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Aligning Partial Defences to Murder with the Offence of Coercive or Controlling Behaviour

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Abstract: This article will reflect on the adoption of s. 76 Serious Crime Act 2015 which criminalises coercive or controlling behaviour in an intimate or family relationship and considers an argument for aligning partial defences to murder with it. It takes inspiration from the case of Sally Challen, granted leave to appeal her murder conviction at the Court of Appeal on 1st March 2018. Leave was granted after her lawyers successfully persuaded the court that the introduction of s. 76 Serious Crime Act 2015 amounted to fresh evidence in her defence that was unavailable at the time of her trial in 2011. Lady Justice Rafferty stated that, “It should be plainly understood that the application made today is but one step in what, it is hoped by counsel, those who instruct her and many others concerned in this case, will be a full detailed exploration of the position, based on scholarship, learning and clinical expertise, which should prevail now ... A jury, it is argued, should, with the benefit of that learning, be enabled to reach a clear settled conclusion on the basis of an understanding which, it is said, was not available to the jury in 2011.” The arguments at her appeal will seek to reduce her murder conviction to manslaughter, providing an opportunity for this article to explore the complexities of aligning the partial defences to murder with the offence of coercive or controlling behaviour.

Keywords: Coercive control, domestic violence, abuse, voluntary manslaughter

Sally Challen was convicted of murdering her husband in 2011, after unsuccessfully pleading diminished responsibility manslaughter. According to the organisation Justice for Women, Challen experienced many years of psychological torment by her husband, which would now be understood as coercive control. Indeed, such behaviours are criminalised under the Serious Crime Act 2015, s. 76 where they cause a person to fear that violence would be used against them on at least two occasions or where it adversely affects their day-to-day life. The recent adoption of the offence represents a milestone in the criminal law's recognition of the real experiences of many victims of domestic violence and was not

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available at the time of Challen's trial for murder.¹ The Court of Appeal has granted leave to appeal against the conviction, persuaded by the argument that such an 'advance in understanding amounts to fresh evidence in the same way that advancement of science such as DNA can result in the undermining of the safety of a conviction'.² The case will therefore lead the court to consider the coerced and controlled victim of domestic violence who kills their abuser in the context of partial defences to murder. The literature extensively examining the availability of partial defences to battered women who kill predates the introduction of the s. 76 offence. Consequently, the debate has focused on victims of domestic violence who fear physical violence following a sustained period of ongoing abuse characterised by violence or threats of violence.³ With the introduction of the offence, the law recognises that the lived experiences of a domestic violence victim may centre on psychological behaviours that undermine the victim's autonomy.⁴ The tactics adopted by the perpetrator may or may not include physical or sexual violence or threats of it, but nonetheless have a profound effect upon the victim's well-being. It is this aspect of the Challen case that offers a fresh opportunity to explore the operation of partial defences to murder in the context of domestic violence and it is argued that they should be interpreted as far as is possible to align with the offence, promoting a coherent and consistent legal approach. Efforts to achieve alignment could negate any urgent need to develop a specific partial defence to murder based on coercive control. However, given the unique impact of coercive and controlling behaviour, a discrete defence ought to be considered. It is fair that the vulnerability of a coerced and controlled victim by an intimate partner is consistently recognised when they enter the criminal justice system as a victim or a vulnerable defendant who has killed their abuser.

What is Coercive Control?

The concept of coercive control is championed by the sociologist Evan Stark who describes it as a pattern of behaviours intended to undermine the victim's autonomy, through the micro-regulation of everyday behaviours, leading to punishment if resisted.⁵ Stark views coercive control as "gendered" in its construction, delivery and consequences', ex-

exercised by men over women and he puts the emergence of male use of coercive and controlling strategies in intimate relationships down to equality gains in the public sphere.⁶ The gendered nature of coercive control and its consequences for identifying it mean that it 'may be hard to discern because it falls on the extreme end of a spectrum of acceptable male control over the allocation of resources and so on'.⁷ Stark acknowledges that women can achieve dominance over a male partner, albeit that this is rare, when she has an advantage such as income or social class.⁸ Vulnerability is deepened when domestic abuse intersects with other characteristics such as ethnicity, where factors such as race, language, family structures, social exclusion and immigration status 'cause multiple or intersectional discrimination which has a direct impact on BME victims' experience of violence and will inform their response to it'.⁹ Coercive control can also feature in same-sex relationships where tactics include threats to 'out' a partner, or using status in the

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community to belittle or isolate them.¹⁰ In transgender relationships, a coercive and controlling partner may use continuous and deliberate misgendering.¹¹ The range of characteristics that impact upon the vulnerability of people experiencing domestic violence is recognised in the cross-government definition.¹²

Control is maintained over the victim as the abuser uses a credible threat which has a negative consequence for resistance.¹³ This threat may have nothing to do with physical violence, but affect the victim's day-to-day activities by withholding finances or other resources and isolating her from friends and family. Dutton and Painter explain that 'as power imbalances increase in an abusive relationship, the subjugated party becomes less capable of fending for herself, and therefore perceives herself as increasingly in need of the dominator'.¹⁴ Williamson explains that the victim begins to internalise the rules as she endeavours to learn how to avoid punishment and eventually the perpetrator is able to ensure compliance by using gestures, looks or words with significance only to each other.¹⁵ As a result of experiencing coercive and controlling behaviours, a victim's psychological well-being is adversely affected, the seriousness of this varying depending upon factors such as the extent of the control and the particular tactics used, or a victim's level of resilience and coping strategies.¹⁶ The adverse effects of a sustained period of coercive control amounts to psychological trauma, making victims vulnerable as the trauma overrides the ability to control their lives and experience feelings of helplessness and terror.¹⁷ The extent of this vulnerability is reflected by studies that show victims of coercive control are at a greater risk of suicide than their non-abused counterparts.¹⁸ Aitken and Munro state that the number of suicides by female victims of domestic violence in England and Wales are 'estimated to exceed those killed by their partners or ex-partners'.¹⁹ Attempted suicides by women subject to domestic violence are five times more prevalent compared to those not subject to it.²⁰ Suicides have been conceptualised as an escape from intolerable pain and 'suicidal acts (completed or not) are understood as a cry of pain, rather than a cry for help, with suicide more likely where feelings of defeat and entrapment exist alongside beliefs that neither rescue nor escape are possible'.²¹ Clearly, there are parallels with feelings of entrapment and helplessness associated with the psychological trauma of domestic violence, coercive control and suicide.

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Growing recognition of the lived experiences of coerced and controlled victims led to a specific offence under the Serious Crime Act 2015, s.76. Our understandings of domestic violence continue to evolve and further legal changes to the definition have been posited in the government's Domestic Abuse Bill Consultation.²² However, there has been no policy debate regarding defences for domestic violence victims who commit crimes during the process of developing the offence or since. This extends to the partial defences to murder, where reforms took place with some sensitivity towards the domestic violence victim who kills.²³ These occurred prior to policy and legal understandings of coercive control and have been criticised for failing to achieve their aim.²⁴ Challen's case provides an opportunity for the judiciary to proactively interpret the partial defences to murder through an appreciation of coercive control and its effect upon victims, in so far as it is possible to do so. If this is not achieved legislative reform would be required to ensure a coherent substantive criminal law framework either through adaptations to the existing measures or the creation of a defence that corresponds with the offence. The next part will examine the case of Challen, first establishing that coercive control could have been present and then illustrating how the court's lack of awareness about the behaviours and effects of coercive control influenced the trial.

