

Defining Fault in Loss of Control: Determining Culpability Through Excuse Theory

Abstract

In English law, fault has regard for the blameworthiness of a defendant, with a focus on the mens rea at the time of a culpable act. For murder, the highest level of fault is required; an intention to kill or cause serious harm. This work will focus on the partial defence of loss of control, where although it is acknowledged that this state of mind exists, the concept of fault in some cases is divided between the defendant's perceived fault in the victim's actions, and the defendant's lack of fair opportunity to adhere to the law, in order to create an avenue to a conviction only of manslaughter. Though this will not always be the situation, establishing if there is fault on part of the victim through provocative conduct, leading to a lack of control at the time of the fatal act, can be crucial in demonstrating a lesser degree of fault on part of the defendant, uncoupling them from the mandatory life sentence for murder.

Introduction

The association between fault and culpability, or blame, has long been an important doctrine of English criminal law. In fact, it could be said that determining blame is the distinguishing factor between criminal and civil law.¹ From this determination, we can define not only the adequate conviction, but also the adequate punishment. Sentencing guidelines now have an appreciation of the importance of both harm caused and culpability in reaching a decision on appropriate sentence.

Of course, fault is not an 'all-or-nothing' concept.² It is a spectrum, on which we assess a defendant's level of blame or culpability by asking various questions. For partial defences to murder, we have long debated over if, and why, such concessions are to be considered as excuses or partial justifications of a defendant's actions. However, one does not excuse in a vacuum.³ This often is related to an additional argument as to intentions, voluntary conduct, and fair opportunity to adhere to the law. Horder has speculated that malice and proportionality have in fact become 'general principles of culpability' in English law.⁴ Often, attempting to define culpability in cases where motive behind intention is something one may have compassion for (particularly in cases invoking partial defences to murder) becomes a real moral and political dilemma.⁵ This chapter will in turn discuss the problems with determining such fault and culpability.

Mens Rea

We view fault as a mens rea descriptor. While we seek to find evidence of intention to satisfy the mens rea requisite of murder, we often lose the intention-motive distinction, and how that might affect blame. Are we viewing fault as the responsibility of the literal consequence – death, or is there a deeper association between fault and culpability to be explored. The partial defences to murder seek to address this issue, alongside sentencing guidelines, but both can prove to be problematic.

Defences, partial or general, will generally seek to find a way of lessening fault on part of the defendant. With some, such as loss of control or duress, we might say that the defendant had no fair opportunity to adhere to the law, and this diluted the culpability. This may differ to others, such as

¹ J Herring, *Criminal Law 10th Ed*, (2017, Palgrave, London) 6

² J Dressler, 'Some Very Modest Reflections on Excusing Criminal Wrongdoing', (2009) 42 *Tex. Tech. L. Rev* 247-258, 254

³ C M V Clarkson, 'Necessary Action: A New Defence', (2004) *Crim. L. R* 13-27, 16

⁴ J Horder, 'Two Histories and Four Hidden Principles of Mens Rea', (1997) 113 *LQR* 95-119, 97

⁵ A Norrie, 'Subjectivity, Morality and Criminal Law', (1999) 3(3) *Edin. L. R.* 359-367, 366

diminished responsibility, where awareness or indifference as to fault might be an issue. Herring, in his criminal law text, identified four ways of evading culpability. Exemption from liability (for example, insanity) lack of capacity (such as automatism) lack of the required mental state and 'special defence', which operates to lessen or remove a defendant's blame.⁶ This certainly suggests that the mens rea requirement plays a substantial role in determining criminal blame, but it is not the whole story. We can use mens rea to determine guilt, but how does it determine blame?

"Like all legal principles, principles of mens rea may have moral authority, through being supported by the soundest theory of guilt applicable to the crime in question".⁷

Intention and fault are inextricably linked. The degree of fault for intended actions is an important question. Of course, if there is no intended action (involuntary conduct) then there is no fault, and a full defence is provided. What makes us question a defendant's culpability for intended actions is *why* they might have intended that behaviour or result. Are their actions morally reprehensible by societal standards? There are cases which fall within the remit of the partial defence to murder of loss of control where, whilst death was the intended result of the defendant, the reason for such an intention invokes questions around fault and blame. Determining the just conviction and sentence in these cases can be difficult. Both murder and manslaughter, being the most heinous of crimes, require proof of a blameworthy state of mind.⁸ However, the distinction between the two has 'significant symbolic dimension'.⁹ We attempt to allocate fairly the correct label and punishment. But, rather than asking questions around the requisite mens rea for the offense, this chapter seeks to ask a simple question: When it comes to loss of control how does motive and emotion affect blame?

