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Loss of Control in the Appeal Courts

G.R. Sullivan, H.S. Crombag, J.J. Child*

Abstract: The article critiques the ‘loss of self-control’ requirement within Loss of Control partial defence, investigating its meaning (legally and scientifically), as well as its theoretical purpose. We contend that the partial defence currently performs a curious and problematic role, promoting questions of self-control, that are most effectively dealt with at a post-conviction stage (i.e., at sentencing), into questions for the liability stage. This could be (perhaps best) resolved through the abolition of the mandatory life sentence for murder, and subsequent abolition of the partial defences, but it is accepted that the current political reality weighs heavily against this option. Looking for viable alternatives, we highlight the advantages of an approach that maximises discretion based on a full appraisal of potentially extenuating circumstances; before discussing how the current partial defence, including the requirement for a loss of self-control, should be interpreted to move the current law closer to this goal.

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The Coroners and Justice Act 2009, in sections 54, 55 and 56, abolished the partial defence of provocation, replacing it with the partial defence of ‘Loss of Control’. The Loss of Control defence reduces what would otherwise be a conviction for murder to a conviction for manslaughter.¹ In the briefest of terms (for the moment), to avail himself of this partial defence, the defendant (D) must produce evidence that at the time he killed his victim (V), he was reacting to something said or done which was of an extremely grave character that caused him to have a justifiable sense of being seriously wronged, or that V did something that caused D to fear serious violence from V against himself or another. Crucially, as a result of one (or a combination) of these *objective* triggers, D must provide evidence that at the time he killed V with intent to kill or cause serious bodily harm, he was in a mental state that amounted to a *subjective* loss of self-control.²

The Loss of Control defence, like its predecessor provocation, is tailored for persons of normal sensibility who have killed in stressful circumstances. Unlike raising diminished responsibility,³ another partial defence to murder, D is not arguing that he has a ‘recognised medical condition’ and an associated defect of mental functioning that lessens his responsibility for killing V. Rather, the argument on D’s behalf is that it is a reasonable possibility that a person of D’s sex and age with a normal degree of tolerance and self-restraint and in the same circumstances of D might have reacted in the same or similar way.⁴ The core requirement that D should have lost self-control at the time of killing V is therefore essentially non-technical: rather than being tied to a medical diagnosis (as with Diminished Responsibility), it is for the jury to decide on the evidence whether D’s mental state at the time he killed V is suggestive of a loss of self-control.

Reviewing its first decade in force, this article provides some general evaluation of the Loss of Control defence; with particular focus on how the subjective requirement of losing self-control has been interpreted and applied. Part 1 begins with a brief discussion of the previous defence of provocation, highlighting its failures and the ambition of reformers. In Part

¹ Thereby avoiding the mandatory life-sentence for murder. Although a life sentence can be handed down for manslaughter, the usual sentence is a specific term of years. Subject to good behaviour, only half the term will be spent in prison whereas for a prisoner serving a mandatory life sentence the minimum term of imprisonment set by the trial judge must be served in full. Beyond that point release is possible subject to approval by the Parole Board.

² The burden of disproving this partial defence falls on the prosecution, who must also prove that D intended to kill or cause V serious harm. In theory, as we discuss later, it is possible that a loss of self-control might be so profound as to be incompatible with proof of these intentions, but here the partial defence would be irrelevant.

³ Homicide Act 1957, s 2. As with Loss of Control, the terms of Diminished Responsibility were significantly amended by the Coroners and Justice Act 2009.

⁴ Coroners and Justice Act 2009, ss 54 and 55.

2, moving to its replacement in the Loss of Control defence, we explain how certain failings in the previous law have persisted; and how predictable (and predicted⁵) problems with the subjective requirement continue to undermine the effectiveness of the defence.⁶ The final two sections of the article are forward looking, but cautioned with a realistic view of that future, in which any legal changes of direction (at least for the next decade) are only likely through the appellate courts. Thus, where Part 3 identifies aspirations for reform, Part 4 discusses how something approaching those targets can be achieved through the courts. We contend that despite some positive developments in the interpretation of the Loss of Control defence in recent years, including some of the language used to define the subjective requirement, the application of the law remains faulty – with major analytical challenges (both legal and scientific), as well as normative under-inclusivity.

1. Why did provocation fail as a partial defence to murder?

Provocation was, in its essentials, accepted by the common law⁷ as a partial defence to murder for centuries.⁸ In the typical provocation scenario D was angered by something that V did (an attack, a sexual proposition, an insult, etc), and angered to an extent that D ‘was so subject to passion as to make him or her for the moment not master of his mind’.⁹ If a jury, on reviewing the facts of the case, thought it was reasonably possible that D was in such a state immediately following something said or done by V, they then had to ask themselves whether a reasonable person might too have been in such an immediately angry state if placed in such circumstances and go on to express his or her anger in the same violent way. D’s killing remained a serious wrong, but mitigation from murder to manslaughter reflected a concession to human frailty, an acceptance that others may have done the same in D’s place.

An early concern, however, was that provocation could apply too broadly. Courts are very reluctant to disallow consideration by a jury of any question reserved for the jury. The

⁵ See, in particular, A Reed and M Bohlander (eds.) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge, 2011).

⁶ The 2009 Act does not define what amounts to a loss of self-control save for stipulating that it need not happen suddenly and that any loss of self-control that is a response to sexual infidelity must be disregarded.

⁷ Provocation was given statutory recognition as a partial defence to murder by the Homicide Act 1957, s 3 (repealed): section 3 was essentially declaratory of the common law save for including words as well as acts as provocative events.

⁸ For a full account of the origins and development of provocation, see J Horder, *Provocation and Responsibility* (OUP, 2005).

⁹ *Duffy* [1949] 1 All ER 932.

effect of this reluctance in the context of provocation was that almost anything that caused D to suddenly lose his temper made it a case where provocation had to be considered by the jury. In *Doughty*,¹⁰ for example, the Court of Appeal ruled that the trial judge was wrong to withdraw provocation from the jury on the basis that no reasonable jury could find that the crying of V, a baby, could amount to legally adequate provocation. Essentially, too much latitude was given to sudden violence arising from anger.¹¹ This underscores the difficulty of using loss of self-control (as then interpreted¹²) as the basis of *any* form of excuse, even partial excuse. Loss of self-control can be very circumstantial: D might be a violent tyrant at home, yet polite and deferential at work.