Challen and Coercive Control

The key aspects of coercive control can be summarised as: reflecting extreme examples of accepted male behaviours such as the control of financial resources; the use of credible threats which may or may not involve threats of physical violence; a victim feeling in need of the dominator; damaged psychological well-being of the victim and a high risk of suicide. Taking into consideration an outline of the life Challen experienced during her marriage provided by Justice for Women, all these elements allegedly feature in the case.²⁵ While the outline is not proven evidence, it is helpful for the task of speculating whether Challen could have been the victim of coercive control and how failing to appreciate this concept may have affected the case.

The behaviour allegedly adopted by the deceased towards Challen may present on some level in many relationships, however, when scrutinised represents extreme dominance by the deceased over her. For example, he 'demand[ed] that she did everything in the house (he was unwilling to make her a cup of tea) making passive aggressive threats by withdrawing and refusing to discuss his behaviour'.²⁶ On its own, this example seems minor and needs to be understood as part of a wider pattern of behaviour between the couple. Therefore, it is relevant that he also allegedly subjected her to financial abuse by 'spending money on himself while the money Sally earned was to purchase necessary household items'.²⁷ The distribution of household roles may appear to be part of the fabric of regular home life and where one partner takes responsibility for the division of household income such behaviour appears to be normal. However, in the context of coercive control, the behaviour is extreme and resistance exposes the victim to negative consequences, either violent or psychological. It is suggested that Challen became increasingly concerned and fearful that the deceased would, as he frequently threatened, leave her, prompting

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her to comply with his demands.²⁸ This situation displays the manner in which her need to be with her dominator was exploited by him. He is described as taunting her, making her feel like she was going mad, achieving this by deriding her for accusing him of having affairs, when he did indeed have several.²⁹ The strength of her feelings meant that she could not face life without him and had returned to the relationship feeling unable to cope, having left him. The deceased agreed to reconcile, but it is suggested he had done so on condition that she signed an agreement 'forbidding her from talking too much or smoking', a clear example of depriving her of autonomy. Faced with this behaviour, should it be accepted, Challen could have experienced the psychological trauma associated with coercive control, making her unable to control her life, giving rise to feelings of entrapment, helplessness and terror.³⁰ Finally, Challen was found before her arrest at Beachy Head, a location known for suicide.³¹ In the absence of physical violence, the court did not appreciate the significance of the ongoing tactics allegedly used by the deceased in order to control her. Had the offence of coercive control existed at the time of her trial, the relevance of such behaviours could have been presented to the court. Challen's appeal against sentence provides an indication of the extent to which the trial court considered the deceased's behaviour towards the appellant and the lack of any material appreciation during the trial regarding how that may have impacted upon her.³²

The court's outline of the facts depict a suspicious and jealous wife who had asked a neighbour to spy on her husband and uncovered his affairs by looking at his e-mail, voice messages and social media.³³ The court noted that there was 'considerable justification' for the appellant to question her husband's fidelity, although stated nothing further in regards to his behaviour towards her.³⁴ In reference to the couple's reconciliation, the court did not explain the conditions proposed by the deceased, instead stating that the appellant 'believed that he was being unfair in relation to the financial aspect of the divorce proceedings and the proposals contained in the post-nuptial agreement'.³⁵ A lack of insight is revealed by the Court of Appeal's language about the methods an abuser uses towards their victim, illustrating the importance of including expert testimony in similar future cases. The trial court and the appeal court did not consider the pattern of behaviour the deceased exposed Challen to, instead preferring a simpler narrative of a jealous wife unhappy with her husband's behaviour towards her. This ought to have been different had the behaviour she had been subjected to by her husband been scrutinised through an appreciation of what coercive control is and the impact it has on a person suffering from it within a domestic abuse relationship. As his alleged behaviours would now amount to a criminal offence, this information should be material evidence at a trial based upon the same facts and a jury may have reached a different conclusion had learning regarding coercive control been available to it.

The clear omission of any observation regarding the cumulative psychological tactics allegedly used by the deceased to control Challen by the Court of Appeal in 2012 demonstrates the strength of the

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argument made by the defence when leave to appeal was sought this year. Allowing the application, the Court of Appeal will consider whether modern knowledge of coercive con-

trol amounts to fresh evidence in accordance with Criminal Attempts Act 1968, s. 23. To highlight the advances in the criminal law since Challen's trial, the next section will reflect upon the operation and critiques of the offence of coercive or controlling behaviour under the Serious Crime Act 2015, s. 76 and the ability of the criminal justice system to recognise the vulnerability of victims subjected to this form of abuse. The section will be followed by an examination of the potential to align coercive control under the partial defences of murder, using Challen as a case study. It will be argued that for the criminal law to be coherent, defences need to reflect the policy aims of combating domestic violence embodied in the offence. Failure to do so, should lead to further legislative reform either through amendments to the existing partial defences to murder or by the creation of a specific defence for abused persons who kill.

How Coercive Control Is Criminalised?

The behaviour and the harm caused to a victim is captured under the Serious Crime Act 2015, s. 76, an offence that criminalises the repeated or continuous use of coercive or controlling behaviour of a partner or family member. The rationale of the offence was to address the failure of the existing criminal law framework to recognise the experience of many domestic violence and abuse survivors and thereby attempt to align the law with policy understandings of the issue.³⁶ While the offence can be applauded in its ambitions, some critics remain sceptical about how effective the offence is as a criminal justice response to domestic violence. Tolmie contends that the criminal justice system is not equipped to accommodate the complexities of cases involving coercive control and is concerned that a bespoke offence will in reality only be applied in extreme cases or those featuring high levels of physical abuse.³⁷ This, she fears will wrongly give the impression that very few cases involve coercive control. Walklate, Fitz-Gibbon and McCulloch raise doubts about the ability to translate clinical practice into the legal context and speculate that an offence will not lead to improved access to justice for most victims, noting that the implementation of the s. 76 offence 'has been patchy to date'.³⁸ However, Home Office data show 4,246 police recordings of the offence by the end of March 2017.³⁹ Conversely, Walklate et al do support the inclusion of coercive control in the courtroom but argue that the 'effective place for clinical understandings of, and explanations for intimate partner violence may better lie in expert testimony', for example, in homicide trials of abused women who kill, who can explain to the jury a woman's experience of abuse.⁴⁰ Certainly, introducing expert testimony about the dynamics of coercive control is essential in such circumstances, as without it cases can be built around more familiar tropes of scorned women, as occurred at Challen's trial. However, recognising coercive control as a form of criminal behaviour that causes a range of injuries to the victim offers another opportunity to include expert testimony to explain the concept to courts and can be particularly useful where the behaviours and harms are psychological.

