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A Critical Evaluation of the Law of Provocation and Proposals for its Reform

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Tomas Thrower



- 5 FEB 2007

Abstract

In 2005, the Home Secretary commissioned a new review of the law of murder, with a view to “*resolving many of the recognised problems.*”¹ These centred on the breadth of conduct, and the implications for the ‘mandatory life’ sentence, both as punishment in law, and as a social label in marking out the gravest offenders against society.

It is against these difficulties that the partial defence of provocation has struggled to reliably reflect the reduced culpability of those who kill when provoked to a loss of self-control, particularly concerning situations of domestic violence. The controversial House of Lords decision in *Smith* led to a separate review of the partial defences.

This thesis first considers the definition and scope of problems facing murder and their reform, in establishing the wider framework within which provocation must operate.

It then examines problems facing present provocation, assessing the different options for reform, and introducing the experiences of other states. The previous reform dialogue suffered from an absence of common values, and so the different reform options for provocation are assessed through the application of specific criteria, enabling more objective and authoritative conclusions.

These conclusions are then reassessed in light of the recommendations made regarding the reform of murder.

¹ Law Commission press release, 20th December 2005.

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Introduction

The law of murder in this country, and in particular the area of the law concerning provocation, has been a focus of legal controversy for well over sixty years.

In that time three Acts of Parliament (the Homicide Act, 1957, and the Abolition of the Death Penalty Act, 1965 and the Criminal Justice Act, 2003), three reviews (the Advisory Council on the Penal System, 1978, the Criminal Law Revision Committee, 1980, and the House of Lords Select Committee on Murder and Life Imprisonment, 1988-89), two Privy Council and several House of Lords' rulings, and a host of case law decisions and commentaries, have failed to produce a sufficiently workable law of murder, or of provocation in murder.

As these words are written, the Law Commission has been commissioned by the Government to undertake a major review of the law of murder.

Why is this? It is not as if the quality of discussion during or since the drafting of the two Acts, or the subsequent case law, is at all inferior to that in other branches of law; rather the contrary, as will become evident in the following pages. Admittedly there have been major mistakes in the case law – by general agreement, *Smith (Morgan)*¹ is the most damaging in the area of provocation law – but the real issues, and indeed the reasons for *Smith* and its like, lie elsewhere.

The fact is that our response to murder, and especially provoked murder, sits at the heart of the evolving complex of social, political, practical and humanitarian values by which we define, perceive, and measure ourselves as a successfully civilized and advanced society – in testimony of which, at least half-a-dozen other major countries are going through the same travails with regard to murder and provocation. It is no coincidence that the word 'barbaric' is bandied about so often when discussing murder and the law of murder. Likewise the involvement of the Secretary of State in sentencing was no accidental by-product of parliamentary bargaining, but the reflection by Parliament of a deeply held view in society that this was too important to leave to the judges where it impinged on society's self-worth.

Any resolution of the problems with murder and provocation must also satisfy this wider requirement, and one possible conclusion from the analysis of murder and provocation that follows is that the failure to provide a lasting resolution, or even proposal, concerning murder and provocation in murder, reflects much less a failure to overcome historical defects in the law, than a degree of narrowness in discussion and approach that has prevented the finest minds in legal practice and analysis from finding an agreed solution. The well-established and effective mechanisms by which the practice of law is defined and advanced have proved insufficient here, despite sixty years of effort, and we must look to other tools, and wider criteria.

A thesis of this length can only hint at these extensions of scope, concept and analytical technique that a fuller treatment would have enabled, and indeed I have had

¹ (2000) 3 WLR 654 (HL); (2001) 1 AC 146. Hereafter '*Smith*'.



to omit significant materials from my coverage. Nevertheless, it includes a full exposition of the principal issues dogging the law of murder as a whole (since provocation can neither be analysed nor resolved without this wider viewpoint); important contributions from murder-law review in other countries; a range of conceptions of provocation; extensive discussions of the various practical approaches that enable a workable balance of responsibility between judge and jury; and a criteria-based comparative analysis of the principal candidate approaches for a successful law of provocation in murder.

Are we in a position to define and establish a successful law of murder, and provocation in murder? I believe so, and the concluding analysis finishes by recommending a particular approach to provocation in murder. However the value of this thesis should not solely reside in its conclusion, and each chapter has been written to be largely self-sufficient, and to provide useful clarifications, insights and conclusions regarding its particular area.

Murder and Provocation

Murder is the intentional unlawful killing of another person. To commit murder is to break the most fundamental of rights, the right to life. For this reason murder is considered to be the worst offence against society, and is punished with a mandatory life sentence, a uniquely severe punishment.

Provocation is one of three partial defences to murder, each of which enables a successful defendant to receive a manslaughter conviction, and a sentence set at the discretion of the sentencing judge, rather than a mandatory life sentence. For a plea of provocation to succeed, the defendant must have been provoked, by words said and/or things done, causing them to lose self-control, leading to their killing the victim; the jury must then decide that a 'reasonable man' would have done the same.

The partial defences are highly important, their presence necessary in justifying the 'one-fit' sentence for murder by enabling defendants who don't deserve this maximum punishment to be convicted of manslaughter.

Criticism of provocation has been primarily directed at the 'loss of self-control' requirement, which is claimed to be outdated and male-centred, and the objective standard, which is claimed to be overly complicated and unrealistic.

The advent of 'battered woman syndrome,' and greater awareness of the plight of battered women in abusive relationships, has brought considerable pressure upon the temporal constraints of self-defence and provocation. Due to deficiencies in self-defence, provocation has tended to be the plea that battered women have raised; this has placed immense pressure on the defence, which is fundamentally ill suited to their predicament.

Smith was an attempt to address this, but its freeing of the jury role and restriction of judicial guidance, as well as subjectivisation of the standard of evaluation, has proved highly controversial (indeed the latest decisions indicate that counter to all precedent it has been overturned).

The Law Commission of England and Wales was commissioned by the Home Secretary in October of 2003 to review the partial defences, with particular emphasis on their effect in domestic violence. The law remains in an unsatisfactory state.

Objectives and Content

The principal objectives of this thesis are to establish

- clear useful expositions of the state of play in each of the main sub-areas of this area of the law
- a methodology for evaluating proposed legal structures for murder as a whole, and provocation in murder
- evaluations of the main proposed and tried approaches leading to a proposal for an effective law of provocation in murder.

To this end the thesis will first consider murder law as a whole, and the prospects and advantages/disadvantages of possible changes (chapters 1&2), before defining, positioning and assessing the present and possible future state of provocation within murder (chapters 3-10). Chapter 11 summarizes and draws conclusions about the state and future of provocation law, and considers these in the light of the conclusions of chapter 2 concerning reform of the system of homicide. Each chapter summarizes and draws conclusions about the particular area or approach it considers.

In chapter 10, five main options for reform of provocation will be assessed:

- the possibility of stabilising provocation in its present form as a subjectivised plea
- the possibility of moving back to a plea based in justification with a stronger objective standard
- the Law Commission's formulation, combining a plea of provocation based in justification with a partial defence of self-defence
- the 'extreme mental or emotional disturbance' formulation, established by the Model Penal Code in the US, which considers the intensity of the emotion experienced by the defendant
- and finally the case for abolishing provocation without replacement

Individual chapters contain additional introductory material.

Research for this thesis was completed in early December 2005. Consequently this precluded any consideration of LCCP No. 177.

SECTION A

The Law of Murder

Chapter 1: Definition of Murder Law and Reform

1. The Present Law of Murder

1.1. Definition

Homicide is: “*The death of a human being in circumstances where the death can be attributed to the conduct of one or more other human beings.*”¹

1.2. *Actus Reus*²

A homicide must contain certain elements: the victim must be human, the death must be through the act or omission of one or more human beings, and it must occur within the Queen’s Peace.³ Homicide can be either unlawful or lawful: unlawful homicide includes crimes such as murder, manslaughter, infanticide and causing death by reckless driving. An example of lawful homicide is justified self-defence.

1.3. *Mens Rea*⁴

The mental element in the crime of murder is ‘*malice aforethought.*’ Prior to the Homicide Act 1957, there were 3 types of malice: ‘express,’ ‘implied’ and ‘constructive.’ Express malice is intent to kill the victim. Implied malice is intent to cause the victim grievous bodily harm. Constructive malice was found where the defendant caused death while committing a felonious act: the intention was to commit the felonious act, but the causing of death (the felonious act) had the effect of ‘constructing’ the crime of murder. This was subsequently considered to render murder too broad in ambit, and was abolished by the Homicide Act 1957.⁵

The mental elements are often referred to as ‘intent to kill’ and ‘intent to cause grievous bodily harm’⁶. Intent to kill is straight-forward; the defendant causes the victim’s death with the intention of doing so. The more difficult element is

¹ Simester and Sullivan, ‘Criminal Law - Theory and Doctrine’ (2001), 319.

² The behaviour element.

³ The meanings of these are not important to this discussion.

⁴ The mental element.

⁵ Section 1: “*Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of some other offence.*” The term ‘*malice aforethought*’ is now outdated and misleading, but remains the mental state required in section 1.

⁶ ‘gbh’ and ‘gbh-intent’ will be used for the latter

intent to cause gbh, which has been interpreted to mean “*really serious*” harm.⁷ After several challenges, the law finally was settled in *Cunningham*⁸, the House of Lords ruling 3-2 in favour of gbh-intent. Any further change will probably have to be made by Parliament.⁹

As established above, the required mental state of the defendant is that of ‘intent.’ The intent required is subjective, i.e. that possessed by the defendant at the time of their conduct causing death.¹⁰

Intent to kill or cause gbh is referred to as ‘core’ or ‘primary’ intent. Where a case involves primary intent, Lord Bridge’s ‘golden rule’ from *Moloney*¹¹ applies: “*the judge should avoid any elaboration or paraphrase of what is meant by intent and leave it to the jury’s good sense to decide whether the accused acted with the necessary intent.*”¹² Where there is a lack of compelling evidence that the defendant intended to kill or cause gbh, the ‘golden rule’ does not apply. In such cases the jury is to decide on the objective evidence (the facts they have regarding the incident, and the defendant’s conduct before, during, and after). Such a situation requires guidance from the judge, but quite what this should constitute has been a matter of considerable debate. Currently a ‘*Woollin*’ direction is required, as established by Lord Steyn:

*“the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious injury was a virtual certainty (barring some unforeseen intervention) as a result of the defendant’s actions and that the defendant appreciated that such was the case.”*¹³

Woollin is the most recent decision in a difficult case law, in which judges have struggled to formulate a coherent doctrine to deal with ‘oblique’ or ‘secondary’ intent.¹⁴ The rationale behind seeking to include such cases within murder is that the defendant, while perhaps not intending to cause death or gbh, was inevitably going to do so; and so is morally deserving of the stigma and punishment of a murder conviction. The significance of a murder conviction as opposed to one of manslaughter is that a convicted murderer receives a mandatory life sentence, whereas a defendant convicted of manslaughter has their punishment set at the discretion of the court.

⁷ “*Bodily harm needs no explanation, and ‘grievous’ means no more and no less than ‘really serious.’*” *Dpp. v Smith* (1961) AC 290, 334, per Viscount Kilmuir.

⁸ (1982) AC 566

⁹ *Ibid.*, 925, per Lord Bridge.

