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'Loss of self-control': the cultural lag of sexual infidelity and the transformative promise of the fear defence

Susan S.M. Edwards

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Introduction

The Coroners and Justice Act 2009 (C and JA 2009) s.55(3), 'loss of self-control' manslaughter, acknowledges 'fear of serious violence' as a 'qualifying trigger' which may 'cause'[1] a defendant to lose self-control and kill another. This new provision is the result of both public and legal recognition that the former defence of manslaughter-provocation,[2] in relying on the presence of anger to precipitate loss of self-control, and in requiring an immediate response to provocation, excluded the delayed and chronic 'passion' of fear of further violence so often experienced by women victims of intimate partner violence which could 'cause'[3] them to kill the violent partner. The law also recognises that fear, which includes heightened anxiety and anticipation of future violence, may cause women victims[4] of domestic abuse to kill the abusive partner in circumstances where their 'reaction' to the deceased's last act is delayed.[5] Notwithstanding the introduction of fear as a qualifying trigger,[6] the legal and everyday construction of loss of self-control continues to contemplate and interpret this behaviour within an anger template.[7]

In this chapter, I argue that the construction of loss of self-control is bound together with anger in its interpretation (ontology) and by the corroborative manifestations deemed demonstrative of its proof. Furthermore, in so far as anger / loss of self-control remains a lawful exoneration for killing conduct and sexual infidelity continues as a primary excuse granting permission for such action in learnt behaviour (notwithstanding its express exclusion as a trigger in s.55(6)(c)) it will continue to be pleaded in some form. I argue that retention of loss of self-control as an

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1 This article draws a distinction between 'cause' and 'allow' or 'permit' as the basis for human action and is a distinction developed later.

2 Homicide Act 1957 (HA 1957), s.3.

3 Teleological survival in the future is the primary goal.

4 Whilst the new law is premised on an understanding of women's fear of violence in heterosexual relationships, it also applies to same-sex relationships.

5 Provided for in C and JA 2009, s.54 (2)(c).

6 C and JA 2009, s.55 (3).

7 J. Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25(1) Oxford Journal of Legal Studies123–40, calls this the 'loss of self-control dilemma.'

excuse for killing cannot subvert the ideological fixity of language[8] which at the level of meaning permits sexual infidelity at least in some form to continue as an excuse for conduct.
I argue that the new fear defence as currently constructed fails adequately to accommodate the very different manifestations of fear and that the overarching requirement of loss of self-control with its fixed and historical features of angered reaction obtrudes into this possibility of an alternative template. There is no commensurability between anger / loss of self-control and fear of serious violence / loss of self-control. Loss of self-control provides a perfect example of what Goodrich coins (albeit in another context) the 'scientific status of legal dogmatics'[9] in so far as the signification of loss of self-control is found, almost if not exclusively, in its allegiance to anger.
Counsel will need to employ new understandings and new descriptors in communicating how fear might result in a particular but different configuration of loss of self-control. Jurors too will need direction. Experts will be needed to elaborate on the fluidity and polysemicity of the signs and manifestations of fear. Loss of self-control in its traditional form will need to be uncoupled from anger. Without such assistance in interpreting the law and making sense of the enactments as intended, signs of anger will remain 'the' arrogated instantiated evidence of loss of self-control whilst manifestations of fear will likely fail to satisfy a manslaughter fear / loss of self-control defence.

Relevances – Women who kill – the irrelevance of a history of male violence.

Of course whilst there have been some gains, the exegesis of this dual problem of construction of loss of self-control around anger and sexual infidelity and the exclusion of fear is rooted in the history of the law on provocation from which the current law needs to be cleaved.
The former defence of provocation[10] was hopelessly unsuited to providing a defence for circumstances where an abused partner out of fear and self-defence killed the abuser. Whilst the defence of provocation authorised 'male' anger (within the statute) and recognised 'male' reasons for lethal violence (largely sexual infidelity as indicated in the case law) the abused partners fear of further violence and necessity for self-preservation were all excluded as evidentially irrelevant. Significantly the new law has reversed that position. Devlin J., had stated in *Duffy*:[11]

> A long course of cruel conduct may be more blameworthy than a sudden act provoking retaliation, but you are not concerned with blame here – the blame attaching to the dead man. You are not standing in judgment on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him. It does not matter how cruel he was, how much or how little he was to blame, except in so far as it resulted in the final act of the accused.[12]

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8 R. Barthes, *Elements of Semiology* (Hill and Wang 1968). See also S. Tiefenbrun, *Decoding International Law: Semiotics and the Humanities* (OUP 2010).
9 P. Goodrich, 'Law and Language: An Historical and Critical Introduction' (1984) 12 Journal of Law & Society 173, 180.
10 HA 1957, s.3.
11 *Duffy* [1949] 1 All ER 932.
12 Ibid. [933]. See also 'Girl sentenced to death for murder of husband' *The Guardian (*Manchester, 18 March 1949).

Mrs. Duffy, it was never doubted, was the victim of repeated violence from the deceased, recorded both in her own police statements and those of witnesses.[13] Devlin J's direction on the law on provocation, upheld by the Court of Appeal, excluded the deceased's previous violent conduct and instead, in determining the defendant's loss of self-control, focused exclusively on the proximity in time of the provocative act of the deceased to the defendant's response. Devlin J., said:

> Provocation is some act, or series of acts, done by the dead man to the accused which would cause in a reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind … Severe nervous exasperation or a long course of conduct causing suffering and anxiety are not by themselves sufficient to constitute provocation in law.[14]

Lord Goddard C.J., though not without sympathy for Mrs. Duffy's suffering, approved Devlin J's direction stating that it would still be 'a classic direction' for cases 'in which the sympathy of everyone would be with the accused and against the dead man.'[15]
In the post-*Duffy* era, judges at the sentencing stage in passing lenient sentences tempered the *Duffy* ruling especially where sons killed fathers who had been violent to mothers.[16] But judges little understood the entrapment of the battered woman and seemed influenced by legal principles guiding the law on self-defence[17] which resulted in judges remarking upon what they considered were alternatives to staying in an abusive relationship and killing an abusive partner. In *Grieg*,[18] where the applicant killed her violent husband following years of his repeated abuse, Lord Dunpark withdrew the defence of self-defence from the jury and also foreclosed the possibility of the jury returning a provocation verdict.

> Now ….there is evidence before you … that he assaulted his wife from time to time … But, hundreds indeed thousands of wives in this country unfortunately suffer this fate. The remedy of divorce or judicial separation or factual separation is available to end

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13 S. Edwards, 'Justice Devlin's Legacy: Duffy – a Battered Woman "Caught" in Time' (2009) 12 Criminal Law Review 851–869.

14 *Duffy* (n 11) [932e].

15 Ibid.

16 In *Jones* (1972) *Daily Telegraph*, 18 July 1972, where a son killed a violent and bullying father, Everleigh J., took into account the father's violent course of conduct. In *Bell* (1974) *The Guardian*, 29 October 1974, where a son killed a violent father, Chapman J., said, 'I find it impossible to regard you as a criminal. Your father was appallingly ruthless, brutal, and violent.'

17 This particular requirement to consider alternative courses of action forms the bedrock of the common law on self-defence and whilst retreat is not a requirement it is a factor to be taken into consideration. See *Regina v Bird* [1985] 1 WLR 816.

18 *HM Advocate v Grieg*, May 1979, *unreported*. June Grieg killed her violent husband by stabbing him while he sat dozing in a chair. Lord Dunpark allowed the provocation to go to the jury but stated that he did not believe that the grounds for the defence of provocation had been established – See J. Chalmers, F. Leverick, L. Farmer (eds) *Essays in Criminal Law* (Edinburgh University Press 2010) 214. The case of *Greig*, is also cited in S. Edwards and A. Halpern, 'Protection For the Victim of Domestic Violence: Time for Radical Revision?' (1991) 13(2) Journal of Social Welfare and Family Law, 96. See also C. Gane and C. Stoddart, *A Casebook on Scottish Criminal Law* (Sweet and Maxwell 1984) 444; C. Connelly, 'Women who Kill Violent Men' (1996) 108(3) Juridical Review 215.