We might say uncoupling defendant's we feel compassion for from the mandatory life sentence and stigma attached to the murder label prevents inherent unfairness,¹⁰ but the realms of the partial defence of loss of control speak more of emotion than motive. The link between emotion, fault and motive are nonetheless prevalent, and worth of note. The difficulty is that, with such cases, that most culpable mental state of intention often remains at the heart, and this affects our concept of how to adequately deal with fault and blame. As Norrie has observed, we qualify the 'badness' of intentional killings on motives.¹¹

No Fair Opportunity

The nature of the discretion that the partial defence of loss of control's predecessor enjoyed has frequently been debated. Most academics can agree the traditional defence of provocation was, as for other jurisdictions with similar provisions, a concession to human frailty which uncoupled a defendant from the mandatory life sentence that accompanies a murder conviction. What is slightly more controversial is the conundrum of whether the defence is justificatory or excusatory in nature.

Defences seek to shift fault and neutralise or lessen blameworthiness. What we come to agree upon is that where actions are fully justified, such as in a successful plea of self defence, there is no fault, and therefore an acquittal. Where actions are partially excused, there is partial fault, and so we

⁶ Herring n(1) 7

⁷ Horder n(4) 95

⁸ Herring n(1) 63

⁹ A Norrie, 'Legal and Social Murder: What's The Difference', (2018) 7 Crim. L. R. 531-542, 531

¹⁰ See N Wake 'Human Trafficking and Modern Day Slavery: When Victims Kill' (2017) 9 Crim. L. R. 658-677 for an interesting discussion

¹¹ A Norrie, 'Between Orthodox Subjectivism and Moral Contextualism: Intention and the Consultation Paper', (2006) 6 Crim. L. R. 486-501, 490

mitigate to manslaughter. For some defendant's, such as battered women who kill their abuser,¹² this has been a substantially different approach to the United States, where many states have been seeking to expand the remit of self defence and allow full justification.¹³ We retain some level of fault because loss of control is not lost completely. It is not an involuntary act. The defendant retains some control, but the ability to control himself is severely impaired.¹⁴ There is a level of blame remaining, and this is considered by the judge at the sentencing stage.¹⁵

An interesting and somewhat controversial aspect of the defence of loss of control lingers. This partial defence reduces murder to voluntary manslaughter if accepted. It requires that the defendant lost self-control, that this loss of control was due to a qualifying trigger, and that a person of the defendant's sex and age, with a normal degree of tolerance and self restraint, and in the circumstances of D, might have acted in a similar way.¹⁶ The qualifying triggers are listed as a fear of serious violence, or things done or said which constituted circumstances of an extremely grave character which gave the defendant a justifiable sense of being seriously wronged.¹⁷ In partially excusing the defendant's lack of opportunity to adhere to the law due to provocative or fearful conduct on part of the victim, might we also be partially shifting some level of blame or fault to the victim for their demise? If fault is considered as a whole, and the defendant is partially at fault, where does the remaining fault lie?

In her recent article, Lodge questioned if we might attribute criminal responsibility to a person who emotionally abused their victim to the point of taking their own life.¹⁸ She speculates that what might be fitting is a context-specific homicide offence which adequately reflects moral culpability but still proves a causal link in such a case:¹⁹

*"The lack of fault predicated on the basis of the defendant's mens rea is substituted by a morally evaluative approach to establishing the accused's causal contribution to the victim's death"*²⁰

This morally evaluative approach may also be said to be a basis for the qualifying triggers in some loss of control cases, where there has been morally reprehensible behaviour on part of the victim. In the 1980s, Dressler pondered the theoretical basis for the reduction from murder to manslaughter based on a victim's own provocative conduct, questioning if it is the defendant who is partially responsible for giving in to passion (excuse), or a sense of being entitled to retaliate in the face of the victim's behaviour (justification).²¹ Should we focus on the defendant's emotions, or the victim's own contributory conduct? There is a considerable difference between saying a behaviour is partially warranted or that it is partially excused.²² It is arguable that, under the new rules of loss of control, a defence meant to bring the provocation concept into the twenty-first century, the crux of the matter

¹² See for example, *Thornton* (No1) [1992] 1 All ER 306, *Thornton* (No2) [1996] 2 All ER 1023, *Ahluwalia* [1992] 4 All ER 889, *Rossiter* [1994] 2 All ER 752, *Humphreys* [1995] 4 All ER 1008.

¹³ The discussion during the case of Judy Norman highlights this, *State v Norman* 324 N.C. 253, 378 S.E. 2d 8, 1989

¹⁴ Herring n(1) 162

¹⁵ See www.sentencingcouncil.org.uk/sentencing-and-the-council accessed 29th June 2021

¹⁶ Coroners and Justice Act 2009, s54

¹⁷ Coroners and Justice Act 2009, s55

¹⁸ A Lodge, 'Domestic Abuse, Suicide and Liability for Manslaughter: In Pursuit of Justice for Victims', (2020) 84(4) J Crim L 273-292

¹⁹ *Ibid*, 273

²⁰ *Ibid*, 277 See also *Wallace* [2018] EWCA 690 [52], where the Court of Appeal cited *Kennedy (no2)* [2007] UKHL 38 in finding the victim's suicide was not unconnected to the defendant's conduct.

