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Murder, manslaughter and domestic violence

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Introduction

Taking a cue from the title of this book, this chapter is organised around the three themes murder, gender and responsibility. It begins by considering the shifting boundary between murder and manslaughter, and, contrary to common wisdom, the lack of consensus around these terms. The focus then shifts to gender, and a consideration of gendered patterns in homicide and femicide using the overlapping categories of domestic homicide and intimate partner homicides. It also demonstrates the value of more complex conceptions of gender to understanding patterns in homicide using an intersectional framework to explore the differential vulnerability of women to homicide. The third theme, responsibility, is examined by reference to legal responses to domestic homicide and intimate partner homicides for battered women. While some women have benefited from law reforms and shifts in legal practices, women who do not conform to idealised notions of what it means to be a battered woman or other 'benchmarks' continue to be disadvantaged.

Murder and manslaughter – the shifting boundary

As Ngaire Naffine (2009) has noted, criminal law theorists commonly approach murder and rape from the presumption that they are 'core crimes' for which there is agreement about the behaviour and its moral culpability. Within this body of work, murder is taken to be 'self evidently blameworthy'. However, Naffine (2009, p. 229) argues that 'actual legal norms and practices' and 'what happens to real people' demonstrate that there is 'less clarity and certainty' about these core wrongs than criminal law theorists typically assert. Empirical research demonstrates that 'persons accused of homicide exhibit a wide range of moral culpability' which demonstrates the need 'to re-examine stereotyped views of 'murderers' in which variations in culpability pass unexamined' (Wallace 1986, p.180).

What constitutes murder is not settled but has varied over time and currently differs across jurisdictions in important respects. What comes to be legally designated as murder is substantially determined by the availability and operation of defences and partial defences. These vary markedly within Australia and across similar nations. A flurry of reform over recent decades has added to this diversity as jurisdictions have adopted different responses (Fitz-Gibbon and Stubbs 2012). Even within a given jurisdiction the direction of reforms has been inconsistent over this period. For instance, reforms adopted within NSW over the past three decades have shifted the boundary between murder and manslaughter, at times contracting the category of murder by expanding manslaughter and at other times reducing

the basis for manslaughter and thus shifting cases into the category murder (Brown et al., 2015, pp.50-1). The following examples are illustrative.

In 1982, statutory reforms made the partial defence of provocation more widely available to some defendants, such as women who had been abused, by removing the requirement of 'immediacy', thus allowing a course of conduct over time and not just the final act to be recognised as provocation. At the same time judges were given some discretion to depart from the mandatory life sentence for murder where there were mitigating circumstances that diminished the offender's culpability.[1] These changes were in line with recommendations made by the NSW Taskforce on Domestic Violence (1981). In 1987 the High Court decision in *Zecevic v DPP (Vic)* ((1987) 162 CLR 645) simplified the rules for self-defence which opened up the prospect of an acquittal for some battered women, but it also narrowed the category manslaughter by abolishing the partial defence of excessive self-defence. However, in 2002 excessive self-defence was reintroduced in NSW, thus widening the category manslaughter, although this shift was made with no reference to domestic homicide. In 2014, reforms to provocation were introduced with the intention of restricting the availability of that partial defence by preventing its use in some circumstances, such as 'infidelity, leaving a relationship or a non-violent sexual advance' and imposing a new threshold of extreme provocation that requires, inter alia, that the provocative conduct must amount to a serious indictable offence (Hazzard 2014). This new threshold, together with other aspects of the reform package,[2] imposes additional hurdles for battered women and all others who are not excluded from relying on the partial defence to reduce murder to manslaughter.

Australian debates around defences to homicide has been driven largely by concerns about domestic violence, intimate partner homicide and so called homosexual advance killings. Social movement activism has been significant in highlighting some defences and some forms of homicide, often in reaction to high profile cases that have generated unease about how the law has been applied (Fitz-Gibbon and Stubbs 2012). There has been substantial criticism of provocation being available too readily in undeserving cases such as abusive men who have killed an intimate partner and men who appear to kill other men out of homophobia (Coss 2006; Howe 1997). There also has been criticism that self-defence and provocation have not been interpreted and applied in an expansive enough way to recognise the desperate circumstances faced by some battered women who kill their abuser (Sheehy, Stubbs and Tolmie 2012; Douglas 2012). However, while there may be a strong sense that there is a need to differentiate between killings that are not morally equivalent, there is less clarity around what principles should be applied and what this means for law and legal practice. Debates about whether the partial defence of provocation should be abolished, retained or modified and the way in which the debate has been resolved differently in different jurisdictions (Fitz-Gibbon 2015; Victorian Law Reform Commission 2004; Select Committee

[1] A subsequent amendment in 1989 gave judges discretion to determine sentence in all cases.