> this torment … If you can find some evidence, which frankly I cannot, that the accused was provoked …[19]

The appeal court agreed. Lord Wheatley LJC., Lord Kissen and Lord Robertson, elaborated:[20]

> There are various expedients open to a woman subjected to rough treatment by her husband, but a licence to kill is not one of them. There is no doubt that this was a deliberate and intentional killing, and provocation in law was at most minimal. Even at the last moment when she was given an opportunity to leave the house, she rejected the offer and opted for the fatal course.[21]

The judicial perception that retreat was a realistic option persisted. Judge J., (as he then was) in *Thornton*[22] (where a battered wife killed an abusive husband and pleaded diminished responsibility) in leaving provocation to the jury in the alternative, said:

> There are … many unhappy, indeed miserable, husbands and wives. It is a fact of life. It has to be faced, members of the jury. But on the whole it is hardly reasonable, you may think, to stab them fatally when there are other alternatives available, like walking out or going upstairs.[23]

Judges in Anglo-American jurisdictions have displayed a similar lack of understanding.[24] Countervailing such assumptions, Lenore Walker[25] an American clinical psychologist, was raising awareness in legal and clinical circles of the role of psychosocial factors,[26] economic dependency, lack of support, fear, trepidation, paralysis to act effectively and sheer physical vulnerability, all of which incapacitated and bound the abused woman to her violent partner contributing to her inability, as Judge J., had so phrased it 'to walk out' or 'go upstairs.'[27] Walker formulated the concept 'learned helplessness'[28] to capture and describe the abused woman's state of mind, apparent inertia and inability to leave the relationship.[29] This contrapuntal narrative gradually permeated into legal argument informing defence submissions, galvanising the movement for reform, which focused on challenging two recalcitrant problems.

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19 Ibid.

20 Ibid.

21 See *The Herald* (Glasgow, 31 March 1992). See also M. Maynard and J. Hanmer (eds) *Women, Violence and Social Control* (Macmillan Press 1987) 116.

22 [1992] 1 ALL ER 306.

23 Ibid., 312h. *R v Thornton* (No 2) – [1996] 2 All ER 1023, [1028j].

24 *R v Wang* (1991) LRC (Crim) 469.

25 L. E. Walker, *The Battered Woman* (Harper Row 1979).

26 Ibid., xvi.

27 *Thornton* (n 22).

28 Drawing on the work of Martin Seligman. See M.E. Seligman and G. Beagley, 'Learned Helplessness in the Rat' (1975) 88(2) Journal of Comparative and Physiological Psychology 534.

29 A. Browne, *When Battered Women Kill* (Free Press 1989) 109, 267.

The first, focused on the concern that angered lethal male violence was too readily exonerated in provocation especially where women were about to leave men, pursued other relationships, or merely declared that the relationship with the abused was over. The second concern focused on lethal female defensive violence and the need to recognise in law as in fact that women's motive was one of self-preservation and survival, little understood within the criminal law except within a mental illness related defence of diminished responsibility.

Permissible male maelstrom of anger

Horder, as did others, conceded that the accepted excuses and dominant narrative of the provocation defence 'seemed to privilege men,'[30] and 'indulge predominantly male anger'.[31] Of course, by establishing that, 'a thing done or said constitu[ting] sexual infidelity is to be disregarded'[32] partly addresses male privilege in the loss of self-control defence. However, case law has interpreted this exclusion to operate only in those circumstances where sexual infidelity stands alone as the sole reason to trigger loss of self-control. Additionally, the reform seems somewhat unfinished as the law has stopped short of addressing a central and problematic feature since the construction of, and instantiated evidence for, a loss of self-control continues to be articulated and cognised as being triggered by and conjoined with anger. Anger is the typological behavioural indicator of loss of self-control in manslaughter and together with the discourse within and outside the law continues to be privileged as 'the' excusable emotional state. This symbiotic synergy between loss of self-control and anger is so elided in common sense and legal understanding that legal arguments presenting loss of self-control resulting from fear will be less persuasive when considered by fact finders. The process by which the emotion of fear and its corollaries result in a loss of self-control, which the proof of a manslaughter defence requires, is yet to be clearly and convincingly articulated.

This task will in part rest with the judge who is required to form a view as to whether the defendant lost his or her self-control. Section 54(6) provides 'For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply' and if so found, it is then for the jury to determine whether self-control was lost or not. As stated in *Gurpinar, Kojo-Smith*, a trial judge must undertake a much more rigorous evaluation of the evidence before the defence could be left to the jury than was required under the former law of provocation.[33]

Rooted in the legal discourse on male anger, loss of self-control is excused under certain defined and agreed circumstances and is justified by prescribed excuses and reasons for indignation, whilst sexual infidelity is precluded, this particular excuse persists in the public mind as of relevance and remains interlocked with the emotion of anger. The new legislation, through its retention of particular words which are carriers of signification, continues to perpetuate some of the earlier problems it seeks to address and remedy.

Let us explore these carriers of signification including language and ideology which through interpellation are embraced by the acting subject.[34] First, in assessing the qualifying trigger for loss of self-control, the circumstances (things done or said) must be of 'extremely grave character'.[35] What constitutes extremely grave circumstances is an objective matter for the jury

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30 Horder (n 7) 123.

31 *Blackstone's Criminal Practice 2016*, B1.25. 196.

32 C and JA 2009, s.55(6)(c).

33 *Gurpinar, Kojo-Smith and another* [2015] EWCA Crim 178 [12]-[14].

34 Derived from Louis Althusser, '"Lenin and Philosophy" and Other Essays. Ideology and Ideological State Apparatuses (Notes towards an Investigation)' (New York Monthly Review Press, 1970).

35 C and JA 2009, s.55(4)(a).

but is also derived from their own intersubjective understanding. The statute sets a high threshold and also narrows the circumstances the defendant might claim are relevant. However 'extremely grave character' must be read together with an assessment of whether the defendant has a 'justifiable sense of being seriously wronged'.[36] 'Justifiable', it is contended, was no doubt intended by those drafting the legislation to connote whether a thing is 'reasonable' but it is a word which carries moral overtones, overlayed with meaning, invoking a sense of a right to behave in a certain way when particular circumstances prevail. This is not the same as reasonable. Significantly, it was precisely the objection to the notion that men regarded their fatal actions as 'justifiable' in circumstances of sexual infidelity or 'unreasonable' female partners[37] that propelled the move for reform of the law on provocation, as Horder noted (on p.4). Typical contributory past conduct articulated by defendants included: she was about to or already had left, suspected or actual sexual infidelity or departure from the stereotypical female gender role, such that the actions of the male defendant was 'justifiable'.[38] Such conduct of the female deceased was frequently considered sufficient to 'justify' male anger and consequent lethal violence even if not expressly stated as such. Diplock J., in *Simpson*,[39] (where the husband had strangled a wife) told the jury to take into account her persistent nagging, her threats to leave him taking their child, her demands for a divorce and for child maintenance.[40] In *Wright*,[41] where a husband killed a wife with a hammer, the judge said he had to put up with her 'Saturday night and Sunday morning activities'. In *Fantle*,[42] where the accused had shot and killed his wife's paramour whom he said had taunted him, Salmon J., in instructing the jury to consider the previous bad character of the deceased, asserted:

> The serious provocation you received from the dead man has reduced your crime from murder to manslaughter … Well, I do not suppose you will have any doubt about [it] that he was provoked to lose his self-control.[43]

Lord Hoffman in *Smith*,[44] contributed significantly to the movement which challenged such justifications: '[m]ale possessiveness and jealousy should not today be an acceptable reason for loss of self- control leading to homicide, whether inflicted upon the woman herself or her new lover.'[45] Persisting with the use of the word 'justifiable'[46] will only muddy the waters by perpetuating a motif of male privilege in how 'a justifiable sense of being seriously wronged' is intended to be read. Justifiable to whom exactly? To the defendant (subjective)? To the jury (objective)? Sexual infidelity and its corollary or flip side of male sexual possessiveness is so

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36 Ibid. s.55(4)(b).