¹⁰ In *Smith* (Op. Cit., 7) this briefly became an objective standard; a defendant was presumed to have intended to cause death or gbh if a reasonable person in their situation would have foreseen death or gbh as a probable consequence. In response, a 2-clause bill was prepared by the Law Commission, and the second clause was passed, becoming section 8 of the 1967 Criminal Justice Act. Section 8 has no real relevance to *Smith*, but since its creation the courts have consistently treated *Smith* as overturned, most recently in *Woollin* ((1999) 1 AC 82). The Privy Council, in *Frankland*, ((1987) AC 576) advised that *Smith* was based on a misunderstanding of the common law and should not be followed. The standard remains a subjective one of whether the defendant actually possessed intent to kill or cause gbh.

¹¹ (1985) AC 905.

¹² *Ibid.*, 926.

¹³ (1999) 1 AC 82, 90.

¹⁴ Hereafter ‘secondary’ intent.

2. Problems with the Definition of Murder, and Reforms

2.1. Introduction

Murder is commonly considered the worst crime possible, and consequently it has always been uniquely severely punished: initially through the death sentence, after 1965¹⁵ by the mandatory life sentence. The highly stigmatic nature of murder and its unique punishment engenders enormous pressure to accurately define its parameters. In this respect, the current law is far from settled, and has been the subject of considerable criticism and advised reform,¹⁶ principally focused on gbh-intent, secondary intent, and mandatory life. Resolution of these issues, particularly mandatory life, has been heavily impacted by the European Convention of Human Rights.

2.2. Gbh Intent

The ambit of murder is very broad; the mental element presently includes both intention to kill and intention to cause gbh to the victim. The latter has been the subject of intense debate, and a troubled case law.

2.2.1. The case law

In *Vickers*¹⁷, the defendant argued that 'gbh-intent' was the equivalent of constructive malice - the intention to cause gbh, and the resultant death, 'constructing' a murder conviction - and as such should be abolished. The Criminal Court of Appeal ruled that the causing of gbh was not a separate felony from murder but was the means by which the death was caused; consequently 'gbh-intent' remained.

In *Hyam*,¹⁸ Lord Diplock asserted that the doctrine of constructive malice had stifled development of the law, and that without it the judiciary certainly would have abolished gbh-intent for murder. Lord Kilbrandon concurred, rejecting this construction of murder. Lords Hailsham and Dilhorne, however, disagreed¹⁹, and the fifth judge, Lord Cross, astonishingly confirmed the murder verdict on the 'assumption' that gbh intent was sufficient. This weak resolution enabled a challenge in *Cunningham*, where the House of Lords ruled 3-2 that gbh intent was sufficient. This is the current state of the law.

¹⁵ The Murder (Abolition of Death Penalty) Act.

¹⁶ 3 Law Reform bodies have reviewed it: Advisory Council on the Penal System (1978), Criminal Law Revision Committee (1980), House of Lords Select Committee on Murder and Mandatory Life Imprisonment (1988-89).

¹⁷ (1957)2 QB 664.

¹⁸ (1975) AC 55.

¹⁹ reasoning that such a change was best left to Parliament. Viscount Dilhorne stated that it would make little difference to the law's administration. (Ibid., 86).

2.2.2. Problems with Gbh-intent

- Breach of the principle of correspondence

An important principle of law is that there should be correspondence between act and mental state for a defendant to be held culpable of a particular offence. Gbh-intent constitutes a significant breach of this principle.

In *Cunningham*, Lord Edmund-Davies, dissenting, said:

*"I find it passing strange that a person can be convicted of murder if death results from, say, his intentional breaking of another's arm, an action which...would in most cases be unlikely to kill."*²⁰

Lord Mustill referred to 'gbh-intent' as a "fiction"²¹: *"If one could find any logic in the rules I would follow it from one fiction to another, but whatever grounds there may once have been have long since disappeared."*²²

Lord Windlesham's review of Home Office statistics for 1994-1996 concerning mandatory life sentences found that the majority of those convicted of murder only possessed gbh intent.²³ This is cause for grave concern: if, as the Law Commission stated, *"a man should not be regarded as a murderer if he does not know that the bodily harm which he intends to inflict is likely to kill,"*²⁴ then Lord Steyn's argument in *Powell and Daniels and English*,²⁵ takes on great force: gbh-intent, he says, *"turns murder into a constructive crime,"*²⁶ and *"results in a majority of defendants being classified murderers who are not in truth murderers."*²⁷

Lord Steyn considered the counter-argument that anyone willing to risk the unpredictability of inflicting gbh is deserving of a murder conviction if death results. He concluded it to be *"outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment."*²⁸

- Inconsistent with broader criminal law

²⁰ (1982) AC 567, 582. Under the present law this would constitute murder, the lack of correspondence between *mens rea* and *actus reus* making murder a constructive crime.

²¹ A-G's ref. No. 3 of '94 (1998) AC 245, 262.

²² *Ibid.*

²³ "Responses to Crime," vol. 3 (1996), 342, n.29.

²⁴ 'Imputed Criminal Intent (*DPP v Smith*)' 1967, para. 15(d).

²⁵ (1999) 1 AC 1, 14-15.

²⁶ *Ibid.*, 15.

²⁷ *Op. Cit.*, 25, 10.

²⁸ *Ibid.*

Glanville Williams highlights the discrepancy between the mental element for murder and attempted murder: "*It may seem remarkable that a person cannot be convicted of attempted murder when he deliberately inflicts grievous bodily harm upon another, and yet can be convicted of murder, if as a result of the injury, the victim dies.*"²⁹ Deaths with this kind of *mens rea* generally result in a manslaughter conviction, argues Williams, unless the defendant is engaged in a "*villainous enterprise.*"³⁰

- Unacceptable to Juries

Lord Goff, writing extra-judicially, cited a case in which one defendant 'glassed' another man, accidentally severing the jugular vein causing the victim's death. The defendants were willing to plead guilty to manslaughter but the prosecution refused and proceeded on a murder charge. Lord Goff in summing-up, told the jury that if they found that the defendant intended to kill or cause gbh, they must find him guilty of murder. The jury acquitted the defendants of murder, convicting them of manslaughter instead. Lord Goff concluded "*it was plain to me, and must have been plain to the jury, that the assailant did indeed intend to cause the victim really serious bodily harm; yet they could not bring themselves to call him a murderer.*"³¹ Where an informed jury find themselves unable to uphold the law, gbh-intent is further called into question.

The case also highlights the wide prosecutorial discretion that this mental element entails: "*So the rule in Cunningham is merely a rule that a person may be convicted of murder if he both falls within the rule and is unlucky in the choice of prosecutor, judge and jury.*"³²

2.2.3. Resolving the problems: the need for a change in the law

Prevailing opinion is that gbh-intent must be changed.

As Ashworth states; "*If we are to continue to have two offences of homicide, murder and manslaughter, the aim should be to define murder so as to capture those killings which are generally the most heinous.*"³³

The MCCOC reports that many law reform bodies have condemned the current formulation of murder.³⁴

Lord Edmund-Davies, in *Cunningham*, considered the arguments to be "*of the greatest public consequence*" but concluded that "*Resolution of*

²⁹ Williams (1983), 251.

³⁰ Ibid.

³¹ Goff, "The Mental Element In Murder" (1988) LQR 30, 49.

³² Op. Cit., 25.

³³ "Reforming the Law of Murder" (1990) Crim. LR 75, 78.

³⁴ Model Criminal Code Officers Committee of the Standing Committee of Attorneys' General, 'Discussion paper, Draft Criminal Code: Fatal Offences Against the person' (MCCOC/SCAG, Canberra, 1998), 51. Hereafter 'MCCOC.'

*that conflict cannot, in my judgement be a matter for your Lordships' House alone. It is a task for none other than Parliament.*³⁵

In *Woollin*, Lord Steyn stated that *"unless the House of Lords or Parliament have occasion to revisit this point, the sufficiency of an intent to cause serious harm is the basic assumption upon which any analysis must proceed."*³⁶

The *Cunningham* decision was strongly influenced by a recognition that the power to overrule must be sparingly used, especially in this context. To overturn the common law would mean that some, including the defendant in *Vickers*,³⁷ were wrongly hanged. Such is the magnitude of this decision, it was left for Parliament to decide.

2.2.4. Options for Reform of Gbh-Intent

The appropriate reform is a matter of considerable debate, and there are a number of different possibilities, each of which is assessed here, incorporating as appropriate the experiences of other States.³⁸

- Abolition of gbh-intent

Various law reform bodies worldwide have recommended the abolition of gbh-intent, including the Victoria LRC of Australia,³⁹ the Law Commission of England and Wales,⁴⁰ and the Canadian LRC.⁴¹ The problems raised in 2.2.2 can be restated as arguments for abolition:

- Murder is such a serious offence that the mental element should correspondingly involve unlawful killing. The Law Commission stated *"unless there are strong reasons which justify a contrary course, it is generally desirable that legal terms should correspond with their popular meaning."*⁴²
- There is a significant difference in moral culpability between someone who intends to cause death and someone who intends to cause gbh but neither intends nor foresees death.
- 'Gbh' is an uncertain standard, leading to some confusion and contention regarding its definition and scope.⁴³

³⁵ Op. Cit., 8, 582, per Lord Edmund-Davies

³⁶ Op. Cit., 13, 90, per Lord Steyn.

³⁷ (1957) 2 QB 664.

³⁸ Options for broadening murder are considered at 2.4.

³⁹ 'Homicide' (Report No. 40, 1990-1991), para.s 122-131.

⁴⁰ Op. Cit., 24, para.s 15-17.

⁴¹ 'Recodifying Criminal Law' (Report 31, 1987), 57-58.

⁴² Op. Cit., 40, 15(a).

⁴³ The LRC of Victoria cited hypothetical scenarios demonstrating the difficulty of distinguishing a plea deserving of murder from manslaughter: stifling a victim's cries by using a pillow to suffocate them to the point of unconsciousness; shooting them with a gun in the arm, leg or foot; punching them with the intention of causing unconsciousness. Each of these scenarios assumes that the defendant intended only to do the action described (Op. Cit., 40).

- Manslaughter is perfectly adequate to deal with those who cause death with gbh-intent, due to the discretionary life sentence.

Despite this there remain strong reasons for its retention and reform:

- Abolition encourages murderers to claim gbh-intent, and so avoid a murder conviction.
- There are many instances in which willingness to inflict extreme harm or cruelty without intending to kill, or sheer indifference as to the risk of death, is sufficiently morally grave as to warrant conviction under the severest heading of unlawful killing, and the severest punishment.
- The doctrine of 'common knowledge' states that a defendant intentionally inflicting gbh understands the "*inherent vulnerability of the human body*"⁴⁴ and therefore the risk of resultant death.

There are several possible approaches to the reform of 'gbh-intent':

- Redefinition of gbh

... according to the effect on the body

This approach seeks to narrow gbh to harm with a serious effect upon the body, and so to exclude objectively trivial harm.

Glanville Williams proposed the following definition:

"An injury is serious if it -

(a) causes distress, and also

*(b) involves loss of a bodily member or organ, or permanent bodily injury or permanent functional impairment, or serious and permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness; and an effect is permanent whether or not it is remediable by surgery."*⁴⁵

Ireland's Non Fatal Offences Against the Person Act, 1997, similarly defines serious harm as

*"injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."*⁴⁶

These definitions both create ample scope for arbitrary decisions: the infliction of serious injury to a finger or toe (in Williams' formulation also causing distress), could constitute gbh.

