In an attempt to legally and socially detach the reactions of abused women who kill from stereotypical psychological syndromes and context limiting standards of objectivity, whilst still recognising that the abused woman's reaction was a defensive response to ongoing abuse, this chapter will apply the woman-centred analytical framework to the partial defence of excessive force in self defence. The partial defence seeks to take the experiences of abused women in the context of the law as a starting point and develop a defence that is both woman-centred and socially acceptable.

A partial defence of excessive force in self defence would find that a defendant was guilty of manslaughter, not murder, if the use of defensive force exceeded that which was necessary and reasonable in the circumstances. The partial defence is a strategic means of overcoming the existing societal and legal reluctance to relax any of the requirements of a full self defence claim, maintaining the theoretical standpoint that a full claim of self defence and subsequent acquittal can only be available to a defendant who responded with lethal force at the precise moment that the state was unable to protect them. It also recognises that when abused women kill they often strike with what society perceives as objectively excessive force, failing to meet the requirements of necessity, reasonableness and proportionality as set out in self defence. As a result, their claim of self defence fails, and the partial defences of loss of control and diminished responsibility are unable to reflect the fact that their reaction was in response to the abuse sustained and to account for the defensive motivation surrounding the homicide.

A partial defence of excessive force in self defence could recognise the impact of domestic violence, whilst at the same time preserving the legal system's interests. The partial defence would reduce a charge of murder to manslaughter, even with the existence of a clear intention to kill, as it recognises human reaction in much the same way as the partial defence of loss of control, by recognising reduced moral

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<sup>535</sup> R. A. Schuller and P.A. Hastings, 'Trials of Battered Women Who Kill: The Impact of Alternative Forms of Expert Evidence' (1996) 20(2) *Law and Human Behaviour* 167, 169



culpability.<sup>536</sup> The partial defence should be considered to be a partial excuse as it reinforces the societal feeling that premature resort to self help is blameworthy and reflects the amount of determinism that society will allow the legal system to tolerate.<sup>537</sup> It would limit determinist human behaviour,<sup>538</sup> which the criminal law is reluctant to accommodate in self defence doctrine,<sup>539</sup> but would recognise that in situations where an abused woman kills her abuser that the nature of the homicide is ultimately defensive, as her actions were the consequence of the abuse sustained.

Moreover, the partial defence would be advantageous for the jury, as they would not be forced to pick between two extremes. Instead of the defendant's conduct either falling within the ambit of self defence, or being excluded, the jury could find excessive force in self defence. This would operate as somewhat of a half way house. The partial defence would more appropriately recognise that the defendant's circumstances do not always fall within the two extremes of full responsibility and non responsibility, and that an all or nothing approach to self defence is insufficient to consider the different levels of culpability and reflect the defendant's circumstances and the influence of external factors.<sup>540</sup> The partial defence could serve as a socially acceptable case for accommodating partial determinism,<sup>541</sup> as the jury can be compassionate as long as the interests of the legal system are being encouraged.<sup>542</sup> The partial defence also avoids a complete acquittal where the jury feels that there is some culpability and that this requires punishment.<sup>543</sup>

This chapter will argue that a partial defence of excessive force in self defence is the most sufficient woman-centred approach to the defences to homicide. This is because it occupies the middle ground between the partial defences of loss of control and the

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<sup>536</sup> See s.215 Criminal Code of Canada 1985 which codifies the partial defence of provocation. Until the 1980s there used to be a third defence, a partial defence of excessive force in self defence. This would reduce a finding of murder, to one of manslaughter if successfully applied. See further: T. Quigley, 'Battered Women and the Defence of Provocation' (1991) 55 Sask. L. Rev. 223, 235 for a discussion of the partial defence and the Canadian cases leading to the abolition of the partial defence.

<sup>537</sup> D.L. Creach, 'Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why' (1982) 34(3) Stanford Law Review 615, 634

<sup>538</sup> D.L.Creach (n537) 628.

<sup>539</sup> M. Kelman, 'Interpretive Construction in the Substantive Criminal Law' (1981) 33 Stanford Law Review 591, 597-598

<sup>540</sup> D.L. Creach, (n545) 615.

<sup>541</sup> M. Kelman (539) 667.

<sup>542</sup> G. Fletcher, *Rethinking Criminal Law* (OUP 2000) 808

<sup>543</sup> see *R v Shannon* (1980), 71 Cr.App.R.192 (C.A.)



complete defence of self defence. It further recognises that both legal and social attitudes towards abused women who kill are gendered and that this gender discrimination is deep rooted. Any attempts to incorporate abused women who kill into these existing frameworks are problematic, as the defences were not designed to incorporate their experiences. Any attempts to widen or reform the defining legal concepts and requirements are met with resistance, as they appear to be changing the fundamental legal requirements to accommodate what are perceived as less deserving cases. A partial defence of excessive force in self defence would serve as a compromise. It would build upon the apparent legislative intentions to incorporate abused women's reactions into the defences to homicide, recognising instead that the reactions displayed are motivated by self preservation rather than existing as unconvincing manifestations of a loss of self control.

By adopting a pragmatic stance, the partial defence would use the law to characterise abused women who kill in a new way, using the role of the law to ensure that this characterisation filtered into popular understanding and would counteract the assumptions and stereotypes which already exist.<sup>544</sup> The partial defence would be used as somewhat of a stepping stone, serving as means of education and aiming to change societal perceptions of abused women who kill in order to incorporate the defensive nature of their reactions into a partial defence to homicide.

Consequently, the partial defence of excessive force in self defence will firstly be critically evaluated according to its application in the jurisdictions of Australia and Canada and its potential application in England and Wales. It will be argued that although the defence can be successfully applied to cases in which abused women kill, the legal standard would still have to be further reformed to be sufficiently woman-centred, otherwise the partial defence could conclude that the defendant was not acting objectively and reasonably. This will be followed by a consideration of the requirements of imminence and necessity, which will draw upon comparative defensive principles to demonstrate that in the context of abused women who kill, the traditional concept of imminence must give way to necessity. Therefore, necessity should be legally prioritised over imminence, to ensure that the partial defence can

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<sup>544</sup> K. Abrams, 'The Constitution of Women' (1997) 48 *Alabama Law Review* 861, 862

sufficiently incorporate the reactions of abused women who kill as reasonable. Due to the partially defensive nature of excessive force in self defence, these concepts are capable of being modified to incorporate the contextual realities of abused women who kill as their modification would not result in an acquittal. Societal and legal conceptions of appropriate behaviour are still ultimately being upheld, but the modified concepts can serve as a means of altering societal and legal perceptions of abused woman who kill, demonstrating that the reaction was a legitimate and reasonable response to a serious threat to her safety.

After an evaluation of the application of the partial defence of excessive force in self defence, this chapter will argue that in order to ensure that abused women fall within constructions of both necessity and reasonableness, that the use of expert testimony concerning domestic violence is essential. This will enable the jury to understand the situation from the perspective of the abused woman, ensuring that she is not constructed and labelled according to her pathology, but that her actions are understood from her own context. This would have the effect of changing the societal perceptions of abused women who kill, as their actions would be exposed as a reasonable response to abuse in the absence of viable alternatives and would help to encourage further legal reform.