37 S. Lees, 'Naggers, Whores and Libbers: Provoking Men to Kill' in J. Radford and D. Russell (eds) *Femicide* (Twayne Publishers 1992) 267–289.

38 Ibid., 267. See also J. Radford 'Woman Slaughter A License to Kill: The Killing of Jane Asher' in *Femicide*, ibid. 253.

39 *Simpson* [1957] Criminal Law Review 815.

40 See also *Elliot* [1960] Criminal Law Review 10, where the court in referring to Simpson, referred to the deceased as 'an endlessly nagging wife'.

41 *The Times*, 24 October 1975.

42 *Fantle* [1959] Criminal Law Review 584. See also *Batson, The Times*, 6 December 1980.

43 J.P. Eddy 'The New Law of Provocation' (1958) Criminal Law Review 778, commenting on *Fantle* cited the defendant's account of his provocation and said 'The defendant said, "… he treated me like dirt … shrugging his shoulders … he stood up and showed me the door"' 784.

44 *Smith* [1999] 1 AC 146.

45 In Australia, since *Stingel v The Queen* (1990) 171 CLR 312, where such reasons allegedly resulted in killing, provocation has been withdrawn from the jury.

46 C and JA 2009, s.55(4)(b).

rooted in a linguistic and psychical linkage to anger / loss of self-control,[47] that s.55(6)(c) which precludes sexual infidelity has been grudgingly received and other avenues for its continuing inclusion imaginatively crafted.[48] Furthermore, defence strategies have also sought to adduce such evidence within a plea of diminished responsibility manslaughter which requires an abnormality of mental functioning[49] which 'provides an explanation for D's acts and omissions in doing or being a party to the killing'.[50]

The second problem lies with the insistence of the word 'tolerance.' Section 54(3) provides:

> In subsection (1)(c) the reference to "the circumstances of D" is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint.

Whilst 'tolerance' is a highly intersubjective concept, fluid and its meaning unsettled, the new provision whilst inserting a requirement for 'tolerance' intends limiting the range of excuses for loss of self-control by being read alongside the 'extremely grave circumstances' requirement. That of course may appear to be positive in setting down a requirement for a 'normal degree' of tolerance and expectation that the defendant cannot rely on his own bigotedness to justify conduct.[51] The Court of Appeal in *Dawes*[52] laid down some boundary markers:

> For the individual with normal capacity of self-restraint and tolerance, unless the circumstances are extremely grave, normal irritation, and even serious anger do not often cross the threshold into loss of control.[53]

However, retention of the term 'tolerance' also communicates a set of behaviours which men have not been expected to endure, these contemplated behaviours are conjoined to women's conduct and thus the retention of the concept presents challenges to the current law and the

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47 Jacques Lacan argues that the unconscious is structured as a language and that language precedes the unconscious mind. See J. Lacan, *Ecrits* (W.W. Norton and Co 2002).

48 Lord Bladen thought its exclusion 'absurd' HL Deb 26 October 2009, 1061 (Lord Neill of Bladen). See for discussion A. Reed and N. Wake, 'Sexual Infidelity Killings: Contemporary Standardisation and Comparative Stereotypes' in A. Reed and M. Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 115.

49 C and JA 2009, s.52(c).

50 Vanessa Allen, 'Husband Who Stabbed His Wife 30 Times Is Cleared of Her Murder' *Daily Mail* (London, 30 October 2009) < www.dailymail.co.uk/news/article-1224150/Alisdair-Sinclair-Nine-years-jealous-husband-knifed-Vodafone-executive-wife-death-frenzied-attack.html> accessed 21 November 2017. Historically there have been references to 'Othello syndrome' and 'pathological jealousy'. See also Delusional Disorder DSM-5 297.1 (F22). The defendant Alasdair Sinclair used evidence of his wife seeking a divorce and a relationship with another man as well as his own mental illness in a successful diminished responsibility defence. He had stabbed her 30 times with a serrated knife and nearly cut her head off. He was sentenced to nine years' imprisonment.

51 The Judicial College, Crown Court Compendium (2017) <www.judiciary.gov.uk/wp-content/uploads/2016/06/crown-court-compendium-pt1-jury-and-trial-management-and-summing-up-nov-2017-v2.pdf> accessed 13 December 2017. The reference to 'tolerance' excludes the person with unacceptable attitudes as well as those with an unacceptable temper. See 19-11, para 13, 19-15 para 22-23.

52 [2013] EWCA Crim 322.

53 Ibid.

very conduct it wishes to exclude. Of course it would be incorrect to argue that since much of the past language of provocation is so linked to a set of excuses, reasons, and rhymes for male conduct then it should be abandoned. But the problem of determining the boundaries of what one is expected to tolerate, what conduct invokes a justifiable sense of being seriously wronged and what can be included in extremely grave circumstances, are social constructs welded to exonerations which law reform cannot necessarily address.

Permission for anger – learnt behaviourism

Since the law now expects a defendant to exercise control, no longer presume male proprietorialness and tolerate circumstances of sexual infidelity hitherto considered intolerable,[54] it implicitly seeks to engineer male conduct. By deleting sexual infidelity from the range of circumstances sufficiently grave to excuse anger and contribute to loss of self-control, it is suggested that the law recognises that loss of self-control is no longer simply reducible to a pathological and hermetically sealed physiological or parasympathetic response over which an individual has no control but is in fact constructed in the material condition and is learnt behaviour. Exploring this ontological question further, whilst rising to anger once initiated may well indeed be predominantly physiological it is the social context or the material condition which in fact releases the moral bind facilitating the permission for anger and loss of self-control and its emotional and physical expression.
This theorising is a challenge to the common sense understanding which assumes (incorrectly) that some personalities, cultures and genders are more pathologically prone to rise to anger. Such understandings incline to a deterministic construction of groups, cultures and genders and essentialist narrations of angry personalities, angry cultures and angry men. Such generic stereotypes are learnt and construct who is permitted to lose self-control and when loss of self-control is excusable. In turn personalities, cultures and genders (men) exploit these stereotypes inverting them, giving themselves special privilege and permission to behave without restraint (*ad libitum*). So, 'I am very passionate and lose self-control because I have Latin blood' is an example of where special permission is sought to excuse intemperate conduct. Precisely this kind of cultural stereotyping arguing for recognition of a lower level for tolerance and self-restraint has also been exploited in defence and prosecution argument in homicide cases.[55] In South East Asia[56] it continues to be the case that male defendants advance a defence that killing a wife is an acceptable way of dealing with marital difference or desire for divorce.[57]

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54 C and JA 2009 s.55(6)(c).

55 So for example the judge's instruction to the jury on the reasonable man standard in C. Howard, 'What Colour is the "Reasonable Man"'(1961) Criminal Law Review [43] in reviewing the cases of *Patipatu* 1951 NTJ 18; *Patipatu* (unreported) May 15 1951; *MacDonald* (1961) Criminal Law Review 41; *Macdonald* (unreported) July 21 1953 44 in which the judge directed the jury that a 'native aborigine' required less provocation than a white man such that a defence of provocation should be open to him. In *Nelson* (1961) Criminal Law Review (1961) 41; *Nelson* (*unreported*) March 21 1956 46, the judge said it would take a longer time for the blood of a man of the Pitjantjatjara tribe to cool than that of a white Australian. See also C. Morris and C. Howard *Studies in Criminal Law* (Clarendon Press 1964).