The CLRC reported "*...we spent some time considering the possible definitions but finally concluded that no satisfactory definition could be*

⁴⁴ Irish LRC 'Homicide - the mental element in murder' (LRC-CP 17-2001), 67.

⁴⁵ "Force, Injury, and Serious Injury" (1990) Vol. 140 New LJ 1227, 1229.

⁴⁶ Section 1(1).

*drawn up: some broken noses might amount to serious injury, others not. Many cases involve a multiplicity of injuries none of which alone might constitute a serious injury but which together might amount to it.*⁴⁷ The gravity of an injury often will depend on *"the particular context and circumstances, including, for instance, the availability or otherwise of timely medical assistance."*⁴⁸

An alternative is to read the definition inclusively, leaving the jury some freedom in determining whether the severity warrants a murder conviction. However, this would permit the jury unacceptable latitude to apply the mental element according to personal values.

... according to the risk of death

Another approach is to define gbh according to the risk of death it creates.

The Queensland and Western Australian criminal codes define it as *"bodily injury of such a nature as to endanger or be likely to endanger life, or cause, or be likely to cause, permanent injury to health."*⁴⁹ The mental element requires *"that the offender intended to do an act or to cause physical or mental injury which was of such a nature as actually to endanger, or objectively viewed be likely to endanger life, or cause, or be objectively likely to cause permanent injury to health."*⁵⁰

The Indian Penal Code states culpable homicide to be murder where it is done *"with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."*⁵¹ The *"ordinary course of nature"* is held to mean *"in the usual course if left alone."*⁵² This approach has the advantage of restricting the scope of 'gbh' and so minimising *"the constructive nature of the liability by excluding injuries such as broken arm, which, although serious, do not normally result in death."*⁵³

However, where a defendant inflicts a fatal injury which would not have caused death in the 'ordinary course of nature', they would evade a murder conviction - even where they knew the probability of death resulting in the particular circumstances. By contrast, a cut to a haemophiliac might be *"sufficient in the ordinary course of nature to cause death"* despite being apparently and objectively trivial.

The definitional approach benefits by narrowing the scope of conduct which can constitute gbh. However, the need to reliably reflect the moral culpability of each offender cannot be achieved through a uniquely

⁴⁷ 14th Report, 'Offences against the Person' Cmnd 7844 (1980), 154.

⁴⁸ Op. Cit., 44, 5.20(2).

⁴⁹ Op. Cit., 34, 41.

⁵⁰ *Kenny Charlie v The Queen* (1999) HCA 23, per Callinan J.

⁵¹ Section 300(3).

⁵² *Chana Padhan* (1979) 47 Cut LT 575.

⁵³ Op. Cit., 44, 5.19(1).

objective definition of gbh, as the examples above show; rendering such an approach insufficient.

- Intention to inflict gbh with an awareness of the risk of causing death

There is a very strong case that the mental element in murder should involve subjective knowledge of the risk of causing death. The two principal levels of subjective knowledge are considered below.

... awareness of a probability of causing death

- The plea

The Indian Penal Code requires that the defendant cause death "*(b) with the intention of causing such bodily injury as is likely to cause death or (c) With the knowledge that he is likely by such act to cause death...*"⁵⁴ Similarly, the legal reform bodies of Victoria and Southern Australia recommend limiting 'gbh-intent' to situations in which the defendant knows there is a "*Substantial risk of causing death*"⁵⁵ or a "*high likelihood that his actions will cause death.*"⁵⁶

- Problems with this formulation

The Crown Prosecution Service criticised the need to prove that the defendant knew their actions to be 'likely' to cause death, as asking too much of the prosecution.⁵⁷ The Irish LRC said "*Whether serious injury is 'likely' to cause death depends on all the surrounding circumstances including the accessibility or otherwise of medical aid. Specialist material evidence may be required to assist the jury, further complicating court proceedings.*"⁵⁸ Indeed defendants could claim that they did not know their actions were likely to result in death, merely that they might.

... awareness of the possibility of causing death

- The Plea

In *Powell and Daniels and English*,⁵⁹ Lord Steyn recommended that a "*killing should be classified as murder if there is an intention to kill or to cause really serious bodily harm coupled with an awareness of the risk of death.*"⁶⁰ The CLRC strongly endorsed this⁶¹, constructing the mental element as "*an unlawful act intended to cause serious injury and known*

⁵⁴ Section 299.

⁵⁵ Victoria, Working Paper, N.o.8 (1984), 21.

⁵⁶ South Australia, 4th Report, 8.

⁵⁷ Op. Cit., 40, paras 59-60.

⁵⁸ Op. Cit., 44, 4.092, 2.

⁵⁹ (1999) 1 AC 1, 15.

⁶⁰ Ibid.

⁶¹ Op. Cit., 47, para. 31.

to that accused to involve a risk of causing death.”⁶² The House of Lords Select Committee favoured a similar formulation: “*intending to cause serious personal harm and being aware that he may cause death,*”⁶³ arguing that “*while the law continues to have two categories of homicide, unforeseen but unlawful killings are properly left to the law of manslaughter.*”⁶⁴ The Irish LRC pointed out that “*these provisions...satisfy the principle of correspondence [unlike]...the present rule which allows a conviction for murder in cases where death was neither foreseen nor intended.*”⁶⁵

- Problems with this formulation

The Irish LRC highlighted the lack of “*indication to the jury as to what degree of possibility is required,*” allowing conviction on “*remote or slight possibilities.*”⁶⁶ This is an important criticism, although where a defendant willingly inflicts gbh and is aware of the risk of causing death, their culpability is significantly elevated, however slight the risk might be.

On the issue of ‘awareness’, the Irish LRC commented: “*A defendant who acts in a temper ‘without thinking’, or who fails to advert to the consequences out of sheer indifference to them, or who claims he was so preoccupied in what he was doing that he gave no thought to any particular result of his actions, would escape liability on this approach.*”⁶⁷

More importantly, the Crown Prosecution Service anticipates significant difficulties regarding proof.⁶⁸ Any formulation needs to be practically workable, and were this provision to result in defendants unacceptably evading a murder conviction due to difficulties of proof, this would be a major drawback.

However, the number of international law reform bodies which have recommended this reform⁶⁹ suggests a consensus that this formulation is workable. If the requirement of subjective knowledge of the risk of death would result in a significant reduction in murder convictions, this might not be due to undesirable practical difficulties, but rather a desirable narrowing of the moral culpability of those charged with murder.

⁶² Ibid., 17-31.

⁶³ Draft Criminal Code, clause 54(1), (HL Paper-I, 1988-89), vol I, para. 71).

⁶⁴ HL Select Committee, ‘Report of the Select Committee on Murder and Life Imprisonment’ (HL Paper 78-1, 1989), 68.

⁶⁵ Op. Cit., 44, 4.091.

⁶⁶ Ibid., 4.093.

⁶⁷ Ibid., 4.100. See 63.

⁶⁸ Op. Cit., 24, para. 59.

⁶⁹ Eg. Canadian LRC, ‘Recodifying Criminal Law’ (Report 31, 1987), 57-58; Victoria LRC, ‘Homicide’ (Report No. 40, 1990-1991), para.s 122-131; NC Crimes Consultative Committee, ‘Crimes Bill 1989: Report of the Crimes Consultative Committee’ (April, 1991); HL Select Committee, (Op. Cit., 65), para. 195; LC England and Wales, ‘A Criminal Code for England and Wales’ (Law Com. No. 177, vol. 1, 1989), para. 54(b)...etc.

2.2.5. Conclusion to Gbh-intent Reform

Reform of gbh-intent has been the subject of extensive and intensive debate. The Home Office's recent commissioning of the Law Commission to undertake a review of murder is welcome, although after three previous major reviews without enactment one's enthusiasm is somewhat guarded.

Abolition of gbh-intent is in many ways a desirable simplification, leaving such killings to be dealt with under manslaughter with its discretionary life sentence. This would improve the correspondence between action and mental state which at present is worryingly disparate. However, abolition would enable many defendants to evade a murder conviction through claiming to have intended gbh but not death. This clearly is undesirable, and arguably unnecessary when under the present 2-tier structure of homicide, unlawful killings of a sufficiently proximate culpability may justifiably be punished under the same offence. Accordingly, abolition is not recommended here.

Likewise, redefining gbh is not a suitable reform option. It would lead to arbitrary distinctions on the basis of the technical definitions, making no reference to the defendant's state of knowledge regarding the risk of death. This formulation fails to limit the scope of 'gbh' sufficiently enough to counteract the absence of a subjective requirement concerning the risk of death. The Irish LRC doesn't see this as a problem, on the basis that an offender willing to inflict 'serious injury' "*must be taken to know that he is risking life in view of the inherent vulnerability of the human body and mind. Such a defendant therefore possesses sufficient moral culpability to justify a murder conviction.*"⁷⁰ This is a dangerous line to pursue, with worrying echoes of *DPP v Smith*.⁷¹

Qualification of gbh-intent through a requirement of foresight of the risk of death is a stronger reform option.⁷² There are some problems with this approach: the Irish LRC identified one such (quoted above);⁷³ however, a defendant who does not think about the fatal consequences of his actions is hardly of the same moral culpability as a defendant who is aware of their potential fatal effect and who despite this proceeds to inflict gbh. Another important concern is that objectively trivial harm, resulting in

⁷⁰ 'Homicide: The Mental Element in Murder' (LRC-CP17-2001), 4.097.

⁷¹ Op. Cit., 7.

⁷² The House of Lords Select Committee recommended: "*intending to cause serious personal harm and being aware that he may cause death.*" (Op. Cit., 65, vol I, para. 71). The LRC of Victoria recommended that 'gbh-intent' be replaced with "*intent to inflict a serious injury which the defendant knows to be life endangering; or intent to cause serious injury being aware that he or she may kill.*" ('Discussion Paper on Homicide' (1991), 6.47). It accepted that "*the combination of the intent to cause serious injury with foresight by the defendant of the possibility of death makes the level of culpability sufficiently comparable with that of the intentional killer to warrant a conviction of murder.*" (para. 115). However, in its subsequent report, the Commission decided that gbh-intent was not appropriate for a murder conviction, regardless of the defendant's awareness of risk, and recommended its abolition. (Para. 139).

⁷³ Op. Cit., 44, 4.100.

death, may result in a murder conviction where the risk of death, however remote, was foreseen by the defendant. However, the line between murder and manslaughter must be drawn somewhere, and this seems an appropriate place to do so. A theoretically ideal solution would be to combine a redefinition of gbh with an awareness of the risk of death resulting; however, redefining gbh carries so many problems that it would result in a highly complex formulation. For this reason, intent to cause gbh with a subjective awareness of the risk of death resulting is advocated as the best way forwards.

Clearly the law must be reformed. There is considerable sympathy towards the majority in *Cunningham*, who stated that they would not hesitate to change the law, and introduce a requirement that the offender be aware of the risk of death, were an appropriate case to come before them. This change is too important to be left any longer: the present law fundamentally devalues murder, and any justification of the mandatory life sentence. An intervention of judicial legislation may be justified.

2.3. *Woollin*: 'Oblique' or 'Secondary' Intention

Courts have struggled with the inability of 'intention to kill or cause gbh' to capture accurately within its definition actions they felt to be morally deserving of a murder conviction; especially cases of utter disregard for life in the pursuit of other criminal ends. Initially they attempted to define and construct intent to kill from an elevated probability of death; subsequently they treated likelihood of death as evidence for the jury in determining intent; ultimately, the difficulties in case law resulted in the *Woollin*-direction, defining a separate category of secondary intention; but this continues to cause confusion.