[2] For instance, while the previous law required that the provocation would cause an ordinary person *in the position of the accused* to lose self control, the new formulation of provocation omits those key words 'in the position of the accused' and thus may work against trying to educate judges and juries about the effects of domestic violence.

on the Partial Defence of Provocation, 2013) provides a prominent example of the lack of consensus on this issue. As Alan Norrie (2005: 59) has argued, there 'is an important gap between legal concepts used to judge deaths, and the moral quality of the killings … legal categories have to be teased and twisted to reflect the moral quality of killings in particular cases.'

For some scholars the answer to differentiating between killings that are not the moral equivalent lies not in different categories of homicide but in sentencing. Others oppose this approach raising concerns about 'fair labelling' (Leader-Elliott 2015). They argue that the distinction between murder (and in some jurisdictions between gradations of murder) and manslaughter is meaningful and should be retained to reflect different levels of moral blame (Crofts 2007). Consistent with the appeal to fair labelling, feminist legal scholars have long sought to have legal categories more adequately reflect women's lives (Graycar and Morgan 2002). Leaving the task to sentencing is also controversial on the basis that it detracts from the role of juries (Crofts and Loughnan 2013). In addition, the shift is predicated on the assumption that judicial officers have sufficient discretion to reflect such distinctions in sentencing and yet there are few jurisdictions in which judicial discretion to sentence in murder cases is unfettered. Murder continues to carry a mandatory life sentence in some jurisdictions (e.g. s305 *Criminal Code* 1899 (Qld)), presumptive life in others (e.g. s279(4) *Criminal Code* (WA) ; s102 *Sentencing Act* 2002 (NZ))) or is constrained by minimum terms, baselines (e.g. s5A *Sentencing Act* 1991 (Vic)) or precedent in other jurisdictions, while there is typically wide discretion in sentencing manslaughter. There has been a lack of political will to review constraints on judicial discretion in sentencing for murder in many jurisdictions (Fitz-Gibbon and Stubbs, 2012, p.323; Quick and Wells 2012, p.338) and indeed the state of Victoria has recently introduced new restrictions in the form of baseline sentences.

Gender, Homicide and Femicide

Most homicides involve men killing other men, and relatively few women resort to homicide. However, men and women kill and are killed in circumstances that are typically very different. Australian homicide researchers made early and significant contributions to recognising '[q]ualitatively distinct homicides' associated with relationships between the victim and offender and situational contexts and gendered patterns in homicide (Wallace, 1986, pp. 177-80; see also Polk, 1994). For instance, Wallace's study based on homicides in NSW from 1968-1981 found that the largest category of homicides were domestic, that is committed by family members, but female victims were almost two and half times more likely than male victims to be killed in a domestic homicide. Women almost exclusively killed family members. Men were also more likely to kill a family member, but domestic homicides made up just one-third of cases in which men killed since men killed in a wider range of circumstances (Wallace 1986, pp.72-74).

The term femicide has been important in bringing to the fore the gendered dimensions often obscured by the gender-neutral term homicide. Feminist activists introduced the term femicide to name the 'misogynist killing of women by men' (Radford 1992, p.3) and to draw

connections with other forms of sexual violence as identified by Liz Kelly's (1988) continuum of violence. However, in this chapter as elsewhere in my work, I also want to keep in sight matters in which women kill in response to domestic violence. Violence against women and girls occurs in the context of structural inequalities, but violence also reinforces gendered inequality (Kelly 2005). Just as femicides cannot be adequately understood as isolated individual events, battered women's resort to lethal violence also needs to be contextualised with reference to gendered inequality. Thus this chapter deals with both femicides and those homicides by women that arise in the context of domestic violence, with attention especially to intimate partner homicides.