Although such scepticism is well intended and is concerned with the experiences faced by complainants of domestic violence, there are some valid counterarguments. Without a criminal offence of coercive and controlling behaviour in the context of domestic violence police officers do

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not have the tool they need to respond to the problem. Research undertaken by Robinson, Pinchevsky and Guthrie indicates that policing in England and Wales is developing the ability to identify non-physical forms of coercive and controlling behaviour.⁴¹ Myhill and Johnson have illustrated the challenges for police officers to apply the policy definition of domestic violence as they need to consider different relationships, ages of individuals and whether they are engaging in abusive behaviour.⁴² More recently, Robinson et al have found that practitioners' recognition of coercive control is not universally poor, however, police tended to reflect a greater focus on physical violence.⁴³ The study emphasises the importance of training officers, as those who were trained were more likely to view jealousy, spying and stalking behaviours as important to evaluating the future risk of a victim.⁴⁴ Compulsory training in coercive control is advocated by Weiner who is supportive of the introduction of the s. 76 offence. Her study found that police officers need help to apply a coercive control model that is unfamiliar to their usual policing practices, as the behaviour being regulated is not straightforward. She suggests that a workable policing model of coercive control could be based on grooming, noting that '[v]ictims of coercive control are vulnerable, but not because they are weak, character-deficient, or mentally unwell. They are vulnerable because they have been groomed'.⁴⁵ Overall impact of the series of acts used by the perpetrator need to be considered by officers in their totality when understanding coercive and controlling behaviours and the affect it has on the victim. The s. 76 offence requires officers to do so, where previously the focus was on single incidents. The offence therefore provides officers with the opportunity to see that apparently trivial conduct changes its character in the context of a pattern of coercive or controlling behaviour. As stated above, the behaviour can be managed through acts which do not involve violence⁴⁶ and Herring notes that the key is the level of control rather than the level of violence.⁴⁷ Control is used as a means to an end, it is needed to bend the victim to the will of the abuser. Stark applauds the enactment of s. 76 noting that its creation covers oppressive acts in personal relationships that had no visibility before. He acknowledges that with the offence are increased expectations of the police response and advocates for necessary changes to ensure enforcement.⁴⁸

In practice, there have been a number of reported convictions for the s. 76 offence suggesting that it is receiving some recognition.⁴⁹ Most of the cases reported in the media have tended to involve a combination of physical and non-violent tactics by the perpetrator. Considered to be the first conviction under s. 76, Mohammed Anwar exercised a sustained period of coercive and controlling behaviour against the victim which included: name calling, controlling what she ate, forcing her to undertake

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exercise, spying on her in the workplace, isolating her from resources, family, friends and a number of physical attacks of a serious nature.⁵⁰ However, there is evidence that cases are being brought in the absence of physical violence, for example, Paul Playle was convicted in January 2018 after he adopted solely psychological tactics against the victim, his wife. In particular, he stalked her on line by hacking her accounts and sending messages to her family and friends. He convinced her that the culprit was her previous partner and would comfort her as she became increasingly distressed and reclusive.⁵¹ Following a jury

trial, he was sentenced to three years six months imprisonment with Judge Christine Henson sentencing stating that he used 'the most calculating and cruel behaviour'.⁵² While the number of prosecutions being brought under s. 76 overall seem low, and a greater and consistent use of the offence would be welcomed by the author, these cases reflect the progress made by the courts in its understanding of what coercive control is and the impact it can have on its victims.⁵³

Defending the Coerced and the Controlled

This appreciation of the courts towards the dynamics of coercive control appears to be limited to the offence under s. 76 and is marred by the failure to ensure that defences also include an understanding of it. Cases such as Challen's demonstrate that victims who experience psychologically focused coercive control can be denied a reduction of moral responsibility when they commit crimes as a result of being subject to it. Where a victim's autonomy is attacked, giving rise to feelings of helplessness and entrapment, they are in a position akin to a hostage situation. Midson supposes that society would not consider such victims as morally culpable for their actions arising from a kidnap or hostage situation and this should extend to those experiencing coercive control.⁵⁴ Coercive control affects moral blame and should afford a defence in the context of victims who kill their abusers.⁵⁵ Failure to do so throws 'the weight of the law behind her subjugation'.⁵⁶ Adopting conceptions of responsibility based on capacity, Midson argues that a person is only criminally responsible for their chosen actions, which they had a fair opportunity to avoid. When applied to victims who kill their abusers, it can be argued that 'their capacity for choice ... [is] eroded by coercive control' and that the fair opportunity to choose the actions they take are overridden by duress.⁵⁷ In England and Wales, criminal responsibility is reduced from a charge of murder to manslaughter based on capacity issues relating to medical conditions and a loss of control. Not extending this reduction in moral responsibility to victims of domestic violence where capacity is severely affected by the behaviour of the deceased is the sign of an unfair and inconsistent criminal law framework.

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This appears to be the current state of the criminal law. In the context of self-defence Carline and Easteal have highlighted the contrasting public response to householders who kill their intruders compared to women who kill their abusers, arguing that the justice system should remove intrinsically unfair gendered approaches in the criminal law.⁵⁸ Loveless has commented on the 'insurmountable legal challenges facing abused women who rely on [the defence of] duress' and while there are overlaps between the trauma experienced by victims of modern slavery and the domestic violence victim, the defence under the Modern Slavery Act 2015, s. 45 does not extend to the latter.⁵⁹ Matters of gendered unfairness have long been the source of debate in respect of partial defences to murder, with defendants historically raising Battered Woman Syndrome (BWS) to support a diminished responsibility defence.⁶⁰ The unfortunate use of the term battered is significant in the context of understanding coercive control as it presents images of physical attacks, bruises and broken bones, with the presence of psychological controlling tactics and trauma-based injuries very much hidden. However, when Celia Wells noted the options of reforming the

law in respect of defences to homicide or re-interpreting it for women who kill in 1994, BWS was not solely defined by physically violent acts.⁶¹ It also included psychological tactics as stated in Walker's description where the victim is '... repeatedly subjected to forceful physical or psychological behaviour by a man in order to coerce her to do something he wants her to do without any concern for her rights ...' (own emphasis added).⁶² As discussed above, cases of coercive control may not feature any physical violence and the use of the BWS is unhelpful at communicating this aspect of the behaviour. A complete understanding of coercive control provides more details around the complex manner in which a person can be coerced and controlled and the impacts it can have on the psychological well-being of the victim.

BWS is also problematical for its direct reference to gender. Coercive control is a gendered phenomenon and the significance of applying a gendered lens to legal responses is advocated by a number of scholars.⁶³ However, a gendered approach to abuse may not be sensitive to the dynamics of all relationships and Dempsey argues that this can deny the experiences of male victims, or those in relationships outside the heterosexual model, for example families.⁶⁴ Certainly, a term such as BWS would not be applicable in cases involving all same-sex relationships which feature coercive control. That a domestic homicide could arise in a same-sex relationship is evident with a glance at the recent crime statistics revealing that there were 32 homicides carried out on a male partner or ex-partner by male defendants between April 2013 and March 2016.⁶⁵ Coercive control is common to many domestic violence relationships and has been evidenced to occur regardless of sexuality.⁶⁶ In addition, the syndrome would not extend to all family relationships, which are included within the s. 76 offence. Coercive control is therefore a broader concept than BWS and while understood as gendered it is also connected to other vulnerability characteristics. The cross-government definition of domestic violence applies regardless of

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'gender and sexuality' and the s. 76 offence adopts a gender-neutral approach that recognises perpetrators as both male and female. The BWS is therefore an insufficiently sophisticated tool to support new understandings of coercive control in the courtroom in regards to victims of domestic violence who kill their abusers.