²¹ J Dressler, 'Provocation: Partial Justification or Partial Excuse', (1988) 51(4) *Modern Law Review* 467-480

²² *Ibid*, 468

is that the defendant was not able to adhere to the law due to some external factor. Capacity remains, but control does not, due to circumstances the defendant has no control over. As Dressler shrewdly observes, 'we excuse those we cannot blame'.²³

Curiously, there are some situations where we specifically can not lessen blame. Sexual infidelity was declared unable to constitute a qualifying trigger.²⁴ Perhaps this is not abhorrent enough behaviour in modern society to warrant the victim sharing some amount of fault, meaning that we cannot condemn this conduct enough to alter the level of blame given to the defendant, or tolerate the outburst of retaliatory violence enough to partially excuse. In a later paper, Dressler suggested that lawyers and judges alike should have more focus on the distinction between justification and excuse, and why it is important.²⁵ If what we are doing in the realm of loss of control is partially excusing the emotions felt, Dressler deliberates if we may ask an additional question: is this for justice or compassion?²⁶ Morse takes this idea one step further for partial defences, creating a verdict which encompasses both ideas – one of 'guilty but partially responsible', available for all crimes.²⁷ How advantageous this might be in correctly identifying fault, reducing culpability without extinguishing it.²⁸

The very difficult aspect of this idea which verges on victim-blaming, is that not all victims will appear worthy of any share of the blame. There is no real discussion here of killing the innocent, or who the innocent might be.²⁹ Consider, for example, a case of mercy killing. How can such a victim be said to share some portion of fault? Making such an assumption is dangerous ground, and it begs the question of which behaviours can we blame victims for? In twenty-first century society, we want to hold people accountable for their actions, but trying to create an exhaustive list of victim's behaviour which will not mitigate fault and culpability would be impossible, and likely create injustice. Actions cannot be deemed 'right' if you face no wrong, but how much can we really excuse because a victim's actions caused, or attributed to, their own demise?³⁰ Can we reduce culpability due to the wrongdoing of the victim, and if so, which wrongdoings and which victims?³¹

This type of thinking lies close to the realms of forfeiture theory – that a person can essentially give up, if temporarily, their right to life by their own behaviour. We usually associate this with self-defence retaliation against person or property. It is a flawed concept, sometimes described as 'widely rejected',³² and 'unsatisfactory on a number of counts'.³³ It does not account for situations such as mistake.³⁴ When we attempt to relate it to a battered woman who kills her sleeping abuser, it fails miserably to explain why we partially excuse her. Since she does not act during a battering

²³ Ibid, 471

²⁴ S55(6)©

²⁵ J Dressler, 'Some Very Modest Reflections on Excusing Criminal Wrongdoers', (2009) 42 Tex. Tech. L. Rev 247-258, 248

²⁶ Ibid, 252

²⁷ S Morse, 'Diminished Rationality, Diminished Responsibility', (2003) 1 Ohio St. J. Crime L 299-307

²⁸ For an excellent discussion on this point, see A Ashworth and D Thomas, 'Sentencing: Murder – Mercy Killing (case comment) (2011) 3 Crim. L. R. 243-248, discussing the tragic case of *Inglis* [2008] EWCA Crim 2637

²⁹ Norrie n(11) 490

³⁰ A Clough, 'Battered Women: Loss of Control and Lost Opportunities', (2016) 3 J I C L 279-316, 296

³¹ C Wells, 'C Wells, 'Provocation: The Case For Abolition' Chapter 6, B Mitchell and A Ashworth, *Rethinking English Homicide Law* (Oxford University Press, 2000) 309

³² B Sangero, 'A New Defence for Self-Defence', (2006) 9(2) Buffalo Crim. L. Rev 475-560, 507

³³ S H Kadish, 'Respect for Life and Regard for Rights in the Criminal Law', (1976) 4 Calif. L. R. 871-901, 883

³⁴ L Bleasdale-Hill, 'Our Home is Our Haven and Refuge – A Place Where We Have Every Right to Feel Safe: Justifying the Use if up to Grossly Disproportionate Force in a Place of Residence', (2015) 6 Crim. L. R. 407-419, 413

incident, the victim could have said to have 'regained' his rights.³⁵ A more modern take on this theory is that justified conduct is not necessarily right, but permissible in the circumstances.³⁶ Even for a full defence such as self-defence, this is an adequate explanation, and certainly addresses concepts such as no duty to retreat.³⁷ Essentially, it is possible for the aggressor here to give the defendant a 'moral claim' to justifying their actions.³⁸