56 See A. Renteln, 'The Use and Abuse of the Cultural Defence' (2005) 20(1) Canadian Journal of Law and Society / Revue Canadienne Droit et Société 47. See also A. Phillips, 'When Culture Means Gender: Issues of Cultural Defence in the English Courts' (2003) 66(4) Modern Law Review 510.

57 A. Gill, 'Reconfiguring "honour"- Based Violence as a Form of Gendered Violence" in M. M. Idriss and T. Abbas (eds) *Honour, Violence, Women and Islam* (Routledge 2011) 218–232. See also *R v Shabir Hussain* [1997] EWCA Crim 2876. Amanda Clough, "Honour Killings, Partial Defences and the Exclusionary Conduct Model" Journal of Criminal Law (2016) 80(3) 177.

In Anglo-American jurisprudence, in recent years such attempts at advancing a 'cultural defence' have been rejected, for example, see *Masciantonio*[58] and *Karimi*'s[59] defence in a murder trial, the latter alleging that he had been provoked by a friend who had spoken the words 'you have no honour' (*Bisharaf*). Such examples suggest that the aetiology of anger which prompts a loss of self-control provides further evidence that such materialisations of emotion are less to be found in some essentialistic pathology of peoples, cultures and men, and instead are learnt, tempered and mediated by social convention changing through time and across cultures. The case for the temporal nature of the circumstances adjoined to this conduct and considered to prompt anger is substantiated and reflected in society and in law's fluidity over time in what conditions are considered to excuse it.[60]

This understanding that self-control and toleration is learnt and configured in social interaction and not simply reducible to intrinsic individual and social group factors and crude stereotypes has been long recognised, such that attempting to change conduct overnight through legal exclusion will inevitably fail. Such considerations have been developed by critical legal theorists. Uniacke[61] considers the notion of permission regarding the development of the law on self-defence. Raz writing in more general terms asserts:[62]

> … My suggestion is that we can think of people who perform normally expressive actions as people who let themselves express their emotions, feelings, or moods in action. They permit themselves to do so … In the case of purely expressive actions we … allow the emotion to express itself, the will acting as a non-interfering gatekeeper.

Horder takes up this notion of 'permission' in his discussion of loss of self-control within the criminal law.[63] David Matza's[64] work on 'neutralization' is particularly instructive. He identifies those excuses in society and shows how they are used by offenders to mitigate and

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58 *Masciantonio v The Queen* [1995] 183 CLR 58 [66].

59 *James, Karimi* [2006] EWCA Crim 14.

60 Within the criminal law these 'neutralisation techniques' for conduct are relational and change over time. See the Homosexual advance defence (HAD). See *R v Cavanagh R v Shaw* [1972] 2 All ER 704. *See also Australian cases of Green v The Queen* [1997] HCA 50. *Lindsay v The Queen* [2015] HCA 16.
R.B. Mison, 'Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation' (1992) California Law Review Volume 80 Issue 1 133.
A.Kent, Comments 'A Matter of Law: The Non-Violent Homosexual Advance Defense Is Insufficient Evidence of Provocation' (2009) University Of San Francisco Law Review Vol. 44 155.
R. McGeary and K. Fitz-Gibbon, 'The homosexual advance defence in Australia: An examination of sentencing practices and provocation law reform'
The Australia & New Zealand Journal of Criminology Article, first published online: January 11, (2018) https://doi.org/10.1177/0004865817749261
See also Review of the 'Homosexual Advance Defence' Attorney Generals Department New South Wales August 1996 http://www.gaylawnet.com/ezine/crime/panic.html

61 S. Uniacke, *Permissible Killing* (Cambridge University Press 1996) 143.

62 See J. Raz, *Engaging Reason* (OUP 1999) 44.

63 J. Horder, *Excusing Crime* (OUP 2004) 128. See also J. Dancy, and C. Sandis (eds) *Philosophy of Action: An Anthology* (Wiley Blackwell 2015) 242. See also S. Gough, 'Taking the Heat out of Provocation' (1999) 19(3) Oxford Journal of Legal Studies 487, where he says 'Anger … modifies perspective, directing focus towards (existing) reasons to confront and fight at the expense of reasons to bite one's tongue, walk away or otherwise act sensibly.'

64 D. Matza, *Delinquency and Drift* (John Wiley 1964) 61. D. Matza, *Becoming Deviant* (Prentice Hall 1969) 47. See also G. Sykes and D. Matza 'Techniques of Neutralisation' (1957) American Sociological Review 667.

neutralise their conduct in an interactive process in which the law breaker becomes deviant. This 'becoming deviant', as Matza describes it, evolves over time in a process of learning the permissions which release the law breaker from the normative bind. Significantly the law has adopted some of these techniques of neutralisation which have been elevated to the level of partial defences whilst others function in mitigation of sentence.

Within the framework of permissions, language is central to the learnt material context. De Saussure's[65] contribution to structural linguistics with his concept of signs which include signifiers and signified is instructive. Considering the loss of self-control and its relation to anger, the language of anger is scripted and performed mimetically by anger's subjects who talk in a recognised and commonly shared idiom. Such that 'seeing red,' does not mean the night sky, 'something coming over me,' does not mean evening fog or morning mist and 'being out of control' does not mean indecision or cognitive dissonance, but an emotional and physical loss of self-control. All of these expressions are part of a learnt symbolic language for arranging emotional expression in performing[66] hurt and insult, indignation and anger. Legal discourse builds this nomenclature in what Foucault[67] would describe as a wider regime of understanding or episteme. But as Gough recognises there is a 'danger of utilizing metaphors within legal definitions.'[68] It is the case that the language or metaphor of loss of self-control continues to privilege anger's stereotypical reaction constructing a *leitmotif* of the angry man and an angry man permitted to act. One of those significant permissions arising in social understanding and anchored in social learning and in language is a prevailing attitude legitimating male sexual proprietorialness.

The question is whether it is possible for a loss of self-control without anger, and anger without sexual infidelity, both within the law and within everyday lay and common sense reasons for action. Gough writes perceptively: 'It is because scholars have largely ignored angers' impact upon reasoning, presenting it instead as a fundamentally irrational force, that modern interpretations of the defence obscure so much of its moral detail.'[69] Certainly, s.55(6)(c) is intended to foreclose sexual infidelity as a technique of neutralisation for killing conduct, to exclude it from the episteme of loss of self-control and to uncouple it from anger.

Unsurprisingly some defendants, continue to present such narrations as reasons and excuses for conduct. The law has made a structural system change but it will take time for intimate partner abusers (largely men) who kill to unlearn those former social permissions which have hitherto shaped their learnt behaviour.[70] Andrew Edis QC, prosecuting in *Clinton; Parker; Evans*[71] described s.55(6)(c) as a 'formidably difficult provision'[72]. What exactly he meant is

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65 F. De Saussure, *Course in General Linguistics* (10th edn, Open Court Publishing 2000).

66 See 'performative expression' in Raz (n 62), and 'performative utterances' in J. L. Austin, *Philosophical Papers* (3rd edn Clarendon Press 1989) 233.

67 M. Foucault, *POWER/KNOWLEDGE Selected Interviews and Other Writings 1972–1977*, Colin Gordon (ed.) (Pantheon Books: New York, 1980) See <www.monoskop.org/images/5/5d/Foucault_Michel_Power_Knowledge_Selected_Interviews_and_Other_Writings_1972-1977.pdf> accessed 13 December 2017

68 See Gough (n 63).

69 Ibid., 481.

70 By contrast, in cases where women killed male partners courts were rarely, if ever, presented with the sexual infidelity of the deceased as a reason for her lethal conduct. Certainly jurors would be unlikely to consider this as adequate grounds for provocation because of the ideological biased and gender specific social constructions of what behaviour women are expected to tolerate without complaint. It is likely that even if such reasons were articulated that they would be filtered out by defence counsel in crafting submissions and legal argument as they would be likely to undermine a defence or be considered irrelevant.