Problems beyond the reliance of the BWS with cases involving women who kill their abusers and the application of partial defences to murder are familiar. Criticism has continued following the reforms contained in the Coroners and Justice Act 2009, which arguably fail to adequately address the domestic abuse defendant's situation.⁶⁷ Challen's case invites an opportunity to reflect on whether it is possible to align the partial defences to murder with the concept of coercive control as it is understood within the s. 76 offence. The next section will undertake an exploration of diminished responsibility and loss of control manslaughter, using the facts outlined above in relation to Sally Challen. Ultimately, it will be shown that while a sympathetic reading of the provisions through a lens of coercive control may assist some defendants who kill their abusers, it falls short of aligning with the offence of coercive control. Future legislative reform is therefore advocated in order to ensure that the government policy of addressing domestic violence in the criminal justice system is executed beyond the offence of coercive and controlling behaviour towards a suitable de-

fence of coercive control to murder. Whether such an offence should be partial or complete will require further analysis for another time.

Diminished Responsibility

Diminished responsibility became an important defence for women who killed their abusers and were able to show that they were suffering from BWS, as it proved difficult to satisfy the elements of a provocation defence.⁶⁸ Whereas loss of control manslaughter places a burden of proof on the prosecution to disprove it (Coroners and Justice Act 2009, s. 54(5)), the burden of proof falls on the defence based upon a balance of probabilities in respect of diminished responsibility (Homicide Act 1957, s.2(2)), thereby presenting a further challenge to the defendant. Challen was denied the opportunity to raise the plea of provocation and unsuccessfully resorted to the defence of diminished responsibility, on the basis she was suffering from a depressive disorder at the time of the killing.⁶⁹ It has been argued that this defence is 'inherently unsuitable' in domestic violence cases where the abused kills the abuser as it medicalises the defendant through the use of disorders like BWS and therapeutises domestic violence.⁷⁰ This concern extends to coerced and controlled victims, whether there has been the presence of physical harm or otherwise, 'victims of coercive control are vulnerable, but not ... mentally unwell'.⁷¹ Never-theless, to succeed in reducing a conviction for murder to manslaughter with a plea of diminished responsibility, the defendant must show that they had an 'abnormality of mental functioning' at the time they killed.⁷² Abused defendants like Challen must therefore construct their defence on the basis of an abnormal or 'crazy' mind, rather than presenting their experiences of abuse as key to their state of mind at the time of the killing.⁷³ This disproportionately affects women defendants as it has produced 'intelligible gendered scripts against which the behaviour of a battered woman who kills is judged'.⁷⁴

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While it is incumbent upon the defence lawyer to use the law available in the interests of their client, it is far from a satisfactory situation that the impact of coercive control upon the victim has to be fitted within this language of abnormality. The feelings of many victims of coercive control, though varied, are normal responses to the denial of their autonomy.

The diminished responsibility defence is further problematical in cases of coercive control as the abnormality must arise from a recognised medical condition. Although it provides a clearer requirement than the old form of the plea, it retains the need to establish that the abuse gave way to a 'condition', rather than what McColgan suggests would be preferable, that an abnormality should arise from a serious emotional upset.⁷⁵ Mackay and Mitchell found that contesting pleas of diminished responsibility by the prosecution increased following the implementation of Coroners and Justice Act 2009, s. 52.⁷⁶ It is therefore imperative that the defence is able to put forward evidence of coercive control by the deceased that explains the existence of a recognised condition.⁷⁷ Presenting the background to the condition will make it more difficult for the prosecution to contest the plea, although demonstrating the existence of coercive and controlling behaviour will be insufficient of itself to

settle the defence. As McColgan states in the context of physical domestic violence, 'even if diminished responsibility were to be regarded as appropriate in circumstances where women kill for fear of themselves being murdered, not every abused woman will qualify for it'.⁷⁸ Equally, not every coerced or controlled defendant will be able to demonstrate that the impact of such behaviours on them led to a recognised medical condition. Justice for Women have stated that Challen has now been diagnosed as having a dependent personality disorder which would have led to a destructive and consuming attachment to the deceased, supporting an argument that the coercive and controlling behaviour would have exacerbated this disorder.⁷⁹ This illustrates how important the emphasis is on the personal capacity of the individual defendant for this defence to succeed. However, the insistence of the diminished responsibility plea to characterise defendants, who kill their abusers as mentally unwell, detracts from the understanding and learning around the use of coercive control in domestic relationships. It works against the operation of the offence which does not require psychiatric injury, but an adverse effect on a person's day-to-day activities. It therefore, remains an 'inherently unsuitable' defence for women who kill their abusers as a result of coercive or controlling behaviours.⁸⁰

The focus on the defendant's state of mind continues as the abnormality must substantially impair the defendant's ability to do the things listed in (1A).⁸¹ These are (a) to understand the nature of D's conduct; (b) to form a rational judgment; and (c) to exercise self-control. This element of the defence is altered from the old plea operating at the time of Challen's trial and appears to be narrower. A key change is the removal of the term responsibility where the pre-2009, Homicide Act 1957, s. 2 required an abnormality of mind that impaired a person's mental responsibility.⁸² While the old plea will apply to Challen, future cases will need to satisfy the narrower limb. Arguably, the more appropriate option would be that the abnormality substantially impaired their ability to exercise self-control at the time of the killing.⁸³ Expert

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testimony would explain how the dynamics of coercive control exacerbated the defendant's abnormality of mental functioning, heightening their feelings of entrapment and loss of control over their life to satisfy this limb. Complexities around the issue of loss of self-control also arise in the context of the partial defence of loss of control manslaughter and will be explored below.

Loss of Control Manslaughter

This final section provides a precis of the key issues in relation to the loss of control manslaughter defence and coercive control using the facts of Sally Challen's case for reflection. The significance of this discussion, as with the preceding evaluation of diminished responsibility, compared with previous analyses of the defence, is that the source of provocation, the trigger for a potential loss of control stems from the deceased's psychological behaviour towards the abused defendant and a lack of physical violence or threat of it.