### **5.1 Australia and the Partial Defence of Excessive Force in Self Defence**

Excessive force in self defence is widely regarded as being the creation of the Australian common law,<sup>545</sup> and existed as a partial defence to homicide until 1987 when it was abolished in *Zecevic v Dpp*.<sup>546</sup> The defence was abolished because trial judges were having great difficulty in expressing the requirements in a manner which were readily understandable to the jury.<sup>547</sup> Instead of reformulating the partial defence, it was abolished on the grounds that the doctrine was too uncertain, and lacked the support of case authority.<sup>548</sup>

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<sup>545</sup> The Victorian Full Court decision in *R. v. McKay* [1957] V.R. 560 purports to be the first case to recognise the defence.

<sup>546</sup> (1987) 71 A.L.R. 641

<sup>547</sup> (1987) 71 A.L.R. 641 at 651. (Deane J).

<sup>548</sup> S. Yeo, 'The Demise of Excessive Force in Self-Defence in Australia' (1988) *International and Comparative Law Quarterly* 348, 353

The partial defence had previously been applied according to the requirements set out in the case of *R v Howe*.<sup>549</sup> The Court found that a person who is subjected to a violent and felonious attack and who, in endeavouring, by way of self defence, to prevent the consummation of that attack by force exercises more force than a reasonable man would consider necessary in the circumstances, but no more than what he honestly believed to be necessary in the circumstances, is guilty of manslaughter and not of murder.<sup>550</sup> The partial defence recognised that a defendant can honestly believe that the force that they deploy at the time is reasonable, even though it is not objectively reasonable.<sup>551</sup> This makes the concept of reasonableness the focal point of the defence, as provided the defendant had an honest belief in the reasonableness of their action, then the partial defence could apply.

The position in *Howe* was subsequently approved in *R v Viro*,<sup>552</sup> and the stages of inquiry were further elaborated. In order to be able to rely on the doctrine of excessive force in self defence, Mr Justice Mason outlined the requirements to be satisfied by the defendant.<sup>553</sup> It had to be demonstrated that the defendant reasonably believed that there was an unlawful attack which threatened them with death or serious bodily harm and that this was being made, or was about to be made upon them. In assessing the defendant's 'reasonableness' of belief, the standard adopted is what the accused themselves might reasonably believe in all the circumstances. It was the task of the jury to decide whether the accused's belief was reasonable. If the jury are satisfied beyond reasonable doubt that there was no reasonable belief by the accused in all the circumstances, then the defendant has no access to the defence.

If the jury are not satisfied beyond reasonable doubt that there was no reasonable belief by the accused, then the jury must consider whether the force deployed by the defendant was reasonably proportionate to the danger the defendant believed that they faced. If the jury finds that the defendant deployed a disproportionate amount of force in relation to the danger the defendant believed that they faced, the jury were left with two options. They could either convict the defendant of murder, or convict the

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<sup>549</sup> (1958) S.A.S.R. 95,

<sup>550</sup> (1958) S.A.S.R. 95, 121-122 (*per Mayo J*).

<sup>551</sup> N.C. O'Brien, 'Excessive defence: a need for legislation' (1982-1983) 25 Crim L.Q 441, 444

<sup>552</sup> (1978) 141 C.L.R 88

<sup>553</sup> N.C.O'Brien (n551) 446

defendant of manslaughter. This decision rested on one final decision. The jury had to decide whether the accused believed that the force which they used was reasonably proportionate to the danger which they believed that they faced. If the jury finds that the defendant believed that the force they deployed was reasonably proportionate to the danger faced, the conviction will be for manslaughter rather than murder.<sup>554</sup>

In summary, the Australian doctrine recognises that a defendant may honestly believe that the force they deploy is reasonable, even though when objectively assessed, the force used may be considered unreasonable.<sup>555</sup> If this is the case, the defendant is convicted of manslaughter, even with the existence of an intention to kill. The advantage of the Australian doctrine is that it recognises and accounts for the procedural obstacles faced by abused women who kill when pleading self defence. It accounts for the possibility that the jury are not going to find that the defendant honestly believed in the need for force in the circumstances, and it recognises that the jury may not believe that the defendant responded with proportionate force.

This would be advantageous in English law, as when trying to plead self defence, abused women have found it very difficult to convince a judge and jury that their use of force was a reasonable response in the circumstances, despite this requirement being tested by reference to the facts as the defendant honestly believed them to be, even though this may have been based on an unreasonable belief. Typically, these findings bar access to the self defence doctrine, resulting in any woman who took her chances and tried to plead self defence being convicted of murder.

However, one key disadvantage of the Australian doctrine is that the overall conviction for either murder or manslaughter pivots on whether the jury believe that the defendant believed that the force that they deployed was reasonably proportionate to the danger that they believed they faced. Due to prevailing societal attitudes, abused women who kill have found it very difficult to convince a jury that their actions were either reasonable or proportionate. This demonstrates that if the Australian doctrine were to be transposed into domestic law, the domestic standards used to address reasonableness and proportionality would have to be significantly modified to prevent abused women falling at the very last hurdle when trying to plead

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<sup>554</sup> *R v Viro* (1978) 141 C.L.R. 88, 146-147.

excessive force in self defence. Although the partial defence would allow more of the context of violence to be available to the jury, as the reasonableness of the conduct is looked at according to the perceptions of the defendant, further reform would be required to ensure that the concept of reasonableness was not prejudicial to the defendant.

Consequently, expert testimony would be required to explain to the jury why the defendant thought that their conduct was reasonable in light of their circumstances. Otherwise, there would still be the possibility that the judge and jury could not fully understand and appreciate the abused woman's social context and systems of belief. In addition to this, any consideration of proportionality in domestic law will also take into consideration whether it was objectively necessary to use any violence at all. This will lead to a consideration of whether there were less costly measures available to the defendant.<sup>556</sup> This is going to continue to be detrimental for any abused woman who struck when her partner was off guard, as societal perceptions are going to prevail, risking the finding that instead of responding with force, the abused woman should have simply left the relationship, thus eradicating any need for force.

## 5.2 Canada and the Partial Defence of Excessive Force in Self Defence

Similar problems for abused women who kill arise when the partial defence of excessive force in self defence is applied in accordance with Canadian law, as the existence of circumstances in which the use of some force would be justified is a qualifying condition. In *R v Fraser*,<sup>557</sup> Mr Justice Moir claimed that excessive self defence existed if the following factors were apparent: Firstly, serious circumstances must exist, enabling the accused to reasonably believe that a dangerous situation existed. Secondly, the accused must have used excessive or unreasonable force in these circumstances. Thirdly, the accused must have been acting honestly when such force was deployed, under the mistaken apprehension that the force that they were using was reasonable.<sup>558</sup> In addition to the factors specified by Mr Justice Moir, Mr Justice Martin in *R v Trecoffe*<sup>559</sup> claimed that in order for excessive force in self

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<sup>555</sup> N.C. O'Brien, (n551) 444.

