RECONCEPTUALISING THE CONTOURS OF SELF-DEFENCE IN THE CONTEXT OF VULNERABLE OFFENDERS: A RESPONSE TO THE NEW ZEALAND LAW COMMISSION

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Well word gets around in a small, small town
They said he was a dangerous man
But mama was proud and she stood her ground
But she knew she was on the losing end.
Some folks whispered and some folks talked
But everybody looked the other way
And when time ran out there was no one about
On Independence Day.[1]

Abstract: This article contends that there are compelling reasons for reconceptualising the contours of self-defence, and for the introduction of a bespoke partial defence complemented by jury directions and the admissibility of social framework evidence to assist vulnerable offenders who kill their abusers in a desperate attempt to protect themselves. The New Zealand Law Commission in 2016 recently recommended, *inter alia*, that self-defence be re-categorised and broadened to allow victims of family violence who kill to potentially claim a defence in the absence of an imminent threat of harm, standardised on an "all or nothing" perspective. In truth, a far wider contextualisation needs to apply, beyond the limited and constrained terms of reference before the Commission. The contours of self-defence applicability ought to extend to extra-familial vulnerable offenders, encompassing individuals subjected to human trafficking and/or modern slavery, those trapped by ostensible gang membership, and those experiencing third-party abuse who respond with lethal force. It is our assertion, after a comparative review of the theoretical and doctrinal precepts of a number of alternative legal systems, that the full and partial defence schema should be more nuanced. Extant laws fail to appropriately recognise the need for a *de novo* partial defence template and reflective individuated culpability thresholds.

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1 Martina McBride, "Independence Day", from the album, *The Way That I Am* (1994).

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I. Introduction

This article advances an alternative approach to the New Zealand Law Commission's (the Commission) recent recommendations for victims of family violence who commit homicide. New Zealand criminal law is dangerously "out of step internationally in how it responds to victims of family violence who kill",[2] and the reform recommendations advanced by the Commission are designed to combat the issue.[3] The report recommends, *inter alia*, that self-defence be modified to ensure that victims of family violence who kill are eligible to claim the defence in the absence of an "imminent" threat.[4] This change is designed to be complemented by reforms to the Evidence Act 2006 and Sentencing Act 2002 to ensure that a broad range of family violence evidence is admissible during trial in support of the defence, in addition to constituting relevant mitigation at the sentencing stage. Other measures include potential changes to Prosecutorial Guidelines and the "three strikes" law[5] in order to provide a more holistic approach to reform. Unfortunately the promulgated reforms are flawed in failing to consider extra-familial vulnerable offenders who kill in self-defence, and in advocating that revised self-defence provisions should operate on an "all-or-nothing" basis, whereby the defence either succeeds or it fails.[6]

The proposals advanced herein draw upon experience of self-defence, duress and partial defence provisions across New Zealand, Victoria (Australia), Canada, the United States, and England and Wales. Importantly the recommendations canvassed reject the New Zealand Law Commission's argument that a lower threshold self-defence test should apply to victims of abuse who kill their abuser only if a familial link is established. The narrow focus on this discrete category of vulnerable offender under the New Zealand Law Commission's terms of reference meant the Commission was unable to "consider the law in respect of other defendants who may be less blameworthy in a comparative sense".[7] Real and hypothetical scenarios are advanced to demonstrate the extent to which individuals subjected to human trafficking and/or modern-day slavery, those trapped by ostensible gang

2 Family Violence Death Review Committee (FVDRC), Fourth Annual Report (Health Quality and Safety Commission, New Zealand, 2014).
3 *Ibid.*, p.102.
4 New Zealand Law Commission, Understanding Family Violence: Reforming the Criminal Law Relating to Homicide (NZ Law Com No 139, 2016).
5 For further discussion, see, Warren Brookbanks, "Three Strikes: New Zealand Experience" (2016) 3(2) Journal of International and Comparative Law **[***]**.
6 New Zealand Law Commission, Understanding Family Violence (n.4).
7 *Ibid.*, para.1.17.

membership and those experiencing third-party abuse may similarly respond to that abuse with lethal force. In contrast to the Commission's recommendations, compelling arguments are advanced for general as opposed to specific reforms to self-defence in the context of vulnerable offenders who kill an abuser.

The justificatory basis for self-defence is revisited, comparing affirmative self-defence in Victoria which is available in the context of family violence where the threat is not imminent and the force used is excessive, and the position in several US states where a partial imperfect self-defence provision operates in this context. This comparative analysis reveals that the full and partial defence schema should be more nuanced than the New Zealand Law Commission's report suggests. Even if the Commission's broader self-defence provisions are accepted by the Ministry of Justice, they will not assist extra-familial victims of abuse and for intra-familial victims, self-defence will not always be available on the facts. That is not to say a defence should be available axiomatically. A partial defence ought to be an option, and an appropriate, bespoke self-preservation defence is advanced herein.

The partial defence is designed to sit directly beneath self-defence. It would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious abuse from the victim against the defendant or another identified individual, but unlike affirmative self-defence the lack of an imminent threat and the use of excessive force would not necessarily negate the defence. The absence of imminence and proportionality requirements are justified on the basis that self-preservation is a partial rather than a complete defence. In cases where the defendant claims to have held a particular belief as regards the circumstances, the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; there must be an intelligible basis for the belief; if it is determined that D did genuinely hold it, and there was an intelligible basis for doing so, D is entitled to rely on it for the purposes of the partial defence, whether or not it was mistaken, or (if it was mistaken) the mistake was a reasonable one to have made. Importantly, the defence does not automatically apply where self-defence fails on grounds that the threat was not imminent or the force was excessive, otherwise the defence would be overly broad in ambit and subject to similar criticisms that were levelled at defensive homicide in Victoria.[8] Appropriate threshold filter mechanisms operate to prevent the defence from being available in unmeritorious cases. The defence does not apply where the defendant intentionally incited serious violence or acted in a considered desire for revenge, and is qualified by a normal person test which requires that a person of the defendant's age with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way in the

8 For discussion see, Madeleine Ulbrick, Asher Flynn and Danielle Tyson, "The Abolition of Defensive Homicide: A Step towards Populist Punitivism at the Expense of Mentally Impaired Offenders" (2016) 40(1) Melbourne University Law Review available at http://law.unimelb.edu.au/__data/assets/pdf_file/0005/2099390/09-Ulbrick,-Flynn-and-Tyson.pdf. See also Nicola Wake, "'His Home is His Castle. And Mine is a Cage': A New Partial Defence for Primary Victims Who Kill" (2015) 66(2) Northern Ireland Legal Quarterly149–175.

circumstances. Psychiatric conditions may be relevant to the normal person test in limited circumstances where the condition is especially probative, but evidence of voluntary intoxication remains irrelevant. In all cases, the trial judge may decline to leave the defence to the jury on the basis that no jury properly directed could reasonably conclude that the defence might apply.

II. Background to the Commission's Issues Paper

Following earlier recommendations of the Commission,[9] and a series of controversial cases during which the provocation defence was raised,[10] the New Zealand government abolished the provocation defence in 2009.[11] The Commission recommended that repeal of the partial defence be complemented by removal of the mandatory life sentence for murder in favour of sentencing discretion, the drafting of sentencing and parole guidelines, and reform of self-defence[12] designed to better accommodate victims of family violence who kill.[13] The mandatory life sentence for murder was replaced with a presumption in favour of a life sentence, unless "given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust".[14] Amendments to self-defence, which would have ensured the defence was not excluded simply because the threat faced was not imminent, were not progressed.

This has resulted in three key issues. The interpretation of self-defence in New Zealand continues to render it very difficult for the victim of family violence to successfully claim the defence; "immediacy of life threatening violence" is required in order to justify killing in self-defence; where a viable non-violent

9 New Zealand Law Commission, Some Criminal Defences with Particular Reference to Battered Defendants (NZ Law Com No 73, 2001); New Zealand Law Commission, The Partial Defence of Provocation (NZ Law Com No 98, 2007).

10 *R v Weatherston* HC Christchurch CRI-2008-012-137, 30 June 2009; *R v Ambach* HC Auckland CRI-2007-004-027374, 18 September 2009. The provocation defence was similarly abolished in England and Wales by s.56 of the Coroners and Justice Act 2009, and replaced by the partial loss of control defence; ss.54–55. Earlier controversial cases in England and Wales included, *inter alia*, *R v Smith* [2001] 1 AC 146; and, *R v Doughty* (1986) 83 Cr App R 319.

11 Crimes (Provocation Repeal) Amendment Bill 2009 (NZ).

12 The Commission recommended that s.48 of the Crimes Act 1961 (NZ) be amended: "to make it clear that there can in fact be situations in which the use of force is reasonable even where the danger is not imminent but is inevitable"; and, "to require that whenever there is evidence capable of establishing a reasonable possibility that a defendant intended to act defensively, the question of whether the force used was reasonable is always a question for the jury"; New Zealand Law Commission, Some Criminal Defences with Particular Reference to Battered Defendants (n.9) paras.32 and 42.

13 New Zealand Law Commission, The Partial Defence of Provocation (n.9).

14 Sentencing Act 2002, s.102. The Sentencing Council Act 2007 implemented the recommendations made by the Sentencing Council Report, "Sentencing Guidelines and Parole Reform" *NZLC* (August 2006), available at http://www.nzlii.org/nz/other/nzlc/report/R94/R94.pdf (visited 27 June 2016). However, the Sentencing Council Act 2007 is scheduled to be repealed; New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (NZ Law Com IP No 39, 2015), para.4.8.

option is available the threat is not sufficiently imminent to satisfy self-defence.[15] Where self-defence fails, there is no partial defence available to the victim of family violence, meaning that family violence evidence is considered in sentencing mitigation only. Family violence is a relevant factor in determining whether a life sentence would be "manifestly unjust",[16] but only "exceptional" circumstances will result in rebuttal of the presumption.[17] Even in such a case, the victim of family violence may be labelled a murderer,[18] and the sentence imposed is longer than would be imposed if a partial defence were available.[19] The position is worse if the killing represents a second- or third-strike offence[20] where "the court must impose life without parole, unless parole ineligibility is manifestly unjust".[21]

The leading New Zealand case on self-defence in the context of victims of family violence who commit homicide is *Wang*.[22] Wang (the "primary victim"[23]) was convicted of the murder of her husband, following the trial judge's refusal to leave self-defence to the jury. Wang's husband (the "predominant aggressor"[24]), whom she relied upon heavily because she spoke little English, was sexually, psychologically and physically abusive. On the evening of the killing, the predominant aggressor forced Wang to telephone Hong Kong and demand money from family members,

15 *R v Wang* [1990] 2 NZLR 529 (CA).

16 *Hamidzadeh v R* [2013] 2 NZLR 137, [5]. Sentencing Act 2002, ss.103 and 104. See, generally, Geoff Hall, *Sentencing: 2007 Reforms in Context* (Wellington, LexisNexis, 2007) p.487.

17 In *R v Law* (2002) 19 CRNZ 500, the mercy killing of an elderly woman suffering from Alzheimer's Disease by her husband, attracted an 18-months-term of imprisonment. See also, *Reid* HC Auckland CRI-2008-090-2203, 4 February 2011 (confessing to a crime that might not have otherwise been discovered and attempting suicide after the offence indicated significant remorse. The defendant suffered from major depression and psychotic delusions); *R v McNaughton* [2012] NZHC 815 (peripheral role as a secondary party, previous good character, evident remorse, restorative justice conference held with the victim); *R v Nelson* [2012] NZHC 3570 (deficiency in decision-making faculties, youth, inability to process information, tumultuous family situation); see, generally, Rajesh Chhana, Philip Spier, Susan Roberts and Chris Hurd, The Sentencing Act 2002: Monitoring the First Year (Ministry of Justice, 2004).

18 It is recognised that manslaughter verdicts are returned in a number of such cases; New Zealand Law Commission, Understanding Family Violence (n.4) p.4. It is believed that this may be, in part, a result of jury nullification; New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14).

19 For further discussion see, Wake, "His Home is His Castle. And Mine is a Cage" (n.8).

20 Brookbanks notes:

> "What is especially disturbing about this regime as it applies to homicide offences, is that there is absolutely no scope for mitigation once a second or third strike has been triggered. So whether the killing is the mercy killing by an elderly man of his aged, dementing wife, the killing by a woman of her bullying and abusive partner, a killing in excessive self-defence or the cold-blooded slaying of a child by a hardened criminal, it will make no difference in terms of the sentence the court is mandated to impose."

Brookbanks, "Three Strikes" (n.5).

21 *Ibid.*

22 *Wang* (n.15).

23 The primary victim is an individual subjected to "ongoing, coercive and controlling behaviour from their intimate partner"; FVDRC, Fourth Annual Report (n.2) p.15.

24 *Ibid.*: The principal aggressor in the relationship who exhibits "a pattern of violence to exercise coercive control" over the "primary victim".

and he threatened to kill both Wang and her sister, before retiring to bed in an intoxicated state. Wang attempted to suffocate him, before stabbing him several times, and then smothering him with a pillow. The trial judge advised that if Wang's version of events was believed, there was "ample evidence" of the predominant aggressor's "prior threatening behaviour".[25] Psychiatric testimony described Wang as having a major depressive illness which meant that she would have believed not only that the threats would be carried out, but also that "the only course she could think of was to kill her husband".[26]

Wang attempted to rely on s.48 of the Crimes Act 1961 which provides that "everyone is justified in using, in the defence of himself or another such force, as in the circumstances as he or she believes them to be it is reasonable to use".[27] The trial judge, however, refused to leave self-defence to the jury on the basis that there were "alternative courses open to her" meaning that the "only view on the evidence" was that Wang "was in no immediate danger".[28] The trial judge said:

> "Her sister and her friend Susan were both in the house. She could have woken them and sought their help and advice. She could have left the house taking her sister with her in the car which was available. She could have gone to acquaintances in Christchurch or to the police".[29]

The Court of Appeal upheld the decision of the trial judge, stating:

> "In our view what is reasonable force to use to protect oneself or another when faced with a threat of physical force must depend on the imminence and seriousness of the threat and the opportunity to seek protection without recourse to the use of force. There may well be a number of alternative courses of action open, other than the use of force, to a person subjected to a threat which cannot be carried out immediately. If so, it will not be reasonable to make a pre-emptive strike".[30]

There are three fundamental and inter-related issues with this approach. First, it ignores the overarching, ongoing threat of family violence; its "systematic nature" distinguishes it from other forms of violent conduct;[31] it represents an "omnipresent threat which has the potential to crystalize at any point in time and which the police

25 *Wang* (n.15).
26 *R v Wang* HC Christchurch T 40/88, 27 February–6 March 1989 (trial rulings) 10.
27 Crimes Act 1961 (NZ), s.48(1).
28 *Wang* (n.26), 11.
29 *Wang* (n.15).
30 *Wang* (n.15), 535–536.
31 Victor Tadros, "The Distinctiveness of Domestic Abuse: A Freedom Based Account" (2004–2005) 65 Louisiana Law Review 989.

are unable to defuse".[32] Second, it remains unresolved whether deadly force would be regarded reasonable in cases in which the victim of family violence fears sexual assault, imprisonment or repeated assaults not amounting to serious bodily harm.[33] Commentators have vehemently argued that it may be reasonable for an individual to kill an aggressor who is attempting to rape him/her.[34] The line of reasoning is not found in the psychological or physiological impact of the rape, but "the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanising".[35] The "social meaning of sexual penetration" elucidates the concept of "sheer use", and differentiates rape from the "family of assault crimes".[36] Third, the ostensible "alternative option" is not always available; family violence may be viewed as "a complex form of entrapment", inclusive of "severe victimisation", "social isolation", and "extreme economic deprivation" rendering the victim unable to escape or conditioning him/her into believing it is impossible to do so.[37] In many cases a victim of family violence may be in greater danger if they attempt to leave.[38]

When a victim of family violence kills, the "immediate assault [may] appear relatively minor, or they may respond at a time when the violence has ceased. They may arm themselves in anticipation of an attack, or they may act to protect themselves by a pre-emptive strike".[39] The imminence requirement encourages reference to the immediate incident, simultaneously ignoring the cumulative impact of past abuse, and implying the availability of alternative options.[40] This approach misunderstands the nature of family violence which, described as "intimate terrorism", engages a broad range of tactics, not limited to violence, in order to assert dominion over an intimate partner.[41] Predominant aggressors have been colloquially referred to as intimate terrorists in this regard.[42] The literature not only recognises divergent manifestations of family violence, but also differences across predominant aggressors. Predominant aggressors (or "intimate terrorists") have been referred to as "emotional dependents" (or "pitbulls") so attached to

32 FVDRC, Fourth Annual Report (n.2) submission 20.

33 New Zealand Law Commission Preliminary Paper, "Battered Defendants Victims of Domestic Violence Who Offend" (NZ Law Com PP 41, 2000), para.49, available at http://www.nzlii.org/nz/other/nzlc/pp/PP41/PP41-3_.html (visited 23 June 2016).