The defendant can raise a plea of loss of control manslaughter once the judge has determined that there is sufficient evidence, in their opinion, for a jury to reasonably conclude that the defence might apply.⁸⁴ While this is a narrower approach than applied in the context of the provocation defence, it is interesting that Challen's plea of provocation was denied by the trial judge. From the details provided in *R v Challen* [2012] 2 Cr App R (S) 20, the court did not appreciate that the deceased's behaviour amounted to provocative conduct. At Challen's forthcoming appeal hearing, the Court of Appeal should deliberate whether the judge ought to have allowed the defence had contemporary understandings of coercive control been known to it. For future cases, the pertinent question is whether coerced and controlled defendants like Challen are able to claim loss of control manslaughter. The defence will need to present evidence of the deceased's coercive and controlling behaviour, and expert testimony from professionals working with victim, survivors or perpetrators of domestic violence about the dynamics of coercive control within the context of such relationships. This will be necessary to persuade a judge that there is sufficient evidence that all elements of the defence could be proven.⁸⁵

In respect of the first limb of the defence Challen would have found it difficult to demonstrate that she had suffered a loss of control, interpreted as a sudden response to an act of provocation, with a delayed period being permitted to accommodate a slow-burn effect. This was a question to be left to the jury and limited by the proviso that 'the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation'.⁸⁶ According to the court in *R v Challen*, the final act of provocation was the discovery that he was in a relationship with another woman, when she called the last number dialled on his phone and heard a woman's voice.⁸⁷ She killed him the following day with several blows to his head with a hammer from behind.⁸⁸ Without an appreciation of the history of coercive control during the marriage, it is difficult for people outside the relationship to appreciate the emotions that Challen may have had. Her response does not look like that usually associated with a partial defence requiring a loss of control, as she carried out the killing a day after realising he was seeing another woman. While s. 54(2) removes the suddenness requirement, it is tempered by the condition in s. 54(4) that the killing was not a 'considered desire for revenge'. Edwards has raised concerns about this condition, arguing that it may ensure that premeditated killings fall under the ambit of murder, although the courts will have 'to discern between cases which are deliberate killings involving mixed inculpatory motives' which are evident in cases of coercive control and 'non-domestic cases where there was considerable planning'.⁸⁹ Where there is evidence of repeated and continuous use

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of coercive and controlling behaviours by the deceased that seriously affected the abused defendant's day-to-day activities, this ought to be presented and used to assist the jury in differentiating between the two. Although the existence of coercive control will not conclusively determine whether the specific defendant suffered a loss of control. Herring is optimistic about the statutory requirements around loss of control as he suggests they represent a 'departure from the traditional understanding' of the term, enabling the defence to be framed around 'emotions such as fear, outrage or despair' rather than anger alone.⁹⁰ Whether this optimism is well founded will require a longer period of implementation, however, if it is found to be unfulfilled, consideration of further legislative reform may be

needed in the form of a discrete defence for coerced and controlled defendants who kill. Challen's case illustrates the complexities presenting the argument that a coerced and controlled defendant lost control on account of a mixture of emotions.

Previously the loss of control had to result from any form of provocation, however following the introduction of s. 54 Coroners and Justice Act 2009, the defendant's loss of control must result from one of the stated qualifying triggers in s. 55.⁹¹ Domestic violence cases featuring physical harm or threats thereof could base the loss of control on the fear of serious violence trigger.⁹² The current criminal law framework places physical injury above psychological injury, only recognising the latter where it amounts to a psychiatric condition.⁹³ Consequently the fear trigger excludes the defendant abused by psychological coercive control, where the threats are not of physical harm, but directed at psychological injury. In Challen's situation, the credible threat was not of physical violence but of the deceased leaving her after his alleged abuse rendered her incapable of believing she could fend for herself. Repeated threats to leave and suggestions that she was making crazy accusations in the face of evidence validating her suspicions was allegedly used by the perpetrator to bend her to his will.⁹⁴ It created a fear in Challen that something terrifying would happen, a state the deceased allegedly encouraged in order to control her. Even with an appreciation of coercive control, it seems unlikely that the court would construe a fear of serious violence to extend to Challen's fear of separation from her abuser.

In the alternative, defendants in cases akin to Challen could claim that the loss of control was triggered by things said or done which under s. 55(4) (a) constitute circumstances of an extremely grave character and (b) caused D to have a justifiable sense of being wronged. Herring argues that:

properly understood domestic abuse should readily be regarded as a very serious wrong' where coercive control is a feature and 'the focus may shift away from ... [the defendant's] psychological state and on the wrongfulness of the abuse they are suffering.'⁹⁵

This is to be welcomed in the context of coercive control cases and is why the preference would be to argue cases based on this defence as opposed to diminished responsibility. Presenting expert testimony as to the existence of coercive and controlling behaviour by the deceased and showing how this amounts to circumstances of an extremely grave character would assist the court. The things said or done would not be restricted to the final single act, but the repeated and continuous behaviour experienced as a whole, addressing Edwards concern that it may be difficult to prove this limb 'where the last qualifying trigger is not in itself extremely grave'.⁹⁶ In Challen's case, this would be beneficial to counter the prosecution's narrative of a vengeful, jealous wife. The last act of provocation was the discovery of her

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husband having a relationship with another woman, a letter she left at the scene of the killing, provides further context. It read:

Richard said he would take me back if I signed a post-nuptial agreement. I said I would and we both saw solicitors yesterday. I then found out he was seeing someone and sleeping with them and had no intention of taking me back. It was all a game so he could get everything. He was going to get me to sign and then issue divorce proceedings.⁹⁷

This, against a background of coercive control provides evidence capable of satisfying s. 55(4). There is also a potential difficulty for abused defendants to demonstrate an objectively viewed justifiable sense of being wronged. The provision under s 55(4)(b) seeks to focus on the reasonableness of the abused defendant's actions rather than their psychological state. Edwards contends that, the effect is to, 'transmut[e] battered woman 'syndrome' from locating women's motive for conduct within an abnormal state of mind to situating it within a framework of reasonableness, necessity and duress'.⁹⁸ However, what amounts to a justified sense of being wronged is ultimately determined by the jury whose perception of the circumstances could very well differ from that of the defendant. Even with expert testimony to explain the dynamics of coercive control this limb would be challenging for the defence particularly where the things said or done involve psychological tactics and a lack of physical violence.

The disqualifying trigger of sexual infidelity presents cases like Challen's with a further challenge.⁹⁹ In cases where the trigger was caused by sexual infidelity, the defence is unavailable. The purpose of the provision was to prevent male defendants from arguing a loss of control upon discovery of their wife's infidelity, real or perceived. Challen was presented by the court as a jealous wife and without evidence of coercive control, defendants like Challen would be excluded from this defence. Following the decision in *R v Clinton* [2012] EWCA Crim 2 (CA), evidence of coercive control will be essential to show the wider context in which the things said or done occurred. The presence of sexual infidelity will not automatically exclude the defendant from raising the defence.