Domestic homicide and intimate partner homicide as distinctive

Domestic homicide, intimate partner homicide and domestic violence related homicides are often conflated in media and public discourse. These are distinguishable but overlapping categories, although the definitions are not fixed and are often determined by laws which differ by jurisdiction. For instance, Websdale (1999, p.3) notes that in the US, definitions of domestic homicide commonly include family members but exclude boyfriend/girlfriends who do not live together. By contrast in some Australian states and territories the legal definition of domestic relationship for the purpose of domestic violence laws is very broad. In NSW, it includes current and former partners including same sex partners, current or past intimate (not necessarily sexual) relationships, other family members, residents in the same household or residential care facility and carers (*Crimes (Domestic and Personal Violence) Act* 2007 (NSW) s5). All of those relationships are included in the category domestic homicide. Domestic homicides occur across a range of relationships and in various circumstances. While homicides of children, siblings or parents are instances of domestic homicide, they are not the focus of this chapter.

Within some studies intimate partner homicides are defined as a sub-category of domestic homicide and typically include current or former intimate partners of the offender. Studies vary as to whether they include boyfriend/girlfriends, extramarital lovers or new partners and thus the category intimate partner violence might not be totally subsumed within domestic homicide. Common conceptions of domestic homicide and intimate partner homicide risk providing an incomplete account where they exclude other parties killed in the context of violence within the primary relationship, for instance, friends sheltering a victim of domestic violence or new partners of estranged spouses.

Commonly, public concern and policy has focused on domestic violence related homicides, especially those that occur in intimate partner relationships. One reflection of heightened concern about domestic violence related homicides has been the adoption of domestic violence death review mechanisms in several nations; through the identification of patterns in homicides these mechanisms are intended to prevent deaths and improve systems and services (Bugeja et al., 2013). The Domestic Violence Death Review Team (DVDRT) in NSW examined all homicide incidents for the period 2000-10 (n=833) and found an identifiable history of domestic violence in the cases of 48% of female victims and 17% of

male homicide victims. Almost 80% of females as compared with 35% of males who were killed in a domestic violence homicide were killed by an intimate partner. Males were also commonly killed by their new partner's former partner, by a son or step-son or in the case of children by a parent (DVDRT 2015, p.vii).

Intimate partner homicide

While the common term intimate partner homicide (IPH) is gender-neutral, these homicides are anything but gender-neutral. A recent systematic review of intimate partner violence in 66 countries found that the number of female victims of intimate partner homicide exceeded the number of male victims in all but two countries, and in all countries 'women's main risk of homicide is from an intimate partner' (Stockl et al., 2013, p.862 & p.863). However, consistent with evidence that homicide is shaped by social, historical and cultural norms and practices (Wallace 1986 p.177), the gender ratio between male and female victims differs between countries and over time.

The US is exceptional in that the number of men and women killed in intimate partner homicides is much closer than in other countries. One leading US study reported that the sex ratio of killing, as measured by the number of women who killed husbands per 100 men who killed their wives, was 75 whereas this ratio was typically between 30 and 40 in comparable countries (Websdale 1999, p.9 citing Wilson and Daly 1992). Stockl et al., (2013, p. 864) noted that the gender ratio in the US has changed since 1975 due to the substantial reduction in the number of male victims of intimate partner homicide, but a more modest decrease for women victims. They attributed this trend to improvements in services and support to women victims of domestic violence, providing more options to escape a violent relationship, which has reduced the number of male victims.

Gender patterns in intimate partner violence also differ according to other social categories. Rates are commonly higher among racialised groups although not uniformly so. For instance, in the US African Americans are over-represented as victims and offenders in intimate partner homicides, with a disproportionate involvement by African American women as offenders, while Latinos have low rates. Researchers differ as to how they interpret these findings pointing to different cultural values and levels of socioeconomic disadvantage in different communities and to the differential oppression experienced by African American women (Websdale 1999 pp. 6-7, p.10).

Within Australia homicide rates also differ markedly by race. While Indigenous homicide rates have declined, as have homicide rates generally, Indigenous people remain substantially over-represented as victims and offenders (Bryant and Cussen 2015, p.24). The proportion of IPH is greater where both parties are Indigenous (38%) than non-Indigenous (20%) and Indigenous victims (78% female, 44% males) are much more likely than non-Indigenous victims (64% female, 22% male) to be killed in a domestic or family violence incident (Cussen and Bryant 2015: 5). While offence rates have fallen for Indigenous women too, the proportion of women offenders is higher for Indigenous homicides (20%) than non-Indigenous homicides (12%, Cussen and Bryant 2015: 7). It is especially notable that the

Indigenous female rate exceeds the rate for non-Indigenous men, demonstrating that the commonplace assumption that male rates necessarily exceed female rates is simplistic. Research findings that Filipino women in Australia are disproportionately victims of intimate partner homicide with rates almost six times those of other women (Cunneen and Stubbs 2004) also indicate complexity in the way in which gender relations may be associated with homicide and the value of an intersectional framework (see further below).