Emotion-Fault Link

If we focus on the concept of fault being lessened as a concession to human frailty in the use of the partial defence of loss of control, it is interesting that we should seek to validate some emotions and not others. Certainly, the qualifying triggers are indicative of fear and anger being 'justifiable preludes',³⁹ but why do we elevate them above greed, jealousy, envy and betrayal? As Horder has observed, fear is certainly not a psychiatric injury, due its transitory nature as a type of harm,⁴⁰ nor could anger be explained this way. However, there lies an intrinsic importance in understanding emotional states, for appreciating culpability and mitigating fault.⁴¹ Which emotions might be recognised as deserving or underserving?⁴²

The unique approach of the American Model Penal Code's 'Extreme Mental or Emotional Disturbance' defence embodies emotion without distinction as a defence capable of reducing a charge of murder.⁴³ Though the Code categorises justification defences without such a provision for excuse, they are embodied within the code's coverage of liability and responsibility.⁴⁴ Encompassing a plethora of emotions may be a much more ample concession to the human experience, and gives the courts a much more clear remit of excusable reactions. Though it is unlikely to include excuses outside the realm of emotion, such as brainwashing or economic deprivation,⁴⁵ perhaps it might include situations such as being a victim of coercive control, a new offence England and Wales have come to recognise in the last decade.⁴⁶

When we link emotions and fault, what we are essentially allowing the justice system to insinuate is that the defendant is to blame, but perhaps not as much as other people who commit this crime.⁴⁷ This is equally connected to mitigating factors at the sentencing stage, where we might appreciate that a defendant has committed a particular offence, but begin to delve into the realms of motive, and appreciate their emotional state. Even if a defence such as loss of control fails in the courtroom

³⁵ Ibid, 416

³⁶ Clarkson n(3) 17

³⁷ *Bird* (1985) 2 All ER 513

³⁸ S Uniacke, 'Self-Defence and Natural Law', (1991) 36 American J. Juris 73-102, 78

³⁹ S Edwards, 'Anger and Fear as Justifiable Preludes For Loss of Self-Control' (2010) 74 Journal of Criminal Law 223

⁴⁰ See J Horder, 'Reconsidering Psychiatric Assault', (1998) Crim. L. R. 392 for an excellent discussion on this topic

⁴¹ S M Edwards, 'Recognising the Role of the Emotion of Fear in Offences and Defences', (2019) 83(6) J. Crim. L 450-472, 455

⁴² A Clough, 'Honour Killings, Partial Defences and the Exclusionary Conduct Model', (2016) 80(3) J Crim L 177-187, 177

⁴³ American Law Institute Model Penal Code (1981) 210.3 (1) (b)

⁴⁴ Ibid, Articles 3, 2 and 4 respectively. See Dressler n(25) 250

⁴⁵ Dressler n(25) 253

⁴⁶ Serious Crimes Act 2015, s76

⁴⁷ Dressler n(25) 254

for an intentional killing, and a murder conviction prevails, the sentence might still appreciate the circumstances as mitigating factors for reduced culpability.⁴⁸

This once again brings us back to the argument of if intention should be linked to fault, or if a morally contextual approach is more appropriate.⁴⁹ Surely, this would be more accommodating for cases of mercy killing and battered women who kill. Admitting good motives into the law of intention could prove to be a significantly dangerous move,⁵⁰ but this makes it incredibly arduous for killings driven by compassion. With the 'intention' box checked by the prosecutor, unless a case such as mercy killing can fit within the boundaries of diminished responsibility or loss of control, murder is likely to be the conviction. However, a life sentence here would not match the 'social heinousness of a genuine mercy killing case'.⁵¹ Can compassion not become an emotion worthy to provide mitigation of fault? Neither the defendant (nor likely the public) would see such actions as murder, notwithstanding the fact that the actus reus and mens rea of murder are established.⁵²

Loss of Control

How does losing control affect fault and blameworthiness? This question becomes even more complicated when there is wrongdoing on part of the victim – a regular feature (though not always) in loss of control cases:

*“The harm caused by deliberately or negligently instilling fear in another is inconsistently considered in law as to its impact on criminal responsibility and mens rea”.*⁵³

Whether by instilling fear, or provocative conduct of a nature that gives the defendant a feeling of being wronged, the criminal law needs to have an appreciation that such behaviour may cause a person to commit a fatal act of violence. This is a very different situation to a defendant who has incited the victim's behaviour to give an excuse to use violence, and the partial defence of loss of control does reflect this with such an exclusion.⁵⁴