<sup>556</sup> G. Fletcher, 'Domination in the Theory of Justification and Excuse' (n402) 555.

<sup>557</sup> *R v Fraser* (1980), 55, C.C.C (2d) 503, 523-524

<sup>558</sup> N.C. O'Brien, (n551) 446.

<sup>559</sup> N.C. O'Brien, (n551) 447.

defence to be recognised as a substantive doctrine, the following qualifying factors would also need to be apparent: He claimed that the accused must have been justified in using some force in defending themselves against an attack, either imminent or reasonably apprehended. He also claimed that the accused must have honestly believed that he was justified in using the force that he did, and that the force used was excessive because it exceeded what the accused could reasonably have considered to be necessary.<sup>560</sup>

Both the Australian and Canadian approaches to the partial defence of excessive force in self defence, demonstrate that the partial defence is workable. However, they also demonstrate that the doctrine is not sufficiently woman-centred, as given the nature of domestic violence and its effects, not all abused women who kill strike in circumstances where the use of some force would be justified. This results in the partial defence being unable to overcome the obstacles imbedded in the traditional law of self defence, as women would still be required to adhere to the rigid standards of proportionality and necessity, which fail to recognise the impact of domestic violence. The partial defence focuses on whether the defendant could have justifiably used some force at the time of the homicide, which implicitly incorporates a temporal restriction for abused women who kill, as in order to be able to deploy legitimate force, the threat of violence traditionally has to be ‘sufficiently proximate’<sup>561</sup> to trigger an act of self defence. This results in the defence focusing on the satisfaction of the requirements of self defence, which become paramount to the success of the partial defence, further removing domestic violence and its effects from the investigation.

### **5.3 England and Wales and the Partial Defence of Excessive Force in Self Defence**

Existing jurisprudence in England and Wales outlines that no partial defence of excessive force in self defence exists.<sup>562</sup> Despite this, the possibility of extending the

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<sup>560</sup> N. C. O’Brien, (n551) 447.

<sup>561</sup> G. Fletcher, ‘Domination in the Theory of Justification and Excuse’ (n402) 556.

<sup>562</sup> *Palmer v The Queen* [1971] AC 814, When the Court was asked whether there was a rule of law which required that the jury should be directed that the defendant should be found guilty of manslaughter if the defendant may have acted in self defence but had used more than reasonable force. The court held that there was no such law, with Lord Morris claiming that the accused will either

doctrine of self defence to include excessive force in self defence has been discussed by the Criminal Law Revision Committee,<sup>563</sup> a House of Lords select committee<sup>564</sup> and was the subject of clause 59 of the Law Commission's draft criminal code.<sup>565</sup> Under the Law Commission's proposals, Clause 59 stated as follows:

A person who but for this section, would be guilty of murder is not guilty of murder if, at the time of his act, he believes the use of force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force referred to in public or private defence) but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.

Section 44(1) states that ' A person does not commit an offence by using such force as, in the circumstances which exist or which he believes to exist, is immediately necessary and reasonable.' Following s44(1)(c) this includes the protection of the defendant or another from unlawful force or unlawful personal harm. However, s44(7) states that 'the fact that a person had an opportunity to retreat before using force shall be taken into account, in conjunction with other relevant evidence, in determining whether the use of force was immediately necessary and reasonable.'

This creates a disadvantage for abused women who kill, as following s44(7), it is unlikely that the use of force would be perceived as necessary and reasonable if the abused woman had delayed the fatal strike to ensure her survival. Fortunately, the Law Commission's proposals for the doctrine were raised again in their 2004 partial defences to murder report.<sup>566</sup> However, it was in this report that the partial defence of excessive force in self defence was rejected on the basis that the Law Commission's reformulated partial defence of provocation would be sufficiently wide to cover cases in which excessive force in self defence was deployed. The Law Commission recognised that without the adoption of their proposals, the partial defence of provocation would not be a sufficient partial defence for abused women who kill, as

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succeed or fail in pleading self defence, and that there is no middle ground. This was affirmed in *R v Clegg* [1995] 1 AC 482 as it was held that no such partial defence existed.

<sup>563</sup> The Criminal Law Revision Committee. Fourteenth Report: *Offences Against the Person* (Cmd 7844 1980)

<sup>564</sup> Report of the Select Committee on Murder and Life Imprisonment, (1988-89) HL 78-I, para 89.

<sup>565</sup> Law Commission *A Criminal Code For England and Wales* (Law Com No 177 1989) 68



‘the risk of conviction is high when the proportionality requirements of self defence are juxtaposed with the apparently inconsistent requirement of loss of control necessary for provocation.’<sup>567</sup>

Had the Law Commission’s reformulated proposals for the partial defence of provocation been adopted, its construction of excessive force in self defence would have been insufficiently woman-centred, unless informed by modified self defence principles. The proposals focused on circumstances in which it would have lawful to deploy some force, but that the defendant was unable to rely on self defence, as the force that they had deployed had exceeded what was reasonable.<sup>568</sup> The Law Commission’s construction of the partial defence derives its legitimacy from applying to circumstances in which some use of force would be justified. This provisionally excluded abused women who strike when they have an advantage and their partner is otherwise incapacitated.

Upon a strict interpretation, this reinforces an unnecessary two-tier system for abused women who kill. Those who responded with lethal force could fall within the ambit of a complete defence of self defence and a partial defence of excessive force in self defence. Those who waited until their partner was off guard, would fall within the ambit of neither defences. This would further signify that the circumstances in which some abused women kill are manifestly unreasonable and therefore should not be accorded legal protection. If the partial defence was going to be used to protect abused women who kill, then this applicational requirement must recognise that when abused women kill, the force deployed is necessary even though it is not always imminent.

However, relaxing the requirement of imminence to give way to necessity raises concerns, as in theory without an imminence requirement, the partial defence has little chance of success, as killings in cold blood, without any temporal or necessity restrictions would fall within the partial defence. Instead, the defence must derive its

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<sup>566</sup> Law Commission, *Partial Defences to Murder* (n274) para 3.163

<sup>567</sup> Law Commission, *Partial Defences to Murder*, (n274) para 4.22

<sup>568</sup> Law Commission, *Partial Defences to Murder*, (n274) para 4.1



legitimacy from the fact that the use of some force was legitimate,<sup>569</sup> but that the defendant had gone too far, making it socially acceptable to find a conviction of manslaughter rather than murder, as there was an occasion when the defendant needed to protect themselves. Without this requirement, by hypothesis, any use of force becomes excessive,<sup>570</sup> and abused women who kill would be forced to plead either loss of control or diminished responsibility as the chances of conviction under traditional self defence doctrine are too high.

Therefore, after evaluating the doctrine of excessive force in self defence as it existed under Australian and Canadian law, and how it could have been potentially developed in English law, it is clear that if the defence continues to rely upon masculine constructions of imminence, necessity and reasonableness then little will change for abused women who kill. Although the interpretations of excessive force in self defence recognise that the force abused women deploy in comparison to the circumstances that exist at the time of the killing, is objectively excessive, this recognition alone would not be enough to protect abused women who kill. In order to be sufficiently woman-centred, the partial defence would have to be capable of recognising abused women's circumstances and experiences and how these do not neatly fit within the objective components used to ascertain whether the deployment of lethal force can be justified.