2.3.1. The case law

In *Hyam*, Lord Hailsham stated intention to include the "*inescapable consequences of the end as well as the means*"; although elsewhere in the same judgement he did not consider that "*foresight as such of a high degree of probability is at all the same thing as intention.*"⁷⁴

In *Moloney*, Lord Bridge went further, stating that there may be cases in which events sought neither as ends or means, should be considered to have been intended:

"A man who, at London Airport, boards a plane which he knows to be bound for Manchester, clearly intends to travel to Manchester, even though Manchester is the last place he wants to be and his motive for boarding the plane is simply to escape pursuit...By boarding the

⁷⁴ Op. Cit., 18, 77.

Manchester plane, the man conclusively demonstrates his intention to go there, because it is a moral certainty that that is where he will arrive."⁷⁵

Williams provides an example: a person plants a bomb on a plane in order to claim the insurance for the package's destruction. It is not his aim to kill the passengers and crew; "but he knows that success in his scheme will inevitably involve their deaths as a side-effect."⁷⁶ The death of the passengers and crew is not a means to the destruction of the package, but is nonetheless inextricably linked to the act itself.

However Lord Bridge did not provide an applicable construction of this mental element.

Elsewhere in *Moloney* Lord Bridge stated the accused to be guilty only if he foresaw the probability of an outcome as "little short of overwhelming,"⁷⁷ but neither this, still less his ambiguous term 'natural consequence,' clearly established the level of likelihood required to construct intent.⁷⁸

The cases following *Moloney* supported the view that 'morally certain' consequences were merely evidence from which the jury could 'infer' intent, and not evidence of intent per se. Lord Scarman's position in *Hancock and Shankland*⁷⁹ was restated in *Nedrick* by Lord Lane: "if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easier to infer that he intended to kill or do serious bodily harm."⁸⁰

However the judges in *Woollin* adopted an alternative to regarding 'oblique' or 'secondary' intention as evidence of the defendant possessing intent, treating it instead as constituting a separate category of intention. Lord Steyn's leading judgement rejected the notion of 'inference', replacing 'infer' by 'find' (below):

"...in the rare cases where the direction that it is for the jury to simply decide whether the defendant intended to kill or do serious bodily harm is not enough, the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."⁸¹

Woollin has been widely praised by legal writers as establishing a "firm line"⁸² between intention and recklessness. Simester and Sullivan

⁷⁵ Op. Cit., 11, 926.

⁷⁶ Williams 'Textbook of Criminal Law' (1983), 84.

⁷⁷ Op. Cit., 11, 925.

⁷⁸ Williams: "Conception is a natural consequence of sexual intercourse but it is not necessarily probable." ("Oblique Intention" (1987) CLJ 417).

⁷⁹ (1986) 1 AC 455, 473.

⁸⁰ (1986) 1 WLR 1025, 1028.

⁸¹ Op. Cit., 13, 96.

⁸² Smith, "Case and Comment *R v Woollin*" (1998) Crim. LR 890, 891.

comment that *Woollin* had the effect of “clarifying the independent status of this second category of intention.”⁸³

2.3.2. Related case law

The clearest guidance relating to scope rather than certainty of intent comes not from murder case law, but from *Steane*.⁸⁴ In *Steane*, the defendant made a broadcast for the Nazis, as a means of saving his family from a concentration camp. He clearly foresaw assisting the enemy as a direct consequence of his broadcast, yet the Court of Criminal Appeal acquitted him on the basis that he had made the broadcast with an intent to save his family.

Lord Denning applauded this reasoning on the basis that “it would be very hard to convict him of an ‘intent to assist the enemy’ if it was the last thing he desired to do.”⁸⁵ The judgement in *Steane* was cited with approval by Lord Bridge, who said he knew of “no clearer exposition of the law.”⁸⁶ The judgement stated “if on the totality of the evidence there is room for more than one view as to the intent of the prisoner, the jury should be directed that it is for the prosecution to prove the intent to the jury’s satisfaction, and if, on a review of the whole evidence, they either think that the intent did not exist or they are left in doubt as to the intent, the prisoner is entitled to be acquitted.”⁸⁷

2.3.3. Problems with *Woollin*

- The negative expression of the *Woollin* direction

The negative thrust of the direction “suggests that, although foresight of virtual certainty is necessary before the alternative category of intention is satisfied, it may not always be sufficient.”⁸⁸ In *R v Matthews and Alleyne*,⁸⁹ this ambiguity clearly manifested itself. The trial judge directed the jury to equate foresight of a virtual certainty with intention. In doing so, he directed the jury beyond where the law “as it stood at present permitted him to go...redrafting the *Nedrick/Woollin* direction.”⁹⁰ The Court of Appeal ruled that the jury were ‘entitled to find’ intention, and consequently the judge could not direct that they must find intention, Lord Justice Rix concluding that “the law has not yet reached a definition of intent in murder in terms of appreciation of a virtual certainty.”⁹¹

⁸³ Simester and Sullivan ‘Criminal Law – Theory and Doctrine’ (2001), 123.

⁸⁴ (1947) KB, 997.

⁸⁵ ‘Responsibility before the law’ (1961), 27.

⁸⁶ (1985) 1 All ER, 1039.

⁸⁷ (1947) KB 997, 1004, per Lord Goddard.

⁸⁸ *Ibid.*

⁸⁹ (2003) EWCA Crim, 192.

⁹⁰ Ashworth, “Commentary on *R v Matthews and Alleyne*” (2003) Crim. LR 553, 553-554.

⁹¹ *Ibid.*

The Court stated that, "once what is required is an appreciation of virtual certainty of death, and not some lesser foresight of merely probable consequences, there is very little to choose between a rule of evidence and one of substantive law."⁹² However this remains an anomaly; it is unacceptable that part of the definition of the *mens rea* for murder should be left to the jury's discretion in deciding whether to apply it or not.

- Problems with the scope of intent

Williams' insurance-claiming bomber example is not resolved by *Woollin*. His protagonist's action will maim or kill people, but his act was not directed against them, as the language of the law and of *Woollin* assumes; his act, and his 'primary intent' was simply to destroy a package. If one widens the meaning of 'intent' in order to encompass the certain consequences of his act, it is then no longer possible to say that, for example, the coach driver who saves many lives by staying in his lane on a busy road despite seeing a person on the road ahead did not 'intend' to kill that person: the outcome was obvious, inevitable and chosen; but his 'primary intent' was to save lives.

Similarly, there are situations where a doctor knows that in treating a patient, they are virtually certain to shorten their life; for example the administration of strong pain-killers to a terminally-ill patient. It will be undesirable to find the doctor morally culpable for shortening the patient's life, where they are treating them to the best of their ability. *Woollin* does not cover this.

The approach taken in *Steane*, and cited by Lord Bridge, does not resolve this either; Williams points out that where 'intent' has been broadened - as it surely would for his insurance-claiming bomber example - it is no longer possible to support a claim that *Steane* had no intent to assist the enemy: he intended to assist them in order to save his family.⁹³

Norrie offers an alternative interpretation of *Steane* to bypass this objection: he describes a "moral threshold between the direct intent (saving the family) and the indirect intent (assisting the enemy),"⁹⁴ recognised by the Court of Appeal in narrowing intention to the former, and demands why "intention can be narrowed in these cases but not where necessary, in the law of murder?"⁹⁵ Previously Smith had identified such 'narrowing' as giving effect to a concealed defence of necessity or self-defence, citing the example of the *Herald Free Enterprise*, (in which a man, immobilised with fear, blocking an escape ladder from a sinking ferry, was thrown from the ladder to his death by the defendant, enabling the safe escape of other passengers).⁹⁶

⁹² Ibid.

⁹³ 'The Mental Element in the Crime of Murder' (1988) 104 LQR 30, Id.

⁹⁴ Norrie, "After *Woollin*" (1999) Crim. LR 532, 538.

⁹⁵ Ibid.

⁹⁶ 'Justification and Excuse in the Criminal Law' (1989), 68-74.

Sullivan reiterates William's assertion in relation to *Steane* that "*the concept of intent cannot, without distortion, discriminate between the man who acts to save his family and the man who acts to earn a pack of cigarettes.*"⁹⁷

It can be argued that the law's acceptance of such defences (of necessity, and duress) is very limited, and consequently that in any case of murder with a 'morally acceptable' feel of necessity, the narrow definition of intent must be opted for. This is possible under the *Nedrick/Woollin* direction which 'entitles' the jury to "*find that foresight of virtual certainty does not equate with intent,*"⁹⁸ (as reasserted in *R v Matthews & Alleyne*). But this is an unsatisfactory temporary solution to a fundamental problem.

This then is the current dilemma facing the courts: either virtual certainty equating with intention cannot be applied across the board as it is too morally insensitive and will result in undesirable results; or it can be so-applied, provided it is under the *Woollin* conception, as clarified in *Matthews and Alleyne*, where there remains some moral 'elbow room' for the jury (but not the judge) to 'narrow' intent. This is necessary in situations such as the medical context, or cases such as the *Herald Free Enterprise*; but *Woollin's* 'elbow room' is unintended, anomalous, and capable of misuse.

2.3.4. Resolving the problems

Woollin, confirmed in *Matthews and Alleyne*, can be seen as a major step forward in its rejection of 'virtual certainty' as evidence from which to 'infer' intention, in favour of virtual certainty as a separate category of 'found' intention.

However, the *Nedrick/Woollin* direction is anomalous, and raises issues that need to be addressed directly in any new law, even if only to say that where there is an "indirect intent" as well as a "direct" one, such as in *Steane*, the jury should decide (applying the "'morally acceptable' feel of necessity" – see above) which intent should be dominant: the "direct" in *Steane*, in Smith's example, in the coach driver's case, and in the medical cases⁹⁹; the "indirect" in the insurance-claiming bomber example. Similarly any other circumstances that might justify the jury's 'entitlement' to find on intent should be explicitly categorised, allowing the anomaly above to be resolved by making the *Woollin* formulation substantive.

⁹⁷ Sullivan, 'Intention and Complicity: A Reply', 648, citing Williams, 'Criminal Law, The General Part' (1983), 41.

⁹⁸ Op. Cit., 94, 537.

⁹⁹ See Ashworth's suggestion, "The Treatment of Good Intentions" in Simester and Smith, 'Harm and Culpability' (1996) 173, 178.

2.3.5. Reform Options for 'Secondary' Intent

The primary criticism directed at murder asserts it to be overly broad, and consequently devalued. The CLRC asserted the importance that "*the definition of murder should, so far as possible, ensure that those convicted of murder will be deserving of the stigma. Too wide a law of murder would not only be unjust but would tend to diminish the stigma to which we...attach value.*"¹⁰⁰ For this reason, formulations broadening the scope of intention to encompass recklessness will not be considered further here, the recent decisions having sought to establish a clear distinction between recklessness and intention.

This assessment will briefly look at, firstly, the option to abolish 'oblique' intent, restricting the mental element for murder to where a defendant's purpose is to cause death, and secondly, attempts to resolve difficulties with the '*Woollin*' direction.

- Narrow definition of intention

There are certain advantages to abolishing secondary intention: primarily the avoidance of awkward construction and counterintuitive expression which can result from seeking to extend 'intention.'