The provocative conduct on the part of the victim cannot be trivial – only something substantial warrants a lessening of blame for the defendant. It certainly would not cover a 'minor taunt or irritation',⁵⁵ and the 2012 case of *Zebedee* reflected this.⁵⁶ John Zebedee assaulted then strangled his ninety-four year old father, who was suffering from senile dementia. He was doubly incontinent and had soiled himself; the catalyst for the fatal event after an enduring time of caring for his father. Loss of control (and also diminished responsibility) was rejected by the jury. This is a welcomed development from the old provocation defence, where cries from a baby were considered by the appellate court to be capable of constituting provocative conduct.⁵⁷

⁴⁸ Ashworth and Thomas n(28) 246

⁴⁹ Norrie n(11) 487

⁵⁰ Norrie n(11) 497

⁵¹ A Clough, 'Mercy Killing, Partial Defences and Charge Decisions: 50 Shades of Grey', (2020) 84(3) J Crim L 211-227, 212

⁵² Ibid, 222

⁵³ Edwards n(41) 450

⁵⁴ Coroners and Justice Act 2009, s55 (6)(b)

⁵⁵ Herring n(1) 164

⁵⁶ *Zebedee* [2012] EXCA Crim 1428, where the victim siling himself was not found to be extremely grave circumstances to warrant a successful plea by the defendant, his son.

⁵⁷ *Doughty* (1986) 83 Cr App R 319

In the recent case of *Dawson*, it was reflected on appeal that while the victim's behaviour may not be substantially abhorrent enough to amount to a qualifying trigger, it should still be taken into consideration at the sentencing stage in the defendant's favour:⁵⁸

*"We are of the view that the element of provocation should have had a material impact in mitigating the length of minimum terms".*⁵⁹

In this case, Scott Dawson and his mother Carol killed a man they had complained to police about for damaging property and making threats involving arson, claiming this had affected both their health. He continually crossed the land owned by the defendants, and had a history of anti-social behaviour. At the time of his death, the defendants had a restraining order in place, though the victim had been acquitted of related charges against him. The defendants were described as having a desire for revenge,⁶⁰ something which is specifically excluded by the partial defence of loss of control.⁶¹ Though loss of control had failed at trial after it was discussed at length, the level of provocative conduct was of equal importance to be discussed at the sentencing stage.

The appeal court are equally quick to recognise the reverse, where loss of control was successfully pleaded but in the face of a low level of provocative conduct on part of the victim, such as the case of *Lodge* where the defendant entered the home and bedroom of the victim and beat him to death after he awoke and hit D twice with a bat.⁶² Interestingly, since the new defence of loss of control was enacted, there have been an influx of refused appeals over the judge's refusal to leave loss of control to the jury, believing there to have been no evidence that control was lost, or an inadequate qualifying trigger stemming from the victim's behaviour.⁶³ This would suggest a reluctance to lessen fault and a very high threshold to meet.

Of course, in some cases, it is doubtlessly obvious that a qualifying trigger has not been achieved and the victim cannot be morally portioned any share of fault. In *Riddington*,⁶⁴ the defendant was convicted of murder and sentenced to nineteen years after stabbing his victim a total of seventeen times at a gym in Kent. There was a dispute about money owed between the defendant and the victim, but Charles Riddington had arrived at the gym first wearing gloves and attacked the victim within minutes of him arriving. Though the defendant tried to claim that the victim had produced the knife and attacked first, the prosecution's case was that Riddington had arrived at the gym armed with the knife to get revenge due to the debt, and ambushed him. A witness recalled the victim holding out his arms and saying he did not want to fight before the altercation began.

These 'qualifying triggers' alluding to the conduct of the victim are only part of the loss of control defence, and only one of three prongs to lessening fault and culpability. The defendant must have lost control due to such a trigger. The Law Commission had suggested removing this concept,⁶⁵ but the Ministry of Justice were concerned as to how the defence might be misused without such a

⁵⁸ *Dawson* [2021] EWCA Crim 683, [21]

⁵⁹ *Ibid* [24]

⁶⁰ *Ibid* [14]

⁶¹ Coroners and Justice Act 2009, s54(4)

⁶² *Lodge* [2014] EWCA Crim 446

⁶³ See for example *Locke* [2019] EWCA Crim 2313, *Islam* [2019] EWCA Crim 2419, *Singh* [2020] EWCA Crim 1813

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⁶⁵ See generally Law Commission for England and Wales, *Partial Defences to Murder* (Report No 290, 2004), Law Commission for England and Wales, *Murder, Manslaughter and Infanticide* (Report No 304, 2006)

safeguard.⁶⁶ While it might be easy to recognise a loss of control from an angry outburst, a loss of control due to fear may not be so cliché, and without such evidence how can we lessen blame? This has led some academics to speculate that the opportunity for the new defence to be inclusive of battered women who kill their abusers has been missed.⁶⁷