#### **5.4 Towards a Woman- Centred Interpretation of Excessive Force in Self Defence**

In order to reflect the experiences and reactions of abused women who kill within excessive force in self defence, the masculine concepts of imminence, necessity and reasonableness must be changed. Once modified, the partial defence of excessive force in self defence as outlined in Clause 59 of the Law Commission's draft criminal code could be used as court room strategy for abused women who kill. In order to ensure that abused women would fit within this legal construction of Clause 59, it is essential to interpret the concepts of necessity and reasonableness in line with the circumstances of abused women who kill in accordance with their subjective

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<sup>569</sup> S. White, 'Excessive Force in Self Defence' (1971) 34(1) *The Modern Law Review* 106, 107

<sup>570</sup> C. Howard, 'An Australian Letter-Excessive Force' (1964) *Crim LR* 448, 450

perceptions. This could be achieved through expert testimony to demonstrate the reasonable and defensive nature of the abused woman's reaction.

However, as previously discussed, attempting to demonstrate reasonableness in light of the defendant's subjective perceptions and social context risks becoming immersed in concepts of justification and excuse. A finding that the defendant's actions were both necessary and reasonable suggests that her actions were justified. This would not be appropriate under a justificatory framework, unless it could be demonstrated that the death of a batterer was a social gain.<sup>571</sup> This could lead to claims that the partial defence provides abused woman with a licence to kill. Holding abused women's actions as justifiable implies a tacit endorsement of this behaviour.<sup>572</sup>

Consequently, it will be argued that the labels of justification and excuse carry much more significance under a complete defence to homicide. Under a partial defence to homicide, the label becomes of less legal significance in this context because the defendant is not being exculpated for their conduct. Instead, a finding of excessive force in self defence should be perceived as an action for which the law chooses not to accord maximum punishment to the defendant.<sup>573</sup> This avoids having to demonstrate that the defendant's course of action was the preferred choice of action for society by demonstrating that it is an act for which law and society are not going to demand that the defendant receive the mandatory life sentence, due to the circumstances of the case.<sup>574</sup>

#### **5.4.1 A Woman- Centred Interpretation of Necessity in Excessive Force in Self Defence**

Under the constructions of excessive force in self defence, an indicator of necessity was whether the use of some force would have been justified, but that the defendant's application of force went beyond objective standards of reasonableness. This inevitably leads to a consideration of imminence when investigating necessity, as if

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<sup>571</sup> See Robinson, P. 'A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability' (n453) 274 ("Justified behavior is correct behavior and therefore is not only tolerated but encouraged.")

<sup>572</sup> M. Willoughby (n425) 187.

<sup>573</sup> J. Dressler, 'Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code', (1988) 19 RUTGERS L.J. 671, 675

the defendant could have averted the threat, then her use of force was unnecessary. In order to be sufficiently woman-centred, the partial defence would have to mitigate existing tension over relaxing the requirement of imminence as it exists in self defence, and balance this against concerns that the imminence requirement is not sufficiently woman-centred. There are concerns that the relaxation of the imminence requirement could undermine its historical origins, as imminence forms ‘the fundamental justification for the permission to resort to violence in self defence,’<sup>575</sup> as it recognises that the individual only has the right to resort to defensive force because the authorities and the state are unable to protect them. Although the authorities and state are unable to protect abused women who kill, the standard of imminence is applied under a strict standard.

Abused women are excluded from the ambit of imminence, as upon objective considerations of their contexts, it is held that the abused woman could always have left the relationship. This responds to societal concerns that without a strict standard of imminence, it is feared that the perpetration of homicides in cold blood could fall within the defence, undermining the role that imminence plays in ensuring that the individual has a moral right to act.<sup>576</sup> However, this conception of imminence places undue emphasis on the victim’s immediate conduct rather than considering the terror and fear that the victim deliberately and repeatedly subjected the defendant to over a prolonged period of time.<sup>577</sup> The way in which imminence is constructed neglects to consider that these circumstances do cause the abused woman to believe that her life is in imminent danger and that the past abuse forms the basis of the battered woman’s perception.<sup>578</sup>

In order to balance these competing concerns, Rosen argues that imminence should be viewed as a translator for necessity. When imminence conflicts with necessity, it is necessity which must prevail. This recognises that imminence provides an assurance

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<sup>574</sup> G. Fletcher, ‘The Right Deed for the Wrong Reason: A Reply to Mr. Robinson’ (1975) 23 UCLA L. REv. 293, 306

<sup>575</sup> W.R.P. Kaufman, ‘Self-Defense, Imminence and the Battered Woman’ (2007) 10 New Crim. L. Rev 342, 355

<sup>576</sup> K.K. Ferzan, ‘Defending Imminence: From Battered Women to Iraq’ (2004) 46 Arizona Law Review 213, 215

<sup>577</sup> *State v. Hodges*, 239 Kan. 63, 74, 716 P.2d 563, 571 (1986); *State v. Osbey*, 238 Kan. 280, 710 P.2d 676 (1985); *State v. Hundley*, 236 Kan. 461, 693 P.2d 475 (1985).

<sup>578</sup> A. Browne, *When Battered Women Kill* (Free Press 1987) 175

that the defensive action is necessary to avoid the harm,<sup>579</sup> but that imminence is a condition precedent for necessity rather than an independent legal component.<sup>580</sup> By adopting this understanding, circumstances in which defensive action is necessary to avert harm, even when the harm is not imminent, would fall within the construction of excessive force in self defence. This would enable the partial defence of excessive force in self defence to overcome the procedural hurdles posed by imminence in relation to the complete defence of self defence.

Under the complete defence, the standard of imminence sends a clear societal message, that individuals can only take the law into their own hands at the precise moment that the state is unable to protect them. Although this construction adequately captures abused women's social realities, upon a strict application, abused women who kill have been excluded from legal and social constructions and understandings of imminence. Due to excessive force in self defence existing as a partial defence, it is not limited by the same social demands as a complete defence, and can therefore relax and modify legal constructions without raising societal concerns over special treatment or the inclusion of undeserving cases, as the defendant is still being punished for their conduct.

According to Rosen, incorporating a standard of necessity changes the locus of decision making from judge to jury, leaving it up to the jury to weigh the evidence and determine whether the defendant's use of force was necessary.<sup>581</sup> However, if this standard were to be applied, it would have to recognise that leaving the decision in the jury's hands could in fact encourage discrimination and bias against the defendant. This would enable members of the jury to still blame the abused women for allowing herself to get into situations that the juror themselves believes that they would never have allowed themselves to get into and could blame the defendant for.<sup>582</sup>

In order to safeguard against the improper application of juror discretion, it would be necessary for the trial judge to instruct the jury that killing, using excessive force in self defence must be in response to an imminent danger, unless the defendant is able

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<sup>579</sup> see C.J. Rosen, (n401), 32 and Eber, L.P. 'The Battered Wife's Dilemma: To Kill or To Be Killed', (1981) 32 HASTINGS L.J. 895, 928-29

<sup>580</sup> R.A. Rosen (n494) 380.