The final limb of the defence objectively considers whether the defendant exercised a normal degree of tolerance and self-restraint, given their age and sex, in the circumstances they found themselves to be in and that another person would have reacted in the same or in a similar way to D.¹⁰⁰ Had Challen been permitted to proceed with a plea of provocation, she would have needed to satisfy an objective limb that was concerned with her characteristics rather than circumstances. For the purpose of future coerced and controlled defendants, the relevance of the 'circumstances' to the defence is highly significant as it allows the background of coercive and controlling behaviour by the deceased towards the victim to be told. Such evidence would be strengthened by the inclusion of expert testimony about the dynamics of coercive control within domestic violence relationships. The inclusion of age and sex is contentious in part because it favours some characteristics over others and conflates all female reactions together obfuscating the complexity created when gender intersects with other factors such as class, race, sexuality or disability.¹⁰¹ However, Edwards contends that it has been retained not for purposes of questioning the capacity of her self-restraint, but in respect of the circumstances she has found herself in. As Leigh suggests, this can include factors such as 'the existence or not of a state of dependency which

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could be economic, emotional or psychological'.¹⁰² Sex ought to be subsumed under 'the circumstances of the defendant', although its inclusion in statute 'underscores its importance'.¹⁰³

The problem of applying this third limb to cases of coercive control such as Challen's is that it is her capacity for restraint that has been eroded due to the circumstances she has found herself to be in. The defence may raise evidence demonstrating the history of abusive behaviour used by the deceased towards the defendant to explain the 'circumstances' she was in. Expert testimony can be included to explain how that behaviour impacted upon her as a woman. But she will be judged against a woman in her situation who exercises a 'normal degree of tolerance and self-restraint' and arguably any reduction in her capacity caused by the coercive control, ought not to be included in that assessment. Challen was unable to exercise self-restraint precisely because her capacity to do so was eroded. The jury would have to be persuaded that she lost self-control, because of things said and done and that other people subjected to the types of psychological control she was, that had the capacity to exercise self-restraint would have done as she did. It is easily conceivable that many jurors would not conclude that this element of the defence could be satisfied.

Conclusion

It may be possible that defendants who kill their abusers could successfully rely on the partial defence of diminished responsibility, where expert testimony is relied upon to explain the impact coercive control can have on a person. However, it places the focus and excusatory factors on the mental state of the abused person, as opposed to the harm she suffered.¹⁰⁴ This is not aligned with the approach taken by the s. 76 offence which is constructed in a manner that requires courts to take the pattern of behaviour involved into account without also establishing that the victim has developed a medical disorder as a result of the behaviour. The threshold to apply diminished responsibility in cases of a coerced defendant is set high and will cause some defendants to be labelled a murderer, without the erosion of their capacity to choose their actions resulting in a conviction that reflects their reduced responsibility. Loss of control manslaughter may also be available to abused defendants who kill their dominator if expert testimony is introduced from those who work with victims or perpetrators of domestic violence to explain the dynamics of it. However, it is questionable whether such evidence will lead to successful pleas in difficult cases where the pattern of behaviour adopted by the deceased is predominantly based on psychological tactics and where there is no threat of physical harm. The framework of the defence readily lends itself to jury inconsistency, particularly in efforts to establish that the coerced defendant experienced a loss of control and that objectively a person in the same circumstances would have acted in the same or similar way. Much will depend on whether judges and juries are able to understand the strategies used by the deceased and the adverse effects it has upon the victim's capacity to exercise choices. The Court of Appeal's forthcoming decision in Challen's case will be informative about the future of the existing partial defences to murder.

The argument that a specific defence for battered people is required to accommodate 'the unique situation of abused persons is long overdue' has been endorsed by Carline and Easteal.¹⁰⁵ Such a defence that specifically related to BWS was briefly considered and dismissed by the Law Commission during the homicide law reform consultation, because of its gender-specificity.¹⁰⁶ In developing a discrete offence that seeks to address the experiences and harm of victims coerced and controlled by a family member or intimate partner, it has become timely to raise similar discussions in respect of defences, an opportunity that the recent Domestic Abuse Bill Consultation did not take. Reflecting the language of the

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offence, a partial defence to murder based on the concept of coercive control may be more appropriate and in line with the government's focus of addressing domestic violence within the criminal justice system, than expecting the courts to interpret the existing partial defences in line with the offence. It would arguably provide an opportunity to develop a framework that increases fairness and consistency in the criminal law, particularly as it applies to the psychologically abused who kills their abuser. However, murder is an example of only one offence that can be committed by the coerced and controlled and further discussion should be undertaken about the inadequacy of general defences to accommodate abused defendants who commit crimes as a consequence of that abuse. This needs further exploration as it is unfair that these vulnerable defendants are treated as blameworthy as others with full control of their capacity-making faculties.

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¹ The use of the term domestic violence throughout this article includes all forms of domestic abuse.

² F Hamilton, 'My Mum Murdered My Dad. It Was His Fault' *The Times* 17 February 2018. <<https://www.thetimes.co.uk/article/my-mum-murdered-my-dad-it-was-his-fault-0l9hg955q>> accessed 28 August 2018.

³ A McColgan, 'In Defence of Battered Women Who Kill' (1993) 13 *Oxford Journal of Legal Studies* 508.

⁴ Section 76 applies to coercive and controlling behaviour directed at intimate partners or family members.

⁵ E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (OUP, London 2007), 5.

⁶ *Ibid* at 205, 377–8 and 130.

⁷ C Bishop and V Bettinson, 'Evidencing Domestic Violence, Including Behaviour that Falls Under the New Offence of 'Controlling or Coercive Behaviour' (2018) 22(1) *International Journal of Evidence and Proof* 3, 7.

⁸ E Stark, 'Re-presenting Battered Women: Coercive Control and the Defense of Liberty'. (2012) *Sine loco* (2012) at 5.

⁹ Sisters for Change, 'Unequal Regard, Unequal Protection: Public Authority Responses to Violence Against BME Women in England' (2017) 24. http://sistersforchange.org.uk/wp-content/uploads/2017/11/SistersForChange_UnequalRegardUnequalProtection_Nov2017_Web.pdf accessed 28 August 2018; see also, A Carline, 'Zoorah Shah: An Unusual Woman' (2005) 14(2) *Social and Legal Studies* 215.

¹⁰ C Donovan, R Barnes and C Nixon, 'The Coral Project: Exploring Abusive Behaviours in Lesbian, Gay, Bisexual and/or Transgender Relationships. Interim Report' (September 2014) at 23. <https://www2.le.ac.uk/departments/criminology/documents/coral-project-interim-report> accessed 1 October 2018.

¹¹ C Donovan and R Barnes, 'Domestic Violence and Abuse in Lesbian, Gay, Bisexual and/or Transgender (LGB and/or T) Relationships' *Sexualities*: forthcoming. First published 17 Feb 2017 on-line.

¹² Cross-government definition. <https://www.gov.uk/guidance/domestic-violence-and-abuse#domestic-violence-and-abusenew-definition> accessed 20 August 2018. Domestic violence and abuse can be directed 'between those aged 16 or over who are, or have been, intimate partners or family members regardless of gender or sexuality'.