Researchers have identified common features of intimate partner homicides. Allison Wallace's NSW study (1986) demonstrated that most intimate partner homicides are committed by men; a history of prior domestic violence by the male offender is common and many of the homicides occur at around the time of separation. An 'overwhelming' feature of these cases was 'the widespread use of violence by men to control their wives' activities' (Wallace 1986, p.179). Subsequent Victorian research confirmed these findings and drew on developing theories of masculinity (Polk, 1994). Polk and Ranson (1991, p.21) also found that men who killed an intimate partner often did so out of jealousy and sexual possession in what was often 'the ultimate attempt to exert power and control' over their partner. There were no women in their study who killed out of jealousy or possessiveness; most did so out of self-protection (Polk and Ranson, 1991 p.23); they argue that ' the role of gender is powerful, and must play a central role in any theoretical explanation' (p.24) .

The more recent study of domestic violence homicides in NSW noted above, found that among intimate partner homicides in which there was evidence of domestic violence (IPH DV), all female victims were killed by men. Two-thirds of female victims were killed by a current intimate partner, but in almost half of those cases there was evidence that separation was being considered. In the other one-third of cases, women were killed by a former partner, mostly within 3 months of the end of the relationship. Indigenous women constituted 12% of IPH DV cases, and thus were considerably over-represented as they make up less than 3% of the NSW population. Among male victims, 17% were killed by a male intimate partner and the remainder by a female intimate partner; 91% were killed by a current partner. In all but one of the cases in which a woman killed a male partner, there had been previous domestic violence by the deceased man, and in seven cases the female had also 'occasionally' used domestic violence (data supplied to the author by DVDRT). 'There were no cases where a woman was a domestic violence abuser who killed a male domestic violence victim' (DVDRT 2015, p 4). All same sex IPH DV cases involved men. Indigenous men were substantially over-represented (34%).

The largest number of domestic violence homicides that were not IPH, included other family members, most commonly children, but a substantial number included new intimate partners of the perpetrator's former partner. Dobash and Dobash (2015 p. 254) also noted the number of 'collateral murders' that occurred in the context of intimate partner conflict and the need for greater recognition of these cases in studies of intimate partner homicides.

The findings of these Australian studies are consistent with the international literature. Websdale (1999, p.26) provides a summary of common precursors to intimate partner homicide. These include:

> a history of domestic violence, which often results in the increasing entrapment of women; the separation, estrangement or divorce of the parties; obsessive possessiveness and morbid jealousy by the abusive partner; threats to commit intimate partner homicide; prior agency involvement, including police and courts; depression, the criminal history of perpetrators; and the use of alcohol or drugs or both.

Women who commit intimate partner violence commonly do so out of self preservation; unlike men, women rarely kill following separation, or on discovery (or suspicion) of infidelity (Websdale 1999, p.19). A recent US study of women who killed an intimate partner confirmed that most did so in self-defence and that women rarely killed out of sexual proprietariness (Belknap et al., 2012).

Researchers have consistently found that women are more vulnerable to IPH at the time of separation (Wallace 1986; Mahoney 1991, Stark 2007). Johnston and Hotton (2003, p. 61) reported, based on Canadian data, that women accounted for 75% of victims of homicides between intact spouses but 91% where spouses were estranged. While women were at heightened risk of IPH following separation, that was not the case for men (Johnston and Hotton, p. 70). Women who were estranged were mostly killed in their own homes; men were more likely than women to track down and kill their former partner, consistent with themes of proprietariness and jealousy (Johnston and Hotton, p.80). Similarly in their study of British murder cases, Dobash and Dobash (2015, p. 63) found that ' [m]any of the women saw separation as the ending of an intimate relationship while the men did not. Instead, these men viewed separation as inappropriate and unacceptable and as a challenge to their ongoing possession of, and authority over, their woman partner.'

Dobash and Dobash's study (2015) is notable for several reasons: they examined differences among men who committed intimate partner murders, and between these offenders and those convicted of other types of murder, and considered differences between lethal and non-lethal intimate partner violence.