The insistence on a ‘sudden and temporary’ loss of self-control made provocation both over and under inclusive.¹³ To the latter, of particular concern were cases known as battered woman syndrome (BWS) cases. In *Ahluwalia*¹⁴ and *Thornton*,¹⁵ the defendants, at separate trials, had been charged with murder after killing their respective husbands while these men were asleep, killings done to stop ongoing violent abuse. It was argued in both cases that the women were entitled to raise provocation despite what seemed, particularly on the facts of *Ahluwalia*, planned and deliberated killings. The argument for allowing provocation was that a woman suffering from BWS would experience a ‘slow burn’ reaction to abuse; a state of simmering anger culminating in a sudden eruption in circumstances when the inhibiting effects of fear had eased.¹⁶ However, despite the positive intentions behind legal acceptance of the cause and effects of BWS, it led to uncertainty because for decades a sudden and temporary loss of control was taken to be at the heart of provocation. The BWS cases also blurred the line between provocation and diminished responsibility by allowing a psychological syndrome

¹⁰ (1986) 83 Cr App R 260.

¹¹ G.R. Sullivan, ‘Anger and Excuse: Reassessing Provocation’ (1993) 13(3) OJLS 380.

¹² We discuss alternative interpretations of loss of self-control later.

¹³ ‘[A] sudden and temporary loss of self-control is of the essence of provocation.’: *Duffy* [1949] 1 All ER 932 (Devlin J). As was the case in *Ibrams* (1981) 74 Cr App R 154, persons with much diminished culpability would be denied any mitigation because their reaction was often too delayed.

¹⁴ [1992] 4 All ER 889.

¹⁵ [1992] 1 All ER 306.

¹⁶ In *Ahluwalia* the Court of Appeal was receptive to acknowledging BWS but considered the trial judge’s direction on provocation to be correct. D’s conviction was quashed on the basis that the partial defence of diminished responsibility should have been put to the jury.

(BWS) to be attributed to the reasonable woman.¹⁷ Further cases continued to blur the line between provocation and diminished responsibility.¹⁸

In view of these, and other, criticisms, it was therefore no surprise that the Law Commission undertook a project to review provocation alongside the other partial defences; or, indeed, when the Commission rejected loss of self-control as a defining element of its new version of provocation.¹⁹ The Commission's scheme, though not its rejection of loss of self-control, form the basis of the current law.

There was a lot to be said for abolishing provocation and not replacing it with anything else, and we discuss this briefly in Part 3. However, the case for abolition relies (in large part) on the removal of the mandatory sentence for murder, and, alas, for political reasons, the fixed penalty will be with us for a long time yet.²⁰ Because of that, mitigation of the fixed penalty has to be delivered by way of rules of substantive criminal law. But there is no reason why those rules should not be broadly framed and accommodating. We are not dealing with situations that require an acquittal. We are trying to identify situations where D, though killing V with intent to kill or cause serious harm, none the less, does not deserve a life sentence but typically will deserve a term of imprisonment. At the same time the rules must not let off the hook persons who do deserve to be labelled and sentenced as a murderer. The partial defence of provocation failed to do this: it excluded persons who did not deserve a life sentence yet included persons who did deserve a life sentence.

2. Why does Loss of Control fail as a partial defence to murder?

The essential task of the current partial defence Loss of Control is still the same as the old defence of provocation, to identify persons who are not pleading diminished responsibility or

¹⁷ D. Nicolson and R. Sanghvi, 'Battered Women and Provocation: the implications of *R v Ahluwalia*' [1993] Crim LR 78. In favour of the approach in these cases it was argued that BWS was not a mental abnormality within the meaning of section 2 of the Homicide Act 1957, but a condition that would affect women of normal temperament and stability if subjected to sustained abuse.

¹⁸ It was well settled that while idiosyncrasies of D could be referenced to explain why D found V's conduct so offensive (eg mockery of an addiction) D's reaction to the conduct of V's had to be judged against the standard of a reasonable person of D's age and gender: *Camplin* [1978] AC 705. The House of Lords disrupted this well-established doctrine in *Smith* [2001] 1 AC 146 and was criticised for doing so by the Privy Council in *A-G for Jersey v Holley* [2005] UKPC 23.

¹⁹ Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004) Part 3.

²⁰ The parliamentary process that led to the passing of the Murder (Abolition of the Death Penalty) Act 1965 was by way of Private Members Bill. To ensure the passage of the bill to statute, the sponsors gave an undertaking that all murders would be punished by life imprisonment. Since then, all Home Secretaries of whatever party have rejected any proposal to remove the mandatory sentence.

insanity, yet do not merit the label of murderer even though the defining elements of that offence are proved. Loss of Control is narrowly drawn: self-control must be lost because of (i) a 'qualifying trigger' of either a fear of serious violence from V or gravely wrong conduct which leaves D with a justifiable sense of being seriously wronged, of such character that (ii) a reasonable person in the same circumstances as D and of the same sex and age as D may have reacted in the same or similar way.

It is to be regretted that the Law Commission's recommendation as to the first of these requirements, that 'loss of self-control' should be abandoned as a constituent of any new partial defence to murder, was not followed.²¹ Essentially, under the Commission's recommended scheme, the work done by the positive subjective requirement for a loss of self-control under the old law of provocation was to be replaced with a series of negative exclusions: the core of the defence would shift to the partially excusing reasons for D's conduct, qualified only with the requirement that such conduct was *not* done in consideration of revenge or deliberately instigated by D. There was notable criticism of this recommended approach from scholars concerned that the reformed defence might apply too widely,²² and the Law Commission accepted that additional restrictions may have been required,²³ but the scheme was essentially coherent.

In retaining the requirement that D must have lost self-control, the new partial defence did not reject the exclusionary approach recommended by the Commission. Rather, the subjective positive requirement was simply overlaid as an additional (rather than alternative) approach. This has resulted in a confusion concerning the very rationale of the partial defence of Loss of Control. Loss of self-control is not given any mitigating force in its own right. That is made clear by the exclusion of sexual infidelity as a qualifying trigger.²⁴ The exclusion of this very common source of human distress must rest on the principle that losing self-control for an insufficient reason counts for nothing by way of mitigation. By contrast, killing as a response to a threat of serious violence or conduct that causes a justifiable sense of being

²¹ Law Commission, n19.

²² See, for example, R Holton and S Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27(1) OJLS 49.

²³ Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) Part 5, and particularly the options set out at para 5.32.

²⁴ Coroners and Justice Act 2009, s 55(6)(c). The exclusion of evidence of sexual infidelity is not as complete as might appear from this provision. Although sexual infidelity cannot be a qualifying trigger in its own right, it can be referenced if necessary, to explain the context and gravity of facts other than sexual infidelity that taken in full context explain why D had a justifiable sense of being seriously wronged by the conduct of V: *Clinton* [2012] EWCA Crim 2.

seriously wronged brings into play the Loss of Control defence, but only if D lost self-control at the time he killed V.²⁵ So, in two sets of similar circumstances, which in both instances amount to qualifying triggers, if D1 retained self-control when killing V1 whereas D2 had lost self-control when he killed V2, only D2 may obtain a verdict of manslaughter rather than murder.