However the drawbacks of this reform are vast and preclude any serious follow-through. Invoking the oft-cited example, a person planting a bomb on a passenger plane, wanting to claim insurance on his parcel's destruction, would not be culpable under murder for the resultant deaths because his purpose was not to cause death; "*It is only a philosopher who would consider that there would be any divergence between the accused's knowledge of the ultimate death of the passengers and crew of that plane, and what he meant to do.*"¹⁰¹

There is a certain class of consequence to any action, so intrinsically bound up in the act itself, that it cannot be divorced with any moral legitimacy; indeed to do so may be to encourage defendants to act without fear of the virtually certain consequences of their actions.

- Attempts at defining secondary intention

The need to establish a substantive definition is generally accepted, but its precise form is a matter of some debate. Various attempts have been made at drafting a definition; each is considered in turn below.

Clause 18(b) of the Draft Criminal Code (1989) defines:

"A person acts intentionally with respect to

(i) a circumstance when he hopes or knows that it exists or will exist

¹⁰⁰ 'Offences Against the Person' (14th Report Cmnd. 7844 (1980)) para. 19.

¹⁰¹ Charleton, McDermott, Bolger 'Criminal Law' (1999), 7.93.

(ii) *a result when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events*"

A number of criticisms of this formulation have been raised:

- The expression "*in the ordinary course of events*" lacks clarity, failing to establish the foresight required of the defendant. To take the bomb example given above: if the bomb has a 50% failure rate, is this included under the definition?
- This formulation fails where a defendant acts expressly to prevent a virtually certain outcome from occurring. Lord Goff's hypothetical example is apt: a father and his two little girls are trapped at the top of a burning building, the only means of escape being to jump through the window. The father throws his first daughter out, then jumps out with the second daughter in his arms. It is virtually certain that the first girl will suffer serious injury or die as a result, and under a strict construction of secondary intent, were she to die, the father must be held to have intended her death. Clearly this is absurd: "*The definition leaves open the possibility that a person may be held to have intended a result that it was his express purpose to avoid.*"¹⁰²

Clause 1 of the Criminal Law Bill (1993) sought to make improvements:

"A person acts...intentionally with respect to a result when –

- (i) *it is his purpose to cause it; or*
- (ii) *although it is not his purpose to cause it, he knows that it would occur in the ordinary course of events, if he were to succeed in his purpose of causing some other result.*"¹⁰³

The expression 'being aware that it will occur in the ordinary course of events' of clause 18(b) is here rendered 'he knows that it would occur in the ordinary course of events,' so as to differentiate intent from recklessness. The Law Commission stated that this expression denotes the "*near-inevitability*"¹⁰⁴ of a result.

However, Smith pointed out that this formulation risks being too narrow. On the facts of *Woollin*, the defendant did not have a purpose "*of causing some other result*," but simply sought to vent his anger. For this reason, such a case might well evade Clause 1. Smith and Hogan suggested a suitable amendment to be "*he knows that it will occur in the ordinary course of events, or that it would do so if he were to succeed in his purpose of causing some other result.*"¹⁰⁵ However, it is not certain that this reformulation would capture the *Woollin*-scenario:

¹⁰² Smith "A Note on Intention" (1990) Crim. LR 85, 86.

¹⁰³ This formulation sought to improve on the Draft Criminal Code's clause 18(b).

¹⁰⁴ 'Legislating the Criminal Code: Offence against the Person and General Principles' (Law Com. No. 218, 1993), 9-10.

¹⁰⁵ 'Criminal Law' (1999), 60.

Simester and Sullivan propose this improvement: "*although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events either if he were to succeed in his purpose of causing some other event, or if he were to behave as he purposes.*"¹⁰⁶

This proposed direction, while effective in capturing the *Woollin*-scenario, is not easy for a jury to apply. The following direction is suggested as a possible alternative.

"*A person acts...intentionally with respect to a result when –*
(i) he wants it to happen, and behaves so as to make it happen; or
(ii) he knows it to be a virtually certain consequence of...
(a) his behaviour in trying to cause the result he wanted; or
(b) his behaviour in successfully causing the result he wanted; or
(c) his behaving as he wanted to do."

It is necessary to consider how the above formulation would fare against four examples which have been frequently cited throughout the debate on secondary intention: the father throwing his daughter from the top floor of a burning building; the person planting a bomb on a plane so as to claim insurance on the destruction of the package; the same scenario but where the bomb has a 50% failure rate; and a *Woollin*-type case in which the defendant acts with no clear result in mind.

The scenario involving the father in the burning building would be captured under (a). This is clearly undesirable, and necessitates a specific exemption:

"*(iii) If the defendant expressly acts so as to stop a result from happening, they cannot be held to have intended it - even where it was virtually certain to happen because of their actions.*"

The formulation would capture both scenarios where the package is placed in the plane. Where the bomb is virtually certain to explode, the offender is caught under (ii)(a); where there is a 50% failure rate, the offender is caught under (ii)(b). It is recognised that (a) could be subsumed within (b), but for the sake of a simple direction, it is kept separate. A jury finding a defendant guilty under (a) has no need to deal with the slightly more complex (b).

The *Woollin*-type case would be caught under the third heading. This is a difficult case in which the defendant has no particular end result in mind, but nevertheless acts in such a manner as to be virtually certain to cause death or gbh; however framing virtual certainty by reference to the actions of the defendant would enable *Woollin*-type cases to be caught under secondary intention.

The result of the coach driver example (mentioned in 2.3.3 ii) is unclear under this definition. The defendant's express purpose is not to avoid

¹⁰⁶ (2001), 121.

killing the man in the road, but to save the lives of his passengers. The law of necessity would need to be addressed with a view to capturing altruistic actions which intend to save certain lives, but in doing so must cause the loss of others.

2.3.6. Conclusion to Reform of 'Secondary' intent

The arguments for abolition are flawed. It is artificial to demand absolute correspondence between act and mental state, and to do so would lead to further undermining of murder, encouraging defendants to act without consideration of the fatal consequences of their actions.

Instead, the following plea is proposed as a workable formulation:

- "A person acts...intentionally with respect to a result when –*
- (i) he or she wants it to happen, and acts so as to make it happen; or*
 - (ii) he or she knows it to be a virtually certain consequence of...*
 - (a) their actions in trying to cause the result they wanted; or*
 - (b) their actions in successfully causing the result they wanted; or*
 - (c) their doing the actions they wanted to do."*
 - (iii) If the defendant expressly acts so as to stop a result from happening, they cannot be held to have intended it - even where it was virtually certain to happen because of their actions."*

Additionally, a specific exemption would be needed for situations where for example doctors, treating terminally-ill patients to the best of their abilities, administer increasing doses of painkillers, in the knowledge that this is virtually certain to shorten the patient's life. It is unacceptable that they be convicted of murder, and an exemption is needed. Although many may take exception to a finding of the requisite intention for murder being made in such a case, prior to the defendant's being excused, this is difficult to avoid, and is contended to be outweighed by the benefits of a substantive definition.¹⁰⁷

There would also be the need for very clear guidance as to when the issue of oblique intent is to be considered: i.e. only where there is insufficient evidence on the facts to settle the question of primary intent. There is critical need to maintain a clear distinction between primary and secondary intention, to prevent undermining of the mental element in murder.

2.4. Broadening Murder

There has been considerable argument for widening the scope of murder to include unlawful killings which, although not included within the present definition of murder, are of a moral culpability so grave that they should be.

¹⁰⁷ The precise drafting of the specific clause is beyond the scope of this thesis.

Ashworth stated: "*It may be argued...that there are some reckless killings which ought to be classified as murder, since they show such a high disregard for human life as to be socially and morally equivalent to many intentional killings.*"¹⁰⁸ There is strong feeling that, for example, terrorists who give a warning regarding a bomb they have planted, thus evading intention for murder (due to the absence of a virtual certainty that their actions will cause death or gbh), should be convicted of murder for any resultant death. This is an area fraught with difficulties. As Ashworth stated: "*it is difficult to identify with precision the characteristics of those cases.*"¹⁰⁹

The options considered here are: widening murder so as to incorporate defendants who act with the foresight of a probability of death or gbh resulting; adopting the MPC provision of 'reckless killings manifesting an extreme indifference to the value of human life'; and the Scottish approach of 'wicked recklessness.'¹¹⁰

2.4.1. Foresight of Probability of Death or Gbh

In some states, a likelihood of causing death or gbh is sufficient for a murder conviction.

- The Plea

In Australia, reckless murder is committed when "*D does an act, foreseeing, when he or she commits the act, that it will probably cause death or grievous bodily harm to a person, although D does not intend that either event should happen. D may be indifferent as to whether the specified harm occurs, or D may even wish that it should not occur.*"¹¹¹

In *Boughey v the Queen*, the High Court of Australia held 'probable' to mean "*a substantial - a real and not remote - chance.*"¹¹²

- Problems with this formulation

The Irish LRC considers that this may be crude in its operation: "*The degree of foreseeable risk required...may well depend on the justifiability of the risk-taking in question. Thus, the required degree of risk may be minimal where there is little or no social premise for the risk-taking in*

¹⁰⁸ Op. Cit. 33, 79.

¹⁰⁹ Ibid.

¹¹⁰ The approach of specifically listing those types of killing which augment culpability and consequently the category of conviction, is not considered. The 1957 Homicide Act retained capital punishment for those killings deemed "*particularly susceptible to deterrence,*" but, as Shute comments, "*this messy compromise quickly proved unstable.*" ("Punishing Murderers: Release Procedures and the 'Tariff,' 1953-2004" (2004) Crim. LR 160, 162). Shute cites Lord (Chief Justice) Parker, describing the distinction between 'capital' and 'non-capital' murder as a "*hopeless muddle.*" (See "Lord Parker on the Death Penalty" (1962) Crim. LR 583).

¹¹¹ Gillies, 'Criminal Law' (1997), 630.

¹¹² (1986) 161 CLR 10.

question; by contrast, it may be much higher where the defendant's conduct possesses some moral justification or social virtue."¹¹³

In the often-cited example of a terrorist who has planted a bomb, but given a warning, can the risk be said to be greater than 50%? The need to determine the precise mathematical risk involved quickly becomes arbitrary. Does this approach reliably capture those reckless killers deserving of a murder conviction? The answer is no.

In the American case of *Commonwealth v Malone*¹¹⁴, the defendant pulled the trigger of his gun three times, knowing there to be a bullet in one of the five chambers, and on the third occasion the gun fired, killing the victim. A 60% chance that the gun would fire was sufficient for a murder conviction. Had the defendant pulled the trigger only once, or even twice, the chances of causing death would have been only 20% or 40%, and the defendant would only have been guilty of manslaughter. Michaels states; "*...it is impossible to see why the design of the gun or the slightly earlier death of Malone's companion should change the outcome of the case. In terms of moral culpability, there is no reason for punishing the discharge on the third pull any differently from the discharge on the first.*"¹¹⁵

In *People v Causey*,¹¹⁶ the defendant killed the victim, striking him on the head with a jar of pennies. He was convicted of murder despite there being no discussion as to the chances of the fatal blood clot developing; "*It is difficult to see how the defendant, or the jury, could have calculated such a risk accurately.*"¹¹⁷

- Conclusion

This formulation fails to accurately track the moral culpability of the defendant. The requirement of a risk greater than 50% is arbitrary and quite unsatisfactory.

2.4.2. Reckless Killings manifesting an Extreme Indifference to the Value of Human Life

Under section 202.2(b) of the Model Penal Code, criminal homicide constitutes murder when "*it is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.*" The reasoning behind this provision is that it "*reflects the judgement that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly.*"¹¹⁸

¹¹³ ILRC Consultation Paper, 'Homicide: The Plea of Provocation' (LRC CP27-2003), 4.016.