Men who killed intimate female partners commonly had a history of previous violence against the woman but some did not and their killing appeared to 'come out of the blue' (Dobash and Dobash , 2015, p.64). Men with no prior convictions (approximately 25%) differed from those who had prior convictions in numerous ways. They appeared 'more conventional' - they were less likely to have had problems across the life course and were more likely to be educated and employed – but they shared other characteristics including their orientation to women. In almost half of cases there was evidence of previous violence which had gone undetected or was not acted on (Dobash and Dobash , 2015 p.81). In all, 70% of men who murdered an intimate partner had been violent in a previous relationship (p.82). For IP murderers as compared with other murderers 'issues of gender and gender relations stand out…Male authority and control over women, and particularly women partners, provides a foundation for extreme forms of possessiveness that are related to a variety of behaviors from extreme forms of control to physical and sometimes sexual

violence used against women partners '(Dobash and Dobash 2015 p.99). They found that 'men who murder women tend to "specialize" in perpetrating violence against women' (Dobash and Dobash 2015, p.249). They also found that, contrary to common belief, these were not necessarily cases of 'an incremental shift or slip from a nonlethal to a lethal outcome'. Instead men who killed intimate partners often had a 'fixed firm intention to kill' which involved a shift from the intent 'to keep or reclaim their partner to one fixed on her death' (Dobash and Dobash 2015 p.254). And, 'these men often saw themselves as victims who had been wronged and, as such, were embittered and indignant. They viewed themselves as acting in a moral universe wherein their anger and violence was appropriate and justified' (Dobash and Dobash 2015 p.254).

Explaining gendered patterns domestic homicide and intimate partner homicide

While gendered patterns in domestic homicide and intimate partner homicide are well established, there is little consensus about theoretical frameworks that might explain the patterns. Theorists commonly point to the role of gendered inequality, but differ in their approach. Websdale (1999, p.208) emphasises patriarchal relations, but also recognises that marginalised men may resort to violence to assert masculine status and control. Some theorists hypothesise that greater gender equality is likely to be associated with reduced rates of IPH of females while others propose that, at least in the short term, backlash against shifts to greater gender equality may increase the number of women killed in IPH (Eriksson and Mazerolle (2013). One commonly advanced theory draws on evolutionary biology to explain factors such as higher rates of the killing of female intimate partners after estrangement, where wives are younger, in common law unions rather than marriages, and where there are children from a women's previous relationship. Wilson and Daly (1998) contend that the patterns in IPH arise from sexual proprietariness, related to men's concerns to ensure their paternity and guard against women's infidelity or desertion; cross-cultural differences in rates are attributed to variations in social circumstances. Eriksson and Mazerolle (2013) have proposed a version of general strain theory which they argue accounts for gender patterns in IPH through examining differences in strains, emotions and coping strategies of men and women.

As noted above, gendered relations are associated with intimate partner homicide in complex ways, and thus an intersectional framework offers tools for analysis. Intersectionality has become shorthand for the interplay of gender and other social categories such as race, class, sexuality or disability and is said to address 'the most central theoretical and normative concern within feminist scholarship: namely, the acknowledgement of differences among women' (Davis 2008:70). The framework arose from challenges by African American scholars (Crenshaw 1991; Collins 2000) to the failure of mainstream feminism to reflect women's diversity and of antiracism to engage adequately with gender. While it is subject to debate and has been interpreted in different ways (Cho et al., 2013) it has significantly influenced criminological research on violence (Sokoloff and Dupont 2005; Stubbs and Tolmie 1995).

My colleague Chris Cunneen and I used an intersectional framework to research the heightened vulnerability of Filipino women to intimate partner homicide in Australia, a vulnerability that was not shared by Filipino men or by other immigrant women (Cunneen and Stubbs 2004). Most of the women had migrated to Australia as sponsored partners of Australian men who were not from the Philippines and their deaths commonly occurred in the context of domestic violence. We examined the ways in which the intersection of race, gender and the international political economy that underpins migration situate the immigrant Filipino woman such that she has limited prospects for resistance or opposition to a violent partner. This framework helped us to identify that culturally defined conceptions of male desire and racialised constructions of femininity, together with relative economic power, were at play in Australian men's pursuit of a Filipino partner, often using internet marriage marketing sites, and in their attempts to exercise control of their partners through violence. The vulnerability of these women had transnational and local, symbolic and material dimensions. Redressing that vulnerability would require not just holding men accountable for their violence within the criminal justice system, but also rethinking aspects of immigration policy, commercial marriage brokerage, improving services and supports for immigrant women and significant cultural change.