<sup>581</sup> R. A. Rosen, (n494) 404.

<sup>582</sup> E. Schneider, *Battered Women and Feminist Law Making* (n57) 103.

to overcome an initial threshold, by presenting substantial evidence that the killing was necessary even though the danger was not imminent.<sup>583</sup> This would both retain the imminence requirement in cases where imminence serves as a translator for necessity and would enable it to be removed in cases where it acts as a potential inhibitor as apparent in some American jurisdictions.<sup>584</sup>

Although this would be beneficial to cases in which abused women kill, using imminence as a translator for necessity, only modifies conceptions of imminence and not necessity. Under the traditional framework of self defence, abused women who kill have found it very difficult to satisfy the requirement that their actions were necessary, regardless of whether the danger that they faced was imminent. Therefore, in order to be of legal benefit to abused women who kill, understandings of both imminence and necessity would be required to change. Abused women's experiences and their link to the necessity for action need to be understood in an appropriate framework, one which allows for the consideration of evidence in the context of why she stayed in the relationship and whether the threats and abuse sustained produced a reasonable fear of death or serious injury.

This would require a presentation of the defendant's alternatives, so that the jury can understand that society may not have provided her with reasonable and realistic options which would protect her from her abuser,<sup>585</sup> making reliance on outside help both dubious and dangerous.<sup>586</sup> This would enable society to understand the realities faced by many abused women who kill. It would respond to findings that when a woman kills her abuser, the violence that she has experienced will have escalated in severity and frequency before the killing.<sup>587</sup> It will also acknowledge that the abused woman took other courses of action before killing her abuser,<sup>588</sup> and should not face a mandatory life sentence.

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<sup>583</sup> R. A. Rosen, (n494) 405.

<sup>584</sup> State v. Mash, 323 N.C. 339, 346, 372 S.E.2d 532, 536 (1988). The question of whether the defendant has produced such "substantial evidence" is a question of law to be determined first by the trial judge, and then by the appellate court, considering the evidence in the light most favourable to the defendant.

<sup>585</sup> Mitchell, M.H. 'Note: Does Wife Abuse Justify Homicide?' (1978) 24 WAYNE L. REV. 1705, 1710

<sup>586</sup> R. A. Rosen, (n494) 395.

<sup>587</sup> A. Browne, (n578) 144.

<sup>588</sup> E. Schneider and S. Jordan, 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault.' (n64) 152.

Despite a modification of the imminence requirement, in order to ensure that the jury were evaluating the necessity and therefore reasonableness of the defendant's application of lethal force appropriately, the admissibility of expert testimony on the experiences of battered women would be requisite. Without it, the jury would continue to evaluate abused women who kill according to objective, rigid and ultimately masculine conceptions of what constitutes necessary and reasonable behaviour. In order to overcome this, the testimony provided should consider the abused woman's context and experiences of domestic violence, rather than adhering to objective considerations or constructing abused women who kill through psychological syndromes. This requires the adoption of a less gender biased standard, which allows the jury to fairly consider what may have been a battered woman's necessary and reasonable response to the situation she faced.<sup>589</sup>

#### **5.4.2 Necessity, Reasonableness and the Application of Expert Testimony in Excessive Force in Self Defence**

The application of expert testimony concerning domestic violence would ensure that the jury were able to assess the abused women's actions in light of her context. This recognises that women act in self defence in different ways and in different circumstances to men,<sup>590</sup> that traditional concepts of self defence incorporate sex bias and that these sex based stereotypes can interfere with defensive claims.<sup>591</sup> The testimony provided should enable the jury to consider the state of cumulative terror that abused women face when trapped in abusive relationships alongside the failure of the legal system to protect them.<sup>592</sup> This demonstrates that the abused woman finds herself in a kill or be killed situation when she deploys defensive force and that the jury should consider this in light of her circumstances and perspectives to accommodate her unique situation.<sup>593</sup> This would help to remove some of the sex bias inherent within the traditional self defence framework, as the adherence to a strict objective standard limits the defendant's right to have their individual circumstances

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<sup>589</sup> M. Willoughby, (n425) 192.

<sup>590</sup> see M. I. Vera and G. Newman, 'Till Death Do Us Part: A Study of Spousal Murder' (1982) 10 AM. ACAD. Of Psychiatry and the Law Bull. 271 See also A. Browne, 'Assault and Homicide at Home: When Battered Women Kill' (1985) 3 Advances in Applied Social Psychology 124

<sup>591</sup> E. Schneider and S. Jordan, 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault.' (n64) 159.

<sup>592</sup> *State v. Stewart* 243 Kan. 639, 653, 763 P.2d 572, 582 (1988)

<sup>593</sup> M. Willoughby, (n425) 173.

and beliefs considered and this has the effect of subordinating their experiences in favour of society's interest in limiting recourse to defensive force.<sup>594</sup>

Allowing expert testimony about domestic violence would enable the cumulative effects of repeated violence in the past, and the predictability of future violence to be taken into consideration.<sup>595</sup> This would go some way towards eliminating the sex bias inherent within the criminal justice system and attempt to equalise the treatment of abused women in the courts. It would recognise that abused women who kill have to overcome the special myths of why they did not leave, why they did not seek assistance before acting and why they believed that the danger that they faced was different this time to any other.<sup>596</sup> The testimony would provide credibility to their context, their explanations and ultimately their actions,<sup>597</sup> as it can answer the questions that the jury have and can show that they were behaving reasonably.<sup>598</sup>

The expert testimony would challenge the perception that the battered woman should have left, and because she did not, everything that happened after that was her fault.<sup>599</sup> This would prevent looking at the abused woman's conduct in abstraction, enabling her context to demonstrate the reasons why she could not leave. This would prevent the jury from bestowing their own higher moral standards upon her, which have

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<sup>594</sup> P.L. Crocker, (n29) 125.

<sup>595</sup> A. Browne, (n578) 172.

<sup>596</sup> E. Schneider and S. Jordan, 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault.' (n64) 160.

<sup>597</sup> See, e.g., *State v. Kelly*, 97 N.J. at 201-02, 478 A.2d at 375. ("As can be seen from our discussion of the expert testimony, Dr. Veronen would have bolstered Gladys Kelly's credibility. Specifically, by showing that her experience, although concededly difficult to comprehend, was common to that of other women who had been in similarly abusive relationships. Dr. Veronen would have helped the jury understand that Gladys Kelly could have honestly feared that she would suffer serious bodily harm from her husband's attacks, yet still remain with him. This, in turn would support Mrs. Kelly's testimony about her state of mind (that is, that she honestly feared serious bodily harm) at the time of the stabbing."); *Ibn-Tamas v. United States* 407 A.2d 626 (D.C. 1979) ("Dr. Walker's testimony, therefore, arguably would have served two functions: (1) it would have enhanced Mrs. Ibn-Tamas' general credibility in responding to cross-examination designed to show that her testimony with her husband was implausible; and (2) it would have supported her testimony that on the day of the shooting her husband's actions had provoked a state of fear which led her to believe she was in imminent danger..., and thus responded in self defense.")