34 For further discussion see, Fiona Leverick, *Killing in Self-Defence* (Oxford: Oxford University Press, 2006) ch.8.

35 John Gardner and Stephen Shute, "The Wrongness of Rape" in Jeremy Horder (ed), *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 2000) p.205, cited in Leverick, *ibid*.

36 *Ibid*., p.212.

37 FVDRC, Fourth Annual Report (n.2) pp.18, 80. For further discussion see, FVDRC, Fifth Annual Report (Health Quality and Safety Commission, New Zealand, 2016).

38 Gardner and Shute "The Wrongness of Rape" (n.35) p.212, cited in Leverick, *Killing in Self-Defence* (n.34).

39 New Zealand Law Commission, Understanding Family Violence (n.4) para.6.18.

40 *Ibid.*, paras.6.19 and 6.20.

41 Project Safe, "Domestic Violence," available at http://www.project-safe.org/domestic-violence/ (visited 23 June 2016).

42 *Ibid.*

their victims they engage in violence in order to prevent them from leaving, and "sociopaths" (or "cobras") who seek to control all aspects of the primary victim's life, particularly in relationship contexts.[43] A significant number of predominant aggressors may engage in behaviours attendant to both subsets. In sociopathic cases, it is often more difficult to identify the abuse, particularly where that abuse must translate as life threatening for the purposes of self-defence.

In terms of alternative escape options, Wright has argued that a mistake as to whether alternative options are available (as the trial judge intimated was the case in *Wang*) ought to be treated in the same way as other mistaken beliefs. The general approach to mistaken belief is that "an honest belief in a state of affairs or as to the existence of a fact, which if true would make the act innocent, will provide a defence itself".[44] It is unnecessary to "establish *reasonable grounds*" for the belief although reasonableness "may be relevant in testing the honesty of the belief".[45] In the context of potential escape avenues, whether the primary victim is mistaken has been approached by asking whether a reasonable person might have made the same error.[46] Wright suggests the court ought to take "any material mistakes of fact into account when deciding whether a person's actions were reasonable. These may include mistakes about whether a particular alternative to using force was available. The only limit to what can be a belief about circumstances is that the belief has to be about something that is logically connected to the objective reasonableness of force".[47] Jurisprudential authorities, however, have since clarified that in assessing whether force is reasonable requires consideration of "whether there were alternative courses of action of which [the defendant] was aware".[48]

Notwithstanding the problems with the "imminence" requirement, in the 25 years since *Wang* was decided, case law[49] has confirmed that "imminence"[50] and lack of alternatives remain necessary elements of self-defence.[51] The most recent

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43 *Ibid.*

44 *Millar v Ministry of Transport* [1986] 1 NZLR 660, 673 (McMullin J).

45 *Ibid.*

46 *Jenkins v Police* (1986) 2 CRNZ 196. *Wang* (n.15):

> "One could not *reasonably* have considered that those threats might be carried out by him, 'at any moment', in his then state, nor when his aim was to extort money from her sister in Hong Kong. There was no immediate danger to render causing his death a reasonable course of action".

47 Fran Wright, "The Circumstances as She Believed Them to Be: A Reappraisal of Section 48 of the Crimes Act 1961" [1998] Waikato Law Review 6, 109.

48 *R v Afamasaga* [2014] NZHC 2142, [43]–[50].

49 See, for example, *Vincent v R* [2015] NZCA 201 (CA); *Vincent v R* [2016] NZSC 15 (SC); *Afamasaga v R* (2015) 27 CRNZ 640; *Leason v Attorney-General* [2014] 2 NZLR 224; *R v Sila* [2009] NZCA 233; *R v Hackell* CA131/02, 10 October 2002 and *R v Kneale* [1998] 2 NZLR 169 (CA).

50 Although *cf. Zhou* HC Auckland T 7/93, 8 October 1993; *R v Oakes* [1995] 2 NZLR 673 (CA). See also, New Zealand Ministry of Justice Criminal Defences Discussion Paper, Provocation and Other Partial Defences, Self Defence, and Defences of Duress (2003) p.8.

51 New Zealand Law Commission, Understanding Family Violence (n.4) paras.6.29 and 6.41.

rulings on these issues arose in the cases of *Vincent*[52] and *Afamasaga*.[53] Vincent was convicted of wounding with intent to cause grievous bodily harm after he repeatedly stabbed a fellow prison inmate in the neck four days after an altercation involving a basketball.[54] The Court of Appeal stated: "The defendant must have seen himself or herself as under a real threat of danger and not merely believe there may be some future danger".[55] The Court of Appeal noted that Vincent stabbing the victim four times in the back of the neck "could not possibly be seen as a reasonable or proportionate response to a perceived threat of attack from a basketball in the exercise yard".[56] The Supreme Court dismissed Vincent's application for leave to appeal earlier this year.[57]

The same approach was adopted when Afamasaga, a gang member, unsuccessfully attempted to claim self-defence after he shot a rival gang member from a darkened bedroom at a distance of 10–12 metres. According to his evidence, Afamasaga feared for his life on the basis that he thought he saw a pistol in the victim's hands. The trial judge asserted:

> "Whether the force used was reasonable, will require consideration of the perceived imminence of the seriousness of the attack or anticipated attack, whether the defensive reaction was reasonably proportionate to the perceived danger and whether there were alternative courses of action of which Mr Afamasaga was aware".[58]

The Court of Appeal dismissed Afamasaga's appeal against the judge's direction noting that the elements of self-defence had been correctly explained to the jury. The Commission stated that these cases, not being concerned with victims of family violence, advance "general statements about the law on self-defence that could apply equally to a defendant in that context".[59] Given the rarity of cases where a victim of family violence kills their abuser (1–2 per year on average in New Zealand), it is unlikely that the Court of Appeal or the Supreme Court will have an opportunity to review the approach in that specific context in the near future.[60]

In contrast to the imminence requirement, the reasonableness element of self-defence represents less of a problem for victims of family violence who attempt to invoke the defence. The Court in *Afamasaga* expressed that what is required

52 *Vincent* (CA) (n.49); *Vincent* (SC) (n.49).
53 *Afamasaga* (n.49).
54 Crimes Act 1961 (NZ), s.188.
55 *Vincent* (CA) (n.49), [28]. See also *R v Savage* [1991] 3 NZLR 155, 158.
56 *Vincent* (CA) (n.49), [33].
57 *Vincent* (SC) (n.49), [9], [10].
58 *Afamasaga* (n.48), [68].
59 New Zealand Law Commission, Understanding Family Violence (n.4) para.6.41.
60 *Ibid.*, para.10.108 and para.6.41. The New Zealand Law Commission identified 23 recorded cases of victims of family violence who committed homicide between 2001–2015; New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14), Appendix B

is "reasonable proportionality", meaning the level of force used might still be regarded reasonable even though it is disproportionate.[61] This is important because it allows for an assessment of the "physical limitations" of a victim of family violence,[62] in addition to the impact of the history of abuse. The Commission is of the view that: "reasonable proportionality" is "capable of accommodating victims of family violence",[63] but legislative reform is required to address the "imminence requirement", whilst education and the admission of expert evidence on the nature of family abuse will assist in assessing "reasonable proportionality".[64]

In November 2015, and in response to the Family Violence Death Review Committee report, identifying that "Aotearaa New Zealand is out of step" internationally in how it responds to victims of family violence who kill,[65] the Commission was asked, "as a matter of priority", to consider "the position of victims of family violence (almost overwhelmingly women) who are driven to commit homicide, and what the consequences in law of their actions should be".[66] The terms of reference related to whether:

> "(a) the test for self-defence, in section 48 of the Crimes Act 1961, should be modified so that it is more readily accessible to victims of family violence charged with murder (or manslaughter); (b) a partial defence that would reduce murder to manslaughter is justified, and, if so, in what particular circumstances; and (c) current sentencing principles properly reflect the circumstances of victims of family violence who are convicted of murder".[67]

The subsequent report, published in 2016, advanced as its main recommendation that in cases involving family violence, self-defence ought to be available to victims even when they are responding to a threat that is not "imminent".[68] The other recommendations include the provision of education and training for members of the legal profession,[69] amendments to the Evidence Act 2006 to allow a wide range of family violence evidence to be submitted in support of self-defence claims, and reforms to the Sentencing Act 2002 to foster consistent assessment of family violence history as relevant mitigation. The report also advises that the Solicitor-General should, upon the next review of prosecutorial guidelines, consider whether express reference to family violence history ought to be included, in addition to advocating

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61 *Afamasaga* (n.48), cited in New Zealand Law Commission, Understanding Family Violence (n.4) para.6.54.
62 *Oakes* (n.50).
63 New Zealand Law Commission, Understanding Family Violence (n.4) para.6.62.
64 *Ibid.*, para.6.92.
65 FVDRC, Fourth Annual Report (n.2) p.102.
66 New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) p.iii.
67 *Ibid.*
68 New Zealand Law Commission, Understanding Family Violence (n.4).
69 *Ibid.*, R1–R4.

that the Ministry of Justice assess whether the "three strikes" legislation should be amended to allow judges to impose a sentence other than life imprisonment in appropriate cases. The report expressly advised against the introduction of a new partial defence or separate homicide offence, and declined to consider offenders vulnerable by reason(s) other than family violence.

III. Vulnerable Offenders

The Commission's terms of reference were "limited to the specific category of victims of family violence who have killed their abusers".[70] The Commission explained that the term "victim of family violence" encompasses all individuals who have suffered abuse, irrespective of whether that individual is an adult or child or the abuse is perpetuated by a parent, partner or another family member.[71] The term "abuser" refers to all perpetrators irrespective of their relationship with the victim.[72] The recommendations are limited to killings in response to intra-familial violence, child abuse and neglect, and intimate partner violence. Despite recognising the "potential for unintended consequences that necessarily arise whenever the law is of specific, rather than of general, application", the scope of the terms of reference meant the Commission was unable to "consider the law in respect of other defendants who may be less blameworthy in a comparative sense".[73]

The narrow focus on victims of family violence potentially neglects other vulnerable offenders who may kill in fear of an abuser, since the absence of a familial link or guardian/intimate relationship means that the recommended reforms will not apply. Although "there is disagreement on the range of groups suffering vulnerability and on its sources, there is general agreement that vulnerability is an important concept capturing the dynamic way that people's well-being in today's world is affected by wider changes in the economic, financial, social, institutional, cultural and environmental sphere".[74] The focus of this article is on victims of family violence in addition to those who find themselves in an analogous situation,[75] but for the family link. Individuals subjected to human trafficking and/or modern-day slavery, those trapped by ostensible gang membership (where the member is actually a victim of the gang), and those experiencing third-party abuse may be regarded vulnerable consequent upon their situation.[76] These situations are non-exhaustive but are used to highlight the problems associated with focusing solely upon victims

70 *Ibid.*, p.5.
71 *Ibid.*, para.1.1.
72 *Ibid.*
73 *Ibid.*, para.1.17.
74 Peadar Kirby, *Vulnerability and Violence: The Impact of Globalization* (London: Pluto Press, 2006).
75 Ministry of Social Development, "Background to Family Violence Indicators", available at www.msd.govt.nz (visited 24 June 2016).
76 Helen Innes and Martin Innes, Personal, Situational and Incidental Vulnerabilities to ASB Harm: a follow up study (Universities Police Science Institute, January 2013) p.3.

of family violence. It is also recognised that, *inter alia*, personal, social, cultural and economic factors may render these individuals innately vulnerable, and policy may reaffirm individual or group vulnerabilities.[77] By reducing the evaluation to situational vulnerability, however, it is possible to identify how new reforms should apply across individuals without engaging in an assessment of the merits or demerits of who is in a "worse" position; the approach engages a simple enquiry into whether individuals in the same or a similar situation ought to receive the compassion of the law. Sadly, the situations identified represent growing problems within contemporary society at a global level.

A. Human trafficking and modern-day slavery

It would be a mistake to assume that human trafficking is a rare occurrence, particularly in destination countries, such as New Zealand and the United Kingdom. Early in 2016, in what has been dubbed New Zealand's first human-trafficking case, Kulwant Singh was imprisoned for over two years as a consequence of his "critical" involvement in trafficking 25 workers into New Zealand.[78] Two traffickers have also been convicted in child sex-trafficking cases, highlighting that human trafficking is a live issue in New Zealand. The New Zealand Law Society has suggested these cases may be "merely the tip of the iceberg and New Zealand should have growing concern about human trafficking and forced labour exploitation".[79]

Early in 2016, the Director for Public Prosecutions in England and Wales, the Lord Advocate in Scotland and the Public Prosecutor for Northern Ireland signed action plans committing their respective organisations "to work together in order to react to the changing nature of trafficking around the world".[80] This follows

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77 *Ibid.*

78 Jess Pullar, "Man Jailed for False Refugee Claims in Landmark Human Trafficking Trial" *Stuff NZ* (29 January 2016), available at http://www.stuff.co.nz/nelson-mail/news/76386522/Man-jailed-for-false-refugee-claims-in-landmark-human-trafficking-trial; and Charles Anderson and Jess Pullar, "Trio Plead Not Guilty in New Zealand's First Human Trafficking Trial" *Stuff NZ* (9 November 2015), available at http://www.stuff.co.nz/national/crime/73817107/trio-plead-not-guilty-in-new-zealands-first-human-trafficking-trial.html (visited 24 June 2016).

79 New Zealand Law Society, "Modern Day Slavery and Human Trafficking" (26 September 2014), available at https://www.lawsociety.org.nz/lawtalk/lawtalk-archives/issue-851/modern-day-slavery-and-human-trafficking (visited 14 December 2015).

80 Crown Prosecution Service, Trafficking Prosecutions on the Rise as British Prosecutors Sign Up to New Anti-trafficking Commitments (26 February 2016):

> "Month-on-month the number of defendants being taken to court for trafficking offences is higher than ever before. 183 people were taken to court for trafficking offences between April 2015 and December 2015 while 187 people were taken to court for trafficking offences for the whole of 2014-15. In 2014 there were 1,139 victims of trafficking for sexual exploitation, while victims of labour exploitation (1,017) and domestic servitude (278) were 1,295 combined. In April to June 2015 labour exploitation was 253 and sexual exploitation 248. Domestic servitude was 115".

See also, Emma Batha, "Trafficking Prosecutions Hit Record in England and Wales Following Slavery Law" *Thomson Reuters* (26 February 2016), available at http://news.trust.org/item/20160226152555-0hu9x (visited 24 June 2016).

the implementation of the Modern Slavery Act 2015. In addition to criminalising human trafficking, the landmark Act criminalises holding another person in slavery or servitude, or requiring another person to perform forced or compulsory labour in circumstances in which the person knows or ought to know the other person is held in slavery or servitude.[81] The overlap between the experiences of family violence victims and trafficking victims is evident in the first case involving the new offence. Safraz Ahmed was convicted of forcing his spouse, Sumara Iram, into domestic servitude, after subjecting her to "physical and mental torture" over a two-year-period. The court heard that Ahmed beat his wife, threw tins of cat food at her, sent numerous abusive and demeaning text messages, and told her to kill herself on more than one occasion. Sumara vividly captured her coercive and violent entrapment in the following stark description:

> "Because the beatings happened so regularly and for such small things I felt worthless. I was not allowed to do what I wanted to do, I was never allowed to step out of the house alone and I was not allowed to make friends, which means I was never allowed to socialise; I felt like their prisoner. I cooked, I cleaned, I washed, I ironed, looked after other people's children and when things were not to the liking of the family I was punished by beatings. I felt that there was only one purpose of my life and that was to serve his family".[82]

Ahmed was sentenced to two years' imprisonment for enforced domestic servitude, and eight months' for assault occasioning actual bodily harm for breaking Sumara's nose.[83] The entrapment experienced by Sumara is comparable to the entrapment experienced by victims of human trafficking and domestic violence. Victims may be conditioned into believing their sole purpose is to serve, and they may feel there is no way out. In the trafficking context, victims are likely to fear they will not be believed or they will be punished by the authorities if they seek help or try to escape; although the domestic servitude provisions were utilised in the context of family violence in Ahmed's case, they are also designed to apply to servitude outwith familial constructs, and in trafficking contexts.

That victims of family violence and human trafficking may experience similar forms of abuse is also implicit in definitional constructs attached to these behaviours.

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81 Modern Slavery Act 2015, s.1(a) and 1(b). It was explained in *CN v United Kingdom* (2013) 56 EHRR 24 that "domestic servitude is distinct from trafficking and exploitation and involves a complex set of dynamics, involving both overt and more subtle forms of coercion, to force compliance." Human trafficking, domestic servitude and domestic abuse are not the same thing, but there are undoubtedly similarities across the experiences suffered by victims in these contexts.

82 Peter Walker, "Briton Who Made Wife Live Like Slave is First to be Jailed for Domestic Servitude" *The Guardian* (1 April 2016), available at http://www.theguardian.com/uk-news/2016/apr/01/man-made-wife-live-like-slave-domestic-servitude-faces-jail (visited 24 June 2016).