Law, responsibility and intimate partner homicide

Empirical evidence indicates a wide range of moral culpability among those who kill and complex patterns in homicides related to gender and other social relations, but also some common themes. How well does law respond to these factors in cases of intimate partner homicide? Three decades of research, activism and law reform intended to offer a fairer and more just response to cases of intimate partner homicide appear to have had some limited effects.

Activism and law reform efforts concerning intimate partner femicide have largely focused on closing down opportunities for undeserving men to access defences and thus to achieve consequent reductions in sentences for their acts. These strategies have not always been successful as recent Victorian experience with respect to a new, and now abolished, offence of 'defensive homicide' suggests (Department of Justice, Victoria 2013). However, perhaps it is not surprising that what was intended as a safety net for battered women who killed an abuser, but who could not meet the threshold for self-defence, was used mainly by men who kill other men often while intoxicated, as these are common cases (Leader-Elliott 2015). Experience in Western Australian also depicts a disturbing development. In that state 'one punch laws' were introduced to fill a perceived gap in manslaughter, resulting from the defence of accident which exists in that state, and directed towards the typical case of a young intoxicated man killing another man -- the maximum penalty is 10 years. However, an unintended consequence has been the diversity of circumstances in which cases have arisen under this provision and that 40% of cases have been against men who killed their partners or ex-partners – and in circumstances where they had a history of prior violence and abuse. The highest sentence recorded was 5 years. These were not the types of matters contemplated when the one-punch laws were drafted. That most of these matters involved a guilty plea

(Quilter, 2014, p.25 & p. 25) highlights ongoing concerns about prosecutorial discretion, a process that is largely opaque.

In contrast to efforts to restrict defences in cases of femicide, advocacy and law reform undertaken on behalf of battered women who kill has proposed various strategies to open up law to women, reshape legal categories such as self-defence to more accurately reflect women's lives, situate women's offending in its social context and re-shape what counts as evidence in legal decision making. Some reforms have been limited and risk falling short because they fail to acknowledge the complex ways in which substantive homicide law, defences, evidentiary rules and sentencing interact while others have been more comprehensive. Leader-Elliott (2015, p.166) has described the package of family violence reforms developed by the Victorian Law Reform Commission (2004) as 'among the most significant achievements in Australian criminal law reform over recent decades'. The reforms included inter alia, 'a conceptual structure for the admission of evidence of violence' and a clear statement that in family violence cases the threat need not be 'imminent'. In Queensland wide ranging evidence of the effects of domestic violence has been ruled admissible, and while this lacks a statutory basis, this development has been a significant advance (Douglas 2012).

Some jurisdictions have adopted a more expansive version of self-defence that may better accommodate the circumstances faced by some battered women (Sheehy, Stubbs and Tolmie, 2012) although in reformulating the law on self-defence Victoria has a more restrictive definition than in NSW (Leader-Elliott, 2015). In Victoria the defence is not available unless the defendant feared death or really serious injury (*Crimes Act 1958* (Vic) s332M). Queensland took the distinctive approach of introducing a new defence 'Killing for preservation in an abusive relationship' (s 304B, *Criminal Code Act 1899* (Qld) which reduces murder to manslaughter and may be available to non-confrontational killings where self defence is not in that state. However, it has attracted controversy on several grounds, including because in other states in Australia these elements would be the basis for an acquittal, and it may undermine the prospect of an acquittal based on self-defence, but in practice it seems to have limited application (Easteal and Hopkins, 2010; Edgely and Marchetti, 2011; Douglas 2012).

A common feminist strategy has been to introduce evidence of the social context of the accused person's actions, commonly through the use of expert evidence, in order to allow a fair assessment of those actions. Domestic violence is typically long-term and cumulative, and operates within and reinforces wider circumstances of inequality and social entrapment. The coercion that battered women experience cannot be realistically understood in terms of the immediate circumstances surrounding the homicide event (Stark 2007). Battered woman syndrome was introduced for this purpose. The Canada Supreme Court decision in *R v Lavallee* (1990) which was particularly influential in Australia, endorsed such an approach. Justice Ratushny, who subsequently conducted a review of self-defence cases in Canada, wrote that the significance of *Lavallee* was not in the recognition of expert evidence concerning battered woman syndrome: 'Rather, its real significance for the law of self-

defence lies in the fact that the Court took a broad view of the evidence that is relevant to the legal elements of that defence *(*Ratushny J 1997, p.26).