- ¹³ MA Dutton and LA Goodman, 'Coercion in Intimate Partner Violence: Toward a New Conceptualization' (2005) 52(11–12) *Sex Roles* 743, 747.
- ¹⁴ DG. Dutton and S Painter, 'Emotional Attachments in Abusive Relationships: A Test of Traumatic Bonding Through Theory' (1993) 8 *Violence and Victims* 105, 107.
- ¹⁵ E Williamson, 'Living in the World of the Domestic Violence Perpetrator: Negotiating the Unreality of Coercive Control' (2010) 16(12) *Violence Against Women* 1412.
- ¹⁶ V Bettinson, 'Criminalising Coercive Control in Domestic Violence Cases: Should Scotland Follow the Path of England and Wales?' (2016) 3 *Crim LR* 165.
- ¹⁷ J Herman, *Trauma and Recovery* (Basic Books, New York 1997), 34.
- ¹⁸ R Aitken and V Munro, 'Domestic Abuse and Suicide: Exploring the Links with Refuge's Client Base and Work Force' (2018) *Refuge and Warwick Law School* 11. <<https://www.refuge.org.uk/wp-content/uploads/2018/07/domestic-abuse-suiciderefuge-warwick-july2018.pdf>> accessed 1 October 2018.
- ¹⁹ *Ibid* at 7. They rely on findings in S Walby, *The Cost of Domestic Violence* (Women and Equality Unit, London 2004) that show the number of suicides by female victims of domestic violence and abuse account for more than one-third of all female suicides in England and Wales.
- ²⁰ E Stark and A Flitcraft, *Women at Risk: Domestic Violence and Women's Health* (SAGE, London 1996).
- ²¹ See Aitken and Munro (n 18) at 12; and TL Weaver, JA Allen, E Hopper, ML Maglione, D McLaughlin, MA McCullough, MK Jackson, T Brewer, 'Mediators of Suicidal Ideation Within a Sheltered Sample of Raped and Battered Women' (2007) 28(5) *Health Care For Women International* 478.
- ²² HM Government, *Transforming the Response to Domestic Abuse: Government Consultation* (2018) at 13. <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/supporting_documents/Transforming%20the%20response%20to%20domestic%20abuse.pdf> accessed 1 October 2018.
- ²³ Coroners and Justice Act 2009, ss 52, 54–6.

²⁴ S Edwards, 'Loss of Self-Control: When His Anger Is Worth More than Her Fear' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility Manslaughter: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011), 79–95.

²⁵ The organisation funding Challen's appeal case.

²⁶ See <<https://www.justiceforwomen.org.uk/sally-challen-appeal/>> accessed 28 August 2018.

²⁷ Ibid.

²⁸ Challen was 15 when she met the victim, he was 22 years old. Davina James-Hanman, an expert in 'coercive control' instructed by Challen's legal team describes the effect of the control she experienced as corrosive and her entrapment in the relationship was 'so absolute that ... she was unable to cope alone and establish an identity for herself that was separate from that which she had been taught' <<http://www.thejusticegap.com/2018/02/sally-challen-appeal>> accessed 29 August 2018. See also, E Stark (n 8).

²⁹ See Justice for Women (n 26). This is typical of behaviour now popularised as 'gas lighting' a term derived from the play *Gas Light* (1938) by P Hamilton.

³⁰ See Herman (n 17). At the time of Challen's trial, the defence psychiatrist diagnosed her with depression. Battered Woman Syndrome was not raised, presumably as there were no indications of physical violence towards Challen. Since that time, she has been 'diagnosed with a dependent personality disorder which would have led to a destructive and consuming attachment to the deceased', see Justice for Women (n 26).

³¹ Editorial, 'Sally Challen guilty of murdering husband Richard with hammer' *BBC News* 23 June 2011. <<https://www.bbc.co.uk/news/uk-england-surrey-13892154>> accessed 16 August 2018.

³² *R v Challen (Georgina Sarah)* [2012] 2 Cr App R (S) 20.

³³ Ibid at para. 4.

³⁴ Ibid at para. 3.

³⁵ Ibid at para. 5.

³⁶ Home Office, 'Strengthening the Law on Domestic Abuse—A Consultation' (2014).

³⁷ J Tolmie, 'Coercive Control: To Criminalize or Not to Criminalize?' (2018) 18(1) *Criminology and Criminal Justice* 50.

³⁸ S Walklate, K Fitz-Gibbon and J McCulloch, 'Is More Law the Answer? Seeking Justice for Victims of Intimate Partner Violence Through the Reform of Legal Categories' (2018) 18(1) *Criminology and Criminal Justice* 115 at 118. Section 76 offence had only been 'used 62 times with eight of the 22 forces examined not having charged one person' in the first six months of entering into force.

³⁹ Statistical Bulletin: Domestic Abuse in England and Wales: year ending March 2017.
<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandand-wales/yearendingmarch2017#crown-prosecution-service-prosecutions-and-convictions>> accessed 22 August 2018.

⁴⁰ See Walklate and others (n 38) at 125.

⁴¹ A Robinson, MG Pinchevsky and J Guthrie, 'Under the Radar: Policing Non-Violent Domestic Abuse in the US and UK' (2016) 40(3) *International Journal of Comparative and Applied Criminal Justice* 195.

⁴² A Myhill and K Johnson, 'Police use of Discretion in Response to Domestic Violence' (2016) 16(1) *Criminology and Criminal Justice* 3.

⁴³ A Robinson, A Myhill and J Wire, 'Practitioner (Mis)Understandings of Coercive Control in England and Wales' (2018) 18(1) *Criminology and Criminal Justice* 29, 44.

⁴⁴ A Robinson, G Pinchevsky and J Guthrie, 'A Small Constellation: Risk Factors Informing Police Perceptions of Domestic Abuse' (2018) 28(2) *Policing and Society* 189.

⁴⁵ C Wiener, 'What is "Invisible in Plain Sight": Policing Coercive Control' (2017) 56(4) *The Howard Journal* 500 at 506.

⁴⁶ See DG Dutton and S Painter (n 14).

⁴⁷ J Herring, 'The Serious Wrong of Domestic Abuse and the Loss of Control Defence' in A Reed and M Bohlander (eds), *Loss of Control and Diminished Responsibility Manslaughter: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011), 73.

⁴⁸ E Stark, 'Policing Partner Abuse and the New Crime of Coercive Control in the United Kingdom' (2016) 8(4) *Family and Intimate Partner Violence Quarterly* 345.

⁴⁹ At the end of 2016, five cautions were issued and 155 defendants were prosecuted: Statistical Bulletin: Domestic Abuse in England and Wales: year ending March 2017.

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandand-wales/yearendingmarch2017#crown-prosecution-service-prosecutions-and-convictions>> accessed 22 August 2018.

⁵⁰ Reported in the Daily Mail 20 May 2016.

<<http://www.dailymail.co.uk/news/article-3599415/He-wanted-abs-huge-e-like-Kim-Kardashian-Controlling-boyfriend-forced-girlfriend-run-treadmill-showed-pictures-women-told-didn-t-look-good.html#ixzz4M74hEsl>> accessed 22 August 2018.

⁵¹ Editorial, 'Paul Playle jailed for stalking wife for two years' *BBC News*, 24 January 2018. <<http://www.bbc.co.uk/news/ukengland-sussex-42805203>> accessed 14 August 2018.

⁵² Ibid.

⁵³ The CPS Case Information System recorded 309 s. 76 offences where a prosecution commenced at magistrates' courts in the year ending March 2017 Statistical Bulletin: Domestic Abuse in England and Wales: year ending March 2017.

<<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandand-wales/yearendingmarch2017#crown-prosecution-service-prosecutions-and-convictions>> accessed 22 August 2018.