71 [2012] EWCA Crim 2.

72 See A. Reed and N. Wake (n 48) who assert that the section is opaque and will be impossible to disentangle.

unclear. The appellant's grounds in these appeals certainly suggested there was an appetite for muting the impact of what many assumed was intended to be a blanket exclusion of sexual infidelity. The Court of Appeal ruling adds to future uncertainty regarding the interpretation of this section:

> … sexual infidelity is not subject to a blanket exclusion when the loss of control defence is under consideration. …. events cannot be isolated from their context. … to seek to compartmentalise sexual infidelity and exclude it when it is integral to the facts as a whole is not only much more difficult, but is unrealistic and carries with it the potential for injustice. …, where sexual infidelity is integral to and forms an essential part of the context in which to make a just evaluation whether a qualifying trigger properly falls within the ambit of subsections 55(3) and (4), the prohibition in section 55(6)(c) does not operate to exclude it.[73]

That said, the Court of Appeal's ruling that sexual infidelity remained relevant (permissible) to loss of self-control where it was part of a wider context of circumstances or on the 'margins of sexual infidelity'[74] is both unconvincingly and problematically nebulous.

> … experience over many generations has shown that, however it may become apparent, when it does, sexual infidelity has the potential to create a highly emotional situation or to exacerbate a fraught situation, and to produce a completely unpredictable, and sometimes violent response. This may have nothing to do with any notional "rights" that the one may believe that he or she has over the other, and often stems from a sense of betrayal and heartbreak, and crushed dreams.[75]

Appellant No 1, Parker, stabbed his wife 53 times. The jury rejected his loss of self-control defence. Convicted of murder, his appeal against conviction was dismissed. Appellant No 2, Evans, stabbed his wife after she told him that she was going to leave him. The jury rejected the loss of self-control defence. His appeal against a murder conviction was also dismissed. Appellant No 3, Clinton, killed his wife and was convicted of murder, having beaten her about the head with a wooden baton, strangled her with a belt and a piece of rope.[76] Pictures of her dead body were sent to her paramour, which the Crown contended was evidence of his desire for revenge.[77] The trial judge ruled that there was insufficient evidence of loss of self-control for the issue to be considered by the jury and withdrew it from their consideration. Clinton appealed. One of the grounds related to the fact that the judge had withdrawn the defence of loss of self-control. The Court of Appeal concluded:

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73 *Clinton* (n 71) [37].
74 *Blackstone's Criminal Practice 2016*, B.125
75 *Clinton* (n 71) [16].
76 Ibid. [54].
77 Ibid. [64].

> For the reasons we have endeavoured to explain in this judgment, we have concluded that she misdirected herself about the possible relevance of the wife's infidelity. We have reflected whether the totality of the matters relied on as a qualifying trigger, evaluated in the context of the evidence relating to the wife's sexual infidelity, and examined as a cohesive whole, were of sufficient weight to leave to the jury.[78]

The conviction was quashed and a retrial ordered,[79] on the basis that since sexual infidelity formed part of a broader context which included other arguable 'triggers' the defence should have been left to the jury.[80] Section 54(6) of the C and JA 2009 provides:

> For the purposes of subsection (5), sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply.[81]

Clinton at retrial pleaded guilty to murder such that the jury were never to consider the point raised on appeal or the arguments presumably of the weight of the evidence on the broader context of sexual infidelity, or its admissibility, or its relevance to loss of self-control. So what does that say about the weight of the evidence and the likely persuasibility of a jury on this point? One possibility is that counsel for the appellant at trial[82] (unlike Birnbaum QC who successfully argued this point on appeal) may not have considered that the facts were sufficient to persuade a jury that the references to the broader context of sexual infidelity were relevant and thus advised his client accordingly.[83]

Following *Clinton*, several murder convictions have been appealed (albeit excepting *Wilcocks* (*Callum Paul*)[84] unsuccessfully) on the ground that where evidence of sexual infidelity is not compartmentalised and, for example, had been the subject of taunts it had been wrongly withheld from the jury. The Lord Chief Justice in *Dawes* stated (see p.7) that the fact of the breakup of a relationship, of itself, will not normally constitute circumstances of an extremely grave character and entitle the aggrieved party to feel a justifiable sense of being seriously wronged.[85] Guidance to judges however adds little.[86] In *Wilcocks (Callum Paul)*[87], the applicant

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78 Ibid. [77].

79 See Editorial, 'Jon-Jaques Clinton jailed for murder of wife Dawn' *BBC News* (London, 4 September 2012) <http://www.bbc.co.uk/news/uk-england-berkshire-19480076> accessed 21 November 2017.

80 Compare with reasoning in *Moffa v The Queen* [1977] 138 CLR 601, where court recognised cumulative nature of 'wholesale promiscuity' of the wife.

81 In *Dawes* (n 52) [761], the Lord Chief Justice observed that the section requires a judgment, not the exercise of a discretion. See also Crown Court Compendium (n 51) 19–2, 19.9.

82 Editorial (n 79). See also Becky Barnes, 'Jon Clinton's sentence slashed at murder re-trial' *GetReading* (London, 4 September 2012) reduced by six years from 26 to 20 years. <www.getreading.co.uk/news/local-news/jon-clintons-sentence-slashed-murder-4196454> accessed 21 November 2012.

83 *R. v McDonald (James Luke)* [2016] EWCA Crim 1529 [31]. Clinton did in fact receive a reduction in sentence of six years from that handed down at the original trial. So indeed if sentencing reduction was the strategy prompting the appeal, the goal was achieved.

84 [2014] EWCA Crim 2217.

85 *Dawes* (n 52).

86 Crown Court Compendium (n 51) Para(s) 24–30.

87 *Wilcocks* (n 84).

strangled his female partner who died from a heart attack brought on by asphyxiation. Convicted of murder, there were eight grounds of appeal, one of which related to the judge's direction to the jury to disregard sexual infidelity which had amounted to the deceased saying to the defendant that C was not his child. This constituted one of the grounds upon which he was granted leave. At retrial, Wilcocks was convicted of murder.[88] In *Otunga (Richard Nyawanda)*,[89] the appellant stabbed his wife 32 times. Convicted of murder, on appeal it was argued that the sexual infidelity of the wife had been improperly excluded. This was rejected by the Court of Appeal both at the point of conviction and sentence. In *McDonald (James Luke)*,[90] the appellant killed his former wife by strangling her with an electric flex. He pleaded her sexual infidelity as a wider part of his defence case. The judge at trial found that there was insufficient evidence of at least two of the requirements of the section to leave the defence to the jury. The Court of Appeal agreed and dismissed his appeal.[91] However it may be the case that where sexual infidelity has been argued as part of a wider loss of self-control, trial judges[92] in the Crown Courts are permitting the loss of self-control defence to be put before a jury.[93] It is also to be noted that research by Horder and FitzGibbon[94] discovered that sexual infidelity remains a significant factor in mitigation at the sentencing stage.[95] For all the reasons discussed, loss of self-control will continue to be understood and articulated as 'the' expression of anger and whilst excluding sexual infidelity from the loss of self-control defence, this feature continues to inhabit the public mind as part of an episteme of learnt permissions for anger / loss of self-control.

The problem of loss of control triggered by fear

This raises the interesting question of the prospect for defendants (women victims of violence in heterosexual relationships, and men and women in same-sex partner relationships) who wish to construct a loss of control defence on the grounds of fear.[96] The Crown Court Compendium Part I in acknowledging the complexity of the situation for the abused intimate partner advises,

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88 [2016] EWCA Crim 2043 a further appeal against sentence dismissed. See also Jonathan Humphries, 'Callum Wilcocks found guilty of murdering teenager Kelsey Shaw after re-trial' *Liverpool Echo* (Liverpool, 1 December 2015) <www.liverpoolecho.co.uk/news/liverpool-news/callum-wilcocks-found-guilty-murdering-10531145> accessed 21 November 2017.