Battered woman syndrome has been used successfully in some cases, especially using experts fully conversant in domestic violence and its effects, but is often narrowly construed as evidence of psychological impairment with less attention social context. In the latter case it can work against the requirements of specific defences, for instance to demonstrate that the accused person's behaviour was reasonable. A major US review was critical of battered woman syndrome but affirmed the value of social context evidence in assisting the courts to assess battered women's self-defence claims fairly (US Department of Justice & US Department of Health and Human Services, 1996). However, Schneider (2000, p 147) has identified profound resistance from some criminal law scholars to the 'affirmative recognition of the significance of social context, and the necessary interrelationship between individual action, social context and social responsibility' since such recognition 'challenges fundamental assumptions about "free will" in the criminal law'.

Social context evidence that situates an accused woman's actions may be especially important for those women who don't meet idealised constructions of what it means to be 'a battered woman' and to challenge stereotypes. Naffine's (2009, p.222) criticisms of the approach to homicide taken by some criminal law theorists also takes up concerns about idealised constructions at odds with the complexities and messiness of the lives of real people including women facing desperate circumstances arising from domestic violence.

Feminist scholarship and victimology has long recognised that idealised conceptions of the victim have worked to the disadvantage of those who fall short of the ideal. For instance, Merry (2003, p. 353) noted that domestic violence victims need to 'conform to the law's definitions of rational and autonomous reactions to violence'. The ideal battered woman 'follows through, leaves the batterer, cooperates with prosecuting the case, and does not provoke violence, take drugs or drink, or abuse children' (Merry 2003, p. 353). A battered woman who kills an abuser may well fall short on some of these measures. However, the battered woman who kills faces other hurdles; she is both victim and offender and must also meet the specific legal tests related to the defence she is mounting. For instance, in the case of self-defence these commonly require that her actions were necessary and reasonable. However, evidence of the extent of the threat that she faced and the impact of the abuse upon her may well undermine her claim to self-defence; where such evidence is taken to indicate trauma and impaired psychological functioning arising from abuse, her action may be seen to be unreasonable and due to impairment. This dilemma has been at the heart of debates about Battered Woman Syndrome and its limitations (Sheehy, Stubbs and Tolmie 1992). That BWS reflects white, middle class standards to the disadvantage of other women and especially racialised women has begun to recognised (Allard 1991; Stubbs and Tolmie 1995, 2005; Douglas 2012).

The very substantial over-representation of some racialised women among battered women charged with homicide is a significant concern. Australian research has found marked differences in how Indigenous women's cases proceed, for instance, they rarely go to trial

and most plead to manslaughter (Stubbs and Tolmie 2005). While it cannot be inferred from this that they are subject to unwarranted differential treatment, some of these women appeared to have a possible case for self-defence. Indigenous women are said to be 'the most legally disadvantaged group in Australia' (Human Rights & Equal Opportunity Commission 2003, p 184) and may face additional pressures to plea bargain. While some of these women might have the prospect of going to trial on self-defence, their capacity to plea bargain is likely to be affected substantially by the range of partial defences available. In the absence of partial defences, they may face substantially longer sentences if convicted of murder.

Some proponents of the abolition of provocation have argued that battered women's interests can best be met by extending self-defence; however, not all battered women's cases will meet the criteria for self-defence, even on an expanded definition. Where partial defences don't exist, such as New Zealand, women have little or no basis for entering a guilty plea to manslaughter. New Zealand has a much higher proportion of battered women convicted of murder than Australia or Canada, and the presumption of life sentence is rarely overturned (Sheehy, Stubbs and Tolmie 2012).

In her recent book, Liz Sheehy begins by reflecting on the current position in Canada with this question: '*Lavallee* changed the law of self-defence in 1990, thereby resolving the unfairness that had confronted battered women on trial for murder. Or did it? (Sheehy 2014: 7). The initial optimism following *Lavallee* has not been borne out and there are reasons for ongoing concern. An en bloc review of cases in which women had killed abusive partners and claimed to have done so in self-defence was conducted subsequent to *Lavallee* by Ratushny J and resulted in 98 applications; all but14 were rejected, recommendations were made on behalf of seven but only accepted by government for five, none of whom were released from prison (Sheehy, 2014, p.8). Sheehy (2014, pp. 8-9) concludes that '*Lavallee*… facilitated plea bargains for manslaughter and compassionate sentences for battered women in circumstances in which they might have achieved acquittal based on self-defence had they gone to trial'. In the Australian context Rebecca Bradfield had questioned whether such outcomes constituted 'mercy but not justice' (as cited by Sheehy, 2014, p.9).