83 *Ibid.*

Threats, force, coercion, control, abuse of power, exploitation, patterns of harm and entrapment are terms that have been adopted to describe family violence and human trafficking. The Trafficking Protocol defines human trafficking as:

> "The recruitment, transportation, transfer, harboring or receipt of persons, by means of the *threat or use of force or other forms of coercion*, of abduction, of fraud, of deception, of *the abuse of power or of a position of vulnerability* or of the giving or receiving of payments or benefits to achieve the consent of a person *having control over another person*, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".[84] (Emphasis added.)

In England and Wales, human trafficking is criminalised under s.2 of the Modern Slavery Act 2015; an offence is committed if D arranges or facilitates the travel of V by recruiting, transporting or transferring, harbouring or receiving, or transferring or exchanging *control* over V, intending to exploit V (in any part of the world) during or after the travel, or where D knows or ought to know that another person is likely to exploit D in such circumstance; whether V consents to travel is irrelevant.

In the context of family violence, both the Commission and the FVDRC identify the need for a cultural shift in contemporary understanding of family violence: intimate partner violence ought to be viewed as "a *pattern of harm*, rather than as a series of incidents"; "the individual is subjected to a broad range of *controlling* behaviours, commonly of a physical, sexual and/or psychological nature, which typically involve fear, intimidation and emotional deprivation". In order to understand victims' responses, it is necessary to view family violence as "a form of entrapment" as opposed to explaining the victims' response by reference to "learned helplessness and battered woman syndrome".[85]

It is noteworthy that express reference is made to the term "control" in both definitions, and "coercion" forms an essential aspect of the trafficking definition. These similarities are poignant given that contemporary understanding of family violence reflects control and coercion as integral to such behaviour. Legislative support for this contention is to be found in the Serious Crimes Act 2015 (England and Wales, s.76), considered further in Section IV(A) (see p.xxx below), which criminalises repeated and continuous controlling or coercive behaviour in the context of intimate relationships. These comparative definitions further support the view that victims of family violence and victims of human trafficking may find themselves in similar situations, experiencing similar emotions.

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84 United Nations, The Palermo Protocol: The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2002).

85 New Zealand Law Commission, Understanding Family Violence (n.4) para.2.24 [authors' emphasis added].

The problem is that the reforms promulgated by the Commission are restricted to victims of family violence. Under the Commission's recommendations, self-defence would likely be available to an individual in Sumara's situation if she killed her abuser given the pattern of abuse suffered even if the threat was not imminent and/or the force used was excessive. If, however, the same situation arose, but Sumara was not in a relationship with Ahmed, and had instead been trafficked for the purposes of being forced into domestic servitude the threat would need to be imminent before self-defence could apply (A form of quasi self-defence might have been provided under s.45 of the Modern Slavery Act 2015 (England and Wales) if murder was not excluded from its ambit by Sch.4. A victim of human trafficking is entitled to a defence where she has been compelled to commit a qualifying offence (note the limitations in Sch.4) consequent on slavery or exploitation, and a reasonable person, sharing relevant characteristics, and in the same situation would have no realistic alternative to doing the act. Note that under s.2 a person may be compelled to do something by another person or as a result of circumstances for the purposes of the Act). The situational distinction between family violence and human trafficking cases is not only weak, it is apt to cause injustice.

The inherent unfairness in enacting specific, as opposed to general reform in this context, is further demonstrated in the following victim testimonies, derived from the US Department of State, *Trafficking in Persons Report* 2015. The report notes that the testimonies are designed to be "illustrative only".[86] For present purposes, these illustrations are used to highlight situations where, were the victim to use lethal force, in order to affect an escape, most would expect that some form of mitigation ought to be available.[87] When considered in the context of the Commission's recommendations, these illustrations arguably render it difficult to justify the limitation placed upon the reforms advanced:

(1) Natalie and Dara, at the age of 16, eager to earn money and go to school, left Nigeria with the help of men who arranged their travel and convinced them good jobs awaited them in Cote d'Ivoire. Once there, Natalie and Dara were instead forced to have sex with men every night to pay back a $2,600 "travel debt".[88]
(2) When 14 years old, Cara met Max while on vacation in Greece with her mother. She fell in love with him and, after only a few weeks, Max persuaded her to move in with him, rather than return to England.

86 US Department of State, "Trafficking in Persons Report" (2015), available at http://www.state.gov/j/tip/rls/tiprpt/2015/243362.htm (visited 14 December 2015).

87 Thankfully, support was afforded to these victims before the situations reached the level of lethal violence; *ibid.* Unfortunately, this is not always the case, and, as such, it is appropriate that defences are available to those who kill in similar circumstances.

88 This example is taken *verbatim* US Department of State, Trafficking in Persons Report (n.86) [note, the age of the victims was added by the authors].

He soon broke his promise to take care of her and forced Cara to have sex with strangers. Max first convinced her that the money she made was helping to keep them together; he later threatened to kill her mother if she tried to stop. In time, Max gave Cara to another trafficker who forced her to send postcards to her mother depicting a happy life in Athens.[89]

(3) Tanya was only 11 years old when her mother traded her to a drug dealer for sex, in exchange for heroin. Tanya was raped, forced to commit sexual acts whilst being video recorded, and made to take heroin.[90]

(4) At 13 years old, Effia moved to the United States with family friends, excited to learn English and go to school — something her parents in Ghana could not afford. When she arrived, these so-called friends forbade her from attending school and forced her to clean, cook and watch their children for up to 18 hours a day. The father physically and sexually abused her. Effia received no payment and could not use the telephone or go outside.[91]

One evening, when they could take no more, Natalie and Dara poured petrol over the men and set them on fire whilst they were sleeping, killing them. After writing another postcard to her mother, Cara returned the pen to the kitchen, collected a knife and stabbed the trafficker five times in the back, killing him. Tanya laced a bottle of beer with drugs, after the drug dealer demanded she bring him another bottle of beer, inducing a fatal overdose. Effia knew that she could not overpower her abuser so she took one of the children's baseball bats and repeatedly hit him over the head with it while he was sleeping, inducing fatal injuries.

It is important to note at the outset that the age of these children would not provide them with a defence. Being set at 10 years, the notoriously low age of criminal responsibility in New Zealand mirrors the position in England and Wales.[92] The position differs insofar as children aged between 10 and 11 years may only be charged with murder[93] or manslaughter in New Zealand, whereas there is no such restriction in England and Wales.

In terms of establishing whether self-defence might be available, none of these cases involved an "imminent" threat in the sense required for the purposes of self-defence in New Zealand. Varying degrees of premeditation are apparent in each of the cases. In three of the four cases, a weapon was used. In all of the cases, the abuser was off-guard. Based upon the law as it currently stands, it is unlikely

89 *Ibid.*

90 This example is derived, *mutatis mutandis*, US Department of State, Trafficking in Persons Report (n.86).

91 This example is taken *verbatim* US Department of State, Trafficking in Persons Report (n.86).

92 Crimes Act 1961 (NZ), ss.21 and 22(1).

93 Francine Chye, "When Children Kill: The Age of Criminal Responsibility and Criminal Procedure in New Zealand" [2012] NZLawStuJl 8; (2012) 2 NZLSJ 837.

that any of the individuals in the examples posited would be able to successfully claim self-defence. With the exception of Tanya's case, where it might be argued that her intention was to incapacitate the abuser in order to effect an escape, a manslaughter verdict on the basis that the defendant(s) lacked the requisite *mens rea* for murder is unlikely (assuming jury nullification does not occur) given that there is, arguably, clear evidence of intention in each case.[94] In the absence of a partial defence, the abuse suffered would need to be considered in order to determine whether the imposition of a sentence of life imprisonment is "manifestly unjust"; a determination that rebuts the presumption of a life sentence in murder cases will only occur in exceptional cases, and even then, the sentence imposed is likely to be longer than the sentence that would be imposed were a partial defence available.[95] The irony is that under the Commission's proposals, were Natalie, Dara, Cara, Tanya, and Effia to have a familial connection with their abuser, a lower-threshold test, considered further in Section IV, would apply in the context of self-defence not on the basis of any reduction in their respective culpability level(s), but on the basis that their abuser is related to them in some way. This would render an acquittal more likely in each case. This distinction cannot be justified.

B. Ostensible gang membership

The second category of case in which this distinction cannot be justified is in the context of ostensible gang membership. It is important to note that although criminal gangs may exploit victims of human trafficking, not all gangs are involved in human trafficking. All criminal gangs may create or foster a situation whereby ostensible members are, in fact, victims of the gang who feel unable to escape. This category covers both trafficking victims and non-trafficking victims who might fairly be regarded as ostensible gang members, as a consequence of being subjected to coercive and controlling behaviour by members of the gang resulting in the victim believing that there is no way to escape.

The notion that a gang member might be regarded vulnerable is controversial for two principal reasons. First, the criminal justice response to gang membership has witnessed an overzealous application of what has been termed "parasitic

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94 Culpable homicide is murder in each of the following cases:

(1) if the offender means to cause the death of the person killed;
(2) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not;
(3) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he or she does not mean to hurt the person killed; and
(4) if the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting anyone.

Crimes Act 1961 (NZ), s.167.

95 For discussion see, Wake, "His Home is His Castle. And Mine is a Cage" (n.8).

accessorial liability" in order to erroneously convict gang members of criminal acts, whilst simultaneously excluding the availability of certain defences predicated on the defendant's prior fault in *voluntarily* associating with a gang.[96] Earlier this year, the Supreme Court, in *R v Jogee*, the English case, ruled that the common law had taken a "wrong turn" as regards "parasitic accessorial liability". This may concern any secondary party to a crime, but it is most applicable in the context of gang membership. The issue arises where a secondary party or "secondary parties who have been engaged with one or more others in a criminal venture to commit crime A, but in doing so the principal commits a second crime, crime B".[97] In a significant number of the reported cases, crime B is murder committed during the course of some other criminal venture, but the legal principle is applicable to all criminal offences. In the 1985 and 1999 cases of *Chan Wing Siu v R*[98] and *R v Powell*,[99] it was advocated that the mental element necessary to establish secondary party (D2) liability is that "he foresaw the possibility that D1 might commit crime B". If D2 did foresee this possibility, his continued participation in crime A operated as an automatic authorisation of crime B. D2 was liable, "even if he did not intend to assist crime B at all". The threshold was effectively lower for D2 than for D1, who would only be liable for crime B if he had the requisite *mens rea* for the offence.[100] The Supreme Court in *Jogee* advocated that "foresight is simply evidence (albeit sometimes strong evidence) of intent to assist or encourage, which is the proper mental element for establishing secondary liability".[101]

An adventitious effect of the Supreme Court determination in *Jogee*[102] is the adoption of a holistic template towards accessorial inculpation. The focal inquiry prospectively is whether the secondary party intentionally assisted or encouraged the commission of the crime by the perpetrator, knowing the facts necessary for its commission, and relationally intending to assist or encourage the principal offender to act with the relevant fault element.[103] Difficulties still remain, however, in terms of "joint enterprise" liability precepts and ostensible gang membership for later-day determination in the higher courts. As Sir Richard Buxton has recently intimated,[104]

96 See, for example, *R v Fitzpatrick* [1977] NI 20 (CA); *R v Shepherd* (1988) 86 Cr App R 47 (CA); *Sharp* [1987] QB 853 (CA); *R v Ali* (1995) 16 Cr App R (S) 692, CA; *R v Baker* [1999] 2 Cr App R 335; *R v Hasan* [2005] 2 AC 467.

97 *Jogee* [2016] 2 WLR 681. The murder conviction was overturned by the Supreme Court, and Jogee was convicted of manslaughter at retrial; Lydia Willgress, "Man, 27, Convicted of Manslaughter after Having Joint Enterprise Murder Conviction Overturned" *The Telegraph* (5 September 2016), available at http://www.telegraph.co.uk/news/2016/09/05/man-27-convicted-of-manslaughter-after-having-joint-enterprise-m/ (visited 16 September 2016).

98 [1985] 1 AC 168.

99 [1999] 1 AC 1.

100 *Jogee* (n.97).

101 *Ibid.*

102 *Ibid*., [9], [10]. *Cf* the rejection of *Jogee* by the High Court of Australia on 24 August 2016 in *Miller v The Queen* [2016] HCA 30.

103 *Ibid.*, [10].

104 Sir Richard Buxton, "*Jogee*: Upheaval in Secondary Liability for Murder" [2016] Crim LR 324.

estimates suggest that up to 500 individuals are serving mandatory life sentences after trials in which the jury were directed in the terms adopted in *Chan Wing Siu*.[105] Despite the confident assertion of the Supreme Court in *Jogee* that notwithstanding wrongful directions to juries in such cases the defendant will not be able to appeal out of time, nor will the Criminal Cases Review Commission presumptively refer back to the Court of Appeal challenges that have already reached that adjudicative body, extant precepts suggest otherwise.[106] The practical reality, in terms of pithy realism, is that intuitively it is much more likely that the appropriate and safest response will be to order a retrial.[107]

The likelihood of significant number of retrials stands in conjunction with numerous substantive difficulties that remain *vis-à-vis* secondary participation inculpation post — *Jogee*. These issues coalesce, as Horder cogently articulates,[108] around the nature of any tacit agreement requirement, the requisite knowledge of existing facts comportation to establish liability, and situations where the gang member neither agrees to nor anticipates that the perpetrator will act both with a purposive intent to kill and with a more dangerous weapon.[109] There remains the untrammelled potentiality that, in certain undefined circumstances, the killing was caused by some "overwhelming supervening act" by D1 which nobody in D2's shoes could have contemplated might happen and is of such a character as to relegate his acts to history. Constructive manslaughter rather than murder reflects the culpability threshold standardisation in this scenario for the non-perpetrator but illegal venture gang member.[110]

In the context of defences, the criminal law has adopted a strict exclusionary approach to those who voluntarily associate with criminal gangs. For example, in both New Zealand and England and Wales, those who engage with gang members are unable to avail themselves of the defence of duress by threats due to their prior fault in associating with the gang.[111] The principle established by the House of Lords in *Hasan*[112] is that the excuse of duress by threats is not available to someone who has voluntarily put himself in a position in which he foresaw or ought reasonably to have foreseen the risk of being subjected to any compulsion by threats of violence.[113] More recently, in England and Wales, gang membership has been utilised to restrict

105 *Ibid.*, p.332.
106 *Ibid.*
107 See generally William Wilson and David Ormerod, "Simply Harsh to Fairly Simple: Joint Enterprise Reform" [2015] Crim LR 3 and Graeme Virgo, "Joint Enterprise Liability Is Dead: Long Live Accessorial Liability" [2012] Crim LR 850.
108 Jeremy Horder, *Ashworth's Principles of Criminal Law* (Oxford: Oxford University Press, 2016) pp.456–459.
109 *Ibid.*, p.459.
110 Richard Card and Jill Molloy, *Card, Cross and Jones: Criminal Law* (Oxford: Oxford University Press, 2016) pp.764–765.
111 See cases referred to in note 96.
112 *Hasan* (n.96).
113 *Ali* (n.96), [12].

the availability of the loss of control defence. In *R v Gurpinar*,[114] the Court of Appeal suggested that a gang member would have difficulty in satisfying the defence on the basis that a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint, and in the circumstances of the defendant, would not act in the same or a similar way. In cases where a defendant is convicted, gang membership operates as an aggravating feature for the purposes of sentencing irrespective of the nature of the relationship between the individual and the gang.[115]

Second, whilst it is sometimes difficult to distinguish between a trafficker and a victim of human trafficking, it may be even more difficult to distinguish between gang members by choice and ostensible gang members trapped by the gang. Potential victims may be reluctant to disclose details of trafficking or gang membership for fear of punishment by the authorities, and/or traffickers/gang members.[116] A trafficker or gang member may become romantically involved with the victim, thereby adding to the difficulty in distinguishing the trafficker from the person being trafficked.[117] Not only is there likely to be political and legal reluctance to distinguish genuine from ostensible gang members for fear of appearing "soft on crime", these distinctions would undoubtedly present significant practical problems.

Notwithstanding the difficulties identified, it is appropriate that ostensible gang members are considered in light of the reform recommendations advanced, not least because as the Commission identified, "gangs are environments that compound and exacerbate traditional assumptions about women's roles and violence towards women".[118] Vulnerable individuals, particularly women and children who have been repeatedly failed by the system in devastating ways may seek refuge in a gang; for these individuals, the gang may offer "protection" from traumatic familial abuse.[119] The problem is that such protection comes at a high price, particularly for women, who may be subjected to psychological, sexual and violent abuse by members of the gang. There are three circumstances to consider: first, the circumstances of individuals who are involved in intimate relationships with gang members and are being subjected to abuse within the relationship. The second type of circumstance includes the children of or those related to a gang member. The final situation covers individuals who are not in an intimate relationship with a gang member but are being subjected to abuse by one or more gang members.

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114 [2015] 1 WLR 3442.