89 [2015] EWCA Crim 2517.

90 *McDonald (James Luke)* (n 83).

91 J. Horder, and K. FitzGibbon, 'When Sexual Infidelity Triggers Murder: Examining the Impact of Homicide Law Reform on Judicial Attitudes in Sentencing' (2015) 74(2) Criminal Law Journal 307.

92 Crown Court Bench Book, Part I (February 2017 19–2) para 24–29. See also Ministry of Justice Circular, 'Partial defences to murder: loss of control and diminished responsibility; and infanticide: Implementation of Sections 52, and 54 to 57 of the Coroners and Justice Act 2009' (MoJ/C, 2010/13).

93 Minta Addido, stabbed his wife several times to her arms, chest and abdomen and pleaded loss of self-control due to anger and jealousy because she had another relationship, and was convicted of murder. See Hugo Gye, 'Jealous husband stabbed his wife 15 times, ran her over then sent her a Christmas card as she lay dying in hospital' *Daily Mail* (London, 16 December 2013) <www.dailymail.co.uk/news/article-2524723/Jealous-husband-stabbed-wife-15-times-ran-sent-Christmas-card-lay-dying-hospital.html> accessed 21 November 2017.

94 Horder & FitzGibbon (n 91).

95 *Haywood* [2011] 2 Cr App R (S) 71, 410. In Attorney General's Reference (No 23 of 2011), Lord Judge LCJ said: 'Even if not amounting to a defence of provocation, provocation may provide relevant mitigation to murder'.

96 C and JA 2009, s.55(3).

'The relationship between this defence and self-defence under s.76 of the Criminal Justice and Immigration Act 2008 (CJIA 2008) needs to be approached with care.'[97]

This final section explores whether there truly is a performative place for the defence of fear / loss of self-control and also considers the interface between fear and self-defence for the abused intimate partner who kills. To repeat, the C and JA 2009 is engaged when '… D's loss of self-control was attributable to D's fear of serious violence from V against D or another identified person.'[98] Returning to the discussion at the outset of this chapter, this new provision reflects a moral and conceptual shift and retreat from *Duffy* in that the past violent conduct of the deceased becomes foregrounded as a centrifugal aspect of the relevant factual and evidential narrative in evaluating whether there exists evidence of a claim of fear of serious violence. Assessment of the past to establish the basis of the claim of present and future fear is pivotal. Further the abused woman's (or, where relevant, man's) psychological reaction to past and future violence now becomes a relevant factor in assessing *mens rea*. In respect of the first reform Ashworth[99] in 1975, in his research on sentencing in provocation cases, uncovered the harbinger of a judicial retreat from the legal and moral bind of Devlin J's ruling in *Duffy*, 'it does not matter how cruel he was …'. Ashworth[100] pointed out 'Now those last few words beg the very question: surely the final act of the accused can only be interpreted properly if the whole course of conduct is taken into account and weighed cumulatively?'[101] Wasik[102] also found evidence that '… judges have … chafed at the strictness of the *Duffy* view.' By 1991, Jack Ashley introduced the Crimes [Homicide] Amendment Bill[103] where he said of Sara Thornton:

> When he died [Malcolm Thornton], she was arrested and taken to court. The court found that she was not provoked, because the law says that she had no provocation for killing her husband. The years of brutality were brushed aside. My Bill would simply remove the word "sudden". It includes the requirement that cumulative violence be taken into account.

The Law Commission also recommended that, '… the jury should continue to take into consideration previous provocation before the one which produced the fatal reaction'.[104] So, for example, Josephine Smith convicted of murder in 2002[105] had suffered emotional and physical abuse from her husband; the appeal court in quashing the conviction for murder and substituting manslaughter without seeking a new trial said that the trial judge had, 'wrongly restricted the jury's attention to the events surrounding the killing and did not ask them to consider a whole history of potentially provocative behaviour that had occurred prior to that.'[106] For the appellant, the defence expert found that she was suffering from 'learned helplessness' arising from Battered Woman Syndrome (BWS) with which the Crown's expert agreed. And so the background of violence became an increasingly important aspect of the defence.

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97 Crown Court Bench Book (n 92) para 17.

98 C and JA 2009, s.55(3).

99 A. J. Ashworth 'Sentencing in Provocation Cases' (1975) Criminal Law Review 553.

100 Ibid.

101 Ibid, 557.

102 M. Wasik, 'Cumulative Provocation and Domestic Killing' (1982) Criminal Law Review 29.

103 HC Deb 18 December 1991, vol 201, cols 273–4.

104 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004).

105 *Smith (Josephine)* [2002] EWCA Crim 2671.

106 Ibid., 84.

The understanding of the impact of fear on human action and inaction has had significant impact on the development of the law in this area. The history is well-known. When a battered woman killed an abusive partner she would talk of fear, survival, self-preservation and self-defence. Ann Jones had said in 1980 'what lawyers omit or trial judges exclude is precisely what a woman has to say in her own defence'[107] such that lawyers representing women were forced to intercalate these descriptive accounts as best they could into existing defences by which they were tethered. Nicholson and Sanghvi,[108] recognised that the law was 'based upon male standards of behaviour as to cause considerable injustice to battered women who kill' such that much of women's experiences were silenced by being excluded or maladroitly framed. In the early days fear, survival and self-preservation became maleated into the existing provocation defence, and the very best that lawyers could do was to stretch the time between the last act of provocation and the killing (the immediacy requirement) and hone a new concept of 'cumulative provocation' which recognised the past history of violence.[109] Horder alluded to the monumental misfit women's reaction presented to this legal fixity when he said:

> … women are far less likely to 'permit themselves' to lose self-control in the face of provocation … It is obvious that when a defendant is taunted by a victim who is known or believed to be physically more powerful and aggressive than the defendant, the defendants anger at the taunt is liable to be tempered by fear of the provoking victim's own reaction to any expressive display by the defendant of annoyance at the taunt.[110]

To be more precise, he argued that the defendant's reaction was more likely one of mixed emotions, both fear and anger.[111] Significantly, from a psychological perspective, Walker in her experience of counselling and acting and providing expert opinion found that battered women lived in a denial of their anger.[112] Women's own linguistic accounts shortly after the killing reflected both fear and moral indignation: 'I didn't mean to kill but he deserved it'. Reilly[113] notes, 'Fear might be associated with external signs which are not easily detectable; perhaps being characterized more typically by paralysis and submission …'. Fear is not referable to a loss of self-control and therefore it is easy to understand why a state of disintegration and collapse in despair and anxiety failed then, and possibly to a lesser extent at the present time, to satisfy the outward emotional state of anger cognised and demanded as 'the' privileged and accepted evidential base of loss of self-control.[114]
To assist in bolstering the defence of provocation and diminished responsibility prior to the C and JA 2009, the defendant's experience of fear in perceiving the possibility of future violence

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107 A. Jones, *Women Who Kill* (The Feminist Press 2009) 361.

108 D. Nicholson and R. Sanghvi, 'Battered Women and Provocation: The Implications of R v Ahluwalia' (1993) Criminal Law Review 728 (note). See also J. Horder, 'Sex, Violence, and Sentencing in Domestic Provocation Cases' (19890 Criminal Law Review 546. Horder recognised the need to correct the law's apparent bias in favour of stereotypically 'male violent reactions to provocation.'

109 Ibid., Horder (n 108), Ashworth (n 99) 547. See also M. Wasik, 'Cumulative Provocation and Domestic Killing' (1982) 29 Criminal Law Review 32–3.