The relationship between elements within the Loss of Control defence has therefore continued to cause problems, with the subjective loss of self-control requirement sitting uncomfortably within a scheme for which it was not designed. It also remains problematic in isolation. What exactly is a loss of self-control within the meaning of this partial defence to murder? No definition is offered in the legislative provisions, despite its rejection by the Law Commission being at least partially based on its complex and inconsistent treatment at common law; prompting the Commission to label the requirement ‘unnecessary and undesirable’.²⁶ The condition must still leave intact D’s capacity to recognise and respond to a qualifying trigger and to form an intent to kill V or cause her serious harm. The loss of control need not be sudden yet D must not act with a ‘considered desire for revenge’.²⁷ When considering ‘the circumstances of D’, any feature of D which merely bears on his general capacity for tolerance and self-restraint’ is to be disregarded.²⁸ The plea will fail if D incited V’s otherwise provocative conduct to provide an excuse to use violence.²⁹ These conditions and exceptions are to be resolved by juries under judicial direction. They are not intended as questions for experts in the science of human behaviour such as psychologists or neuroscientists. But do these conditions and exceptions make any sense to such experts? Could such experts, if they were allowed to, help with the resolution of such questions?

2.1. The Problem of self-control

Is loss of self-control a robust concept supported by neuroscience or is it just a crude folk psychological expression used to describe people in emotional states of agitation? Is there, in terms of excuses, anything special about brain states which can lead to conduct (non-scientifically) described as the conduct of a person who has lost self-control contrasted with

²⁵ Coroners and Justice Act 2009, s 54(1)(a).

²⁶ Law Commission, n23, paras 5.17-5.19.

²⁷ Coroners and Justice Act 2009, s 54(4).

²⁸ *Ibid*, s 55(3).

²⁹ *Ibid*, s 55(6)(a).

other criminogenic brain states leading to conduct which would be typically described (non-scientifically) as the product of volition or deliberation?

What loss of self-control means and what use it is as a concept requires examination. From foundational issues of free will and determinism (i.e., to what extent are we in ‘control’ of any decision or action?), through to more precise issues of degree and target. Clarity here is essential for the consistent and fair operation of the Loss of Control defence.

2.1.1. Is there any control to lose?

Arguably, there is something deeply problematic about partially excusing criminal acts arising from a mental state that a jury might find amounted to a loss of self-control, yet assuming full responsibility for conduct arising in the same or similar circumstances where D (in lay terms at least) retains self-control. Research in psychology and neuroscience teaches us that our thoughts, choices and actions, are ultimately reducible to and explained by physical activity in increasingly well-characterised, but exceptionally complex, brain circuitries; circuitries developed and tuned by genetics, maturation,³⁰ and experiential factors, to process and react to external stimuli often outside of and separate from conscious deliberation and control.³¹ It’s classic studies by Libet and others that demonstrate how even complex decisions can be detected and predicted from looking at brain function, many seconds before subjects themselves report being aware of making their decisions.³² These types of findings and the increasingly reductionist and mechanistic view of how the brain generates action and thought has led some neuroscientists (and philosophers) to argue that criminal punishment based on what is for them an unwarranted assumption of free will is unethical.³³

It may well be that at some point in the future the field of neuroscience will challenge the law on this most basic level, but the current state-of-the-art offers us little more than a

³⁰ It is well accepted that a person’s neural possibilities following birth are not exclusively determined by genetics. Brain development can be greatly influenced for better or worse by nutrition, affection and care, or the lack thereof, together with educational processes and other social interactions.

³¹ Two acclaimed works, R. Sapolsky, *Behave: The Biology of Humans at our Best and Worse* (Penguin, 2017) and R. Plomin, *Blueprint: How DNA makes us who we are* (Allen Lane, 2018) give the general reader an excellent account of recent advances in neuroscience and behavioural genetics respectively.

³² B. Libet et al. ‘Time of conscious intention to act in relation to onset of cerebral activity (readiness-potential): the unconscious initiation of a freely voluntary act’ (1983) 106 *Brain* 623; C.S. Soon et al, ‘Predicting Free Choices for Abstract Intentions’ (2013) 110 *Proceedings of the National Academy of Sciences* 6217.

³³ On the basis that no one should be punished (rather than restrained) in the absence of free choice. See D. Pereboom, *Free Will, Agency and Meaning in Life* (OUP, 2014) *passim* and R. Sapolsky, *Behave: The Biology of Humans at our Best and Worse* (Penguin, 2017) 580 *et seq.*

suggestion. We will not rehearse the arguments here, and refer the reader to works by others,³⁴ but we should note that the mere fact that thoughts and actions can be reduced to physical mechanisms in our brains, does not necessitate that such mechanisms operate in a deterministic manner to challenge our intuitions of free will. To date, the data are overwhelmingly consistent with such neural mechanisms acting in a probabilistic or stochastic manner, and little evidence suggests a level of predictability that would empirically support a deterministic view. Whether this reflects the actual workings of the brain mechanisms, or the fact that our understanding is (inevitably) incomplete and/or inaccurate is (and will likely remain) unclear.

Of course, criminal punishment will remain in any imaginable future. The vast majority of persons, even when prompted to consider a deterministic viewpoint,³⁵ believe in free-will as a matter of lived experience: if P, after long and difficult reflection finally decides on X rather than Y, she will very likely not believe you if you tell her it was always going to be X.³⁶ For the influential criminal law theorist Stephen Morse, a stable and a general belief in free will is all that is needed to justify the punishment of criminal acts.³⁷ Further, in a famous paper, Sir Peter Strawson argued most convincingly that even if one takes determinism to be true, particular kinds of conduct will still arouse strong negative reactions.³⁸ For him, these ‘reactive attitudes’ ensure the survival of adverse moral judgments leading to punitive responses. Suppose D kills V because he wanted to take his money. Even should we accept that D was neurologically predetermined to act in that way in those particular circumstances, and agree that this throws doubt on whether he is culpable because culpability requires free-will, we may, none the less, recoil from what he has done. And no one can doubt that V was gravely wronged and that public recognition of that fact is required.³⁹ Our response may well be different had D killed V while V was asleep in order to escape the regime of extreme abuse that D suffered

³⁴ A. Roskies, ‘Neuroscientific Challenges to Free Will and Responsibility’ (2006) 10 *Trends in Cognitive Sciences* 419.

³⁵ E. Nahmias et al, ‘Surveying Freedom: Folk Intuitions about Free Will and Moral Responsibility’ (2005) 18 *Philosophical Psychology* 561.

³⁶ There is often a disconnect between how things seem and what is actually the case. Taking a gentle stroll on a calm summer evening, it is impossible to believe that one is walking on a sphere hurtling through space. And, of course scientific findings may be ignored or even suppressed if going with the science would be inconvenient.