A recent review of battered women's homicide cases in Australia, Canada and New Zealand notes some positive developments. While in all three countries women were usually indicted for murder, in Australia and Canada there were few murder convictions – most commonly the women pleaded guilty to manslaughter and in Australia these were commonly based on provocation or excessive self-defence where those partial defences still exist in some jurisdictions. However, almost one-third of cases in Canada and one in five cases in Australia did not proceed or resulted in an acquittal, as compared with only 10% in New Zealand. Australia was the only country in which acquittals have been achieved in non-confrontational circumstances and there were three cases; all other acquittals involved direct confrontations more consistent with traditional constructions of self-defence.

The proportion of acquittals was not aligned in any direct way with the substantive requirements of self-defence. For instance, the acquittal in *Falls* (Unreported, SC of Qld, Applegarth J, 2-3 June 2010), which involved a non-confrontational form of self-defence,

occurred in Queensland which has one of the strictest formulations of self-defence. However, in that case witness testimony and expert evidence was effectively lead that gave a context to the accused women's actions and to her fear, as well as to domestic violence and its effects and the judge (Unreported, SC of Qld, Applegarth J, 2-3 June 2010 para 12-54-55) clearly explained that:

> [I]t doesn't matter that at the moment she shot Mr Falls in the head he didn't at that moment offer or pose any threat to her. He had assaulted her. There was the threat that there would be another one and another one and another one after that until one day something terrible happened. It might have been the next day, it might have been the next week, but the risk of death or serious injury to her was ever present.

This provides a reminder that outcomes in such cases are not simply determined by substantive law, but inter alia also reflect aspects of defence lawyering, an understanding of the complexities of domestic violence and the presentation and reception of relevant social context evidence.

Sentencing remains a concern. In previous work with Julia Tolmie we found that sentencing did not always give recognition to the context of the offending when determining the objective seriousness of the offence and the extent of the offender's culpability, and where social context was considered it was commonly transformed to individual deficit or pathology. The sentencing process also provided limited recognition of the gendered and / or raced inequalities that provide the context for offending (Stubbs and Tolmie 2015, p.203). We also raised concerns that the link between the defendant's actions and the prior violence of her abusive partner is not always given full attention at sentencing. This is especially a concern where there has not been a trial involving a formal defence like self-defence or provocation which would require consideration of the behaviour of the deceased (Stubbs and Tolmie (2005, p. 204). This is the inverse of the sentencing problem that presents in jurisdictions where provocation has been abolished and reformers ty to guard against the kinds of damaging, victim blaming narratives formerly used by abusive men when raising provocation at trial creeping in at sentencing (Freiberg, Gelb and Stewart 2015). We also found that domestic violence was frequently presented in sentencing remarks as mutual.

More recent NSW data indicates that 100% of offenders convicted of murder over the period October 2004- September 2011 received a custodial sentence and 91% of sentences were for 18 yrs or longer. This contrasted with offenders sentenced for manslaughter, 90% of whom received a custodial sentence, and 70% of these were in the range 5-9 yrs (Select Committee on the Partial Defence of Provocation, 2013, p 22). Previous research on sentences for battered women convicted of manslaughter in Australia during the period 1991-2007 identified 15 cases where women received suspended sentences or non-custodial sentences (Stubbs and Tolmie 2008). These comparisons provide some indication of the risks of going to trial for murder and the substantial role that partial defences appear to play in plea bargaining to manslaughter.

Conclusion

This chapter began with the recognition that the boundary between murder and manslaughter is shifting in response to ongoing debates about the lack of moral equivalence between different types of killings. With no agreed legal principles on which to settle these debates about the moral distinctions between murder and manslaughter, the task remains a contested, political and politicised one.

Heightened public attention to homicides in the context of domestic violence demands a response and legislative reforms, whatever else they may achieve, signal political concern. However, it is hardly novel to recognise that the outcomes of law reform are likely to be uncertain and insufficient to achieve the desired change. However, both the femicides and homicides that have been the focus of this chapter reflect not just individual actions by those people accused or the outcomes of the relationships within which they occur, but are associated with complex gender relations that have structural underpinnings. Finding just outcomes in individual cases remains important and requires shifts not just in legal rules but in legal practice and legal cultures, but preventing such homicides requires much more. In settler nations such as Australia the substantial over-representation of Indigenous people as victims and offenders in homicide should be kept in sight in developing strategies to reduce homicide that do not rely only on the criminal law.

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