110 J. Horder, *Homicide and the Politics of Law Reform* (Oxford University Press 2012).

111 See Horder (n 7) 128.

112 L. E. Walker, *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper and Row 1989) 203.

113 A. Reilly, 'Loss of Self-Control in Provocation' (1997) 21 Criminal Law Journal 320, 33.

114 See S. Edwards 'Loss of Self-Control: When His Anger is Worth More than Her Fear' in D. Bohlander and A. Reed (eds), *Loss of Self-control and Diminished Responsibility* (Ashgate 2011) 79–97.

and her reaction to that possibility was assisted by expert opinion. However, since rules of evidence dictate and constrain what can be admitted in the courtroom, and by whom, fear of violence was constructed as part of a 'syndrome'. Caught by the admissibility hurdle, expert evidence could not be adduced unless women's fear of abuse was a recognised medical condition such that her fear and its corollaries required medical veneering to meet the admissibility threshold.[115] BWS served this purpose in setting out a medical symptomatology. 'BWS has severely limited the effects of violence on women to a pathological condition such that it resembles more of a disease thereby essentialising the woman and seeing it as her problem[116] rather than a set of responses to fear and anticipated future violence.'[117] Its limitations created a 'pathological cul-de-sac for women'[118] and shifted the emphasis from the reasonableness of the defendant's action onto her personality, such that women relying on the effects of battering might be required to be passive and without agency lest the case for victimhood be undermined.[119] The additional problem presenting defence counsel was that it was not certain that jurors would accept fear as a sufficient reason to kill in the face of the absence of the imminency or immediate threat of violence and where a defendant failed to meet the traditional (explosive) and outward manifestation of loss of self-control making pleading provocation a high risk.[120]

But new defence strategies developed, appeals were based on fresh evidence which included BWS, and more significantly the prosecution at the trial stage demonstrated a willingness to accept defence pleas of provocation without insisting on a full trial, such that the fear experienced by abused women came to be recognised as a pivotal component of their defensive response to intimate partner violence. Where provocation had been pleaded at trial and failed counsel then appealed, submitting fresh evidence under the limb of diminished responsibility. So, for example, in *Sangha*[121], an appeal against a conviction for murder on the grounds of diminished responsibility was successful where the wife was the victim of long-term mental and physical cruelty over a period of more than 20 years of marriage including, 'being punched, kicked, almost strangled, struck with a walking stick and with a pan, beaten whilst she was pregnant and beaten in front of her parents'.

Similarly, Kiranjit Ahluwalia[122] convicted of the murder of a violent husband, had unsuccessfully pleaded no intent manslaughter, and provocation in the alternative. On appeal, fresh evidence was submitted regarding a plea of diminished responsibility. Judgment was reserved,[123] a retrial ordered, and in September 1992, the Crown accepted the fresh evidence of

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115 See L. E. Walker (n 112) 75. From 1977 onwards Walker acted as expert in US cases where battered women killed. Walker points out for example that it took six years for the court to rule that her expert testimony in the case of Ibn Tamas court be admitted. See also *Beverly Ibn-Tamas, Appellant, v United States*, Appellee. No. 12614. District of Columbia Court of Appeals. Argued 30 June 1978. 407 A.2d 626 (1979).

116 See A. Shalleck, 'Theory and Experience in Constructing the Relationship between Lawyer and Client: Representing Women Who Have Been Abused' (1997) 64 Tennessee Law Review 1019, reprinted in C. Dalton and E. M. Schneider, *Battered Women and the Law* (Foundation Press 2001) 1063.

117 S. Edwards, 'Expert Witnesses for the Prosecution in Domestic Violence "Prosecuting Domestic Violence – Using Expert Evidence and Expert Witnesses"' Report prepared for the CPS and Standing Together (2001) 34. See also, H. Kennedy, *Eve Was Framed* (Vintage 1992) 734.

118 Ibid. Kennedy, 93–4.

119 *R. v Butler* (Diana Helen) [1999] Criminal Law Review 835

120 Nicholson and Sanghvi (n 108) 734.

121 [1997] 1 Cr.App.R. (S) 202.

122 *R v Ahluwalia* [1992] 4 All ER 889.

123 Heather Mills, 'Brutalised wife appeals against murder verdict' *The Independent* (London, 19 July 1992) <www.independent.co.uk/news/uk/brutalised-wife-appeals-against-murder-verdict-kiranjit-ahluwalia-given-a-life-sentence-for-killing-1534433.html> accessed 23 November 2017

BWS and her plea to diminished responsibility.[124] Kathleen Hobson killed a violent husband and a plea of provocation and self-defence failed. She called the police on 30 previous occasions, making formal complaints on four occasions. On appeal, she pleaded that the effects of violence including BWS were relevant to a defence of diminished responsibility. This fresh evidence was admitted and the conviction quashed.[125] A retrial was ordered where the Crown accepted the evidence of diminished responsibility.[126] Diana Butler[127] stabbed her partner in the course of an hour-long assault in which he dragged her down the stairs by her hair, kicked her against walls and began smashing up the house. Her defence was no intent manslaughter, which was not accepted by the jury. The prosecution had adduced evidence of her previous violence. On appeal, her murder conviction was quashed; at retrial, her pleas of guilty to diminished responsibility manslaughter were accepted by the Crown.[128]

The decisions of the trial courts are much more difficult to track, but there is some evidence of change. For example, during the trial of Alisa Brookes the Crown indicated that it would accept a plea of guilty to manslaughter on grounds of provocation following a successful submission by the defence of 'no case to answer'.[129] Diane Clark[130] stabbed her violent husband, and her plea to provocation was accepted by the prosecution. Judge Gerald Gordon spoke of a 'smoking fuse of provocation'.[131]

However, in developing a fear discourse and raising awareness of the effects of fear on her emotional state and *mens rea*, the new provision continues to misframe the battered woman holding, seeing her reaction often as an overreaction.[132] This cognitive cliché has been embedded in the psyche of courts and within the legal critique[133]such that the current legislative

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124 G. Robertson, *The Justice Game* (Vintage 1992). Sara Thornton killed a violent husband and was convicted of murder following an unsuccessful plea of involuntary manslaughter and diminished responsibility. On appeal a retrial was ordered. On retrial a jury found her not guilty of murder but guilty of manslaughter diminished responsibility and provocation. See Will Bennett, 'Sara Thornton is cleared of murder' *The Independent* (London, 30 May 1996) <www.independent.co.uk/news/sara-thornton-is-cleared-of-murder-1349913.html> accessed 22 November 2017. See also S. Edwards and C. Walsh, 'The Justice of Retrial' (1996) 146 National Law Journal (1996) 857.

125 *R v Hobson* [1998] 43 B.M.L.R. 181. See also Kate O'Hanlon, 'Battered woman's conviction overturned' *The Independent* (London, 5 June 1997) <www.independent.co.uk/news/people/law-report-v-6-june-1997-battered-womans-conviction-overturned-1254390.html > accessed 22 November 2017

126 *The Guardian*, 16 December 1997.

127 *Butler* (n 119); *The Independent*, October 3 1999.

128 Editorial, 'Woman who killed violent partner gets probation' *The Guardian* (London, 2 October 1999) <www.theguardian.com/uk/1999/oct/02/4> accessed 23 November 2017. Not all successful see *R v Williams* [2007] EWCA Crim 2264, who killed her partner and on appeal adduced evidence of BWS was not successful and her appeal was dismissed.

129 Yvonne Roberts, 'A woman in fear for her life is not a murderer' *The Independent* (London, 21 September 1999) <www.independent.co.uk/arts-entertainment/a-woman-in-fear-for-her-life-is-not-a-murderer-1120984.html> accessed 23 November 2017

130 *The Evening Standard*, 7 July 1998.