³⁷ Morse is content to affirm the primacy for criminal justice of what he terms folk psychology over science: ‘Neuroscience for all its recent astonishing discoveries raises no new challenges [regarding] the existence and source and content of meaning of morals and purpose in human life.’: ‘The Neuroscientific non-challenge to Meaning, Morals and Purpose’ in G.D. Caruso and O. Flanagan (eds) *Neuroexistentialism* (OUP, 2018) 333.

³⁸ ‘Freedom and Resentment’ in *Freedom and Resentment* (Methuen, 1974).

³⁹ A belief in determinism is entirely compatible with a policy of deterrence. Effective deterrence may require a denunciatory and punitive criminal law.

under V.⁴⁰ Whether, in each of these different scenarios, it was possible to claim that D had lost self-control is therefore deeply and variously contested.

We are not arguing here that a legal system can/should accept that all conduct is determined and treat all forms of conduct on the same footing regardless of what kind of mental state D was in at the material time. However, by way of starting point, it is useful to acknowledge the depths of theoretical conflict that lay beneath any engagement with ‘control’ as a definitional requirement. Defining a workable test of self-control for the purposes of the Loss of Control defence therefore requires us to identify and engage with a thinner model of that concept. In this manner, Morse is correct when he refers to provocation defences as ‘irreducibly normative’:⁴¹ the law must normatively construct (as opposed to metaphysically discover) an appropriate meaning. Failing to define ‘loss of self-control’ within the 2009 Act, despite its vital role within the partial defence, therefore represents the central failure of its creators.

2.1.2. How much control must be lost?

Loss of self-control is discussed variously in terms of voluntariness and volition (i.e., our ability to make choices in movement), or in terms of rationality (i.e., our ability to reflect on and regulate choices in movement), and we return to this important distinction shortly. However, whichever is preferred, it should be clear that the Loss of Control defence cannot require a *complete* loss of self-control. A complete and blameless loss of voluntariness or rationality will (and should) always result in an acquittal. The criminal law adjudicates such claims through the rules of automatism and insanity,⁴² including the much discussed ‘psychological blow’ cases where D claims to have experienced a complete loss of self-control following a psychologically traumatic event.⁴³ Where loss of self-control is required for a *partial* defence to murder, therefore, we must logically be looking for some lesser degree of impairment. The

⁴⁰ The facts of *Ibrams* (1981) 74 Cr App R 154. The Court of Appeal confirmed his conviction for murder because there was no imminent threat of violence from V, as is required for self-defence, and no sudden loss of self-control by D as was then required for the applicable partial defence of provocation. The abuse that D suffered at the hands of V was so extreme as to prompt the presiding judge, Lawton LJ to write to the Home Secretary, recommending D’s immediate release.

⁴¹ S. Morse, ‘The Irreducibly Normative Nature of Provocation/Passion’ (2009) 43 U Mich J L Reform 193.

⁴² See A.P. Simester et al, *Simester and Sullivan’s Criminal Law* (7th Ed, Hart, 2019) Chapters 18-19.

⁴³ See J. Horder, ‘Pleading Involuntary Lack of Capacity’ (1993) 53 CLJ 298.

language of lost self-control can be read to imply something total and complete, likewise the use of ‘involuntariness’ in the context of duress. In both cases this is unfortunately misleading.

A finding of lost self-control is therefore logically compatible with a finding that D retained *some* level of volition or rationality, that he continued to make certain choices in action (such as intentional killing). This recognition is important when engaging with psychological critiques of the partial defence. For example, Sarah Sorial uses evidence from social psychology (as well as additional clinical data) to highlight the control maintained by provoked defendants in the regulation of their emotions and translation into conduct.⁴⁴ For Sorial, whilst accepting that ‘intense anger can inhibit analytic processing’,⁴⁵ evidence of various levels of control mean that we should abandon any partial defence of Loss of Control and instead focus on D’s normative reasons in action. We have considerable sympathy for this conclusion, as we discuss in Part 3. But, as must be remembered, the criticism observed here is primarily one of language: a loss of self-control requirement, in application, can only be targeting a certain point on a spectrum of voluntary or rational decision making; and so although the language may imply a *complete* loss of self-control (rightly criticised as incoherent within a partial defence), this is not the basis for the legal test. Thus, although the lack of precise definition for ‘loss of self-control’ is deeply problematic (as we continue to explore), evidence suggestive of a partial impairment of self-control is not.

Targeting a certain point within a spectrum of self-control brings obvious problems for the law, but we see such problems as inevitable (where this concept is used). Indeed, this is why partial impairments are better dealt with at sentencing, where the range of disposal and punishment options provides a more appropriate mechanism for matching D’s particular blameworthiness. When dealt with at the liability stage through the partial defences, threshold analysis becomes inevitable, but it is far from clear where such thresholds should be drawn and/or how they may be recognised reliably in the manner required for legal adjudication. Courts and academics may console themselves with metaphors of elastic that is stretched to a recognisable snap,⁴⁶ but where and how we identify that snap in the human condition remains rather more elusive.

⁴⁴ S. Sorial, ‘Anger, Provocation and Loss of Self-Control: What does “Losing It” Really Mean?’ (2019) 13 Crim L & P 247.

⁴⁵ *Ibid.* 260.

⁴⁶ See R. Holton and S. Shute, ‘Self-Control in the Modern Provocation Defence’ (2007) 27(1) OJLS 49.

2.1.3. Voluntariness or rationality?

The question here is fundamental, but again left open by the absence of a statutory definition of self-control: are we looking for a partial loss of voluntariness or volitional capacity (i.e., D's ability to make choices in conduct) or are we concerned with impaired rationality (i.e., D's ability to perceive and recognise, reflect on and to adjust those choices within his broader goals and values), or perhaps some combination of both? When thinking about the design and application of law, the first of these, the voluntariness test, has an obvious appeal. Voluntariness is a familiar marker of criminal responsibility, and intuitively lends itself more easily to the threshold requirements of the liability stage. However, in line with other commentators such as Stephen Morse,⁴⁷ we do not accept that asking whether D's conduct was voluntary or involuntary is apposite. Where D kills V with intention to kill or cause grievous bodily harm, it is accurate to say that she has voluntarily chosen to do so (and if not, there would be no liability for murder). So, in this context, the only way to understand a claim of partial or impeded voluntariness would be something akin to an irresistible impulse.⁴⁸ But this is equally problematic, first because we expect reasonable people to resist urges to do harm to others,⁴⁹ and secondly, because in the absence of any mental condition with specific, identifiable symptoms, we lack the evidential tools to understand and quantify the push factors D claims to have experienced.⁵⁰

The better approach, we contend, is to examine D's impaired rationality at the time of acting. In this manner, the relevant focus (when assessing loss of self-control) is not the overpowering of D's will power or ability to resist, but D's ability to rationally consider, to self-monitor, and evaluate the wider circumstances and options available to him; to 'fly straight' to use Morse's terminology.⁵¹ Where D is faced with extreme antagonism or threat, it is coherent for him to claim that he could not process the situation (including his own responses) as he otherwise would/should have done; and this accords, as a human experience, with both the social and the neural sciences.⁵²

⁴⁷ S. Morse, 'Culpability and Control' (1994) 142 U Pa L Rev 1587, 1650.