Even more problematic is the fact that, in such cases, there is a rush to pathologise women, stereotyping them within the prism of ‘battered woman syndrome’.⁶⁸ This effectively ‘places them at the centre’ of the failings in the relationship.⁶⁹ Where is the aggressor’s share of the blame? While the law appears to make advancements for battered women who kill by creating a qualifying trigger of fear of serious violence, the reality is that women in such situations still often have to rely on diminished responsibility pleas to avoid the mandatory life sentence. The recent appeal of Fariessia Martin in December 2020 was absolute proof of that.⁷⁰

Possibly the most difficult aspect of determining fault in such cases is when a weapon is used. A regular feature in cases of battered women who kill their abuser, from an instinctive knowledge that her hands are no match for his fists. This is certainly not the type of situation the law had in mind when the traditional provocation doctrine developed, where there is an inherent disparity in strength between one party and another.⁷¹ Use of a weapon in any scenario would normally denote a higher degree of culpability, and the sentencing guidelines reflect this, creating a paradox. This will be discussed further on in the chapter.

Householders and Self Defence

A thought-provoking aspect of the lessening of a defendant’s fault due to the behaviour of their victim is the situation for householders and self-defence. S76(5A) Criminal Justice and Immigration Act 2008 provides that, from 25th April 2013, householders would be able to use disproportionate force against intruders, as long as it is not enough to be deemed grossly disproportionate.⁷² Do we extend the self-defence provisions in these circumstances because the victim is not only at fault himself, but actually committing a criminal offence? Is the death of a burglar not as wrongful as the death of an innocent person?⁷³ Usually, self-defence law values human life, and we justify deadly force when the threat is near a level of ‘kill or be killed’. This law developed in the context of male-on-male violence, as feminists are quick to point out,⁷⁴ but why is invasion of the home any more worthy of protection by disproportionate force than say, the mind from coercive control? It would be difficult to say a burglar-victim is any less at fault himself than a controlling-victim on the receiving end of fatal violence. Surely, as soon as force used can be considered to be disproportionate, there is some fault on the part of the defendant, and an acquittal does not seem in

⁶⁶ The Ministry of Justice Consultation Paper, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (2008)

⁶⁷ See for example T Storey, *Unlocking Criminal Law 6th Edition* (2017, Routledge, London) 341

⁶⁸ R McPherson, ‘Battered Woman Syndrome, Diminished Responsibility and Women Who Kill: Insights From Scottish Case Law’, (2019) 83(5) *J Crim L* 381-393, 385

⁶⁹ *Ibid*, 386

⁷⁰ www.theguardian.com/uk-news/2020/dec/16/womans-conviction-quashed-by-court-of-appeal accessed 29th June 2021. The CPS have since accepted a plea of diminished responsibility after a retrial was ordered. See also *Challen* [2019] EWCA Crim 6916

⁷¹ J Dressler, ‘Feminist (or Feminist) Reform of Self-Defense Law: Some Critical Reflections’, (2010) 93 *Marq L Rev* 1475-1494, 1479

⁷² See <https://www.cps.gov.uk/legal-guidance/self-defence-and-prevention-crime> accessed 29th June 2021

⁷³ Dressler n(21) 477

⁷⁴ Dressler n(71)1479

keeping with the roots of self-defence law – the sanctity of life.⁷⁵ This is the very reason the partial defence of loss of control’s fear of serious violence trigger is just that – a partial defence. If force used in the face of violence is excessive, the defendant retains a level of culpability, balancing the rights of the victim and defendant respectively. Even within the boundaries of the ill-fated forfeiture theory, some level of proportionality is warranted.⁷⁶

D’s Prior Fault, V’s Consent and the Objective Test

If we find the defendant to be at prior fault for some reason, we are reluctant to lessen blame within the courtroom. Voluntary intoxication rules are a punitive doctrine of prior fault inculcation.⁷⁷ Majewski confirmed this rule,⁷⁸ and Kingston went a step further to say our intoxicated intentions receive no lesser culpability, even if the intoxication is involuntary.⁷⁹ We also make the assumption that intoxicated mistakes are blameworthy,⁸⁰ even if they have evolved into delusional belief, and gain, we see the same pattern evolving. An obvious reluctance to restrict a defendant’s fault:

“D may be culpably responsible for his delusion, where that delusion is caused by D’s voluntary conduct and would or should have been foreseeable to him”⁸¹

Perhaps seen as a yardstick used to lessen fault by speculating on the actions of any member of the public in D’s circumstances, the objective test is also worthy of note in this context, particularly for the partial defence of loss of control. The defence enquires as to whether:

“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”⁸²

In the case of *Goodwin*,⁸³ Anthony Goodwin appealed his murder conviction on the basis that the judge had erred in his decision to omit loss of control from jury consideration. This was (unsuccessfully) raised at trial as an alternative to self-defence. Goodwin had killed his seventy-five year old friend and neighbour during an altercation involving a hammer. Forensic evidence had shown the victim was at some point attacked whilst lying on the ground for at least eighteen hammer blows.⁸⁴ The trial judge said Goodwin had remained in control, despite the frightening circumstances of the victim initially coming towards him with the hammer.⁸⁵ Interestingly, the court of appeal stated, dismissing the appeal, that loss of control was lost and there was evidence of a qualifying trigger in this case, but it would fail on the objective test – the victim was more than ten years older than Goodwin, in poor health and overweight (and also lying on the ground for the most substantial part of the attack).

This objective assessment of the actions of the defendant is intrinsically linked to our concept of fault and blame. How do we blame a person for their conduct, if we too might have acted as they did in

⁷⁵ C Elliott, ‘Interpreting the Contours of Self-Defence Within the Boundaries of the Rule of Law, the Common Law and Human Rights’, (2015) 79(5) *J Crim L* 330-343, 337

⁷⁶ *Ibid*, 339

⁷⁷ JJ Child, HS Crombag, GR Sullivan, ‘Defending the Delusional, the Irrational, and the Dangerous’, (2020) 4 *Crim L R* 306-324, 311

⁷⁸ *Majewski* (1076) UKHL 2

⁷⁹ *Kingston* (1994) 3 WLR 519

⁸⁰ *O’Grady* (1987) QB 995

⁸¹ *Child et al* n(77) 307

⁸² Coroners and Justice Act 2009, s54(1)(c)

⁸³ *Goodwin* (Anthony Gerard) [2018] EWCA Crim 2287

⁸⁴ *Ibid* [9]

⁸⁵ *Ibid* [25]

the given situation? If a jury can relate to the circumstances the defendant has dealt with or can at least appreciate them, culpability shifts and lessens. Perhaps we lessen a defendant's fault by shifting some blame to the circumstances, rather than the victim. This may be a much more valid explanation. It is questionable how much the criminal law should be used to enforce moral values,⁸⁶ and returns us to the 'justification v excuse' argument. Are we objectively asking if the defendant should have, or accepting that they should not have but partially validating their excuse?⁸⁷ This use of the objective test to gatekeep moral practices lies at the heart of the law's acceptance of excuse culture.⁸⁸ As Horder has observed, the reasonable person standard is a 'considerable virtue' of English law,⁸⁹ though it has also been suggested that the test might be replaced by asking if the defendant's behaviour showed 'culpable indifference'.⁹⁰ We seek to attribute fault by questioning the defendant's behaviour in accordance with societal expectations, coupled with the concession to human frailty.

Sentencing Guidelines

We reflect notions of fault in sentencing. The basic features of sentencing are culpability and harm. In particular, the sentencing guidelines, with lists of aggravating and mitigating factors, are the cornerstone of culpability. Unfortunately, particularly in cases of loss of control, the contradictory chasms of facts can result in difficulties. For battered women who kill, the courts have showed a willingness to accommodate partial defences to murder in recent years. However, these same mitigations are not reflected by sentencing practice.⁹¹ For example, use of a weapon, an astoundingly common feature in such cases,⁹² is an aggravating factor which gives the impression of a higher degree of culpability.⁹³ This contradiction is not helpful in assessing fault and culpability to adequately approach sentencing for battered women who kill, and can be contrasted with cases where, with equal use of the loss of control defence, not enough weight has been given to aggravating factors such as only just meeting the criteria of the qualifying triggers, requiring the Court of Appeal to step in.⁹⁴ The relationship between the sentencing guidelines and the Court of Appeal is certainly an interesting one.⁹⁵

Equally to inconsistent application, is the approach to manslaughter guidelines for all categories, with sentencing ranges varying between voluntary and involuntary manslaughter types quite significantly without correlation.⁹⁶ In such cases, a matrix of sentencing which is usually guided by both harm and culpability, culpability takes centre stage. Harm caused is unilateral – loss of life. For

⁸⁶ Storey n(64) 4

⁸⁷ Dressler n(21) 469

⁸⁸ See S Kadish, 'Excusing Crime', (1987) 75 *Cal L Rev* 257-289, 264

⁸⁹ J Horder, 'Can the Law do Without the Reasonable Person?', (2005) 55 *U. Toronto L. J.* 253-276, 254

⁹⁰ *Ibid*, 255

⁹¹ See N Wake, 'Manslaughter by Loss of Control: Sentencing Primary Victims Who Kill', (2019) 4 *Crim. L. R.* 291-314 for an excellent discussion on this matter.