115 *R v Wihongi* HC Napier CRI 2009-041-2096 [2010] NZHC 2034 (30 August 2010).

116 See, generally, UK Home Office, "Victims of Modern Slavery" (18 March 2016), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/450834/Victims_of_modern_slavery_frontline_staff_guidance_v2_0_ext.pdf (visited 31 March 2016).

117 *Ibid*.

118 New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) para.2.32.

119 Glennis Dennehy, "Troubled Journeys: An Analysis of Women's Reality Experience within New Zealand Gangs" *University of Canterbury* (2000), available at http://ir.canterbury.ac.nz/handle/10092/5629 (visited 14 December 2015).

The reform recommendations advanced by the New Zealand Law Commission may assist individuals engaged in intimate or familial relationships with gang members, by raising awareness that the individual is, in fact a victim of familial violence and not a willing participant in the gang. As of this writing there is a demonstrable lack of awareness of the dynamics of familial abuse in gang-related contexts. A pertinent example is the *Wihongi* case,[120] in which, the Court of Appeal increased Jacqueline Wihongi's sentence from eight to twelve years' imprisonment on the basis that she represented a "high risk of reoffending" due to gang association.[121] Jacqueline killed her abusive partner after he demanded sex during the course of an argument. Jacqueline had been threatened, prostituted and gang raped repeatedly by members of the Black Power gang. Once an individual becomes associated with a gang, dissociation from that gang can be very difficult. Gang members may demand money or force the individual to commit a crime. In other instances, the gang member may be punished before being allowed to leave the gang. In cases involving a victim of abuse, they may simply not be able to leave the gang because they are too frightened to do so, or alternatively because the predominant aggressor and other gang members will not allow it. The FVDRC states:

> "violence and abuse against women and children within gang cultures is often more frequent and extreme. For a woman and her children living with a gang-affiliated man, their ability to leave the relationship is greatly curtailed. Fear of gang retaliatory violence and intimidation are very real barriers".[122]

It is expected that the proposed reforms will assist victims of family violence in such contexts.

The review is less likely to assist those not in an "intimate relationship" with a gang member. It is common for intimate relationships to exist between gang members, but this is not always the case, and it is therefore important to ensure that any revisions to self-defence and/or the introduction of a new partial defence do not unjustifiably exclude vulnerable categories of offender on the grounds that there is no familial link between the offender and their abuser. The exploitation suffered by women and children in gangs is often indistinguishable between those who have an intimate or familial link to a gang member and those who do not. In the rare case in which a victim of exploitation kills the perpetrator, it is inappropriate that the legal response should differ on the basis of the relationship between the victim

120 *Wihongi* (n.115).

121 For further discussion see Nicola Wake, "Anglo-Antipodean Perspectives on the Positive Restriction Model and Abolition of the Provocation Defence" in Ben Livings, Alan Reed and Nicola Wake (eds), *Mental Condition Defences and the Criminal Justice System: Perspectives from Law and Medicine* (Newcastle-Upon-Tyne: Cambridge Scholars Publishing, 2015) pp.365–405.

122 FVDRC, Fourth Annual Report (n.2) p.85.

and the perpetrator; all women and children, particularly girls, are vulnerable to exploitation within gangs.[123] The arbitrary distinction implicit in the Commission's reform recommendations is apt to cause injustice.

C. Third-party abuse

A further category of cases in which the distinction between victims of family violence and other vulnerable offenders cannot be justified is in the context of third-party abuse. The multi-faceted nature of third-party abuse, and the pernicious impact of sexual coercion, may be cogently identified in alternative spheres of substantive criminal law.[124]

By way of extrapolation, a triumvirate of high-profile determinations in the United States have invoked the parameters of rape by deception engaging abuse of authority and positions of trust by teachers, doctors, psychotherapists and the clergy.[125] The cases share a common theme of abusive psychological entrapment: in *Boro v Superior Court*,[126] the defendants told their respective victims that sexual intercourse was essential for effective medical treatment instead of a painful surgical alternative; in *People v Cardenas*,[127] the defendant represented himself as a faith healer in the Curanderismo religion, and utilised a combination of abuse of trust, religious authority, psychological coercion, physical deprivation and elements of actual bodily force to coerce two women, one a minor, into multiple non-consensual sexual acts; and in *Scadden v State*,[128] a high school teacher and girls' volleyball coach in Wyoming "encouraged the victims to become dependent upon him in an atmosphere of trust, and …. he used his influence to impose his sexual will on those students".[129] The epicentre of the manipulative abuse is that the defendants use an authoritative position or manipulate a proven relationship to achieve sexual compliance, the corollary is that if the denuded and coerced individual subsequently reacts with fatal violence against the predatory "victim" coercer, even in a non-directly immediate confrontation scenario, a reconceptualised partial self-defence template ought to be potentially applicable.

In England and Wales, the House of Lords recognised that the former provocation defence ought to be left to the jury where Camplin, a 15-year-old boy, killed Khan,

123 Violence Against Women and Girls Strategy, "Exploitation of Girls by Gangs Fact Sheet" (2015–2018), available at https://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0ahUKEwi9-5zs-pLNAhUpDcAKHd_KAbwQFgggMAA&url=http%3A%2F%2Fwww.royalgreenwich.gov.uk%2Fdownload%2Fdownloads%2Fid%2F2927%2Fexploitation_of_girls_by_gangs_fact_sheet&usg=AFQjCNEKYEJsz7htqe01WQdHA0zq0FvyrQ (visited 24 June 2016).

124 New Zealand Law Commission, Understanding Family Violence (n.4) para.7.35 discusses non-familial elder abuse.

125 Patricia J Falk, "Rape by Fraud and Rape by Coercion" (1998) 64 Brooklyn Law Review 44.

126 210 Cal Rptr 122 (Cal CA 1985).

127 21 Cal App 4th 927 (Cal CA 1994).

128 732 P 2d 1036 (Wyo 1987).

129 *Ibid*., 1039.

a man in his fifties, after he had "forcibly buggered" him "against his will", and then laughed.[130] It is unclear why reforms should assist an individual like Camplin only if Khan were a relative. Individuals who utilise violence in self-defence and/or to escape third-party abuse ought to receive the same criminal justice system response as those who react in the same or a similar way in response to intra-familial abuse. The mental state of the victim in these cases is broadly comparable, irrespective of whether that abuse emanates from an intimate partner/family member or a stranger/third party, and for this reason reform recommendations should not be arbitrarily restricted on grounds of relationship status. Unfortunately this has not been the approach adopted by the New Zealand Law Commission.

The Howard League for Penal Reform have identified another stratification of third-party abuse of child offenders by officers within our prison system in England and Wales.[131] In 2006 the Howard League published the findings of an independent inquiry led by Lord Carlile into the use of restraint, strip-searching and solitary confinement in penal institutions holding young offenders.[132] This inquiry transpired against the backdrop of the tragic deaths of 14-year-old Adam Rickwood, who was found hanging in his cell after restraint by staff, and of 15-year-old Gareth Myatt, who died whilst being restrained by officers. The position, in certain respects, has arguably not significantly improved during the intervening years since the publication of the Carlile inquiry: five more boys have died in prison, and 4,350 injuries have been sustained by children while being subject to restraint between 2011 and 2015, and serious ongoing allegations remain against Medway Secure Training Centre involving child abuse, coercion and falsification of records.[133] The broader self-defence provisions outlined by the New Zealand Law Commission would not assist individuals like Adam and Gareth were they to kill an abuser in a bid to defend themselves.

The arbitrariness of the New Zealand Law Commission's proposals is clearly illustrated through their potential application to the *Wihongi* case. It is worth reiterating that during the course of Jacqueline Wihongi's life, she had been abused by intimate partners, gang members, and, at the age of 14, her drug and alcohol counsellor.[134] The recommended reforms would not assist an individual like Jacqueline were she to kill her sexually abusive drug and alcohol counsellor but would assist were she to kill an abusive intimate partner. Not only is this distinction unjustifiable, it ignores prior recognition that individuals subject to third-party abuse ought to, in appropriate cases, have a (partial) defence available to them should they resort to killing their abuser. In truth, a more enlightened and communitarian set of reconceptualised self-defence proposals need to extend beyond familial

130 *Director of Public Prosecutions v Camplin* [1978] AC 705 (HL).

131 The Howard League for Penal Reform, The Carlile Inquiry Ten Years on: The Use of Restraint, Solitary Confinement and Strip-searching on Children (2016).

132 The Howard League for Penal Reform, The Carlile Inquiry (2006).

133 The Howard League for Penal Reform, The Carlile Inquiry Ten Years on (n.131).

134 *Wihongi* (n.115).

violence standardisations to integrate other types of abuse of authoritative position and psychological coercive entrapment.

IV. Problems with the Law Commission's Recommendations

Every submission in response to the Law Commission's Issues Paper agreed that self-defence is too restrictive, and out of line with other Commonwealth jurisdictions. Respondents differed, however, on the extent to which the solutions promulgated by the Commission ought to be restricted to victims of family violence. Half of the respondents were of the view that reform should be of general rather than specific application.[135] The Commission conceded that there might be offenders in a comparable situation to victims of family violence, for example, those suffering "non-familial elder abuse"[136] but resolved that the reform should be specific to "avoid the unintended consequence of violent offenders being able to take advantage of the change of law".[137] It is our contention that the unintended consequences associated with restrictive reforms cannot be justified.

The main recommendation advanced by the Commission is the insertion of a new provision into the Crimes Act 1961 to ensure, where a person is responding to family violence, self-defence may apply even if that person is responding to a threat that is not imminent or uses force in excess of that involved in the harm or threatened harm. Note the limitation on the lower-threshold test to victims of family violence. The Commission recommended the Ministry of Justice consider whether the term "family violence" should be consistent with the definition provided in the Domestic Violence Act 1995 (violence against that person by any other person with whom that person is, or has been, in a domestic relationship[138]) in its current or amended form, but suggest that the definition ought to be inclusive rather than exhaustive for the purposes of revised self-defence.[139] The 1995 Act states that the term "domestic relationship" includes relationships between spouses, partners, family members, others who are ordinarily members of the same household and close personal friends.[140] "Violence" encompasses physical, sexual, and psychological abuse, including intimidation, harassment, threats and financial or economic abuse.[141] This substantive change is designed to be supplemented by amendments to the Evidence Act 2006 to allow admission of a broad range of family violence evidence to support self-defence claims.[142] This approach was preferred to earlier

135 New Zealand Law Commission, Understanding Family Violence (n.4).
136 *Ibid.*, para.7.35.
137 *Ibid.*, para.28.
138 Domestic Violence Act 1995 (NZ), s.3(1).
139 New Zealand Law Commission, Understanding Family Violence (n.4) R6.
140 Domestic Violence Act 1995 (NZ), s.3(2).
141 *Ibid.*
142 New Zealand Law Commission, Understanding Family Violence (n.4) R7.

posited options which would have replaced "imminence" with the concept of "inevitability"[143] or alternatively have introduced a bespoke self-defence provision for victims of family violence. Clarification, as opposed to the introduction of new concepts, has the advantage of "minimising the risks of unintended consequences and introducing complexities of interpretation that could result in a further body of case law".[144]

The problem is that whilst the advanced reforms may reduce the risk of unintended consequences, they do so only at the expense of excluding equally meritorious cases, and ultimately there is no guarantee that the proposed revisions to self-defence would only capture deserving cases. The reform recommendations highlight a recurring political approach to legislating for specific issues rather than identifying the benefit of more general reform. There are three key problems with the proposed reforms. The first practical problem relates to the proposed definitions of the terms "family violence" and "domestic relationship". The second issue concerns the Commission's insistence on confining the reform recommendations to a specific category of individual; the problems with this approach are articulated via a review of self-defence in householder cases in England and Wales. The final issue pertains to the justificatory basis of self-defence, and the extent to which the proposed reforms diverge from this theoretical underpinning. There has been public outcry in response to the operation of self-defence in family violence cases in Victoria on grounds that certain offenders ought not to have been able to claim the defence.

A. Relationship status

The terms "family violence" and "domestic relationship" are defined, as noted, in wide terms in order that a broad cohort of individuals and situations may be brought within the test. Importantly, the legislation applies not only to current partnerships, but also to ex-partners thereby avoiding the inherent difficulty in assessing when/whether a relationship came to an end. This criticism has been levelled at s.76 of

143 It is questionable whether the defence ought to be available where the threat is inevitable. The term itself is inherently vague; it is not clear how remote a threat will have to be before it is considered too remote; or what factors might be taken into account in assessing whether there is a threat. It may blur the distinction between killings in self-defence and revenge killings, given the difficulty the court is likely to encounter in separating such motivations, particularly where there may be a retaliatory element in cases involving abuse. As the Commission concedes, it blurs the justificatory basis for the defence: New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) para.7.13. The term could be interpreted too widely. For example, the defence may be open to prison inmates who are of the view that an attack or another attack was inevitable: *Vincent* (CA) (n.49); *Vincent* (SC) (n.49). Those of a paranoid disposition, who are unable to conceive of alternative options, might readily invoke it. Gang members could allege that an attack by another gang was inevitable: New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) para.7.11

144 New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) para.7.

the Serious Crimes Act 2015 (England and Wales) which created the offence of "controlling or coercive behaviour in an intimate or family relationship". A person (A) commits an offence if he repeatedly or continuously engages in behaviour towards another person (B) that is controlling or coercive.[145] The offence applies only where A and B are personally connected,[146] the behaviour has a serious effect on B[147] and A knows or ought to know this to be the case.[148] An intimate personal relationship must exist between A and B, and will only do so where A and B live together and they are members of the same family, or have previously been in an intimate personal relationship with each other.[149] The offence may apply to former partners who live with the victim but can never apply to a former partner who no longer resides with the victim. Where coercive and controlling behaviour occurs in the latter type of scenario, the statutory framework guidance provides that harassment and/or stalking legislation ought to apply.[150] As Bettinson suggests, this does not reflect the true reality of relationship breakdowns where an end point may be difficult to identify.[151]

As noted, the proposed definition in New Zealand is broader, and in the absence of a familial link and/or where the perpetrator is not living with the victim of abuse, it may be possible to establish that a close personal friendship existed between the parties for the purposes of the proposed reform.[152] In the absence of a domestic relationship, the relationships between landlord and tenant, employer and worker, and employees within the same business are excluded from the definition in New Zealand. This implies that more formal relationship constructs, for example, student/teacher, counsellor/patient relationships will also be excluded. The law recognises, however, that protection is mandated in cases outside domestic relationships. The expectation is that, whilst the Domestic Violence Act 1995 (NZ) provisions allow protection orders to be implemented in the context of intra-familial abuse, restraining orders may be implemented under the Harassment Act 1997 (NZ) in response to, *inter alia*, harassment that is intended to cause individuals to fear for their safety or the safety of their family in extra-familial cases. The implementation of a designated offence combatting such behaviour supports the argument that similar protections ought to be available to vulnerable offenders within and outside

145 Serious Crimes Act 2015 (UK), s.76(1).
146 *Ibid.*, s.76(2).
147 *Ibid.*, s.76(1)(c).
148 *Ibid.*, s.76(1)(d).
149 *Ibid.*, s.76(2).
150 Home Office, Controlling or Coercive Behaviour in an Intimate or Family Relationship: Statutory Guidance Framework (December 2015). For further discussion see, Vanessa Bettinson and Charlotte Bishop, "Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?" (2015) 66(2) The Northern Ireland Legal Quarterly 179–197.
151 Vanessa Bettinson, Criminalising Coercive and Controlling Behaviour in Domestic Violence Cases: Achievable or a Mere Aspiration? (Northumbria Centre for Evidence and Criminal Justice Studies, 2016).
152 Domestic Violence Act 1995 (NZ), s.3 (2).

of the familial context. As identified the position is mirrored in England and Wales where stalking and harassment legislation is designed to protect extra-familial victims. The rationale for distinguishing offences based upon relationship status as opposed to the conduct of the offender is unclear; presumably these offences could be reviewed and re-enacted to cover intra- and extra-familial coercive and controlling behaviour rather than the current position which unsatisfactorily requires prosecutors to navigate diverse offences predicated on relationship status rather than individual culpability.

Importantly, recognition that this form of conduct occurs and is criminalised in intra- and extra-familial cases demonstrates the need to protect victims of family abuse irrespective of their relationship status. It is unclear why an individual defending themselves or attempting to evade such criminal behaviour should be held to a different standard of accountability by virtue of their relationship with the perpetrator. The fundamental problem with the recommended reform is the insistence on adopting a definition that attempts to capture several forms of personal relationship, at the unjustified expense of other relationships that may also be open to abuse. The focus in these cases should be upon the situation, the actions of the parties, and the emotions experienced, as opposed to relationship status. The Commission's proposed reform to self-defence is arguably worse than the position regarding the offences outlined in this section, since only intra-familial abuse is relevant to the former, but intra- and extra-familial abuse is recognised by the latter.