¹¹⁴ (1946) (Pennsylvania) 354 Pa. 180, 47 A.2d 445.

¹¹⁵ 'Defining Unintended Murder' (1985) 85 Col LR (No. 4) 786, 798.

¹¹⁶ (1978) (Illinois) 66 Ill App. 3d 12, 383 NE 2d 234.

¹¹⁷ Op. Cit., 44, 4.023.

¹¹⁸ American Law Institute, 'Model Penal Code and Commentaries' (1980) Part II, 21.

- The Plea

The Code defines recklessness as the conscious disregard of a substantial and unjustifiable risk that the defendant's actions will cause death. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, his disregard involves a gross deviation from the standard of conduct required.¹¹⁹ The requirement of recklessness is expressed as follows:

*"...the Code calls for the further judgement whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful knowing homicide demonstrates precisely such indifference to the value of human life."*¹²⁰ The standard set is subjective, and cannot include risk-taking by the defendant where they do not realise the danger of their act.

- Criticisms of the plea

Criticisms focus on the subjective nature of this formulation, and the accompanying risk of inconsistency. The Irish LRC highlights the risk of *"inconsistent jury verdicts, or possibly verdicts based on irrelevant or discriminatory factors such as the defendant's background, allegiance or other activities."*¹²¹

Yeo strongly condemned the formulation as introducing *"...an unacceptable degree of uncertainty over the outcome of a case. One jury might consider that the lack of social utility of an accused's conduct was so great as to warrant a murder conviction even though the foreseeable risk of causing death was only a possibility. Another jury deliberating on exactly the same facts might decide against a murder conviction on the ground that a higher degree of foreseeable risk was required."*¹²²

The House of Lords' Select Committee on Murder and Mandatory Life Imprisonment concluded of this formulation, that the law of murder is already regarded by many as too broad, and that there is a need for precision regarding any further expansion.¹²³

The Irish LRC, in its consultation paper on Homicide, also recognised these criticisms, but reasoned that *"some degree of imprecision may be inevitable as the concept of justifiability is necessarily value laden."*¹²⁴ While this is to an extent inevitable in any jury system, there remain degrees of risk or uncertainty, and this provision may go too far.

¹¹⁹ Ibid., (Official Draft and Revised Comments)' Part I, 202(2)(c).

¹²⁰ Op. Cit., 118, 21-22.

¹²¹ Op. Cit., 113, 4.036.

¹²² 'Fault in Homicide' (1997) 0- 83.

¹²³ Op. Cit., 64, para. 73.

¹²⁴ Op. Cit., 113, 4.043.

It is striking that although 42 out of 51 US states¹²⁵ have some version of 'depraved heart' murder (the common law forerunner to the MPC 'extreme indifference' provision), only 14 codify a formula of 'extreme indifference' similar to the MPC's definition: it is clear that some discomfort is felt with the subjectivity of this provision, and consequently, where adopted it is significantly tempered.

- Conclusion

This plea is insufficiently precise for the purposes of broadening murder, the subjective nature of the plea resulting in a lack of certainty concerning its application. Murder is already criticised as overly broad and devalued because of the breadth of 'gbh-intent'; to further expand the scope of murder would place even greater pressure upon the indeterminate sentence and partial defences.

2.4.3. Wicked Recklessness

- The Plea

Lord Goff has recommended the adoption of the Scots 'wicked recklessness' provision,¹²⁶ which includes within its definition of murder, killings which demonstrate "*such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.*"¹²⁷ The 'wicked' conduct must be "*recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer.*"¹²⁸ Lord Sutherland defined the action required as demonstrating "*that you don't really care whether the person you are attacking lives or dies.*"¹²⁹ It seems that the defendant must have intended some personal injury,¹³⁰ but need not have appreciated the risk of causing death.¹³¹

Certain factors are deemed relevant in determining whether the defendant has been wickedly reckless: these include the use of a weapon,¹³² intention to commit an assault with particular reference to the nature and circumstances being "*all-important.*"¹³³

¹²⁵ 50 states and the District of Columbia.

¹²⁶ Op. Cit., 31, 58.

¹²⁷ *Cawthorne v HM Advocate* (1968) JC 32, 193. Macdonald, 'Criminal Law' (1978), 38.

¹²⁸ Sheriff Gordon, 'Criminal Law' (1978), 23-17.

¹²⁹ *HM Advocate v Hartley* (1989) SLT 135, 136.

¹³⁰ Op. Cit., 128, para. 23-15, quoting Viscount Hailsham LC in *Hyam* (Op. Cit., 18, 77-78).

¹³¹ *HM Advocate v Hartley* (1989) SLT 135; *HM Advocate v McGuiness* (1937) JC.37; *HM Advocate v Frazer* (1920) JC 60.

¹³² The Scottish Law Commission, 'Attempted Homicide' (Consultative Memorandum No. 61, 1984) 3.5.

¹³³ The Law Commission cited Alison stating the intention to inflict an injury must be "*of such a kind as indicates an utter recklessness as to the life of the sufferer, whether he live or die.*" (Alison, 'Principles of the Criminal Law of Scotland' (1989), 1).

This formulation has the advantage of enabling a murder conviction for those reckless killers possessing the same culpability as an intentional killer. It also ensures that terrorists who plant a bomb but give a warning, are convicted of murder where the bomb explodes causing death.

- Problems with the plea

... The expression 'wicked' is emotive and imprecise.

The House of Lords Select Committee reasoned: "*Wicked* is not a term used in English criminal law and has no precise meaning. It is true that the jury is often called upon to make a moral judgement (as when it is called on to decide whether certain conduct should be characterised as 'dishonest') but it is not generally part of its function to decide whether the defendant's behaviour was so 'wicked' that it should amount to the crime charged."¹³⁴ Lord Goff contended that such behaviour could "be epitomised as indifference,"¹³⁵ but this criticism remains a forceful one.

Williams asserted this lack of precision to render the rule "sufficiently abstruse to admit of being applied or not applied according to the condemnations or sympathies of the moment."¹³⁶ Lord Lane stated that such a provision "would be a bonanza for the criminal Bar. It would never go short of fees for years to come."¹³⁷ Indeed such a provision seems fraught with difficulties of accuracy in definition and application.

... The test is objective in nature, ignoring the actual mental state of the defendant

There is no requirement that the defendant recognised a risk of death resulting from his actions; the conduct must constitute "*recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer.*"¹³⁸ There is no reference to the actual state of mind of the defendant, the leading case of *Cawthorne v HM Advocate* requiring "*such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.*"¹³⁹

This feature has been heavily criticised; Williams states that "*acceptance of [this] proposal will land us back in the morass from which we thought we had wearily escaped.*"¹⁴⁰ He cites *DPP v Smith*,¹⁴¹ in which the mental element in murder briefly became an objective one, attracting

¹³⁴ Op. Cit., 64, 74.

¹³⁵ Op. Cit., 31, 54.

¹³⁶ Williams, "The Mens Rea for Murder: Leave It Alone" (1989) LQR 387, 397.

¹³⁷ HL. Deb. Vol. 512, Col. 480.

¹³⁸ Op. Cit., 41.

¹³⁹ Op. Cit., 129 for both, para 38.

¹⁴⁰ Op. Cit., 136, 395.

¹⁴¹ Op. Cit., 7, 326. Viscount Kilmuir LC: stated the test to be what the "*reasonable man would contemplate as the probable results of his acts, and, therefore, would intend...*"

tremendous criticism. A similar fear must exist concerning this formulation.

In defence of the provision, it must be recognised that Scotland has no doctrine of implied malice. Intention to cause serious injury will not of itself suffice for a murder conviction, it is a factor from which wicked recklessness may be drawn; the defendant must have intended personal injury sufficiently grave so as to constitute wicked recklessness. The ILRC noted that *"it appears that in this respect the concept of wicked recklessness in Scots law serves much the same function as the doctrine of implied malice serves in Irish and English law."*¹⁴² It reasoned that with these taken into account, *"the concept of wicked recklessness is a good deal less severe, at least in practice, than it might appear at first."*¹⁴³

Despite this, it is less than ideal to leave the potential for a very harsh operation of the law to judicial interpretation.

- Conclusion

It is ultimately concluded that the objective nature of the test, and the term 'wicked,' constitute sufficiently substantial reasons so as to recommend against the adoption of 'wicked recklessness.' The House of Lords' Select Committee, in rejecting this partial defence, considered such a broadening of murder to fall below the necessary standard of certainty: *"It is neither satisfactory nor desirable to distort the principle in order to deal with the reckless terrorist and other 'wickedly' reckless killers, who will, in any event, be liable to imprisonment for life."*¹⁴⁴

2.4.4. Conclusion to Broadening Murder

While broadening murder so as to capture those grossly reckless or indifferent to the value of human life is highly desirable, any extension of the law beyond intention and into recklessness is necessarily accompanied by a reduction in its moral reliability. Foresight of a probability is rejected for this reason; it cannot reliably distinguish between killings deserving of murder and those deserving of a manslaughter conviction.

The 'wicked recklessness' provision and the MPC's 'reckless killings manifesting an extreme indifference to the value of human life,' are more viable. Both require the jury to consider whether they found the actions of the defendant to constitute such a grave expression of indifference to the value of human life as to warrant a conviction for murder, enabling a broader consideration of the overall moral culpability of the defendant.

¹⁴² Op. Cit., 44, 4.061.

¹⁴³ Ibid., 4.062.

¹⁴⁴ Op. Cit., 64, 76.

However, both formulations have serious drawbacks. Wicked recklessness lacks clarity and precision. The term 'wicked' has been accused of being overly emotive, and imprecise. This, alongside the objective nature of the test, risks a very harsh standard being applied, subject to the sympathies of a particular jury. For this reason, it is recommended that this provision not be enacted.

The MPC provision's flexibility, permitting the jury to take into account the broad balance of the circumstances in assessing the defendant's culpability, while constituting its primary strength is also its principal weakness. The jury's freedom to determine - according to its own standards - whether a killing manifests 'extreme indifference to the value of human life' could lead to unpalatable decisions.

Law reform bodies in England and Wales have repeatedly expressed great reluctance to expand the scope of murder, and have consistently rejected proposals to extend it. The tension between a desire to incorporate all those deserving of mandatory life, and to maintain the same degree of exclusivity and declaratory stigma which follows a murder conviction, remains unresolved.

Ultimately, one must conclude that the potential cost in devaluing murder outweighs the moral benefits of increased scope, benefits further reduced when reckless killers with a high moral culpability can already be given a discretionary life sentence under manslaughter. The range of behaviour covered by murder is over-broad, and this problem would only be aggravated by such a reform.

Chapter 2: The Punishment Regime for Murder and its Reform

1. The present sentencing regime for murder

Every convicted murderer receives a mandatory life sentence.¹ This involves a minimum term which must be served by the prisoner, after which the prisoner's release is determined through the parole process.

1.1. Minimum term

The minimum term must be served to satisfy the requirements of 'retribution and deterrence.' Pursuant to the Criminal Justice Act, 2003, the minimum term is determined "*as the court considers appropriate.*"² The sentencing judge is to "*have regard to*"³ the general principles set out in Schedule 21, in setting the 'appropriate' minimum sentence.