⁴⁸ *Ibid.* 1611-1619.

⁴⁹ Usefully discussed in Sorial, n44.

⁵⁰ Morse, n47, Part 5.

⁵¹ *Ibid.* 1605.

⁵² See L. Claydon and C. Rödiger, 'Fear, Loss of Control and Cognitive Neuroscience' (2016) 22(2) European Journal of Current Legal Issues.

Indeed, we know a lot about the various consequences that extreme antagonism or threat have on human cognitive capacities that feed into our ability to rationally make decisions, to plan ahead, weigh our options and to consider the consequences of our actions or inactions. For instance, in the lab, exposure and/or experience to threats (e.g. expectancy of a painful shock; anxiety disorders) can enhance the detection and impact of potential harmful or aversive stimuli, by lowering sensory-perceptual thresholds, enhancing/biasing attention towards threatening cues (though the data are less consistent), enhancing long-term (but not short-term) memory storage, and more complex effects on executive function and decision making (e.g. increasing or decreasing risk avoidance).⁵³ Critical is that some of these effects are seen with both acute and more sustained threat experiences, whereas others vary with the type and duration of exposure/experience. But equally, a phenomenon of learned helplessness shows us that sustained or repeated exposure to unpredictable and uncontrollable threats can produce profound (pathological) changes in the behaviour of animals, leading to apathy, depression-type symptoms, and especially a severe and sustained inability to develop and/or initiate escape responses (i.e. animals learnt that ‘nothing they did mattered’).⁵⁴

The literature in these areas is vast, and modern neuroscience is revealing the underlying brain changes. But the more general point here is that a focus on rationality and the cognitive, emotional or otherwise capacities that affect our ability to regulate our decisions and actions, (and that allow us to ‘fly straight’), provides us with identifiable targets. Targets that can be operationalised and measured, and therefore better understood for legal purposes, with the help of research findings produced in the psychology and neuroscience laboratory.

Where D’s fear or anger-related impaired rationality leads to D killing V, such conduct is clearly not fully excused, it is still an expression of D’s intentions and goals. However, as a partial concession to human frailty, D’s compromised ability to rationally self-regulate does provide plausible grounds for partial mitigation; particularly where this is combined with objective tests within the Loss of Control defence (i.e. the need for a justifiable sense of being seriously wronged, and the requirement that a reasonable person in the same position might have done likewise). The difficulty with this approach, however, is that the relevant point of

⁵³ O.J. Robinson et al, ‘The Impact of Anxiety upon Cognition: Perspectives from Human Threat of Shock Studies’ (2013) 17(7) *Frontiers in Human Neuroscience* 203.

⁵⁴ S.F. Maier and M.E. Seligman, ‘Learned Helplessness at Fifty: Insights from Neuroscience’ (2016) 123 *Psychological Review* 349.

impairment along the possible spectrum remains open to interpretation and remains elusive as a fact to be demonstrated (or challenged) in evidence.

2.1.4. How is the test applied in practice?

The courts have faced an unenviable task when interpreting and applying the subjective loss of self-control requirement. A requirement without statutory definition, which leaves the fundamental uncertainties just discussed for the court to resolve; a requirement that will inevitably have a significant effect on the boundaries of the partial defence; and a requirement, it should be remembered, that the Law Commissions' recommended scheme (most of which was incorporated into the Loss of Control defence) was specifically designed to exclude. The reform also presented a confused picture on the usefulness of previous case law engaging with the meaning of self-control that might otherwise have assisted the courts. For example, by excluding the requirement that D's loss of self-control need be 'sudden and temporary', and by highlighting the need to avoid inappropriately gendered interpretations, Parliament clearly signalled their desire for a change. However, in failing to articulate the direction of this change in terms of an alternative definition, uncertainty has prevailed.⁵⁵

The first major cases to reach the Court of Appeal reflect this uncertainty. In *Clinton*,⁵⁶ the Lord Chief Justice emphasised that loss of self-control no longer needs to be sudden or temporary, and that both men and women may lose self-control, but then qualified this with the observation that 'where there is a genuine loss of control, the remaining components [of the partial defence] are likely to arise for consideration simultaneously or virtually so, at or very close to the moment when the fatal violence is used.'⁵⁷ Similarly, in *Dawes*,⁵⁸ although the court went further than *Clinton* to explicitly recognise the potential for 'cumulative impact' where D is antagonised over a period of time,⁵⁹ old tropes about the meaning of self-control quickly re-emerged when applying law to facts (for example, the observation that D was 'shocked rather than angry'⁶⁰). In this manner, both cases appear to tread carefully, avoiding

⁵⁵ For example, even within the explanatory notes for the 2009 Act, when highlighting that a loss of self-control need not be 'sudden and temporary', this is qualified by the observation that 'delay' between provocation and loss of control remains a key consideration for both judge and jury. Coroners and Justice Act 2009 Explanatory Notes, para 337.

⁵⁶ [2012] EWCA Crim 2.

⁵⁷ *Ibid*, para 9.

⁵⁸ [2013] EWCA Crim 322.

⁵⁹ *Ibid*, para 54.

⁶⁰ *Ibid*, para 64.

detailed criteria or definitions for the application of loss of self-control. But in doing so, both in analysis and application, they suggest that little may have changed from the previous law.

A major concern in early commentaries was that the loss of self-control requirement would continue to be interpreted on the basis of an imprecise folk-psychological association between lost control and extreme anger, and would continue to exclude slow-burn scenarios such as the BWS cases introduced earlier.⁶¹ There was little in the initial caselaw to displace such concerns. Indeed, in the case of *Charles*,⁶² not only did the Court of Appeal focus on D's apparent voluntariness, but they went on to highlight the nature of V's physical injuries as evidence that D had not 'gone berserk' at the time of killing.⁶³ The court here seems to take an exceptionally narrow approach to loss of self-control, equating it with the loss of physical motor control and/or coordination - an approach that was convincingly critiqued over forty years ago.⁶⁴ To the extent that courts here were engaging with the questions we raise in the preceding sections, their answers remained (at best) confused.