B. When the home is both a castle and a cage: self-defence in England and Wales

In assessing criminal responsibility, where two individuals respond in a similar way to a particular set of circumstances, the question should concern culpability rather than the class or category that individual belongs to. The true arbitrariness of the proposed reforms may be viewed through a critical elucidation of the householder provisions in England and Wales, and the equivalent family violence in self-defence legislation operating in Victoria.

Self-defence in England and Wales arises under common law, as clarified by s.76 of the Criminal Justice and Immigration Act 2008, and s.3(1) of the Criminal Law Act 1967 (use of force in the prevention of crime or making arrest). The test for self-defence requires that the degree of force used by the defendant was reasonable in the circumstances as the defendant believed them to be.[153] The defendant may rely on a genuine mistaken belief in the need for self-defence,[154] and there is no need "to weigh to a nicety the exact measure of any necessary action".[155] A failure

153 Criminal Justice and Immigration Act 2008 (UK), s.76(3). See also, *Palmer v R* [1971] AC 814; *R v McInnes* [1971] 1 WLR 1600.

154 Criminal Justice and Immigration Act 2008, s.76(4). See also, *R v Williams* (1984) 78 Cr App R 276; *R v Oatridge* (1992) 94 Cr App R 367.

155 Criminal Justice and Immigration Act 2008, s.76 (7).

to retreat is a factor to be considered rather than establishing a duty to retreat when assessing whether force was reasonable in the circumstances.[156] The defence is less restrictive than the approach operating in New Zealand where imminence and a lack of alternative options remain essential elements of the defence, albeit judicially constructed.

Despite the less restrictive nature of self-defence in England and Wales, a "new category of self-defence"[157] was introduced in 2013 in order to accommodate the "unique" circumstances of householders acting in defence of themselves or another. New s.5A established that:

> "*In a householder case*, the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was *grossly disproportionate* in those circumstances".[158]

In a case other than a householder case, "the degree of force used by D is not to be regarded as having been reasonable in the circumstances as D believed them to be if it was *disproportionate* in those circumstances".[159] De Than and Elvin identify that it is "hard to understand the rationale behind the grossly disproportionate test",[160] and whether the amendments represent the substantive reform which upon first blush it might appear is also doubted.[161] Nevertheless, focus upon a discrete category of offender is of concern to members of both the legal profession and legal academics.

The first appellate court case involving the householder provisions was made on behalf of Collins (a burglar) who sustained injuries from which he is not expected to recover, as a result of being restrained in a headlock by the homeowner.[162] The claimant submitted two grounds under Judicial Review Proceedings, namely: a declaration that s.76(5A) is incompatible with art.2 of the European Convention on Human Rights; and that the Crown Prosecution Service had erred in their decision not to prosecute the homeowner. The Court of Appeal found no breach of art.2, noting that s.76(5A) was compatible with the Claimant's right to life.[163] Three key

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156 *Ibid.*, s.76(6A) as inserted by s.148 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012.

157 Mark P Thomas, "Defenceless Castles: The Use of Grossly Disproportionate Force by Householders in Light of *Collins*" (2016) 80(6) Journal of Criminal Law (December, forthcoming).

158 Section 76 of the Criminal Justice and Immigration Act 2008 as amended by s.43(1)(5) of the Crime and Courts Act 2013.

159 Section 76(5A) and 76(6) of the Criminal Justice and Immigration Act 2008 as amended by s.43 of the Crime and Courts Act 2013 [author's emphasis added].

160 Claire De Than and Jesse Elvin, "Mistaken Private Defence: The Case for Reform" in Alan Reed, Michael Bohlander, Nicola Wake and Emma Smith (eds), *General Defences in Criminal Law: Domestic and Comparative Perspectives* (Farnham: Ashgate Publishing, 2015) p.138.

161 *Ibid.*

162 In the early hours, Collins had entered the home of B, whereupon he was restrained by means of a headlock. As a consequence, Collins suffered serious personal injury from which he is not expected to recover: *R (Collins) v Secretary of State for Justice* [2016] 2 WLR 1303, [2].

163 *Ibid.*, [32] (Sir Brian Leveson).

issues arose in the case which are worth highlighting as similar difficulties are likely to arise in relation to the recommended reforms in New Zealand. The first problem is the elevation of a particular category of individual above all others in terms of the level of legal protection provided. The introduction of the "grossly disproportionate" test was "designed to give householders greater latitude in terrifying or extreme situations where they may not be thinking clearly about the precise level of force that is necessary to deal with the threat faced".[164] Thomas advocates that "it makes sense that householders have that extra margin of appreciation in defending themselves".[165] Judge CJ, in *R v Saw*[166] identified that "there is a longstanding, almost intuitive, belief that our homes should be our castles. The concept suggests impregnability and defiance against intrusion".

Yet there is no logical explanation for failing to extend the same protection to victims of family violence and/or other vulnerable categories of offender who fear for their safety or the safety of loved ones. The material difference in the former case, in particular, is that the perpetrator is known to the victim; it is simply unacceptable that the legislation imports a lower or higher threshold test based upon a (lack of) personal nexus between the victim and the perpetrator. Brooks has suggested that being attacked by a family member might even be regarded "worse" than a domestic burglary on account of "the particular relational connection between offenders and victims. This connection is forged through shared intimacy, familial bonds [and/] or a shared householder".[167] The aggressor is known, a person placed in a position of trust, not a trespasser or a stranger. The breach of trust, Brooks argues, might render the second case worse than the first.[168] The fact that the victim of family violence is unable (actually or based upon his/her understanding of the situation) to escape the torment of the live-in aggressor might support that view. The simple fact, however, is that where an individual fears (serious) violence, they ought to be able to protect themselves, and the test for self-defence ought not to vary depending upon whether the attack occurred inside or outside of the home and/or whether there was a personal nexus between the victim and the perpetrator. The current position in England and Wales which treats the home as a castle and the safest "place of refuge"[169] in householder cases, but as a cage where the victim defends him/herself against an intimate partner or family member is simply unacceptable. The New Zealand Law Commission's reforms are likely to give rise to similar anomalies in cases involving extra-familial vulnerable offenders.

The second issue concerns the extent to which the householder provisions have substantively changed the law. Sir Brian Leveson expressed that the change

164 Ministry of Justice, Circular No 213/02, para.11.
165 Thomas, "Defenceless Castles" (n.157).
166 [2009] 2 Cr App R (S) 54, [6].
167 Thom Brooks, *Punishment* (New York and London: Routledge, 2012) p.190.
168 *Ibid.*
169 Edward Coke, *The Third Part of the Institutes of the Laws of England: Concerning High Treason, and Other Pleas of the Crown and Criminal Causes* (Bell-Yard, near Temple-Bar: E and R Brooke, 1628) p.83.

represents "no more than a refinement to the common law on self-defence".[170] Endorsing the explanation provided in Blackstone, the Secretary of State for Justice, explained:

> "The new provision merely affects the interpretation of '(un)reasonable in the circumstances' so that force is not by law automatically unreasonable in householder cases simply because it is disproportionate provided it is not grossly disproportionate".[171]

The rationale is to provide a "discretionary area of judgment in householder cases, with a different emphasis to that which applies in other cases".[172] The amendment does not provide "a *carte blanche*" to householders in the degree of force they use against trespassers.[173] The example provided by the court is that a failure to retreat may be disproportionate but still reasonable in a householder case although in other cases, it would remain unreasonable;[174] what is reasonable "for a bouncer whose job it is to restrain those who create disturbance in a public setting will not necessarily be the same for a householder who does not have that expertise, imputed knowledge or experience…".[175] The same argument could be made in the majority of cases as most individuals are not specially trained in self-defence. Further, if the force used is reasonable, arguably it is the context that makes it so, rendering the force used proportionate according to the circumstances; the emphasis on proportionate/disproportionate/grossly disproportionate force blurs the issue, when the assessment ought to focus upon the impact the circumstances have on the reasonableness of the defendant's actions. Given the restrictive interpretation of self-defence in New Zealand, it is clear that the Commission's recommendations are designed to make a substantive change to the law. Nevertheless, the extent of that change and any sound policy for limiting the defence to a specific category of offender remain unclear.

The third issue identified is that a defendant cannot rely on "any mistaken belief attributable to intoxication that is voluntarily induced".[176] Sir Brian Leveson implied that the householder provision might be justified on the predicate that the common law approach to intoxication is "unduly restrictive for householders".[177] This issue would not arise in New Zealand where intoxication may be invoked as an evidentiary strategy to negate *mens rea* and thereby remains relevant to

170 *Collins* (n.162), [34].
171 David Ormerod and David Perry, *Blackstone's Criminal Practice* (Oxford: Oxford University Press, 2016), para.A3.63 cited in *Collins*, *ibid*.
172 *Ibid.*, [23].
173 *Ibid.*, [61].
174 *Ibid.*, [24].
175 *Ibid.*, [29].
176 Criminal Justice and Immigration Act 2008, s.76(5). See also, *R v O'Grady* [1987] QB 995.
177 *Collins* (n.162), [30].

subjective elements of criminal law defences.[178] Nevertheless, a critical exposition of this rationale demonstrates how difficult it is to justify restricting defences to specific categories of offender. The extrapolation is that there is much to support the proposition that those who are intoxicated in public must take responsibility for their level of intoxication,[179] but the rationale falls away when an individual consumes alcohol in his/her own home in the absence of anticipation of any interaction with a trespasser.[180] The position elucidated in *O'Grady*,[181] *R v O'Connor*[182] and *R v Hatton*[183] that "where the jury are satisfied that the defendant was mistaken in his belief that any force or the force that he in fact used was necessary to defend himself and are further satisfied that the mistake was caused by voluntary intoxication, the defence must fail",[184] was codified by s.76(5) of the Criminal Justice and Immigration Act 2008. This uncompromising position applies irrespective of specific/basic intent offence delineation. On a murder charge, intoxication evidence is relevant to the *mens rea* assessment, but not the defendant's subjective belief of the circumstances for the purposes of self-defence. Sir Brian Leveson's suggestion that amending the reasonableness requirement compensates for the unavailability of the defence in cases involving intoxicated mistaken belief is odd. The amendments do not alter the position, and his assertion ignores the fact that the issue runs much deeper than self-defence, and it impacts on the significant majority of intoxicated offenders, not just householders. New Zealand, by contrast, rejects the controversial specific/basic intent bifurcation operating in Anglo-American jurisdictions, advocating that it is "not only inappropriate but it obscures more than it reveals".[185] The New Zealand approach more appropriately utilises voluntary intoxication as an evidentiary strategy to demonstrate lack of *mens rea* across the spectrum of offences.[186] The issue in England and Wales is not resolved by *ad hoc* and incoherent amendments to self-defence, but rather Parliamentary intervention in terms of rejecting constructive *mens rea* in the context of voluntary intoxication and basic intent offences, and the implementation of a bespoke offence predicated on dangerous intoxication.[187] The problems associated with intoxication doctrine in England and Wales cannot be usefully invoked to support the householder provisions.

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178 *R v Kamipeli* [1975] 2 NZLR 610; *Steinberg v Police* (1983) 1 CRNZ 129; *R v Storer* CA368/05 (2 May 2006), [26].

179 See generally, *Director of Public Prosecutions v Majewski* [1977] AC 443 and Andrew Simester, "Intoxication is Never a Defence" [2009] Crim LR 3, 5.

180 *Collins* (n.162), [30].

181 *O'Grady* (n.176).

182 [1991] Crim LR 135.

183 [2006] 1 Cr App R 16.

184 *O'Grady* (n.176), 999 (Lord Lane CJ).

185 *O'Connor* (n.182), [53] (Barwick CJ).

186 *Kamipeli* (n.178).

187 For further discussion see, Alan Reed and Nicola Wake, "Potentiate Liability and Preventing Fault Attribution: The Intoxicated 'Offender' and Anglo-American *Dépecage* Standardisations" (2013) 47 John Marshall Law Review 57.

C. *Justifying self-defence: the experience in Victoria*

The amendments proposed by the New Zealand Law Commission are based upon s.322M (formerly s.9AH) of the Crimes Act 1958 (Victoria).[188] Section 322M specifies that, in cases involving family violence, self-defence may apply even where the threat was not imminent and the force was excessive.[189] The provision is "enlivened in circumstances where family violence is alleged".[190] Despite overwhelming support for the revised provisions in Victoria, their use in *Bracken* resulted in public outcry. Bracken was acquitted of the murder of his *de facto* partner, Curtis, on grounds of self-defence. Curtis had driven to Bracken's father Michael's house with a gun in her car, and during the course of an argument she threatened to kill him. Bracken arrived soon after and, believing Curtis was going to shoot his father, retrieved the gun from the car. Curtis advanced towards Bracken, and CCTV footage showed Bracken push her to the ground before shooting her twice in the head, twice in the abdomen and then in the wrist.

The defence argued that Bracken was "broken by the abuse", and it was, in a terrifying moment, a necessary act to protect Bracken and his father. Forensic psychiatrist Associate Professor Dr Carolyn Quadrio, told the jury that Bracken had been subjected to the most severe category of family violence, "intimate terrorism".[191] There was evidence that Bracken had been subjected to regular beatings over the course of the relationship, which had been witnessed by friends on various occasions. Bracken's colleague recalled seeing a gash on his face; Bracken allegedly explained, "she wants to stab me in my sleep".[192] Defence counsel argued that identifying the "tragedy of the situation" serves to recognise:

> "the reality of the black eyes and the bruises, and the split lips, and the screaming, the kicking while he's on the floor with shattered blood and glass. It recognises the illness, the rages, the control. It also recognises that he loved her and he didn't want her dead".[193]

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188 As amended by Crimes Amendment (Abolition of Defensive Homicide) Act 2014 (Vic).

189 This effectively re-enacted and expanded the scope of s.9AH of the Crimes (Homicide) Act 2005 (Vic) beyond homicide cases.

190 *R v Bracken* [2014] VSC 94, [10].

191 Mark Russell, "Family Violence Claim 'a Nonsense' in the Phillip Bracken Case" *The Age* (21 February 2014), available at http://www.theage.com.au/victoria/family-violence-claim-a-nonsense-in-phillip-bracken-case-20140221-3362l.html (visited 27 June 2016).

192 Shelley Hadfield and Kathryn Powley, "Jury Lets Phillip Bracken Walk Free after Trial over Death of Defacto Helen Curtis" *Herald Sun* (8 March 2014), available at http://www.heraldsun.com.au/news/law-order/jury-lets-phillip-bracken-walk-free-after-trial-over-death-of-defacto-helen-curtis/story-fni0fee2-1226849204563 (visited 27 June 2016).

193 Mark Russell, "Forklift Driver Found Not Guilty of Murdering Defacto" *The Age* (28 February 2014), available at http://www.theage.com.au/victoria/forklift-driver-found-not-guilty-of-murdering-defacto-20140228-33qpe.html#ixzz4ClgMjJFh (visited 27 June 2016).

Based on this account, it would appear that this is the category of case s.322M, and the posited option for amendment in New Zealand, is designed to accommodate.

The Crown argued, however, that the account provided was "blacker than necessarily the reality".[194] The defence gave notice, in the form of defence overview, of an intention to adduce tendency evidence from prosecution witnesses;[195] namely that Curtis had a tendency towards losing her temper, becoming angry, and/or being in an uncontrollable rage, rendering it more probable that she was a perpetrator of family violence, and that she had acted in the way described by Bracken and his father on the day of the killing.[196] The defence also sought advanced ruling as to whether in adducing evidence of the defendant's good character,[197] the prosecution would be permitted to adduce evidence of the defendant's prior convictions.[198] Insofar as the evidence of good character related to the nature of the relationship, and not the offence charged, the prosecution would not be permitted to adduce such evidence.[199] That Bracken was in possession of a long-arm weapon in the period proximate to the shooting might demonstrate a disposition different to that advanced by the defence, but whether the Crown was able to adduce such evidence would depend on how the good character evidence unfolded during trial.[200] In an indictment of the revised defence, MP Phil Cleary said, "I'm sick of watching poor, dead women being vilified in the courtroom. It's devastating for the family. No civilised society could say that she did anything to deserve the level of violence inflicted on her".[201]

It is our contention that while the public outcry pertained to victim blaming and potential abuse of self-defence where family violence is alleged, concerns regarding s.322M run deeper and tie to the justificatory nature of self-defence. A fundamental question is whether justificatory self-defence ought to be made available where the threat was not imminent and the force used is excessive. There is a "temptation" to "say that a non-confrontational [sic] 'self-defence' homicide is morally justifiable",[202] particularly in cases like *Wang*. In non-confrontational homicides involving domestic abuse, it might be argued that the predominant aggressor's violent conduct operates to forfeit the right to life or that the violation of the primary victim's autonomy justifies the primary victim's response.[203] As Dressler puts it, the proposition that a primary victim is "justified in killing her abuser [in non-confrontational circumstances], although well meaning, is wrong,

194 Russell, "Family Violence Claim 'a Nonsense' in the Phillip Bracken Case" (n.191).
195 *Bracken* (n.190), [17]. See also, Evidence Act 2008 (Vic), s.97.
196 *Bracken* (n.190), [18].
197 Evidence Act 2008 (Vic), s.110.
198 *Bracken* (n.190), [31]. See also, Evidence Act 2008, ss.135 and 137.
199 *Bracken* (n.190), [42].
200 *Ibid.*, [61]–[66].
201 Hadfield and Powley, "Jury Lets Phillip Bracken Walk Free after Trial over Death of Defacto Helen Curtis" (n.192).
202 Joshua Dressler, "Battered Women and Sleeping Abusers: Some Reflections" [2006] Ohio State Journal of Criminal Law 3, 463.
203 *Ibid.*

and…any serious effort to expand self-defence law — for [primary victims] but also presumably, for others — to permit such killings is a 'reform' society ultimately will regret". In order for self-defence to operate, the use of defensive force must be justified. Though it may be tempting to allow complete self-defence in some cases where the threat is not imminent and the force is excessive, this ought to be resisted since these circumstances may be more closely aligned with imperfect self-defence, similar to that adopted in a number of US jurisdictions.