⁹² Observations in the recent report by the Centre for Women's Justice: Women Who Kill – How the State Criminalises Women We Might Otherwise be Burying 2021 -

<https://www.centreforwomensjustice.org.uk/women-who-kill> accessed 29th June 2021

⁹³ <https://www.sentencingcouncil.org.uk/offences/crown-court/item/manslaughter-by-reason-of-loss-of-control/> accessed 29th June 2021

⁹⁴ See for example *Brehmer (AG's Ref)* [2021] EWCA Crim 390, where sentence was raised from 10.5 years to 13.5 years

⁹⁵ See A Ashworth, 'The Evolution of English Sentencing Guidance in 2016', (2017) 7 *Crim. L. R.* 507-520

⁹⁶ M Wasik, 'Reflections on the Manslaughter Sentencing Guidelines', (2019) *r Crim. L. R.* 315-332, 317

cases of loss of control, this leaves us questioning only those factors left – the provocative conduct by the victim and a history of abuse appearing as a mitigating feature. As Samuels has noted:

“Sentencing has become somewhat mechanistic, insensitive, not sufficiently insightful for the individual”⁹⁷

We also of course, give sentencing concessions to those who agree to admit fault early, with early guilty plea discounts for those who are willing to do this without a costly trial. This perhaps links with the ‘remorse’ mitigating factor of sentencing guidelines, but it is questionable how admitting fault can lessen blame in any respect. This only further proves that sentencing is a ‘blunt tool’ with which to assess wrongdoing.⁹⁸

Conclusion

For the most serious and heinous of crimes, a very high level of culpability is necessary – sometimes even when a compassionate motive is established:

“The law assumes that every person is a free autonomous agent who is responsible for what she does”⁹⁹

However, it is established that even murders falling short of the boundaries of partial defences may receive a more lenient sentence to reflect how we feel about fault and culpability. The previously discussed case of *Zebedee* reflected this with a reduction in sentence for murder from fourteen years to ten on account of insufficient weight being given to the defendant having become frustrated in his efforts to provide care for his elderly father.¹⁰⁰

Our sentencing guidelines, particularly for homicide offences, attempt to reflect this, though not necessarily with the most robust and comprehensive regulations. As Wasik has noted, the four strands of voluntary and involuntary manslaughter have differing minimum and maximum recommendations without any indication of reason, other than ‘reflecting existing practice’.¹⁰¹ We assume that the guidelines, and their incorporation of culpability elements, reflect fault as best we can without the stigmatic murder label.

For loss of control, the championed new partial defence replacing a failing predecessor, it has been said that whilst the courts can be seen paying attention to such distinction between excuses, justifications, and their reflection of fault, legislators have not.¹⁰² Perhaps in the courtroom, compassion for motive can cause us to excuse some wrongdoers who do not deserve it,¹⁰³ but surely excusing too many rather than too few is the lesser of two evils. We see this same paradox in cases of battered women who seek to rely on the loss of control defence in a situation she feels is ‘kill or be killed’:

“Even if she can avoid injury today, she is effectively incarcerated in the home with a violent partner, creating an ongoing danger to her”.¹⁰⁴

⁹⁷ A Samuels, ‘The Sentencing Guidelines: Reflection and Reform’, (2020) 84(3) J. Crim. L. 246-248, 246

⁹⁸ J Chalmers and F Leverick, ‘Fair Labelling in Criminal Law’, (2008) 71(2) Modern L.R. 217-246, 223

⁹⁹ Herring n(1) 6

¹⁰⁰ *Zebedee* [2012] EXCA Crim 1428

¹⁰¹ Wasik n(96) 318

¹⁰² Dressler n(25) 250

¹⁰³ J Dressler, ‘Reflections on Excusing Wrongdoers: Moral Theory, New Excuses and the Model Penal Code’, (1988) 19 Rutgers L J 671, 673

¹⁰⁴ Dressler n(71) 1480

Her decision appears to be the lesser of two evils because her tormentor is at fault, and perhaps this is why we have strived over the last thirty years to accommodate such cases within voluntary manslaughter, uncoupling the mandatory life sentence from those we deem worthy due to lessened culpability. Norrie referred to the manslaughter categories as a 'bucket shop' for killing that are seriously culpable, but not the worst kind.¹⁰⁵ Fair labelling is an issue, and the reason why we do not have less offences with fault and culpability merely dealt with at the sentencing stage.¹⁰⁶ For battered women specifically, we cannot adequately assess her culpability without exploring her reality, and loss of control has attempted to bring that into the courtroom.¹⁰⁷

¹⁰⁵ Norrie n(9) 532

¹⁰⁶ Chalmers and Leverick n(98) 218

¹⁰⁷ Clough n(30) 301