A potential shift can be identified from the subsequent case of *Jewell*.⁶⁵ *Jewell* is an important case because, although not involving BWS, D was intimidated and provoked over a period of weeks, and acted to kill V in the absence of any immediately provocative act. As a result, the Court of Appeal were forced to engage with the possibility of a loss of self-control due to an accumulated impact on rationality in a manner that had not been previously required under the new law. Crucially, in analysis, the Court of Appeal adopted a definition for the loss of self-control that also pointed towards an analysis of rationality over simple volitional control. For the court, loss of self-control should be equated with 'a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning.'⁶⁶

Despite this apparent shift within *Jewell* in terms of the *analysis* of self-control, however, the *application* of the law in this case (and the cases that have followed it) demonstrate (again) that little may have changed. In *Jewell* itself, for example, despite endorsing a test based on impaired 'judgment' and 'reasoning', the court went on to conclude that evidence of a 12-hour cooling off period made the judicial decision not to leave Loss of

⁶¹ See, for example, S. Edwards, 'Loss of self-control: when his anger is worth more than her fear'; B Mitchell, 'Loss of self-control under the Coroners and Justice Act 2009: oh no!' in Reed and Bohlander (eds.) n5.

⁶² [2013] EWCA Crim 1205.

⁶³ *Ibid*, para 20.

⁶⁴ A. Ashworth, 'The doctrine of provocation' (1976) 35 CLJ 292.

⁶⁵ [2014] EWCA Crim 414.

⁶⁶ *Ibid*, para 24. The definition is taken from Ormerod, *Smith and Hogan's Criminal Law* (13th Ed, 2011).

Control to the jury ‘inevitable’, ‘overwhelming’⁶⁷ and ‘unimpugnable’.⁶⁸ This was despite D’s description of feeling trapped in the circumstances,⁶⁹ and despite D displaying a ‘kamikaze’ type of behaviour that was ‘spectacularly out of character.’⁷⁰ The point here is not that Loss of Control should necessarily have succeeded on the facts, but simply to emphasise a potential instability in the application of the new loss of self-control test, and the temptation of falling back upon traditional volition-based markers. Indeed, the subsequent case of *Gurpinar* arguably takes us back to square one.⁷¹ First, the Lord Chief Justice declined to endorse the definition of loss of self-control from *Jewell* when challenged by the Crown.⁷² And second, in application of the law, the court unhelpfully focuses on voluntariness and (again) physical motor control, emphasising evidence that ‘[t]he video made it clear that Gurpinar delivered one thrusting blow with the knife which was plainly aimed at the deceased’s chest.’⁷³

On the meaning of loss of self-control, therefore, both as to target and threshold, the law remains confused and detached from scientific understandings. Correcting this, however, is far from straightforward, and we repeat our recognition of the difficult position in which the courts have been placed. As a starting point, we need further clarity as to our reformatory ambitions.

3. What does the ideal defence look like?

In many respects, the Loss of Control partial defence is an improvement from provocation. The requirement that D must have a justifiable sense of being seriously wronged arising from conduct of an extremely grave character will ensure that cases such as *Doughty*,⁷⁴ where D claimed he was ‘provoked’ by a crying child, will no longer be candidates for partial excuse.⁷⁵ It is also useful to explicitly inform judges that they can withdraw this partial defence if they consider no reasonable jury could find for D.⁷⁶ The exclusion of sexual infidelity as a qualifying

⁶⁷ *Ibid*, para 52.

⁶⁸ *Ibid*, para 55.

⁶⁹ *Ibid*, para 30.

⁷⁰ *Ibid*, para 27.

⁷¹ [2015] EWCA Crim 178.

⁷² *Ibid*, paras 19-20.

⁷³ *Ibid*, para 55.

⁷⁴ (1986) 83 Cr App R 260.

⁷⁵ Judging whether it was justifiable for D to consider V’s conduct gravely wrong may involve difficult cultural issues, but this seems unavoidable.

⁷⁶ Coroners and Justice Act 2009, s 54(6).

trigger, though not without its difficulties,⁷⁷ should mean that some of the most troubling cases of successful provocation pleas will not recur.

However, as discussed in Part 2, the continued failings of the Loss of Control defence require us to consider alternatives. We will next consider what, from a blank slate perspective, would be the ideal replacement. But, of course, there is no blank slate, the partial defence of Loss of Control is not going anywhere soon. The point of attempting to sketch a better replacement is to test the extent to which loss of self-control jurisprudence can be interpreted (particularly by the Supreme Court) towards that ideal.

3.1. Abolition of the mandatory sentence

The most obvious solution to the Loss of Control debate (though often remaining an unspoken elephant in the room⁷⁸) is the abolition of the mandatory life sentence for murder, allowing for the subsequent abolition of Loss of Control as a partial defence. All serious studies of the fixed penalty for murder have recommended its abolition,⁷⁹ principally because murder, like other serious offences, embraces conduct of different degrees of turpitude, from the slaughter of concert-goers to the reluctant killing of a loved one for reasons of compassion. In this manner, allowing trial judges' discretion when sentencing those convicted of murder would provide a benefit in its own right. A collateral benefit arising from the abolition of the fixed penalty would be to give up on trying to capture what are essentially matters of circumstantial mitigation by rules of law, and turn instead to the guided discretion of sentencing.⁸⁰

We endorse this approach as the best way forward for the law. But we do not do so naively. Even where the loss of self-control discussion moves to the sentencing stage, as we typically see in civil law jurisdictions (though across several common law jurisdictions as well),⁸¹ issues around extreme emotion and/or loss of rationality remain contested subjects of

⁷⁷ Sexual infidelity rather than sexual jealousy must assume a relationship that excludes other sexual partners. The phrase most comfortably sits with the sex act itself, but may well go beyond it. See further *Clinton* [2012] EWCA Crim 2.

⁷⁸ See A. Cornford, 'Mitigating murder' (2016) 10(1) Crim L&P 31, reviewing the Reed and Bohlander collection (n5).

⁷⁹ Report of the Advisory Council on the Penal System: *Sentences of Imprisonment* (1978) paras 235-254; House of Lords Select Committee on Murder and Life Imprisonment (Session 1988-89), HL Paper 78, paras 108-118.

⁸⁰ For proposals for a radical simplification of the law of homicide see L. Blom-Cooper and T. Morris, *Fine Lines and Distinctions: Murder, Manslaughter and the Unlawful Taking of Human Life* (Waterside Press, 2011).

⁸¹ See the extremely useful comparative chapters in Reed and Bohlander (eds.) n5.

mitigation. It is also far from self-evident that, when moved to sentencing, BWS cases will receive greater mitigation than traditional paradigms of provocation.⁸² Rather, we favour this approach because we see the sentencing stage as the best place to represent D's blame across a spectrum of rationality impairment.⁸³

3.2. A partial defence of 'extenuating circumstances'

Our preference for abolition is stated briefly in the previous section because, for the next decade at least, the potential for reform of that kind is extremely (politically) remote. In this next subsection we move to a more realistic option, though one that would still require statutory reform: an amended partial defence of 'extenuating circumstances'.⁸⁴ Alas, even here, the prospect of reform is slim.⁸⁵ However, in setting out this option we begin to see more clearly a set of ideals that might guide future interpretations of the current law, a subject we turn to directly in the sections that follow.