V. Comparative American Standardisations: The Imperfect Self-Defence Doctrine

The judgement on the appropriateness of self defence in US jurisprudence often engages an holistic evaluation of risk thresholds appurtenant to psychological coercive entrapment.[204] The theoretical risk standardisation correlates to arguments advanced herein that it is the individual coercer, who creates the entrapment and conseqeuential fear, who bears part of the societal risk burden.[205] There is a parallel syllogism with perspectives advanced by Bergelson[206] that, when addressing the liability of the defendant coercee for intentional killing, courts should factorise within the criminal liability equipoise whether the "victim" was in any way culpable for D's conduct.[207] This perspective is framed in terms of conditionality of rights:[208] "a victim may lose (or lessen) his right not to be harmed because of his own conduct".[209] If that happens the defendant ought not to be held criminally accountable or his punishment should be reduced.[210] The jurors, as moral arbiters within the reasonable/excessive force self-defence morality play, should be instructed in this comparative culpability defence when imposing culpability thresholds.[211]

Further grist to the mill sits within Ferzan's articulation that there is a "moral symmetry" between the aggressor and the defendant.[212] In this reconceptualisation

204 See, generally, Mitchell N Berman, "The Normative Function of Coercion Claims" (2008) 8 Legal Theory 45; Richard A Rosen, "On Self-Defence, Imminence and Women Who Kill Their Batterers" (1993) 71 North Carolina Law Review 371; and Claire O Finkelstein, "Self-Defence as a Rational Excuse" (1996) 57 University of Pennsylvania Law Review 621.

205 See Monu Bedi, "Excusing Behaviour: Reclassifying the Federal Common Law Defences of Duress and Necessity Relying on the Victim's Role" (2011) 101 Journal of Criminal Law and Criminology 575.

206 Vera Bergelson, *Victims' Rights and Victims' Wrongs: Comparative Liability in Criminal Law* in Markus D Dubber (ed) (California, USA: Stanford University Press, 2009).

207 *Ibid.*, pp.1–5.

208 *Ibid.*, pp.61–62, 161–163.

209 *Ibid.*, pp.89–90.

210 *Ibid.*

211 See, George P Fletcher, "The Place of Victims in the Theory of Retribution" (1999) 3 Buffalo Criminal Law Review 51. Interestingly, Bergelson ultimately advocates for an affirmative defence of comparative liability that defendants can utilise for culpability mitigation: Bergelson, *Victims' Rights And Victims' Wrongs* (n.206).

212 Kimberly Kessler Ferzan, "Justifying Self-Defence" (2005) Law and Philosophy 711, 734.

the aggressor is an actor who has volitionally and intentionally created a risk of harm, and it is incumbent upon the coercee to confront that risk.[213] The answer is to remove the veneer and get to the substance of the norms, whereby it may be just to allow the defendant to redistribute risk (or part of the risk) back to the aggressor. Viewed in such a legal prism, risk is demarcated as an epistemic concept with redistribution amongst "unlawful" participants:[214] "It is the aggressor's culpable creation of the risk that gives rise to the defender's prescriptive rights".[215]

The epistemic conceptualisation of risk that Ferzan cogently advances stands in tandem with Robinson's theory of self-defence as an embodiment of moral forfeiture.[216] Self-defence is classified as a justification defence in that via their initial acts of aggression the ultimate victim forfeits a panoply of rights that otherwise would have existed.[217] The umbrella of "lost" rights may encompass rights to bodily integrity, right to freedom from aggression, or even interest in life within defined spheres.[218]

The basic substantive contours of self-defence have developed under US precepts in more limited circumstances.[219] The venerable formulation of common law is that an individual actor may defend herself with deadly force only when she believes such force is necessary to defend against an imminent (or in a number of jurisdictions an "immediate") unlawful threat of death or serious bodily harm.[220] The defence is emasculated as an "all or nothing" reduction in culpability for

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213 *Ibid.*, and see also Kimberly Kessler Ferzan, "Self-Defense and the State" (2008) 5 Ohio State Journal of Criminal Law 449.

214 Ferzan, "Justifying Self-Defence" (n.212) 740.

215 *Ibid.*, and see also, Jeff McMahan, "Self-Defense and the Problem of the Innocent Attacker" (1994) 104 Ethics 252–290, articulating an eclectic theory that justifies self-defence against an innocent attacker on the predicate that he poses an objectively unjustified threat.

216 Paul H Robinson, "Criminal Law Defenses: A Systematic Analysis" (1982) 82 Columbia Law Review 199, 214.

217 *Ibid.*, pp.214–216.

218 See, generally, Paul H Robinson, *Criminal Law Defenses* (West Publishing Co: Minnesota, USA, 1984) s.131(c)(1) where he also rejects the traditional assumption that only imminent harm requires a response, and asserts that if the necessity requirement is applied appropriately, no abuse of the justification defence will occur, even if the danger to the victim is not imminent:

> "If the concern of the limitation is to exclude threats of harm that are too remote to require a response, the problem is adequately handled by requiring simply that the response be 'necessary'. The proper inquiry is not the immediacy of the threat but the immediacy of the response necessary in defence. If a threatened harm is such that it cannot be avoided if the intended victim waits until the last moment, the principle of self-defence must permit him to act earlier-as early as is required to defend himself effectively".

219 See Dressler, "Battered Women and Sleeping Abusers" (n.202); Sanford H Kadish, "Respect for Life and Regard for Rights in the Criminal Law" (1976) 64 California Law Review 871; and Jeremy Waldron, "Self-Defense: Agent-Neutral and Agent-Relative Accounts" (2000) 88 California Law Review 711.

220 Luis E Chiesa, "United States of America" in Reed, Bohlander, Wake and Smith, *General Defences in Criminal Law* (n.160) pp.329, 333–336.

murder,[221] as also applicable within the criminal codes in France[222] and Germany,[223] and the force utilised must be proportionate to threatened harm to allow application. A fear of present or future violence from the initial aggressor has generally not been sufficient for activation of even a partial defence to liability, except in rare cases of "imperfect" self-defence, as articulated below.[224] The belief in an unlawful threat of death or serious bodily harm must be both subjectively reasonable in that the actor herself truly believes it, and normatively reasonable in that the objective reasonable person would similarly so believe.[225] This latter criterion mirrors the doctrinal change that occurred in Canada in 2012,[226] whereby Parliament replaced the self-defence provisions in the criminal code that had received vituperative criticism for their enduring complexity with a more straightforward standardisation, albeit less predictable in overall outcome. The key issue is whether the act of self-defence was "reasonable" in light of a non-exhaustive list of factors set out in the code for jury evaluation. Section 34(2) of the Canadian Criminal Code provides that the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to nine specified factors:

(1) the nature of the force or threat;
(2) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
(3) the person's role in the incident;
(4) whether any party to the incident used or threatened to use a weapon;
(5) the size, age, gender and physical capabilities of the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
(6) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

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221 *Ibid.*

222 Article 122.5 of the French Criminal Code lays down the ambit of self-defence, called "legitimate defence":

> "A person who, faced with an unjustified attack against himself or another, carries out at that time an act required by the necessity of the legitimate defence of himself or another is not criminally liable, except it there is a disproportion between the means of defence used and the gravity of the attack".

223 The right to self-defence is codified in s.32 StGB of the German Criminal Code:

> (1) "A person who commits an act in self-defence does not act unlawfully;
>
> (2) self-defence means any defensive action that is necessary to avert an imminent unlawful attack on oneself or another".

See, generally, Michael Bohlander, *Principles of German Criminal Law* (Oxford: Hart Publishing, 2009).

224 See, for example, *Swann v United States* 548 A 2d 928, 930, 931 (DC 1994).

225 Cathryn Jo Rosen, "The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill" (1986) 36 The American University Law Review 11, 27–33.

226 Kent Roach, "Canada" in Reed, Bohlander, Wake and Smith, *General Defences in Criminal Law* (n.160) pp.201–205.

(7) any history of interaction or communication between the parties to the incident;
(8) the nature and proportionality of the person's response to the use or threat of force; and
(9) whether the act committed was in response to a use or threat of force that the person knew was lawful.[227]

The antediluvian lineage of federal US self-defence doctrine attaches to early Supreme Court precepts. In *Andersen v United States*,[228] by way of illustration, a precedential "authority" that concerned a sailor who killed the first mate, but sought reliance on retaliatory lethal force, it was determined that self-defence was transcendent: the defendant, "was acting under a reasonable belief that he was in imminent danger of death or great bodily harm by the deceased and that his act in causing death was necessary in order to avoid [this harm] which was apparently imminent".[229] The fundamental elements and parameters of self-defence doctrine have not changed over the years, and federal courts have adopted the defence where a defendant's use of force was reasonable, proportionate and necessary to defend against imminent serious bodily harm.[230] A standardised definition has been provided by the Ninth Circuit within the following contours:

> "In order to make a prima facie case of self-defence, a defendant must make an offer of proof as elements: (1) a reasonable belief that the use of force was necessary to defend himself or another against the immediate use of unlawful force and (2) the use of no more force than was reasonable in the circumstances".[231]

Interestingly, a more expansive self-defence doctrine, beyond the "immediacy" constraints of federal common law, has been recommended by the American Law Institute in its Model Penal Code and enacted in some states.[232] Section 3.04 of the

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227 *Ibid.*, p.203.
228 170 US 481 (1898).
229 *Ibid.*
230 See generally, Stephen S Schwartz, "Is There a Common Law Necessity Defense in Federal Criminal Law" (2008) 75 University of Chicago Law Review 1259.
231 *United States v Biggs* 441 F 3d 1069, 1071 (9th Cir 2006) (In defining one's self against an unlawful attack, a person is only justified in using such an account of force as may appear to him at the time necessary to accomplish that purpose).
232 Note that a rare exception where self-defence was transcendental in a non-confrontational scenario was *State v Leidholm* 334 NW 2d 811 (ND 1982). The abusively coerced wife killed the sleeping coercee. The court, in facilitating a self-defence claim, adopted a subjectified personification of the reasonable person individuation:

> "[A] correct statement of the law of self-defense is one in which the court directs the jury to assume the physical and psychological properties peculiar to the accused, viz., the place itself as best it can in the shoes of the accused, and then decide whether or not the peculiar circumstances surrounding the accused at the time he used force were sufficient to crate in his mind a sincere and reasonable belief that the use of force was necessary to protect himself from imminent and unlawful harm".

code justifies the use of self-preventative force, including deadly force, subject to certain limitations, when the actor believes (and such a belief is reasonable) that the force used is "immediately necessary" on the present occasion. The code simply asks whether the necessity to use the defensive force is immediately at hand, rather than the spatial temporal limitation that applies at common law which delimits a relational time span between the contours of the defendant's use of defensive force and the threatened act of aggression being counteracted.[233]

The imminence/immediately necessary standardisations to justify lethal force has proved controversial in the US for outcomes reached in cases involving battered women.[234] The paradigmatic scenario engages pre-emptive rather than retaliatory force in the strict sense where the psychologically coerced and entrapped spouse, subject to historical cumulative violence, kills the aggressor to avoid the infliction of future, violence, and whilst in such fear.[235] The cause célèbre in this regard, and a point of departure for numerous academics, is the polarising decision in *State v Norman*,[236] a North Carolina case in which a woman who killed her long-time abuser while he slept raised a claim of self-defence. Judy Norman had married her husband when she was fifteen because she was pregnant, and for the next 20 years suffered appalling physical and psychological abuse, including coercion into prostitution to support the family, and if she failed to make a minimum of one hundred dollars pay per day she would be beaten. The violence escalated in the days prior to the killing. Her husband called her a "bitch" and a "whore", referred to her as a dog, and beat her "most every day", especially when he was drunk, and when other people were around to "show off".[237] Judy was beaten with whatever was handy — his fist, a fly swatter, a baseball bat, his shoe or a bottle; he put out cigarettes on her face; he threw food and drink in her face and refused to let her eat for days at a time; he threw glasses, ashtrays and beer bottles at her and once smashed a glass in her face.[238] Judy was often made to bark like a dog and if she refused, he would beat her; he often forced here to sleep on the concrete floor of their home and on several occasions forced her to eat dog or cat food out of the dog or cat bowl. Judy, after a failed suicide attempt, and unsuccessfully trying to summon help from the police and local authorities, obtained a gun and shot her husband three times in the head while he was sleeping. The majority of the North Carolina Supreme Court agreed with the trial court's ruling to deny a self-defence instruction because there was no *imminent* danger of serious physical abuse or death when Judy killed her husband.[239]

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233 Dressler, "Battered Women and Sleeping Abusers" (n.202) p.468.

234 See Victoria Nourse "Self-Defence and Subjectivity" (2001) 68 The University of Chicago Law Review 1235; and Elisabeth Ayyilidiz, "When Battered Woman's Syndrome Does Not Go Far Enough: The Battered Woman as Vigilante" (1995) 4 The American University Journal of Gender and the Law 141.

235 See, generally, Phyllis L Crocker, "The Meaning of Equality for Battered Women Who Kill Men in Self-Defense" (1985) 8 Harvard Women's Law Journal 121.

236 366 SE 2d 586 (NC CA 1988).

237 *Ibid.*, 587.

238 *Ibid.*, 588.

239 *Ibid.*, 589.

It is contended that the outcome in *Norman* was inapposite, and that self-defence constructs, of a partial nature, ought to be promulgated that broaden standardisation to justify intentional killings in non-confrontational situations provided use of force is necessary to prevent a future attack. This ought to be inclusively deconstructed to embrace the psychologically coerced entrapee even if the aggression is not technically imminent.[240] A partial defence should apply to coercees in the situation of Judy Norman. As subsequently adumbrated, a new schema is required whereby a reformulated partial defence is designed to sit directly beneath self-defence. It would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious violence from the victim against the defendant or another identified individual, and the force used is unreasonable on the facts. This reflects, in part, the remarks of North Carolina Supreme Court Justice Harry Martin in his dissent in *Norman*:

> "By his barbaric conduct over the course of twenty years, J.T. Norman reduced the quality of the defendant's life to such an abysmal state that, given the opportunity to do so, the jury might well have found that she was justified in acting in self-defence for the preservation of her tragic life".[241]

The majoritorian perspective in the United States is that utilisation of excessive force operates as a bulwark against a full or partial defence for liability.[242] There are some exemplars, however, of state courts recognising a partial defence when primary victim is charged with murder, and jury determination is that the force used should be categorised as excessive or unreasonable — the terminology is that of "*imperfect self-defence*".[243] The operational impact of imperfect self-defence is to mitigate murder to the lesser culpability offence of manslaughter: the parameters of this embryonic conceptualisation is that mitigation applies when the defendant reasonably believed that using some force was necessary but she unreasonably used more force than was necessary to thwart the attack, or where the actor honestly but unreasonably believed that the force was necessary to avert wrongful aggression.[244]

An iteration of imperfect self-defence doctrine, and constituent elements, was vividly exemplified by the District Court of Columbia in *Swann*.[245] The case arose

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240 Ayyilidiz, "When Battered Women's Syndrome Does Not Go Far Enough" (n.234) p.149: contends that the state's failure to protect women such as Judy Norman constitutes a breach of the social contract; the battered woman who kills her abuser should be seen in such a perspective as a spontaneous vigilante repairing a fractured moral order. Note that Ayyilidiz ultimately argues for jury nullification, not for an expanded self-defence doctrine. (pp.164, 165)

241 *State v Norman* 378 SE 2d, 8, 21 (NC 1989) (Martin J, dissenting).

242 See Chiesa, "United States of America" (n.220) pp.333–335.

243 *Swann* (n.224); and see, generally, Stuart Green, "Castles and Carjackers: Proportionality and the Use of Deadly Force in Defense of Dwellings and Vehicles" [1999] University of Illinois Law Review 19; and Judith Jarvis Thomson, "Self-Defense" (1991) 20 Philosophy and Public Affairs 283.