Schedule 21 establishes three starting points for determining the minimum sentence: 'Whole Life', '30 Years', and '15 Years.' The 'Whole Life' starting point is for murders of "*exceptionally high*" seriousness; examples include the murder of two or more persons, planning or premeditation, abduction of the victim, or sadistic conduct. The '30 Years' starting point is for murders of a "*particularly high*" degree of seriousness; examples include the murder of a police or prison officer in the course of his duty, or the use of a firearm or explosive. For all other cases of murder committed by those over 18, the starting point is '15 Years.'

Paragraphs 8 and 9 of Schedule 21 state that "*having chosen the starting point, the court should take into account any aggravating or mitigating factors.*" Paragraph 9 reads: "*Detailed consideration of aggravating or mitigating factors may result in a minimum term of any length (whatever the starting point) or in the making of a whole life order.*"

Aggravating and mitigating factors are set out non-exhaustively in paragraphs 10 and 11. Aggravating factors include:

- “ ...
- (a) a significant degree of planning and premeditation,
 - (b) the fact that the victim was particularly vulnerable because of age or disability,
 - (c) mental or physical suffering inflicted on the victim before death,
 - (d) the abuse of a position of trust,

¹ The 1965 Murder (Abolition of Death Penalty) Act.

² Section 269 (3).

³ Ibid., (5).

- (e) the use of duress or threats against another person to facilitate the commission of the offence,
- (f) the fact that the victim was providing a public service or performing a public duty, and
- (g) concealment, destruction or dismemberment of the body."

Mitigating factors include:

"...

- (a) an intention to cause serious bodily harm rather than to kill,
- (b) lack of premeditation,
- (c) the fact that the offender suffered from a mental disorder or mental disability which (although not falling within section 2(1) of the Homicide Act 1957 (c. 11)), lowered his degree of culpability,
- (d) the fact that the offender was provoked (for example, by prolonged stress) in a way not amounting to a defence of provocation,
- (e) the fact that the offender acted to any extent in self-defence
- (f) a belief by the offender that the murder was an act of mercy, and
- (g) the age of the offender."

In 2004, the Court of Appeal dealt with four appeals by convicted murderers, whose minimum terms had been fixed "in accordance with the Criminal Justice Act 2003, s.269."⁴ Lord Woolf CJ stated that the judgement was intended to provide general assistance to the courts in applying those provisions.

The extent to which a judge is bound by the 'starting points' of Schedule 21 was assessed by the court: "It was important to note that the judge complied with the section if he had 'regard' to the principles set out in Sch.21. As long as he bore them in mind, he was not bound to follow them. If he did not follow the principles, he should explain why..."⁵

This, the Court held, made it clear that:

"...despite the provision of starting points, the judge had a discretion to determine a term of any length as being appropriate because of the particular aggravating and mitigating circumstances that existed in that case.⁶ This discretion must be exercised lawfully, and this required the judge to have regard to the guidance set out in the Schedule, though he was free not to follow the guidance if in his opinion this would not result in an appropriate term for the reasons he identified."⁷

The minimum term set by the judge is subject to appeal from the prisoner, or an Attorney-General's reference.⁸

⁴ Thomas, "Case and Comment – *R v Sullivan*" (2004) Crim. LR 853.

⁵ *Ibid.*, 855.

⁶ Paragraph 8 reads: "Having chosen a starting point, the court should take into account any aggravating or mitigating factors, to the extent that it has not allowed for them in its choice of starting point."

⁷ *Op. Cit.*, 856.

⁸ "The Criminal Justice Act 2003: Custodial Sentences" (2003) Crim. LR 702, 703.

1.2. Parole Process

After the minimum term's expiry, the prisoner is entitled to have his case referred to the Parole Board, which "*may direct his release if it is satisfied that the protection of the public does not require that he should continue to be detained.*"⁹ If it directs his release, the Secretary of State is no longer able to detain him. Once released on licence, the usual rules concerning revocation of licence apply.

2. Problems with Mandatory Life

Mandatory Life: Origins, Intentions, and Practical Outcomes

2.1. The roots of mandatory life

The mandatory life sentence has provoked, and continues to provoke, considerable controversy. Since it came into being in the 1965 Murder (Abolition of Death Penalty) Act,¹⁰ there have been 3 major reviews of the current law of murder, and frequent calls for reform, particularly of mandatory life. As Simester and Sullivan stated, "*it would be a bold prediction to say this process is at an end.*"¹¹ Internationally, the mandatory life sentence has been the subject of a significant number of reviews from law reform bodies.¹²

It is important to recognise that the present form of murder has its origins in a "*parliamentary compromise,*"¹³ between those desiring the death penalty's abolition and those desiring that murder should remain uniquely severely punished.¹⁴ It would seem accordingly that the present form of the offence of murder was not arrived at expressly, and may for this reason be compromised; this also undermines attempts to interpret the law by reference to the Parliamentary discussion.

2.2. Problems

Mandatory life has been an ongoing battleground between the executive and the judiciary. The executive's desire to control murder has struggled against the

⁹ Ibid.

¹⁰ This temporary resolution was made permanent through the affirmative resolution of both houses of Parliament 4 years later.

¹¹ Simester and Sullivan 'Criminal Law – Theory and Doctrine' (2001), 369.

¹² NZ CLRC 'Report on Culpable Homicide' (1976); Advisory Council on the Penal System 'Sentences of Imprisonment: A Review of Maximum Penalties (HMSO, London, 1978); LRC of Canada 'Homicide' (WP33 Ottawa, 1984)...etc.

¹³ Ashworth "Reforming the Law of Murder" (1990) Crim. LR 75, 77.

¹⁴ "...little consideration was given to what would replace capital punishment; the main focus was on the need for it to be abolished."

judiciary which, understandably, has seen the administration of the mandatory life sentence as a judicial function. The Home Secretary's powers have been gradually eroded through a recognition of the need for greater transparency in the administration of the mandatory life sentence, and through a number of important decisions in the European courts.¹⁵ Furthermore, the 2003 Criminal Justice Act, section 269, has firmly established judicial control of the setting of minimum terms, the release of a prisoner to be determined solely according to the parole board's decision.

There have been a staggering number of changes to this process, which all too often have appeared to be reactions against legal challenges to the executive's overbearing control, rather than the result of reform driven by an underlying rationale.

This lack of coherence has engendered 3 major reviews of the law of murder in the last 30 years: the Criminal Law Revision Committee,¹⁶ the Advisory Council on the Penal System,¹⁷ and the House of Lords Select Committee.^{18,19} All three considered whether murder should be punished by mandatory life, and reached different conclusions despite considering very similar evidence. The major areas they considered were the indeterminate nature of mandatory life, its value in protecting the public, the justifiability of the indeterminate term in the context of the breadth of murder, and the stigmatic effect of the murder label.

2.2.1. Protecting the public

The CLRC considered the indeterminacy of mandatory life an asset in safeguarding the public against the release of a prisoner still posing a threat, while enabling the early release of a prisoner no longer posing a threat.

The Advisory Council disagreed, contending that the judge's discretion to impose a life sentence was adequate protection: "*[We] cannot believe that the problems of predicting future behaviour at the time of conviction are inherently more difficult in a murder case than in any other case where there is a measure of instability, or that judges are any less able to make predictions or to assess degrees of culpability in murder cases than in any others...*"²⁰

¹⁵ In *R (Anderson) v Secretary of State for the Home Department*, ((2002) UKHL 46; (2003) 1 Cr App R 32), the Home Secretary's powers in setting how long adult prisoners convicted of murder should serve for the purposes of punishment (under s.29 Crime (Sentences) Act 1997) were held incompatible with the European Convention on Human Rights, Article 6(1), which establishes the right to a fair trial by an independent judicial body.

¹⁶ 14th Report, 'Offences against the Person' Cmnd 7844 (1980).

¹⁷ 'Sentences of Imprisonment: a Revision of Maximum Penalties' (HMSO, London 1978).

¹⁸ 'Report of the Select Committee on Murder and Life Imprisonment' Session 1988-89, HL Paper 78, 3 Volumes.

¹⁹ Hereafter referred to as: the 'CLRC', the 'Advisory Council' and the 'Select Committee'.

²⁰ *Op. Cit.*, 17, para.s 235-244.

This stance was strengthened by the New Zealand CLRC,²¹ which recommended that any prisoner serving a determinate sentence of two or more years for homicide, would be 'liable to recall upon release,' thus eliminating the fear of the Home Secretary being powerless to prevent the release of a prisoner still posing a threat to the public.

The Select Committee reported that "*many murderers are not generally dangerous,*" citing "*Dr Thomas who pointed out that, during a ten-year period when 6,000 persons convicted of homicide (including manslaughter) were at large, only six persons previously convicted of murder committed a second murder - and several of these were committed in prison.*"²² They are certainly no more dangerous than those imprisoned for manslaughter upon the grounds of diminished responsibility, which in Thomas's view makes a "*complete nonsense,*"²³ of the argument that mandatory life better protects the public. Cross makes the point that, "*At the expiration of fixed term sentences there is the possibility that a prisoner known to be potentially dangerous will have to be released, but this does not deter us from having fixed term sentences.*"²⁴ Thomas asserts that as long as murder excludes those killers who suffer from a reduced mental capacity and those who fail to kill through no fault of their own, the present law "*cannot be defended on the ground that it effectively selects the homicidally dangerous person.*"²⁵

2.2.2. It encompasses a huge range of conduct

A major criticism of mandatory life is that it encompasses an enormous range of culpability. The Advisory Council stated "*Although murder has been traditionally and distinctively considered the most serious crime, it is not a homogenous offence but a crime of considerable variety.*"²⁶ The Select Committee contended this to devalue mandatory life, reducing "*what should be the awe-inspiring nature of the life sentence. Because many murderers receive unnecessary life sentences, the average time served is reduced, giving credence to the common belief that 'life' means nine years.*"²⁷ Where a murder conviction does not reliably mark out the worst offenders against society, mandatory life is devalued and confidence is lost in its punitive significance.

In the light of the 2003 Criminal Justice Act, this criticism gains far greater force. The minimum term is now determined entirely at the discretion of the sentencing judge, which will inevitably result in sentences of a matter of months in cases such as 'mercy killings.'

²¹ 'Report on Culpable Homicide' (1976).

²² Op. Cit., 18, para. 111B(i). Influential evidence was given by Thomas: Report Vol. II, 40-58.

²³ Thomas "Sentencing Implications" (1980) Crim. LR 565, 566.

²⁴ Cross, "Penal Reform In 1965: A Mass Of Unexplained and Unfounded Assumptions" (1966) Crim. LR 184, 188.

²⁵ Op. Cit., 23, 566.

²⁶ Op. Cit., 17, para. 244.

²⁷ Op. Cit., 18, para. 114B.

2.2.3. Lack of a clear rationale

Lord Windlesham, writing following the introduction of the 'tariff period' (the present day 'minimum term') stated "*The paradox now posed by life imprisonment is that it is neither a sentence of life nor a genuinely indeterminate term. The importation of a stated tariff period means there is in effect a minimum fixed sentence contained within the indeterminate sentence.*"²⁸ This criticism is especially apt in the light of the 2003 Act, which leaves the mandatory life sentence in a state of considerable confusion.

2.3. The need for reform

Mandatory life is caught between different pressures; the longer it remains unreformed, the greater the disillusionment. The 2003 Act, in giving the judiciary complete freedom to determine the minimum term, has significantly improved matters. However, the huge scope of murder only serves to devalue the mandatory life sentence when judges might set minimum terms of a matter of months for a 'mercy killing.'