<sup>598</sup> *People v. Minnis*, 118 Ill. App. 3d 345, 356, 455 N.E.2d 209, 219 (1983) ("Those courts which have allowed expert evidence on the syndrome have done so only for the purpose of explaining why the abuse a woman suffered causes her to reasonably believe that her life is in danger and that she must use deadly force to escape her batterer.")

<sup>599</sup> E. Schneider and S. Jordan, 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault.' (n64) 197.



developed in isolation from any consideration of the defendant's circumstances and experiences.

However, this must be treated with caution, as previous analysis of judicial willingness to accept the testimony of abused women who kill has reinforced the perspective that the courts are listening to the accounts of damaged women,<sup>600</sup> not women who are responding reasonably to the threat of their abuser in the absence of alternatives. Therefore, expert testimony cannot be used in isolation and must be integrated within the overall defence strategy.<sup>601</sup> Battered women's explanations of their actions from a solely victimised perspective cannot explain why she believed it necessary to act,<sup>602</sup> as it reinforces perceptions of passivity and weakness. Their explanations also continue to emphasise the difference in their social reality in comparison to the rest of society, further rendering her situation and reaction as manifestly different. Experts are needed to translate the experiences of abused women who kill, as their reactions seem to be so far removed from societal comprehension.<sup>603</sup> This creates the perception that the defendant's voice is not strong enough to be heard on its own, and that her account of her experiences lacks credibility.<sup>604</sup>

Expert testimony must be able to strengthen the accounts of abused women who kill and enable their narrative to be heard and understood in their own words and it must be ensured that the testimony does not become a substitute for the individual voice.<sup>605</sup> This places the role of expert testimony in a difficult position. It must be able to overcome the problems inherent within objective considerations of reasonableness and the male values that it embodies. It must also be able to put the abused woman's actions in the context of the victimisation that she faces, without portraying the abused woman as weak and passive, as this fails to acknowledge her complex social realities and the strength required to survive relationships of domestic abuse. It also leads to tendencies to pathologise abused women and their experiences. A struggle

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<sup>600</sup> E. Schneider and S. Jordan, 'Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault.' (n64) 211.

<sup>601</sup> E. Schneider, *Battered Women and Feminist Lawmaking* (n57) 126.

<sup>602</sup> Schneider, E. *Battered Women and Feminist Lawmaking*. (n57) 132.

<sup>603</sup> see B. Ehrenreich and D. English, *For Her Own Good: One Hundred and Fifty Years Of Experts Advice to Women* (Anchor/Doubleday 1978)

<sup>604</sup> I. Frieze et al, *Women and Sex Roles: A Social Psychological Perspective* (W.W.Norton 1978) 280-285

<sup>605</sup> B. Ehrenreich and D. English, (n603) 106.



occurs in trying to present the abused woman as an individual and consider her individual circumstances, whilst at the same recognising that her experiences are often consistent with those of an oppressed group, and that this exists against a wider backdrop of gender discrimination.

Further, the admissibility of evidence about domestic violence and women's experiences pivots upon the adoption of a relaxed interpretation of *R v Turner* to ensure that abused women's reactions to abuse are understood as reasonable. The *Turner* rules of evidence have posed significant difficulties in relation to the development of a woman-centred court room strategy in the context of the existing defences to homicide. However, in the context of a partial defence of excessive force in self defence, the relaxation of such a standard could be both legally and socially acceptable.

If a partial defence of excessive force in self defence were developed and the *Turner* rules were relaxed, such approach would not undermine the existing homicide defences. In the context of the complete defence of self defence, the liberalisation of the *Turner* rules of evidence would have little implication on the operation of the defence. The complete defence would still be underpinned by objective and justificatory criteria, which facilitate little consideration of the contexts of abused women who kill. The abused woman's subjective perceptions would carry much greater legal weight under an excusatory framework. In the context of the complete defence, the objective and justificatory standard would mean that abused women would only fall within its ambit if they killed their abuser with proportionate force in the middle of an attack.

Further, the Coroners and Justice Act 2009 and the development of a partial defence based on a loss of control was an attempt to incorporate the reactions of abused women who kill into a partial defence, which was not premised upon the existence of a mental abnormality. The legislation sought to acknowledge and reflect the fearful nature of abused women's responses to violence. However, the advantages for abused women who kill were limited by the legislation's retention of the gender biased concept of loss of self control and the inclusion of sex into the evaluative standard. Therefore, despite attempts to incorporate the social realities of abused women who

kill, the Coroners and Justice Act 2009 was unable to be fully severed from the underlying and deeply imbedded masculine concepts of its predecessor provocation.

Consequently, the relaxation of the rules governing the admissibility of expert testimony and the adoption of a partial defence of excessive force in self defence would serve as a pragmatic incorporation of the reactions of abused women who kill into a legally partially defensive framework. This serves as a means to ensure further legal and societal understanding of both experiences of domestic violence and subsequent reactions to it. Law could be used as a means of changing society, as the partial nature of the defence and the receipt of punishment for the defendant would reduce societal perceptions of special pleading. The defendant would not be acquitted for their action, but would have their behaviour judged in light of their circumstances, enabling the requirements of self defence to be modified to consider the subjective perceptions of the defendant. This would serve as a pragmatic attempt to overcome the gendered application of the concepts of self defence, in the hope that the application and understanding of the defendant's context under a partial defence of excessive force in self defence would enable the defendant to legitimately meet the thresholds of necessity and reasonableness in relation to excessive force in self defence in the eyes of both society and the law.

Further, it is hoped that the recognition of the defendant's reaction as a defensive response to domestic abuse could pave the way for further change. By enabling a consideration of more of the defendant's factual context, the partial defence of excessive force in self defence could be used as a means of dispelling the myths and stereotypes concerning abused women who kill. Instead, the defendant's context would be able to expose the reasonable and defensive nature of their reaction in light of the violence sustained. This would enable society to realise that the defendant's options were significantly limited, and that the defendant justifiably deployed defensive force to protect herself from future harm. This could facilitate the social and legal recognition that abused women's reactions are acts of self defence, despite not being able to adhere to the objective and justificatory requirements of self defence, and that by modifying the complete defence of self defence to incorporate the experiences of abused women who kill would not provide defendants with a license to kill.

### 5.3 Conclusions

This Chapter sought to ascertain whether a partial defence of excessive force in self defence could operate as a sufficiently woman-centred strategy, by recognising both the defensive nature of abused women's reactions to abuse, and the societal reluctance to accommodate the claims of abused women who kill into a complete defence. The partial defence of excessive force in self defence could therefore break the existing deadlock involved in trying to incorporate the experiences of abused women who kill into the partially defensive framework of loss of self control and the complete defence of self defence. These defences demonstrate that gendered attitudes towards constructions of appropriate behaviour are already deeply ingrained in these defensive contexts. A partial defence of excessive force in self defence could strike a strategically appropriate balance between the legal recognition of abused women's reactions as reasonable within a defensive context, and the societal need for the law to uphold strict standards of punishment when individuals deviate from its prescribed behavioural standards.