The idea behind the phrase, 'extenuating circumstances' is simple. On a charge of murder, it would, on appropriate facts, be left to the jury to find if it was reasonably possible that at the time that D killed V there were circumstances that made a manslaughter verdict more morally fitting than a murder verdict. Would the situation facing D when he killed V raise the possibility that a person of D's sex and age, with a normal degree of tolerance and self-restraint would or might have reacted in the same or similar way. The fact that D was voluntarily intoxicated when he killed V, and likely would not have killed but for being disinhibited, would not of itself undermine the partial defence provided a sober person might have reacted in the same or similar way. It would be for the judge to rule whether the evidence given on behalf of D might amount to extenuating circumstances. It would be for the jury to find whether they do.

This partial defence is not tied down to any psychological effect that the conduct of V had on D: in particular, there need be no evidence suggestive that D may have lost self-control when she killed V. The English and Welsh Law Commission when pondering a replacement for provocation identified the requirement for loss of self-control as the most troublesome

⁸² See, eg, the discussion of German law in Claydon and Rödiger, n52.

⁸³ I.e. avoiding the threshold analysis required at the liability stage.

⁸⁴ A version of this approach is usefully outlined in J. Spencer, 'Lifting the life sentence' (2009) Arch News 5. It is employed in Israel and the French Penal Code, art 345.

⁸⁵ An amendment based on Spencer's recommendations was put forward in the House of Lords during the passage of the 2009 Act, but it was not accepted. It was perceived (negatively) as an erosion of the mandatory life sentence. See Hansard, HL, 26 October 2009, cols 1008–9.

element of the partial defence of provocation, and we agree that moving away from such a requirement (as a substantive rule at the liability stage) would provide significant benefits for the law.

What should count as an extenuating circumstance would ultimately be left at large. Which is not to say that certain circumstances that are likely to recur in other cases cannot be set down in legislation. But there may be other exceptional circumstances which might cause persons of normal sensibility to react in the same or similar way to D. The judge should be left free to identify such cases as and when they come up. It would be for the judge to rule whether the facts adduced on behalf of D can amount to an exceptional circumstance, and if she thinks that they might, it would be for the jury to find whether they do. Unlike the current Loss of Control partial defence, there would be no restrictions on the kind of circumstances that can partially excuse. The fact that D killed his wife V because of her affair with P, and could be said to have taken revenge against V and P, would not *per se* exclude him from this proposed partial defence. As the decision in *Clinton* demonstrates,⁸⁶ courts will evade *ex ante* restrictions on what kind of circumstances can partially excuse if justice requires the whole story to be told. Judgments about culpability should be taken *ex post* on all the available evidence. As is the case at present, a judge can decide not to put this partial defence to the jury if she considers that no reasonable jury could find in favour of D on the evidence put on his behalf.

Fear of serious violence is an obvious example of an extenuating circumstance. At present such a fear must at some point lead to a loss of self-control if murder is to be reduced to manslaughter. The principal reason given for this loss of self-control requirement was the fear that without it too many gangland killings would be partially excused. But a gangland killing would only be so favoured if the judge thought that the circumstances of the killing could amount to extenuating circumstances and the jury found that such were present. Freed from the loss of self-control restraint, a broader swathe of conduct that is essentially fearful and defensive rather than aggressive would be exempted from the fixed penalty for murder. As self-defence leads to acquittal, it is understandable that it is bounded by requirements of immediacy and proportionality, but their absence should not mean that pre-emptive or excessive responses triggered by a fear of serious violence should not qualify for partial excuse. Furthermore, the exclusion of duress as a defence to murder would be tempered: there is no reason to block consideration of duress in the context of partial excuse.

⁸⁶ [2012] EWCA Crim 2.

It would be appropriate to retain within this partial defence responses to things done or said which made for circumstances of extremely grave character causing D to have a justifiable sense of being seriously wronged. But with the need for loss of self-control removed, some caution is required. Feelings of being seriously wronged may be very culturally specific. A father may be outraged that his daughter will not marry the man chosen for her, or, even more distressing perhaps, a daughter who also renounces the faith she was brought up to follow. Yet in a liberal democracy choosing who to marry or not marry, and what faith to follow if any, are fundamental freedoms. A judge should have this very much to the forefront of her mind when a killing by way of response to a culturally specific wrong is argued to be manslaughter rather than murder.

Though it is useful to specify what might make for extenuating circumstances, there should not be a closed list. The judge should be left leeway for the exceptional case, a case such as *Wallace*.⁸⁷ V ended his relationship with D. While V slept, D doused him with acid to devastating effect: V was paralysed from the neck downwards, blinded and in incessant pain. V sought and received a lawful, lethal injection in Belgium. The Court of Appeal considered it was foreseeable that V would wish his life to end. All blame was focused on D. She was ultimately convicted of an offence against the person. Had the lethal injection taken place in the UK, the doctor (or any non-doctor) would have been guilty of murder. The legal position is well established; there is no shifting of it in the foreseeable future. But one need not take any position on the sanctity of life/euthanasia debate to question whether a person acceding to a perfectly understandable request for the relief that only death can bring for certain conditions should be punished as a murderer.⁸⁸ Sanctity of life zealots can take comfort from the fact that a manslaughter verdict still concedes that euthanasia remains unlawful, yet punished in a less draconian fashion.

3.3. Looking to the courts

Recognising the limited potential for legislative reform, we find ourselves appealing to the interpretive powers of the higher courts. This is not our ideal response to the problems we have identified in the preceding sections, but, in our view, it does have the best potential for making

⁸⁷ [2018] EWCA Crim 690. A.P. Simester and G.R. Sullivan, 'Causing euthanasia' (2019) 135 LQR 21.

⁸⁸ See also *Serrano* [2006] EWCA Crim 3182: a tragic case in which D's caution when killing his terminally ill wife demonstrated that he was not out of control, and thus outside the provocation defence.

the kind of changes that are needed now. The appellate courts, and particularly the Supreme Court, have demonstrated a willingness in recent years to abandon common law precepts (even those that have been in place for decades) if it is deemed necessary for reasons of fairness and coherence across the law: examples in the criminal law include the abolition of joint enterprise in *Jogee*,⁸⁹ and the redefinition of dishonesty in *Ivey*.⁹⁰ It is a controversial trend in decision making,⁹¹ but arguably a necessary one at a time when legislative corrections to the substantive criminal law (in all but the most politically expedient areas) have become extremely rare. Indeed, the recent case of *Barton* has expanded the potential for judicial correction still further, with a specially constituted five-member Court of Appeal Criminal Division explicitly accepting the potential for Supreme Court precedent to emerge from unanimous *obiter* declarations.⁹²

In what follows, we do not contend that the court should abandon a form of liability as they did for complicity and the joint enterprise doctrine, or that they should reinterpret a settled common law concept as they did with ‘dishonesty’. Rather, in the context of the partial defence of Loss of Control, we simply encourage the court to reinterpret a defence requirement (i.e. loss of self-control) to ensure that it can be fairly and consistently applied. As we discuss in Part 4 below, we contend that such interpretation should be as expansive as possible, refocusing the test of self-control to D’s rationality rather than his volitional capacity.