131 See Cathy Comerford, 'Woman "driven" to kill husband' *The Independent* (London, 10 August 1998) <www.independent.co.uk/news/woman-driven-to-kill-husband-1170893.html > accessed 23 November 2017.

132 S. Edwards, 'Abolishing Provocation and Reframing Self-Defence—the Law Commission's Options for Reform' (2004) Criminal Law Review 181.

133 S. Edwards, 'Loss of Self-control: When His Anger is Worth More Than Her Fear' in M. Bohlander and A. Reed (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011) 93. See also, Law Com CP No 173 (n 104) para 1.62, and Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 5.1, fear of serious violence is recognised fear but nonetheless in anticipating future violence whilst the Law Commission was willing to expand the

requirement of 'fear' must meet the standard or threshold of 'fear of serious violence'.[134] This suggests that there still exists some misunderstanding of the abused partner's fear of intimate partner violence. Since the law requires evidence of fear of significant violence (serious violence) before the defence can be triggered, albeit with regard to self-defence the fear of a householder of a trespasser's violence is more readily understood and not requiring of so high a threshold.[135]

So whilst fear of 'serious violence' need not be of imminent violence, it must be serious nonetheless. What fear means, and what is required to prove 'fear of serious violence', is left to be determined. In relation to the 'fear of serious violence', the test is subjective. What constitutes 'serious violence', rather like what constitutes 'grave circumstances', is undetermined. Will it be aligned to grievous bodily harm or will chronic long-term violence be accepted as 'serious violence' because of its habituated and cumulative impact?

In developing a fear defence, the considerable body of earlier research and writing on BWS is material, especially with regard to the understanding of a cumulative and prospective fear of violence. For example, in *Longsworth*,[136] 'the appellant threw an accelerant on her common law husband, set him on fire with a candle and then tried to extinguish the fire by throwing water over him', her defence on appeal centered around fresh evidence with regard to BWS. In submissions, counsel said that:

> (4) the appellant's loss of self-control was a result of buildup of anger over the years. It appeared that her capacity to absorb such violence was finally exhausted and she threw the petrol and candle described this response as "slow burn" to cumulative provocation, which is observed in women who have experienced repeated abuse.[137]

The appeal court said:

> She explained that the appellant had reached her psychological "breaking point". This type of response, she stated, had also been described as a "slow burn" response to cumulative provocation, particularly observed in women who have experienced repeat abuse and which may occur in response to what objectively appears to be a relatively minor or trivial provocation, often after an apparent time delay between the last provocative act and the apparent loss of control … The court considered Dr Mezey's opinion where she stated at para 15.31 of her report that the appellant's cognitive, emotional and behavioral deficits associated with PTSD and BWS would have affected her perception of the severity of the provocation.[138]

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definition of provocation to include 'fear driven killings' it still considered that fear leading to killing another was an 'overreaction'.

134 C and JA 2009, s.55 (3)

135 See, for example, where D has killed when attacking a trespasser in a dwelling s 76 of the CJIA 2008 as amended by the Crime and Courts Act 2013.

136 [2015] 3 LRC 580.

137 Ibid. [607].

138 Ibid. [611].

The appellant's conviction for murder was quashed, substituted with a manslaughter verdict based on diminished responsibility, and a sentence of eight years' was imposed.

As was expected and anticipated, violent men have also tried to take advantage of the defence and such cases have been the subject of appeal. In these circumstances, trial judges have withdrawn the defence of loss of control.[139] The withdrawal of the defence was successfully challenged on appeal in *Clinton.*[140]

Most problematically for the abused partner, the fear limb of the loss of control defence[141] has not removed the incongruency problem wherein the abused partner who kills out of fear is required to satisfy the loss of self-control requirement. Given the construction of loss of self-control in thought, language, outward emotional and physical expression, its fixity as a signifier, the way it is conjoined conceptually, linguistically and cognitively to anger, articulated in symbolic descriptions of red mist, losing it, becoming wild and deranged etc., fear, so different in every way can never ever earn its place in the framework of the loss of self-control defence.

So what of the possibility that self-defence might be mounted? Undoubtedly, it is the case that the evolving consciousness in society and in legal discourse regarding the predicament of the battered woman and the new fear limb in loss of self-control manslaughter has influenced legal argument in cases of murder, self-defence and no intent/involuntary manslaughter. The Crown Court Compendium states:

> (5) Self-defence and this s.54 defence may both be pleaded. Care is needed. Unlike self-defence, D has lost control. Unlike self-defence, D can rely on fear of future non-imminent attack. If D has intentionally killed V, pleads self-defence but is alleged to have used excessive force, the complete defence of self-defence might fail, but D may still be able to rely on the new partial defence, the excessive amount of force being explicable by reference to the "loss of self-control". Section 54(5) requires only that sufficient evidence is adduced to raise an issue under s 54(1). Thereafter, the prosecution shoulders the legal burden of proving, to the criminal standard of proof, that the defence is not satisfied.[142]

The case of Elizabeth Hart-Browne is a case in point. On 27 April 2017, she pleaded not guilty to murder and pleaded self-defence stating that she picked up a knife and stabbed her partner accidentally in the course of a struggle. The defence presented argument of his continual violence towards her over a period of time and her fear of serious violence from him such that she took out a life insurance policy so that her children would be provided for if she was killed. She was acquitted of murder and all charges, including manslaughter, following 15 hours of deliberation.[143]

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139 *Dawes* (n 52), *McDonald (James Luke)* (n 83), *Khan* (Jamshaid) [2016] EWCA Crim 1786, *Gurpinar* [2015] EWCA Crim 178.

140 *Clinton* (n 71).

141 C and JA 2009, 55(3).

142 Crown Court Compendium (n 51) 19-13 para 18(5).

143 Alice Ross, 'West London jeweller cleared of murdering abusive boyfriend' *The Guardian* (London, 27 April 2017) < www.theguardian.com/society/2017/apr/27/west-london-jeweller-cleared-of-murdering-abusive-boyfriend> accessed 22 November 2017. See also *Van Den Hoek v R* [1986] 161 CLR 158; *Ivanovic* [2005] VSCA 238; *Osland* [1998] 2 VR 636.

However, an investigation of the generic statistical evidence indicates that there have been few cases since the enactment of C and JA where fear has provided a basis for loss of control. For the period when the C and JA 2009 was in force (April 2011–March 2015, latest figures available), 39 female defendants were convicted of 'other manslaughter'[144] irrespective of the relationship of victim to suspect. This gives some indication of the likely little use of the fear limb of the manslaughter defence. However, the very advent of the fear trigger and the symbolic importance of this recognition of the role of fear in understanding what drives an abused partner to kill is significant.

Conclusion – What is to be done now?

One is left considering whether the 'loss of self-control' defence be removed altogether. Should anger continue to be privileged? Should the fear limb of the defence be restructured since, as it exists in law and in public discourse, the battered woman in fear can never neatly be interpellated to meet the loss of self-control requirement?
Should legal reform look to ensure that the abused partner's fear is also explicitly accommodated elsewhere within the criminal law? Certainly there seems to be little logic or fair play in recognising that a householder in fear[145] may not react with measure but a victim of domestic violence is nonetheless required to do so. Further refining is required. The wording of the modern fear manslaughter defence is ill-equipped to accommodate the fear of the abused partner trapped within a domestic context who reacts emotionally, linguistically and physically in accordance with the effects of fear of violence, whilst the requirement of loss of self-control continues to privilege anger and, through both interpellation and instantiation, continues even if unintended to perpetuate the gendered exonerations of male abusers as the normative template.

144 'Other manslaughter' includes 'loss of control manslaughter' killings (s.54(1), loss of control, fear manslaughter (s.55(3), a combination of both (s.54(1) and s.55(3)); and involuntary or constructive manslaughter no intent, and killings where there was no intention to kill including accident and gross negligence.

145 CJIA 2008, s.76.