After a critical evaluation of the partial defence of excessive force in self defence, as it existed in Australia, Canada and its potential application in England and Wales, it became increasingly clear that the defence would not be capable of being sufficiently woman-centred without a modification of its underlying concepts. In order to serve as a sufficiently woman-centred strategy, masculine orientated conceptions of imminence had to give way to understandings of the necessary deployment of defensive force. Without a modification of the imminence standard, many abused women who waited until their partner was off guard before committing the homicide would continue to fall outside of the ambit of the law. Therefore, imminence was recognised as a translator for necessity, requiring a consideration of whether it was necessary for the defendant to deploy defensive force in order to avert real harm, regardless of whether the threat was imminent. This ensured that the partial defence adopted a more subjective stance, allowing the defence to appropriately consider the abused woman's factual context and whether alternative courses of action were meaningfully available to her.

Further, in order to be sufficiently woman-centred, expert testimony would be required to distance the abused woman's narrative from typical pathological constructions. It was argued that expert testimony presenting abused women's reactions to abuse as reasonable could be admissible under the requirements outlined in *R v Turner*, as there is evidence to suggest that both the courts and the government are not averse to such an approach. The liberalisation of the rules governing the admissibility of expert testimony would not threaten the legitimacy of the existing homicide defences and would not grant abused women a license to kill. The admissibility of expert testimony would enable the reasonable nature of the abused woman's response to be evaluated in light of her social context. Her narrative would become the central point of legal focus, enabling her conduct to be assessed in light of her own reality rather than against pathological constructions of irrationality and mental illness, or against stereotypical standards of passivity.

Moreover, the testimony would ensure that abused women who kill would not have to adhere to standards of sameness due to the focus on the individual narrative. Such testimony would also demonstrate that the experiences of abused women who kill exist as part of a wider experience of collective discrimination and disadvantage, helping to expose the structures of domination which keep battered women trapped in abusive relationships.

## Chapter Six

### Conclusions

In order to challenge the gender bias within the partial and complete defences to homicide, this thesis developed a woman-centred analytical framework and accompanying court room strategy. The analytical framework was shaped by existing feminist epistemologies, which can account for the processes and structures which subordinate abused women's social realities, contexts and narratives. The epistemologies were used to reveal how masculine dominance has facilitated the consideration of men's social realities at the expense of abused women's experiences. This is achieved through the adoption of a legal standard of formal equality, which opens up two avenues for abused women who kill, both of which maintain masculinity as the normative legal standard. Abused women are required to demonstrate that they are either the same as men, or that they are so very different from men, and thus require different treatment within the legal system. Adherence to these standards enables law and society to objectively determine appropriate behaviours in abstraction from social context.

The epistemologies were used to distance the experiences of abused women who kill from prevailing standards of sameness and difference by recognising the importance of the abused woman's narrative and how it could be used to achieve legal change. This required acknowledging the implications of both standards for abused women who kill. By addressing standards of sameness and difference, the woman-centred analytical framework was able to go beyond these constructions and focus on the gender disadvantage created. It was found that eliminating such disadvantage requires more than adopting either a standard of sameness or a standard of difference. Such an approach would be too narrow and restrictive and would always exclude some abused women who kill from its ambit, as masculinity would remain as the normative legal standard.

Consequently, the analytical framework was used to determine how abused women are legally disadvantaged in light of their experiences and how their experiences can be used to overcome this disadvantage. This involved engaging with the current legal construction of abused women who kill through BWS, which legitimises the social

stereotypes that the court is dealing with an irrational and psychologically impaired individual, not a woman responding reasonably to domestic violence. As such, the use of BWS reinforces standards of sameness and difference without displacing masculinity as the normative legal standard. Abused women who kill are presented as so very different from men due to the perception that they are suffering from a psychological condition. Further, abused women must adhere to the necessary psychological symptomology in order to fall within the ambit of BWS. This reinforces standards of sameness, as abused women are expected to react in conjunction with the requirements of BWS in order to warrant legal protection.

To move beyond constructing abused women through a lens of pathology, abused women's experiences became central to the creation of a woman-centred court room strategy. This involved ascertaining whether the incorporation of more general expert testimony relating to the experiences and narratives of abused women who kill would facilitate the legal and social recognition of abused women's responses to violence as reasonable. The strategic advantages apparent in expert testimony were developed in line with comparative jurisprudence, following the United States case of *Wanrow*. The case acknowledged that the adoption of a standard of formal equality can neglect to consider the perspectives of women. Instead, the case recognised the distinct experiences of the defendant and the need for expert testimony to ensure that the jury could understand the defendant's individual perspective.

*Wanrow* further recognised that the defendant's experiences often exist as part of a collective experience. In the context of abused women who kill, this reflects the individual nature of the abused woman's experiences, whilst acknowledging that this experience exists as a small fragment of a wider framework of collective discrimination, held in place by the legal adoption of masculinity as the normative standard. It was hoped that the admissibility of such testimony would enable the defendant's own social context and narrative to demonstrate the reasonable nature of her reaction in light of her circumstances. This would ensure that the defendant was judged in accordance with her social reality, rather than by societal perceptions of appropriate behaviour which are formed in abstraction from the abused woman's actual experiences.

Moreover, the application of expert testimony concerning the experiences of abused women who kill following the position in *Wanrow* could be used to challenge the current requirements governing the admissibility of expert testimony. Following *R v Turner*, the admissibility of expert testimony is permitted if it provides the court with scientific information which is likely to be beyond the comprehension of jurors. This furthers the position that jurors already understand normal behaviours, and only need expert testimony to educate them about the workings of the abnormal mind, which would continue to construct abused women through a lens of mental abnormality.

Existing case law was used to challenge the admissibility requirements of *R v Turner*, as evidence suggests that a more liberalised interpretation of *Turner* allows for the admissibility of more general testimony relating to behaviours which are beyond the understanding of the jury but are not mental abnormalities. This would enable the position in *Wanrow* to be adopted, ensuring that abused women's experiences can be used as a means of dispelling existing stereotypes. This could demonstrate the reasonable nature of their reactions to abuse without having to satisfy the requirements of a medicalised framework.

However, the development of expert testimony was not enough to overcome the gender bias within the partial defences to homicide. This leaves abused women with a partial defence of diminished responsibility, which relies upon constructing the abused woman's reaction through the psychological framework of BWS. This is significant because the Coroners and Justice Act 2009 was introduced to alleviate the gender disparate application of the partial defences to homicide by recognising that abused women kill out of fear. The legislation significantly alters the construction of the partial defences to homicide as they existed under the Homicide Act 1957. The Coroners and Justice Act 2009 abolishes the partial defence of provocation, replacing it with a partial defence of loss of control, and modifies the partial defence of diminished responsibility.