⁵⁴ B Midson, 'Coercive control and Criminal responsibility: Victims Who Kill Their Abusers' (2016) 27(4) *Criminal Law Forum* 417, 433.

⁵⁵ Ibid at 434.

⁵⁶ E Sheehy, J Stubbs and J Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' (2014) 38 *Melbourne University Law Review* 666, 695.

⁵⁷ See B Midson (n 55) at 433. Midson adopts concepts of responsibility from N Lacey, 'Space, Time and Function: Intersecting Principles of Responsibility Across the Terrain of Criminal Justice' (2007) 1 *Criminal Law and Philosophy* 233; J Dressler, 'Battered Women and Sleeping Abusers: Some Reflections' (2006) 3 *Ohio State Journal of Criminal Law* 457.

⁵⁸ A Carline and P Easteal, *Shades of Grey—Domestic and Sexual Violence Against Women* (Routledge, Oxford 2014), 134–5.

⁵⁹ J Loveless, '*R v GAC*: Battered Woman “Syndromization”' (2014) 9 *Criminal Law Review* 655, 656; N Wake, 'Human Trafficking and Modern-Day Slavery: When Victims Kill' (2017) 9 *Crim LR* 658.

⁶⁰ See A McColgan (n 3); M Burton, *Legal Responses to Domestic Violence* (Oxon: Routledge-Cavendish, 2008).

⁶¹ C Wells, 'Battered Woman Syndrome and Defences to Homicide: Where Now?' (1994) 14 *Legal Studies* 266.

⁶² L Walker, *The Battered Woman* (New York: Harper and Row, 1979), p xv.

⁶³ M Burman and O Brooks-Hay, 'Aligning Policy and Law? The Creation of a Domestic Abuse Offence Incorporating Coercive Control' (2018) 18(1) *Criminology and Criminal Justice* 67.

⁶⁴ B Dempsey, 'Gender Neutral Laws and Heterocentric Policies: 'Domestic abuse as Gender-Based abuse' and Same-Sex Couples' (2011) 15(3) *Edinburgh Law Review* 381, 390.

⁶⁵ Table 14: Statistical Bulletin: Domestic Abuse in England and Wales: year ending March 2017. <<https://www.ons.gov.uk/peoplepopulationandcommunity/crimeandjustice/bulletins/domesticabuseinenglandand-wales/yearendingmarch2017#crown-prosecution-service-prosecutions-and-convictions>> accessed 22 August 2018. There was 1 homicide of a female partner/expartner by a female defendant in the same time range.

⁶⁶ Experiences described as 'Intimate Terrorism' of LGBT participants were found in Donovan and others (n 10); C Donovan and R Barnes, 'Domestic Violence and Abuse in Lesbian, Gay, Bisexual and/or Transgender (LGB and/or T) Relationships' (2017) *Sexualities* forthcoming (First published 17 Feb 2017 on-line).

⁶⁷ S. Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (2010) 74 JCL 223.

⁶⁸ See Burton (n 60) at 74.

⁶⁹ Battered Woman Syndrome does not appear to have been explored.

⁷⁰ McColgan, 'In Defence of Battered Women Who Kill' (n 3) at 509; D Nicholson and R Sanghvi, 'Battered Women and Provocation: The Implications of *R v Ahluwalia*' (1993) Crim LR 728, 737.

⁷¹ See Weiner (n 45).

⁷² The deceased was killed prior to the amendments under s. 52 of the Coroners and Justice Act 2009 when an abnormality of mind was required.

⁷³ S Kyd, T Elliott and MA Walters, *Clarkson and Keating: Criminal Law* (9th edn, London: Sweet and Maxwell, 2017), 1081; K O'Donovan, 'Defences for Battered Women Who Kill' (1991) 18 *Journal of Law and Society* 219..

⁷⁴ See Carline and Easteal (n 58) at 141; Carline (n 9).

⁷⁵ McColgan, 'In Defence of Battered Women Who Kill' (n 3) at 513.

⁷⁶ R Mackay and B Mitchell, 'The New Diminished Responsibility Plea in Operation: Some Initial Findings' (2017) 18 Crim LR 26.

⁷⁷ This evidence did not exist at the time of Challen's trial and would represent the fresh evidence proposed in her application for leave to appeal.

⁷⁸ A McColgan, 'General Defences' in D Nicholson and L Bibbings (ed), *Feminist Perspectives on Criminal Law* (Cavendish, London 2000), 152.

⁷⁹ <<https://www.justiceforwomen.org.uk/>> (n 26).

⁸⁰ McColgan, 'In Defence of Battered Women Who Kill' (n 3) at 509.

⁸¹ Section 2 Homicide Act 1957 as amended by s. 52 Coroners and Justice Act 1957.

⁸² R MacKay, 'The New Diminished Responsibility Plea: More than Mere Modernisation?' in A Reed, M Bohlander (eds), *Loss of Control and Diminished Responsibility Manslaughter: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011), 10.

⁸³ Although they would not be excluded from the other options.

⁸⁴ Coroners and Justice Act 2009, s. 54(6).

⁸⁵ *R v Gurpinar* [2015] EWCA Crim 178.

⁸⁶ Lord Taylor CJ, *R v Ahluwalia* [1992] 4 All ER 889 at 896.

⁸⁷ *R v Challen (Georgina Sarah)* [2012] 2 Cr App R (S) 20 at para. 7.

⁸⁸ *Ibid* at para. 8.

⁸⁹ See Edwards (n 24) at 89.

⁹⁰ See Herring (n 47) at 68.

⁹¹ *Doughty* (1986) 83 Cr App R 319.

⁹² From V against D or another identified person (Coroners and Justice Act 2009, s. 55 (3)).

⁹³ *R v Dhaliwal* [2006] EWCA Crim 1139.

⁹⁴ <<https://www.justiceforwomen.org.uk>> (n 26).

⁹⁵ Herring (n 47) at 66–67.

⁹⁶ See Edwards (n 67) at 233.

⁹⁷ *R v Challen (Georgina Sarah)* [2012] 2 Cr App R (S) 20 at para. 10.

⁹⁸ Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (n 67) at 235.

⁹⁹ Coroners and Justice Act 2009, s. 55(6)(c).

¹⁰⁰ *Ibid* s. 54(1)(c).

¹⁰¹ N Cobb and A Gausden, 'Feminism, 'Typical' Women and Losing Control' in A Reed, M Bohlander (eds), *Loss of Control and Diminished Responsibility Manslaughter: Domestic, Comparative and International Perspectives* (Ashgate, Surrey, 2011), 99..

¹⁰² L Leigh, 'Two New Partial Defences to Murder' (2010) *Criminal Law and Justice Weekly* 53.

¹⁰³ Edwards, 'Anger and Fear as Justifiable Preludes for Loss of Self-Control' (n 67) at 237.

¹⁰⁴ Carline and Easteal, *Shades of Grey—Domestic and Sexual Violence Against Women* (n 58) at 140.

¹⁰⁵ *Ibid* at 152.

¹⁰⁶ Law Commission, *Partial Defences to Murder*, (2004) at 204 paras 420–4.