4. The role of the appeal courts

An important starting point is that the current partial defence of Loss of Control is failing, as discussed in Part 2. There is a lot to be said for the new objective elements introduced via the Law Commission’s recommendations, remodelling the qualifying triggers to ensure that the defence only applies to ‘serious’ and ‘justifiable’ prompts;⁹³ introducing a new exclusion where D acts in a ‘considered desire for revenge’;⁹⁴ and (to some extent at least) clarifying the

⁸⁹ [2016] UKSC 8.

⁹⁰ *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67, confirmed in *Barton* [2020] EWCA Crim 575.

⁹¹ See, for example, F. Stark, ‘The Demise of “Parasitic Accessorial Liability”’: Substantive Judicial Law Reform, not Common Law Housekeeping’ (2016) 75 CLJ 550; and, generally, B. Krebs (Ed.), *Accessorial Liability after Jogee* (Hart, 2020).

⁹² *Barton* [2020] EWCA Crim 575, paras 93-105.

⁹³ Coroners and Justice Act 2009, s 55.

⁹⁴ Coroners and Justice Act 2009, s 54(4).

requirement that a reasonable person in D's position might have been caused to act similarly.⁹⁵ However, the positive subjective requirement that D must have lost self-control at the point of killing remains deeply confused and problematic, both in terms of clarity of target and threshold for application. Unfortunately, just as the courts struggled to interpret and apply the equivalent requirement to the old law of provocation, the first decade of the Loss of Control defence has failed to mark a significant change.

Such change is possible, however, and it is possible through reinterpretation and clarification in the appellate courts. Essentially, in line with our discussion from Parts 2 and 3, we call on the courts to abandon and reject any interpretation of self-control within the partial defence that appeals to folk psychological notions of lost volitional capacity: the scientific basis for partial volitional impairment as a mitigating factor is (at best) contested, and the evidential mechanisms available to test it in application lay in unhelpful metaphor and storytelling.⁹⁶ Rather, 'loss of self-control' should be interpreted expansively, asking whether the circumstances impaired D's ability to make considered and rational judgments in action, an impairment that made 'flying straight' improbable and induced conduct that otherwise would not have occurred. As we discussed in Part 2, this interpretation has the advantage of greater scientific validity and measurability as a source of partial mitigation. And of equal importance, in line with our normative analysis in Part 3, it has the effect of relegating loss of self-control to a secondary issue in all but the most exceptional of cases. Where D has not acted in a considered desire for revenge, and where we agree that a normal person in D's position might also have killed with intention to kill or cause serious harm, it may safely be assumed that D's rationality was impeded.

We recognise that some will see this reinterpretation as overly generous to D, and there is some evidence that broad partial defences can become equally problematic in different ways.⁹⁷ However, against this, and in line with our Part 3 discussion, two points should be emphasised. First, it must be remembered that Loss of Control is a *partial* defence: we are not therefore engaged in a search for the conditions of legitimate excuse as we see for other *complete* defences; but should rather perceive its function more in line with a mitigation of

⁹⁵ Coroners and Justice Act 2009, s 54(1)(c). Usefully discussed in *Rejmanski & Gassman* [2017] EWCA Crim 2061.

⁹⁶ See Morse, n47 and Sorial, n44.

⁹⁷ For example, see discussion of 'extreme emotional disturbance' within the US Model Penal Code, s1.12(2), in A. Reed and N. Wake, 'Anglo-American perspectives on partial defences' in Reed and Bohlander (eds.) n5. Cf, in the same volume, P. Robinson, 'Abnormal mental state mitigations or murder: the US perspective'.

sentence. Secondly, unlike a broad ‘extenuating circumstances’ partial defence, or the US focus on ‘extreme emotional disturbance’, the Loss of Control defence already includes a host of objective requirements that are capable of excluding unmerited applications.⁹⁸

Curiously, we do not believe that any great reinterpretation of the law is required to meet these desired ends. As we discussed in Part 2, the Court of Appeal in *Jewell* has already endorsed a definition of loss of self-control that is broadly in line with what is called for in this article: ‘a loss of the ability to act in accordance with considered judgment or a loss of normal powers of reasoning.’⁹⁹ This definition should be explicitly endorsed in future cases. And more importantly, the *application* of the law must be brought into line with the rationality focus that this definition centres around: questions of rational judgement do not necessarily turn on time delays before killing, and are certainly not undermined by evidence of physical control in movement. The fallacies and folk psychology of the old provocation defence must be set to one side.

In most cases, we believe that our broader rationality-based interpretation of self-control can be applied by courts with little difficulty. As explained above, we can assume a finding of loss of self-control being made whenever the other objective criteria within the partial defence are met. However, we would highlight that certain experiences of impaired rationality should be presumed outside the experience of the court, and so expert evidence may be appropriate to understand how a ‘reasonable person’ might resort to killing in those circumstances. We are chiefly referring to cases of abused women (it typically is women) who kill their abusers in circumstances of apparent calm and safety, though we would not limit it to such cases. The idea here is not to explain symptoms of a mental illness, better dealt with within the partial defence of diminished responsibility, but to explain the cumulative impact of abuse upon a ‘normal’ but rationally impaired mind.¹⁰⁰

5. Conclusion

The Loss of Control defence represents a partial concession to human frailty, it does not excuse or justify D’s choices in killing V. However, to the extent that such concession is appropriate,

⁹⁸ See, for example, *Davies-Jones* [2013] EWCA Crim 2809, discussing the revenge exclusion as a logical precursor to an investigation of D’s potential loss of self-control.

⁹⁹ [2014] EWCA Crim 414, para 24.

¹⁰⁰ See useful discussion of such evidence in Queensland in Claydon and Rödiger, n52, Part 4.

particularly in circumstances of a mandatory life sentence for murder, we believe that it should be interpreted broadly to include all cases where D's rational decision making was seriously impaired as a result of a qualifying trigger. In such cases, D should be convicted of manslaughter where his sentence can more accurately reflect the blameworthiness of his actions. Such a change would, we contend, make the law more defensible, including in its scientific credibility, and more importantly, make it fairer and more consistent in application. Such change is within the appropriate powers of the court.