244 David Wasserman, "Justifying Self-Defense" (1987) 16 Philosophy and Public Affairs 356.

245 *Swann* (n.224).

out of a basketball court dispute between the respective parties. The appellant testified that he thought that V was about to draw a gun on him so he fired pre-emptively with fatal consequences. The principal issue on appeal was whether Swann was entitled to a manslaughter instruction on a theory of imperfect self-defence predicated on the mitigating circumstances.[246] An initial altercation had occurred when V, aware that the defendant had recently been stabbed, deliberately hit him in the stomach with a basketball, then stated, "You think you stabbed up now, just watch".[247] Swann claimed that the fatal shot was fired in a scenario where he had a heightened sense of fear since the earlier stabling, and with an underpinning appreciation that V had previously killed someone with a gun. The District Court determined that, as a general proposition, a theory of imperfect self-defence may be applicable.[248] The parameters of this nascent common law defence invoke consideration of whether a reasonable jury could have found that the defendant had a subjective actual belief that his life was in danger, and a like belief that he had to react with the force that he did, even though such beliefs were objectively unreasonable.[249]

The outcome in *Swann* raised the significance of pre-emptive force, conjoined together with the focal import of relational evidence of past experiences. These pillars are, of course, of particular relevance in cases of battered women and prior spousal abuse, and other exemplars of intentional killing in non-directly confrontational circumstances. Goetz, for example, was the notorious "subway vigilante", and as a victim of previous muggings, he shot four youths in a New York subway when one of them demanded five dollars.[250] Nourse has previously identified that part of the pre-emptive nature of Goetz's volitional conduct related to framework evidence that the state had previously failed to provide adequate protection, and he consequently believed that he needed to protect himself.[251] A broader contextualisation of the importance of social framework evidence within psychological coercive entrapment, is distilled subsequently, but experiential issues also played a part before the court in *Goetz*. The Court of Appeal iterated that evidence of prior experiences that are relevant to assessing the defendant's state of mind at the time of the use of force is relevant to the determination whether his belief that force was necessary was objectively reasonable.[252] Moreover, the Court elaborated that the standard that should be developed to assess whether the defendant's belief is reasonable is whether a reasonable person in the defendant's

246 *Ibid.*, 929.
247 *Ibid.*
248 *Ibid.*, 930–931.
249 See, generally, James Q Whitman, "Between Self-Defense and Vengeance/between Social Contract and Monopoly of Violence" (2004) 39 Tulsa Law Review 901.
250 See, generally, George P Fletcher, *A Crime of Self-Defense: Bernard Goetz and the Law on Trial* (Chicago: The University of Chicago Press, 1988).
251 *People v Goetz* 497 NE 2d 41, 44 (NY 1986), and see Nourse, "Self-Defence and Subjectivity" (n.234).
252 *Ibid.*

situation would also have believed that using force was necessary to counteract unlawful aggression.[253]

It is our contention, however, after a comparative review of US theoretical and doctrinal precepts, encompassing imperfect self-defence and individuated experiential evidence, that the full and partial defence schema should be more nuanced. Extant laws fail to appropriately recognise the need for a *de novo* partial self-defence template. Rather than asking whether the psychologically coerced entrapee believes that she will be killed or suffer serious injury in every case in order to allow/deny any type of defence, the proper question in certain posited situations is to ask whether she was put in fear of serious violence in the context of past experience. This should be enough for the actor to potentially invoke a partial self-defence in particularised circumstances, even if she does not believe the next attack is likely to take her life as in the case of Judy Norman. This reconceptualisation is supported by conditionality of rights and epistemic conceptualisation of risk arguments, as previously stated.

A. A bespoke partial defence

The English Law Commission, prior to the Coroner and Justice Act 2009 reforms, have consistently rejected a specific separate partial defence to murder based on excessive use of force in self-defence, articulating instead a reformulated standardisation for the law of provocation, embracing either fear of serious violence or anger.[254] In tandem there have been proposals for a reconceptualised full defence of duress by threats as a defence to first-degree murder where the operative threat is one of death or life-threatening harm. This is viewed as a *de novo* affirmative defence where the defendant should bear the consequences of proving the qualifying conditions of the defence on a balance of probabilities.[255]

It is significant, however, that the Law Commission have acknowledged the perspectives advanced by some academics that English precepts fails to assist those abused individuals who kill their coercers when they are asleep or otherwise defenceless.[256] The coercees under extant law are precluded from being able to rely on self-defence because, in order to do so, they need to be able to demonstrate that the killing was necessary to resist actual or imminent violence. Wells, in this context, has expressed the view that reform should, "contemplate a re-thinking of self-defence, and a radical shift in some of the ideas that

253 *Ibid.*; see, generally, Victoria Nourse, "Reconceptualising Criminal Law Defenses" (2003) 151 University of Pennsylvania Law Review 1691, 1704 asserting that Goetz's references to previous muggings can be interpreted as a contention of necessity for self-protection derived from state failure.

254 Law Commission for England and Wales, Partial Defences to Murder (Law Com No 290, 2004).

255 Law Commission for England and Wales, Murder, Manslaughter and Infanticide (Law Com No 304, 2006).

256 See generally, Aileen McColgan, "In Defence of Battered Women Who Kill" (1993) 13 Oxford Journal of Legal Studies 508; and Joshua Dressler, "Provocation: Partial Justification or Partial Excuse" (1988) 51 Modern Law Review 467.

underlie it".[257] The paradoxes and contradictions inherent within general defences doctrine fails to recognise that familial violence and other types of abuse, do not simply invade an individual's physical integrity, "it is an instrument of psychological and emotional control".[258] Clarkson has viewed this issue through a broadened prism, propounding a new single defence of "necessary action".[259] The focal inquiry herein is whether it is reasonable for the coercee to take pre-emptive action and, given the prevailing circumstances, was the force utilised proportionate to the danger — in this contextualisation "danger" is given a wider time frame than under the present law.[260] The challenge remains, however, whether to facilitate a partial defence where excessive force is used, and perforce not a "reasonable" and "proportionate" reaction to presented danger, but to avoid unfair syndromisation of the psychologically entrapped coercee.

It is our contention that even with bespoke provisions dedicated to the unique circumstances of family violence, as promulgated by the New Zealand Law Commission, some victims of abuse, like Judy Norman, considered above, may continue to find themselves bereft of a defence in homicide cases. The reality is that even if self-defence is reformed in line with the New Zealand Law Commission recommendations, it will not always be available on the facts.[261] That is not to say that a defence always ought to be available axiomatically to the victim of abuse. However, in cases of prolonged and systematic abuse where the victim kills an abuser, and self-defence remains unavailable, a partial defence ought to provide a *potential* option.[262] Any limitation to family members may serve to exclude deserving defendants who find themselves in potentially analogous situations but for failing to fall within the identified category.

(i) Self-preservation

A new partial defence of general application ought to be introduced to New Zealand. A partial defence avoids the stigmatic murder label;[263] it may influence charging practices by encouraging guilty pleas thereby avoiding unnecessary trials or by encouraging a trial where self-defence might apply on grounds that the partial defence represents a safety-net;[264] and, it sends a signal to sentencing judges and society regarding culpability levels.[265] Importantly, there is evidence that the lack of

257 Celia Wells, "Battered Woman Syndrome and Defences to Homicide: Where Now" (1994) 14 Legal Studies 266, 272.
258 *Ibid.*, p.273.
259 Christopher Clarkson, "Necessary Action: A New Defence" [2004] Crim LR 81, 82.
260 *Ibid.*, pp.90, 91.
261 New Zealand Law Commission, Understanding Family Violence (n.4) para.5.31.
262 New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) p.4, question 14: "Should a new partial defence (or separate homicide offence)-whether of general application or specific to victims of family violence-be introduced to New Zealand?"
263 *Ibid.*, para.8.5.
264 It is recognised that partial defences may encourage compromise verdicts: *Ibid.*, para.8.10.
265 *Ibid.*, para.8.7.

a partial defence in New Zealand does not accord with societal expectations of how victims of family violence ought to have their victimisation and culpability reflected in criminal offending; manslaughter verdicts are being returned, in cases where there is significant evidence of murderous intent. For example, Paton[266] was convicted of manslaughter after she stabbed the victim in the neck when he challenged her to use the knife. Wickham[267] was convicted of manslaughter after shooting her abusive husband because he "tried to throttle" her again.[268] The implementation of a new partial defence would reduce current jury nullification practices, and provide a more accurate reflection of the rationale for the verdict returned.

A new self-preservation defence, drawing upon earlier recommendations of the Law Commission for England and Wales is advanced. The partial defence is complemented by social framework evidence, mandatory juror directions and an interlocutory appeal procedure. Importantly, the defence is specifically tailored to the law in New Zealand. The partial defence operates as an imperfect justification; the defendant is justified in responding to an unjust attack, but the overall response is wrong.[269]

The partial defence is designed to sit directly beneath self-defence. It would operate to reduce a murder conviction to manslaughter where the defendant kills in response to a fear of serious abuse from the victim against the defendant or another identified individual, but unlike affirmative self-defence the lack of an imminent threat and the use of excessive force would not necessarily negate the defence. The absence of imminence and proportionality requirements are justified on the basis that self-preservation is a partial rather than a complete defence. In cases where the defendant claims to have held a particular belief as regards the circumstances, the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; there must be an intelligible basis for the belief; if it is determined that D did genuinely hold it, and there was an intelligible basis for doing so, D is entitled to rely on it for the purposes of the partial defence, whether or not it was mistaken, or (if it was mistaken) the mistake was a reasonable one to have made. Importantly, the defence does not automatically apply where self-defence fails on grounds that the threat was not imminent or the force was excessive, otherwise the defence would be overly broad in ambit and subject to similar criticisms that were levelled at defensive homicide in Victoria.[270]

Appropriate threshold filter mechanisms operate to prevent the defence from being available in unmeritorious cases. The defence does not apply where the

266 *R v Paton* [2013] NZHC 21.

267 NZPA, "Murder-Accused Lived in Fear" *Stuff NZ* (4 October 2010), available at http://www.stuff.co.nz/national/crime/4196192/Murder-accused-lived-in-fear (visited 27 June 2016).

268 See, Brenda Midson, "Degrees of Blameworthiness in Culpable Homicide" (2015) 6 New Zealand Law Journal 220, 231.

269 Alan Norrie, "The Coroners and Justice Act 2009 — Partial Defences to Murder: (i) Loss of Control" [2010] Crim LR 275, 283.

270 See works referred to in note 8.

defendant intentionally incited serious violence or acted in a considered desire for revenge, and is qualified by a normal person test which requires that a person of the defendant's age with a normal degree of tolerance and self-restraint might have reacted in the same or a similar way in the circumstances. Psychiatric conditions may be relevant to the normal person test in limited circumstances where the condition is especially probative, but evidence of voluntary intoxication remains irrelevant. In all cases, the trial judge may decline to leave the defence to the jury on the basis that no jury properly directed could reasonably conclude that the defence might apply. The manner in which appropriate and inappropriate cases might be determined is demonstrated through a critical elucidation and application of the newly proposed elements of the defence to the case facts in *Wang* and *Vincent*, considered above. There were no lasting consequences to the victim's injuries in *Vincent*,[271] but, let us consider that the attack had been fatal.

The first element of the defence requires that the defendant feared serious abuse from the victim against the defendant or another identified person. The term abuse should be broadly construed as including psychological and sexual harm, in addition to physical violence; the victim of abuse's response to the predominant aggressor "does not necessarily follow from the severity of the last act of violence, but flows from her perception of the severity of the threat he poses to her life".[272] It is not sufficient that the defendant feared violence, the level of violence feared must be serious. This mirrors the test operating under the loss of control defence in England and Wales, and is entirely subjective.[273] The Court of Appeal in *Gurpinar*[274] distinguished fear of serious violence from fear before engagement in a fight, highlighting that despite the subjectivity of this limb, it may still be utilised to restrict the availability of the defence in appropriate circumstances. The defence is supported by social framework evidence, considered further below, relating to the nature of abuse. This evidence should be utilised to highlight the impact of coercive control,[275] and to explain why an ostensibly trivial incident might cause the primary victim to fear such abuse; "it is often only when the context...is taken into account that seemingly small and trivial incidents can be seen to have a detrimental effect on the victim".[276] The fact that the threat may be targeted towards the defendant or another identified individual is particularly important, given that primary victims may act in defence of their children as well as themselves.[277] Similarly, children

271 *Vincent* (CA) (n.49), [6].

272 Susan Edwards, "Anger and Fear as Justifiable Preludes to Loss of Self-Control" (2010) 74(3) Journal of Criminal Law 223–241.

273 *R v Ward* [2013] 2 Cr App R (S) 35; *R v Davies-Jones* [2013] EWCA Crim 2809 and R v *Lodge* [2013] EWCA Crim 987.

274 *Gurpinar* (n.114).

275 Evan Stark, "Rethinking Coercive Control" (2009) 15(12) Violence Against Women 1509.

276 Bettinson and Bishop, "Is the Creation of a Discrete Offence of Coercive Control Necessary to Combat Domestic Violence?" (n.150) p.186.

277 D successfully pleaded Loss of Control after killing V, who had physically attacked D's brother at a house party: *Ward* (n.273).

may act in order to defend a parent. As noted, those over the age of 10 may be convicted of murder and/or manslaughter in New Zealand should the prosecution effectively discharge its burden of proof to the usual criminal standard.

Wang would undoubtedly satisfy the fear of serious abuse element of the proposed defence. The psychiatrist, in *Wang*, stated that Wang believed that the predominant aggressor's threats would be carried out, and that she could see no other alternative to the use of force. Whether *Vincent* could satisfy this aspect of the defence is debatable. Their lordships, in *Vincent*, conceded that:

> "It may be that Mr Vincent genuinely believed it was necessary for him to take the actions he did in the circumstances as he believed them to be…He may have believed that the Corrections personnel at the prison were not taking adequate steps to secure his safety".[278]

Even with a generous interpretation of the "fear of serious abuse" requirement, it does not follow that the defence would be available, since the remaining elements of the defence must be satisfied.

The proposed defence is qualified by the "normal person" test. This aspect of the defence is objective. The test is similar to the "normal person" test operating in relation to the loss of control defence, with the exception that "sex" is omitted. "Sex" overstates the "role of sex and gender in explaining D's reaction".[279] It encourages problematic stereotyping, in addition to typecasting the reactions of men and women. If women are typical victims and men are typical aggressors, this is likely to render it more difficult for both sexes to claim the defence.[280] Sex and gender are more appropriately considered as part of the circumstances of the case, where disparities between size, strength, and other relevant factors can be addressed.

Akin to the loss of control defence, circumstances refer to all the defendant's circumstances other than those whose only relevance is that they bear on the defendant's general capacity for tolerance and self-restraint. Given the fluidity and potential evolution of these terms, it is important to advise jurors that irrational prejudices, such as homophobia and racism, and other repugnant characteristics, such as aggression and irritability, are excluded.[281]

The question in both *Wang* and *Vincent* would be whether a person of the defendant's age with a normal degree of tolerance and self-restraint might have

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278 *Vincent* (CA) (n.49), [33].

279 Neil Cobb and Anna Gausden, "Feminism, 'Typical' Women, and Losing Control" in Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Farnham: Ashgate Publishing, 2011).

280 *Ibid.*

281 We express our gratitude to the De Montfort Law School staff for making this point. An early version of this article was presented to De Montfort Law School; Nicola Wake, Responding to the NZ Law Commission: A New Partial Defence (for Primary Victims)? (De Montfort Law School, 2016).

reacted in the same or a similar way in the circumstances. It is foreseeable that a normal person who has suffered a prolonged history of abuse, and *believes* there is no other option but to kill might react in the same way as Wang. Vincent, in contrast, had been placed in a separate management regime to avoid further confrontation, but following assurances from both parties, they returned to the earlier routine where they were managed together.[282] Vincent had the opportunity "to seek the assistance of the corrections officers" to be returned to the separate regime.[283] There were four days between the initial altercation and the stabbing, during which there was nothing to suggest an increased threat. Vincent's situation is simply incomparable to the pattern of abuse suffered by the intra- and extra-familial vulnerable individuals identified in Section II, above. Note that Vincent's situation similarly differs from *Swann*, the US case, in terms of the framework factors highlighted by Nourse.