To fall within the ambit of a partial defence of loss of control, the abused woman is required to demonstrate that she lost her self control, that the loss of self control had a qualifying trigger, and that an ordinary person of the same sex and age and with ordinary powers of tolerance and self restraint could have responded in the same way

as she did. By requiring the defendant to demonstrate a loss of self control, the deeply ingrained masculine bias of the partial defence is exposed. The concept of loss of self control is synonymous with angry and violent responses, as opposed to being reflective of responses motivated by fear. Moreover, the legislation fails to clarify how a loss of self control underpinned by fear should be manifested for the purpose of the defence. This position enables abused women to continue to be legally constructed in accordance with prevailing interpretations of loss of control through anger, which are not reflective of the circumstances in which abused women kill. Consequently, cases of female perpetrated intimate partner homicide appear premeditated and calculated, as opposed to the result of a fearful loss of self control.

The requirement that an ordinary person of the defendant's sex and age may have reacted in the same way, reinforces prevailing standards of sameness and difference to the disadvantage of abused women who kill. The incorporation of sex into the evaluative standard was supposed to serve as a means of addressing formal equality by displacing masculinity as the normative legal standard. It sought to facilitate a better consideration of the circumstances of abused women who kill, by recognising the different motivations and methodologies involved in cases of female perpetrated intimate partner homicide. However, such an approach only begins to scratch the surface of gender disadvantage. Seeking to displace standards of formal equality does not automatically address standards of sameness and difference, resulting in the incorporation of sex into the evaluative standard actually reinforcing these standards.

Women's reactions to abuse are presented as so very different from men's, hence the need to explicitly acknowledge sex. Furthermore, the recognition of sex actually encourages the application of gender stereotypes and essentialism as the abused woman is objectively assessed in accordance with the prevailing constructions of femininity. The ordinary woman embodies all the necessary attributes of domesticity and passivity, rendering violent behaviour contrary to such constructions. As the defendant's sex is only considered in relation to their capacity to exercise tolerance and self restraint, the abused woman's conduct can be perceived as irrational and incompatible with the standard of self control expected of the ordinary woman. This pushes abused women who kill towards constructions of mental abnormality, reinforcing the legal status quo.



Therefore, it was necessary to critically evaluate whether abused women's experiences could be incorporated into the complete defence of self defence. Although this would recognise the defensive nature of the abused woman's reaction to domestic abuse and bring the defence of self defence in line with existing empiricism, there were significant obstacles to overcome. The complete nature of the defence signifies the rigid and proscribed circumstances in which an individual can take the life of another without being punished and these circumstances are determined according to objective and justificatory requirements. These criteria limit considerations of the defendant's factual context, as the requirements of necessity, proportionality and reasonableness are all objectively determined. Although the defence allows these conditions to be objectively determined according to the subjective perceptions of the defendant, upon application they accommodate the circumstances in which two men of equal size and strength have fought.

Consequently, the woman-centred analytical framework and accompanying court room strategy were used to assess the numerous ways in which the complete defence of self defence could be reformed to better accommodate the subjective perceptions of the defendant and the social realities of abused women who kill. It was considered whether the framework could be changed from one of justification to one of excuse, which would examine the defendant's context when assessing their conduct. It was determined whether the complete defence of self defence could be reinterpreted according to the meta concept of unavoidable harm in order to incorporate the experiences of abused women who kill. This would move beyond context limiting objective standards by acknowledging that the ultimate aim of the complete defence of self defence is to enable individuals to respond with force when faced with unavoidable harm. Further, it was considered whether a relaxation of the *Turner* rules of evidence and the admissibility of more general expert testimony concerning the experiences of abused women who kill would enable abused women to fall within the complete defence by making more of the defendant's social context available to the jury.

Despite the theoretical possibilities apparent in altering the complete defence, any attempts to accommodate the subjective perceptions of the defendant are incompatible

with a complete defence underpinned by masculine constructions of appropriate behaviour and applied in a masculine culture. Allowing a more subjective interpretation of the principles underpinning the complete defence could be seen to undermine the strong justificatory nature of the complete defence, as if the defendant subjectively believes that they acting in self defence then they could be acquitted. This could create the perception that certain groups were given a license to kill, setting undesirable precedents, as if one individual is acquitted for their conduct, others in a similar situation could be too.

Therefore, although the defence is capable of being reformed to recognise the reactions of abused women who kill as legitimate acts of self defence, objective constructions of appropriate behaviour are widely perceived as necessary to ensure that only deserving candidates are acquitted for their conduct. Consequently, in a masculine culture, abused women are not perceived as deserving of complete exculpation, making it unlikely that juries are going to be persuaded to acquit abused women who kill on the grounds of self defence even with a consideration of their circumstances and factual context.

This made it necessary to move beyond trying to incorporate the experiences of abused women who kill into existing homicide defences underpinned by masculine standards of appropriate behaviour. This required exploring the possibilities apparent in a partial defence of excessive force in self defence, which could recognise that abused women's reactions are defensive responses to domestic violence and could overcome the social reluctance to accommodating the defensive claims of abused women who kill.

The partial nature of the defence would ensure that the defendant was not fully exculpated for their conduct. This would maintain the societal standpoint that a defendant can only be acquitted if they can satisfy the objective and justificatory requirements of self defence. The partial defence legally prioritises the legal recognition of the defensive nature of the reaction, rather than requiring abused women to be acquitted, recognising that the social realities of abused women who kill exist in contrast to societal perceptions of appropriate and reasonable behaviour.

In order to explore the woman-centred potential of a partial defence of excessive force in self defence, it was critically evaluated according to its application in Australia and Canada and existing proposals to incorporate the partial defence into English and Welsh law were analysed. It was recognised that without modification, the partial defence's underlying principles of necessity and reasonableness would continue to be applied in accordance with masculine social context. This made it unlikely that the defendant's reaction to domestic violence would be perceived as reasonable.

Therefore, the defensive principles of necessity and reasonableness within the partial defence of excessive force in self defence were amended to incorporate the subjective perceptions of abused women who kill. This ensured that defensive standards were interpreted according to abused women's social contexts in order to use these experiences to explain the reasonable and defensive nature of their behaviour. This was achieved by relaxing the standards governing the admissibility of expert testimony under *R v Turner*. Although relaxing the *Turner* rules would impact upon the existing defences to homicide, it would not enable abused women to fall within the complete defence of self defence or lower the standards of accountability that society demands under the existing defences to homicide.

Consequently, the adoption of a partial defence of excessive force in self defence would represent a pragmatic woman-centred strategy capable of incorporating the defensive nature of abused women's reactions to violence into the defences to homicide. It would also encourage further societal and legal development. The recognition of the defensive nature of abused women's reactions and the accommodation of these behaviours into a defence to homicide would demonstrate that allowing the defendant's subjective perceptions to play a greater role in the application of the defences to homicide would not undermine the legitimacy of these defences. Enabling the defendant's perceptions and experiences to carry much greater legal weight would demonstrate that abused women would not be given a license to kill, or that individuals would be allowed to take the lives of others without punishment. This would encourage the societal recognition of abused women's reactions as acts of self defence, rather than examples of special pleading or manifestations of an underlying mental abnormality and pave the way for future reform.

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