Medical conditions short of insanity are relevant to subjective elements of criminal law defences in New Zealand, but not objective elements.[284] This is the approach adopted in self-defence cases in England and Wales. Medical conditions are relevant to the subjective assessment as to whether force is necessary, but not in relation to whether the force was reasonable in the circumstances as perceived by the defendant. Tony Martin shot two intruders in the back, killing 16-year-old Barras. Martin appealed his conviction for murder on grounds that the Court of Appeal refused to allow personal characteristics (paranoid personality disorder) to be taken into account for the purposes of assessing whether the use of force was reasonable in self-defence, despite being relevant to the assessment of whether Martin believed force was necessary (it should be noted that Martin's condition was relevant for the purposes of the diminished responsibility defence, considered further below). Simester and Sullivan have described the position where mental disorder is relevant to the first limb of self-defence but not the second as "untenable".[285] In cases involving insane delusions, the implication in both jurisdictions is that they should fall to be considered under the insanity defence.[286]

In the context of the loss of control defence, the Law Commission for England and Wales noted that psychiatric conditions and developmental immaturity would undermine the normal person tests objectivity. Accordingly, given the objectivity of the normal person test, it would appear that medical conditions would not be recognised for the purposes of the partial defence under New Zealand law. This potentially creates an anomaly in the defence in that psychiatric conditions would be relevant to the fear assessment but not the normal person element of the defence. There is a clear preference in England and Wales for medical conditions

282 *Vincent* (CA) (n.49), [4].
283 *Ibid.*, [33].
284 *R v Oakley* CA337/05 (22 September 2006); *R v Ghabachi* [2007] NZCA 285.
285 AP Simester, JR Spencer, GR Sullivan, and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (Oxford: Hart Publishing, 2014).
286 *R v Oye* [2014] 1 WLR 3354.

to be considered under the alternative defence of diminished responsibility. The Ministry of Justice advised that medical conditions are relevant to the diminished responsibility defence and not loss of control.[287] The position is not black and white, however, and hues of grey ought to apply. In an *obiter* statement, in *R v Asmelash*, the Court of Appeal considered that a recognised medical condition may be a relevant circumstance for the purposes of the loss-of control defence where it is especially relevant to a qualifying trigger.[288] In the context of self-defence, the Court of Appeal in *R v Martin*, identified that medical evidence may be admissible in limited cases:

> "We would not agree that it is appropriate, except in exceptional circumstances which would make the evidence especially probative, in deciding whether excessive force has been used to take into account whether the defendant is suffering from some form of psychiatric condition".[289]

It should be borne in mind that New Zealand does not have a diminished responsibility defence. The approach adopted in *Asmelash* and *Martin*, that medical evidence may be relevant where it is "especially probative" might be preferable to a purely objective assessment in all cases, but this arguably ought to be left to appropriate judicial development. In all cases, the self-preservation defence may be supported by social framework evidence and juror directions, which render the psychological impact of abuse a relevant circumstance.

In the context of mistaken beliefs, the self-preservation defence provides that the reasonableness or otherwise of that belief is relevant to the question whether D genuinely held it; there must be an intelligible basis for the belief; if it is determined that D did genuinely hold it, and there was an intelligible basis for doing so, D is entitled to rely on it for the purposes of the partial defence, whether or not it was mistaken, or (if it was mistaken) the mistake was a reasonable one to have made. This is aligned with the approach adopted in the context of mistaken belief in qualifying triggers for the purposes of loss of control and the former provocation defence in England and Wales. The belief did not have to be based on reasonable grounds, but the more unreasonable, the less likely there would be an intelligible basis for the belief. This engages a two-part test: Were the circumstances such that a person of the same age, with a normal degree of tolerance and self-restraint might make the same mistake? If so, might a person of the same age, with a normal degree of tolerance and self-restraint, have reacted in the same or a similar way? The intelligible basis test would also circumvent the issues identified by Wright, above, in the context of escape avenues in self-defence claims, where the courts have in

287 Ministry of Justice Consultation Paper, Murder, Manslaughter and Infanticide: Proposals for Reform of the Law (MoJ cp19/08, 2008), para.22.
288 [2014] QB 103.
289 [2003] QB 1, 16.

some cases engaged in a reasonableness rather than a genuineness assessment. The test ensures that the normal person test does not preclude deserving cases, while ensuring that the defence is not so broad that it can be misused.

It might be suggested that defendants like Martin[290] may successfully claim the partial defence, given that social framework evidence would introduce evidence relating to the recurrent victimisation to which Martin was subjected. It must be remembered, however, that despite media outcry[291] in response to *Martin*, the evidence suggests that he was an unconvincing witness, and it is unlikely that his medical condition would be relevant given that it was not regarded especially probative by the Court of Appeal. A balancing exercise must occur since not everyone who fears serious violence and uses excessive force would successfully claim the defence, because it requires that a normal person might react in the same or a similar way.

The proposed defence specifically excludes self-induced intoxication for the purposes of the normal-person test. It was recognised in *Asmelash* that the objective normal-person test implicitly excludes self-induced intoxication:

> "The only relevance of the drunkenness was that it affected [D's] self-restraint, and caused him to act in a way in which he would not have acted if sober. Such drunkenness was *an irrelevant consideration*. It may have had some relevance to his general capacity for tolerance or self-restraint: but no more".[292]

A specific exclusionary clause in England and Wales might have prevented unnecessary litigation. In New Zealand, it serves to reinforce that the normal-person test is objective in nature, and is in line with intoxication as an evidentiary strategy, relevant only to subjective and not objective elements of criminal law defences.[293]The exclusionary clause reinforces the objective nature of the normal person test, and is designed to prevent unnecessary litigation as has occurred in England and Wales in the context of loss of control.[294]

The defence is also excluded where the defendant acted in a considered desire for revenge. This mirrors the approach adopted domestically in England and Wales. The clause operates to prevent the use of the defence in pre-meditated, cold-blooded killings. The primary victim who claims "he deserved it!" remains eligible to claim the defence because jurors are in a position to distinguish genuine cases involving

290 Thank you to Omar Madlhoom (De Montfort University) for pointing this out.

291 Anita Biressi and Heather Nunn, "'An Englishman's Home...': Reflections on the Tony Martin Case" (25 September 2002), available at http://www.signsofthetimes.org.uk/biresinu[textonly].html (visited 20 August 2016).

292 *Asmelash* (n.288).

293 Julia Tolmie, "New Zealand" in Reed, Bohlander, Wake and Smith, *General Defences in Criminal Law* (n.160) pp.274–275.

294 *Asmelash* (n.288).

an element of retaliation from disingenuous claims. Even if there were a retaliatory element in *Wang*, she would be entitled to the defence. Vincent, in contrast, "had effectively removed himself from this separate regime and placed himself back into contact" with the victim.[295] Vincent had fashioned a makeshift knife for the purposes of stabbing the victim.[296] The altercation "involving the basketball and the ensuing scuffle had taken place some four days previously and there had been no material conduct…since that time that could have increased Mr Vincent's concerns that he was under imminent attack. His actions are more accurately described as retaliatory in nature".[297]

The defendant's fear of serious violence is to be disregarded in cases where the defendant intentionally incited serious violence, ensuring that the defence is not "engineered by him or her through inciting the provocation that led to it".[298] This is different from the provision operating under English precepts, which requires not only that D incited V's response but that she did so for the *purpose of* using it as an excuse to use violence. The English provision will arguably only apply where D has "formed a premeditated intent to kill or cause grievous bodily harm to the victim, and incites provocation by the victim so as to provide an opportunity for attacking him or her", and presumably this could be filtered out by the considered desire for revenge aspect of the partial defence.

The Law Commission for England and Wales was of the view that to exclude the partial defence "in the broader sense of self-induced provocation" might exclude deserving claims where the incitement was induced by "morally laudable" conduct, for example, "standing up for a victim of racism in a racially hostile environment".[299] Nevertheless, it is essential that "criminals whose unlawful activities expose them to the risk of provocation by others" are unable to avail themselves of the defence.[300]

The new provision seeks to create a balance between deserving and undeserving cases. It would not operate where the defendant *intentionally incited serious violence*. The "mere fact that the defendant caused a reaction in others" would not result in the defence being excluded. This is important as the primary victim may feel responsible for inciting the aggressor's response, because she is aware that doing X makes him angry, but it cannot be said that it was her *intention* to have that effect. This ensures that confrontational circumstances do not automatically preclude the partial defence, but where the defendant intends to incite serious violence, the defence is precluded. It would prevent the defence from being available in cases like *Duncan*; the defendant successfully claimed the loss of control defence after concealing a knife in a carrier bag, and following

295 *Afamasaga* (n.48), [33].
296 *Ibid.*, [3].
297 *Ibid.*, [32].
298 Law Commission for England and Wales, Murder, Manslaughter and Infanticide (n.255) para.5.20.
299 Law Commission for England and Wales, Partial Defences to Murder (n.254) para.3.317.
300 *Ibid.*

the victim shouting at him before allegedly losing self-control when the victim responded by engaging in a knife fight. This is a departure from the approach adopted in relation to self-induced self-defence which is permitted in both England and Wales and New South Wales, but the "tables must have turned".[301] The nature of the partial defence requires that self-induced provocation is excluded because a normal person of tolerance and self-restraint would not intentionally incite serious violence.

There is no loss of self-control requirement in the proposed framework, meaning that the defence may be more closely aligned with self-defence. In England and Wales, a defendant claiming self-defence may raise self-defence and loss of control. The problem is that the defendant will have to revert from alleging that she was acting reasonably in the circumstances, to asserting that she lost self-control. It has been suggested that this may not be such a problem in practice.[302] Nevertheless, the loss of self-control requirement is difficult for victims of family violence to establish since rarely will the victim lose self-control in a behaviourist sense in response to a fear of serious violence.

In all cases, should the outlined threshold filter mechanisms of the proposed defence be bypassed, the trial judge has the authority to reject a claim on the basis that no jury, properly directed, could reasonably conclude that the defence might apply. The trial judge is also gatekeeper in relation to self-defence in New Zealand:[303]

> "If there is a credible or plausible narrative which might lead the jury to entertain the reasonable possibility of self-defence, then the issue should be left to the jury. If, on the other hand, the judge is satisfied that it would be impossible for the jury to entertain a reasonable doubt that the defendant acted in the defence of himself or herself or another within the terms of s 48, then self-defence should be withdrawn from the jury".[304]

VI. Procedural and Evidential Issues

A. Social framework evidence

The defence is designed to be complemented by the use of social framework evidence. With regard to the admission of expert evidence, it is important to note the initial utility of "battered woman syndrome" in a forensic context lay in explaining the

301 *Brown v Police* [2012] NZHC 1516; For self-induced self-defence see, *R v Orrett Duncan* Sheffield Crown Court (26 February 2014).

302 Thank you to Professor Gavin Dingwall (De Montfort University) for making this point.

303 *Wang* (n.15), 534, citing *R v Tavete* [1988] 1 NZLR 428 (CA) and *R v Kerr* [1976] 1 NZLR 335 (CA).

304 *Vincent* (CA) (n.49), [30].

circumstances of the abuse,[305] but erroneous, albeit benevolent, application meant the term was frequently invoked as a relevant and defining characteristic of the "reasonable man"[306] conceptualisation. The connotations associated with the term, and potential for misapplication render its future utility in depicting the nature of abuse doubtful, in preference of more gender neutral, and non-stigmatising, social framework evidence, considered further below. Importantly, social framework evidence engenders a departure from focusing on the psychological impact of the abuse, and highlights the relevance of the dynamics of the relationship, strategic responses designed to resist, avoid or escape the violence and the ramifications of those efforts, in addition to social and economic factors pertinent to the abuse.[307] A departure from pathologising the primary victim, and thereby fuelling the "abuse excuse" myth is mandated, and social framework evidence provides an appropriate route for future development.[308]

The New Zealand Law Commission recommend that the Evidence Act 2006 (NZ) should be amended to include provisions based on ss.322J and 322M(2) of the Crimes Act 1958 (Vic) to provide for a broad range of family violence evidence to be admitted in support of claims of self-defence and to make it clear that such evidence may be relevant to both the subjective and objective elements of self-defence in s.48 of the Crimes Act 1961 (NZ). The recommended provision would allow the admission of evidence of the nature and dynamics of family violence to "dispel myths about family violence that exist within the community".[309] In *Bracken*, the court advocated that once family violence was accepted relevant, cross-examination of witnesses directed at matters made relevant by social framework evidence constitute adducing admissible evidence. The broader ambit of the proposed partial defence advanced herein would require amendments to such a provision in order to capture extra-familial homicide cases involving prior abuse. This would involve repudiation of the term "family member" and "family" from the current wording of the proposal. For example:

> "Evidence of ~~family~~ violence, in relation to a person, includes evidence of any of the following: (a) the history of the relationship between the person and a ~~family member~~ [perpetrator], including violence by the [perpetrator] ~~family member~~ towards the person or by the person towards the ~~family member~~ [perpetrator] or by the ~~family member~~ [perpetrator] or the person in relation to any other ~~family member~~ [vulnerable individual known to the person]".

305 *Hickey* (1992) 16 Crim LJ 271.

306 *R v Thornton (No 2)* [1996] 1 WLR 1174.

307 Mary Ann Dutton, "Critique of the 'Battered Woman Syndrome' Model" *The George Washington University*, available at http://www.aaets.org/article138.htm (visited 23 June 2016).

308 *Ibid.*

309 New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) para.6.22.

Additional clauses would pertain to, *inter alia*, the impact of coercive and controlling behaviour, domestic servitude, trafficking, and ostensible gang membership.

B. Jury directions

Unlike the New Zealand Law Commission recommendations which reject specific juror directions, the proposed partial defence would be supported by express juror directions modelled on the Jury Directions Act 2015 (Vic).[310] Where requested by the defence, and where relevant, the trial judge must inform the jury that self-defence is in issue and that evidence of family violence may be relevant to determining whether the defendant acted in self-defence. It is possible for the trial judge to decline such a request, but only where there are good reasons to do so, for example, unnecessarily demeaning the victim. The following matters may be included in the direction:

(1) that family violence:
  (a) is not limited to physical abuse and may include sexual abuse and psychological abuse;
  (b) may involve intimidation, harassment and threats of abuse;
  (c) may consist of a single act; and
  (d) may consist of separate acts that form part of a pattern of behaviour which can amount to abuse even though some or all of those acts may, when viewed in isolation, appear to be minor or trivial.
(2) if relevant, that experience shows that:
  (a) people may react differently to family violence and there is no typical, proper or normal response to family violence; and
  (b) it is not uncommon for a person who has been subjected to family violence:
    (i) to stay with an abusive partner after the onset of family violence, or to leave and then return to the partner; and
    (ii) not to report family violence to police or seek assistance to stop family violence.

These juror directions would similarly be amended to capture the broader category of vulnerable offender the proposed reforms seek to accommodate. The juror directions are designed to complement the social framework evidence provisions, assist in counteracting myths surrounding the impact of abuse, and are designedly flexible in order to ensure that the trial judge can tailor individual directions to the specific facts of the case. These procedures are essential in order to "transform the way we collectively think about domestic violence".[311]

310 New Zealand Law Commission, Understanding Family Violence (n.4) para.7.97.
311 FVDRC, Fifth Annual Report (n.37) p.13.

VII. Conclusion

The Commission's terms of reference were limited to victims of family violence who commit homicide, unless "there are strong reasons for recommending general reform and the risk of unintended consequences is low".[312] It is our contention that there are compelling reasons for reconceptualising self-defence and introducing a bespoke partial defence, complemented by juror directions and the admissibility of social framework evidence, to assist vulnerable offenders who kill their abuser(s) in a desperate attempt to protect themselves.

Abuse ought to be regarded as a complex form of entrapment whereby a pattern of coercive and controlling behaviour is undertaken engendering harm to the victim. This form of abuse extends beyond familial relationships, occurring in the contexts of human trafficking, ostensible gang membership, and third party abuse. The "similarities and intersections" between domestic violence, human trafficking and other forms of abuse should not be ignored.[313] An individual who kills in response to victimisation and/or abuse has already been failed by the system. The criminal justice system has an obligation to ensure appropriate defences remain an option for those individuals who tragically utilise lethal force in an attempt to defend themselves from further harm. The threshold test for criminal law defences should not differ dependent upon the relationship status of the victim and the perpetrator, but ought to focus on individuated culpability levels.

Drawing upon affirmative and partial self-defence formulations across New Zealand, Victoria, Canada, the United States and England and Wales, the reconceptualised affirmative and partial self-defence models advocated herein serve to provide an optimal model for appropriate future reform to the legal position in New Zealand. A more nuanced approach is deconstructed which would operate to ensure that the nature and impact of abuse is more readily understood within the criminal justice system, that deserving defendants are not excluded on the basis of their relationship status with the abuser, and importantly that the system does not fail these vulnerable individuals again; those "who have acted to save their lives should not be punished by [murder convictions and] long prison sentences".[314]

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312 New Zealand Law Commission Issues Paper, Victims of Family Violence Who Commit Homicide (n.14) para.7.6.

313 NVDRC "What are the Connections between Domestic Violence and Human Trafficking?" available at http://www.nrcdv.org/dvam/sites/default/files2/HumanTrafficking%26DV-TalkingPointsForm.pdf (visited 20 August 2016).

314 Melissa Jeltson, "Should Domestic Violence Victims Go to Prison for Killing Their Abusers?" *Huffington Post* (25 May 2016), available at http://www.huffingtonpost.com/entry/domestic-violence-prison-legislation_us_573deaa3e4b0aee7b8e94236 (visited 20 August 2016).