The 2003 Act represents an attempt at patching up the present law, when what is required is a full review. At the end of its Final Report on 'Partial Defences to Murder' the Law Commission stated "*our first recommendation is that the Law Commission be asked to conduct a review of the law of murder;*"²⁹ it is time for the law of murder, and indeed more broadly homicide, to be brought into a state of collective coherence. In view of the many failures to resolve the current law's problems, proper resolution awaits a new law.

3. Reform of the structure of Homicide

There are three main options for replacing the present system of homicide: a limited discretionary sentencing regime for murder, the unification of murder and manslaughter into a single offence of 'unlawful offence,' and the 'degrees of murder' approach.

3.1. The abolition of mandatory life, to be replaced by a limited sentencing discretion

The mandatory life sentence is at the root of the tension between murder and manslaughter, placing considerable pressure on the definition of murder and the partial defences, because of its indeterminate severity. One possible solution, is to replace it with a limited sentencing discretion. Under this approach, there

²⁸ Lord Windlesham, "Life Sentences: The Paradox of Indeterminacy" (1989) Crim. LR 244, 255.

²⁹ 'Final Report' (2004) No. 173, 1.12.

would remain a presumption that a convicted murderer will receive a discretionary life sentence, subject to an assessment of mitigating and aggravating circumstances.

3.1.1. Arguments in favour of a total sentencing discretion

- It enables a fairer reflection of the culpability of any individual offender

Murder comprises a vast range of culpability, which mandatory life cannot reflect. A discretionary sentencing regime would enable precise sentencing and accurate reflection of the moral culpability of the individual offender.

- Partial defences create a "fairly arbitrary patchwork"³⁰ which fails to reliably reflect moral culpability

The difference between a murder conviction, with its mandatory life sentence, and a manslaughter conviction, with its discretionary sentencing regime, is huge. This puts pressure on the partial defences, which have struggled to cope. It is unrealistic to expect legal mechanisms to reflect the many permutations of aggravating and mitigating factors, and provocation has reflected this tension.

- Discretionary sentencing does not mean shorter prison-time

A primary criticism has been that discretionary sentencing results in more lenient sentences, but this assertion is not borne out by the statistics. The Law Reform Commission of Victoria reviewed all the cases of murder between 1986 (when the mandatory life sentence was abolished) and 1991. It found that the average prison time under the new system was longer than under mandatory life. Similarly, in New South Wales, the time spent in prison under the discretionary sentencing regime was greater than under the previous system of death sentences commuted to life imprisonment.³¹

3.1.2. Criticisms of a discretionary sentencing regime

- The loss of a declaratory and stigmatic 'murder' label

The declaratory value of murder would be significantly diminished. Ashworth makes the important point that "*If the mandatory sentence were abolished and the range of available sentences were the same for murder*

³⁰ LC of NZ 'Some Criminal Offences, with Particular Reference to battered Defendants' Report 73k, May 2001, Wellington, para. 145.

³¹ LRC of Victoria, 'Homicide' R 40 (Melbourne, 1991), para. 218; Freiberg & Biles 'The Meaning of Life: A Study of Life Sentences in Australia' (AIC, Canberra 1975), 53-54; Judicial Commission of NSW, 'Sentenced Homicides in New South Wales' 1990-1993 (Sydney 1995), 87.

and manslaughter, would there be any reason for keeping the legal distinction between the two offences?"³² The precise impact of such a reform is difficult to gauge. See 3.1.3 for a fuller discussion.

- Protection of the public

There is a frequently-expressed concern that a total sentencing discretion will mean judges are forced to give a determinate sentence to unlawful killers of a lower moral culpability who nonetheless pose a threat to the public. Thomas, however, contends that the exclusion of defendants who successfully plead diminished responsibility "*makes a complete nonsense of this argument.*" Furthermore, "*the mandatory sentence does not apply to those who inflict serious violence with an intent which will result in a conviction for murder if death results, but who fail to kill through a combination of accidental circumstances which affect neither their dangerousness nor their culpability.*"³³

Under a limited discretionary sentencing regime the presumption would be of 'life,' so the danger to the public could be factored-in to any sentence given.³⁴

- Complicated sentencing ranges

There has been some concern that this would lead to judges assigning differing sentences to cases of similar culpability. Ashworth suggests that through guideline judgements from the Lord Chief Justice, judges could be directed as to the number of years they should set for different types of murder. Having warned that a sentencing discretion might be "*a voyage into the unknown, with sentences of 50, 60 and 75 years being mentioned,*"³⁵ he concludes it "*broadly to be welcomed.*"³⁶

- In light of the 2003 Criminal Justice Act a discretionary sentencing regime is unnecessary

Judicial control of the setting of the minimum term effectively means that mandatory life operates as a discretionary sentencing regime.

While this argument has some force, it is unacceptable to retain mandatory life when the term is so at odds with the reality of its administration. Better, surely, to abolish the indeterminate sentence, and to enable accurate sentencing and fair labelling to reflect the enormous range of culpability within murder.

3.1.3. What about public opinion?

³² Ibid., 78.

³³ Op. Cit., 23, 566.

³⁴ Release would be on licence, subject to the usual remission.

³⁵ Op. Cit., 13, 84.

³⁶ Ibid., 83.

The fundamental reason stated against the abolition of mandatory life is that the public desire it to be uniquely punished. This belief has generally been based upon very broad opinion surveys,³⁷ and is considered in greater depth below.

- 1998 Survey of Public Opinion concerning homicide law

Mitchell has carried out extensive research in this area, and his findings are significant. In 1998, in collaboration with Social and Community Planning Research, he undertook a qualitative survey of public opinion, "*testing the law's assumption that it has public support for the way in which it deals with homicides.*"³⁸

The 822 participants were chosen to be demographically representative of English and Welsh populations. Each participant ranked 8 homicide scenarios according to seriousness, with reasons, indicating their perceptions of the crime and the appropriate sentence after certain variations were introduced.

This research revealed that the "*personal culpability of the defendant was a key factor in the public's evaluation of homicides.*"³⁹ Factors especially influential were premeditation, planning, victim vulnerability, justified self-preservation, and the extent of the defendant's fault.⁴⁰ Regarding categorisation of the offences, no respondents used the term 'murderer' to describe the battered spouse or self-defence scenarios; 15% considered these to be 'killings,' while 15% described the self-defence scenario as manslaughter, and 21% as 'self-preservation.'⁴¹

In a follow-up survey, 33 of the original participants commented on, and explained, their observations regarding the gravity of the different scenarios, and the effect of aggravating factors. Mitchell concluded:

*"...the follow up survey provided encouraging evidence that, given the opportunity to consider the matter, the public present neither knee-jerk nor especially punitive views about the way in which the criminal justice system should deal with homicide... There is little doubt that they share the view that distinctions in gravity should be made according to the offender's personal culpability."*⁴²

³⁷ "*Whilst there has been a good deal of research in England on popular views across a broad range of crimes, there has been comparatively little work specifically concerned with homicide.*" (Op. Cit., 29, Appendix C, 180).

³⁸ "Public Perceptions of Homicide and Criminal Justice" (1998) British Journal of Criminology, 453, 456.

³⁹ Law Commission, 'Partial Defences to Murder' (2003) (LCCP173), 2.18

⁴⁰ Op. Cit., 38, 467-468.

⁴¹ Ibid., 466.

⁴² "*There were real signs of attempts to give proportionate and discriminatory responses, of efforts to focus not solely on the loss of life but to take account of the circumstances generally, including the personal culpability of the killer.*" (Mitchell, "Further Evidence of the Relationship between Legal and Public Opinion on the Law of Homicide" (2000) CLR 814, 825-26).

- Mitchell's research into public perception of culpability for the various unlawful killings falling within murder.

In the light of Mitchell's findings the Law Commission, as part of its report on 'Partial Defences to Murder,' commissioned Mitchell to conduct research into "*public opinion on homicides in which defendants would be likely to raise a defence based on provocation, diminished responsibility or the use of excessive force in self-defence.*"⁴³ The selected approach was "*a short series of interviews...undertaken with a group of individuals drawn from various parts of the country who might be expected to reflect a wide cross-section of backgrounds and personal circumstances...The Law Commission was also keen to elicit the views of the next-of-kin of those who had been killed, and a small sub-group of these secondary victims were included in the survey.*"⁴⁴

Professor Mitchell conducted 62 interviews.⁴⁵ Each interviewee commented on a series of scenarios; "*the objectives were to determine whether the scenario was regarded as one of the more or less serious homicides, and to identify the factors which affected this assessment.*"⁴⁶ Approximately ten were put to each interviewee, with variations then added, ranging from the 'contract killer scenario,' to the 'mercy killer scenario.'

The results were striking;

*"Of the 62 respondents, 39 (62.5%) said they did not favour a mandatory penalty for what are regarded as the most serious criminal homicides. Of course, the views as to what should constitute the most serious criminal homicides vary – the comments received in this survey broadly confirmed the results of the 1995 national survey which highlighted factors such as premeditation, torturing victims before death, and killing child victims – but the majority of respondents felt that even within this category of the most serious homicides there will inevitably be sufficient variations in gravity and heinousness that the judge ought to be able to reflect the more precise degree of seriousness in the sentence imposed."*⁴⁷

The Law Commission cited the tremendous variation in perceived culpability across the different scenarios put to the respondents, from the contract killer,⁴⁸ for which 79% would have given a life sentence, to the mercy killer,⁴⁹ for which almost 60% would not have prosecuted at all, and 77% would either have not prosecuted, granted a non-custodial disposal, or given less than a 2 year sentence. Even if the very particular situation of the mercy killing is set aside, only 33% recommended

⁴³ Op. Cit., 29, Appendix C, 1.

⁴⁴ Ibid., 2.

⁴⁵ 47 with the main sample, 15 with secondary victims.

⁴⁶ Op. Cit., 43, 4.

⁴⁷ Ibid., 68.

⁴⁸ Scenario E.

⁴⁹ Scenario I.

mandatory life in the scenario of a father who hunted-down and killed his daughter's rapist.

The Commission stated;

*"The notion that all murders, as the law is presently framed, represent instances of a uniquely heinous offence for which a uniquely severe penalty is justified does not reflect the views of a cross section of the public when asked to reflect on particular cases."*⁵⁰

The limited sample size qualifies the survey's authority, but, with the demographic weighting,⁵¹ this constitutes a significant finding. The Law Commission concluded; *"Although the number questioned was small, their responses when asked to consider a range of scenarios covering a wide range of cases which could give rise to murder convictions tend to point against there being a popular mandate for the present mandatory sentence."*⁵²

- Conclusion

Mitchell's results, if they accurately reflect the general public's opinion, have potentially huge consequences for the justification of the mandatory life sentence. Mitchell's informed approach suggests that the primary concern of the public is that sentencing should reflect the culpability of the offender.

A move to a limited sentencing discretion would take some preparation to establish a range of sentences for the different levels of moral culpability. The ambit of murder would also need to be addressed, but the power of the judge to set a sentence specifically tailored to the moral culpability of the individual defendant would render the difficulties of definition much more acceptable than at present.

For some, the reduction in the stigmatic effect of a murder conviction remains a major obstacle to abolition of mandatory life. However, it is difficult to justify this indeterminate sentence where it does not exclusively mark-out the worst offenders against society. Under the discretionary approach, a presumption of discretionary 'life' for murderers would retain some of the stigma of the indeterminate sentence.

The House of Lords Select Committee recommended a judicial discretionary sentencing power, proposing that life imprisonment should be reserved for *"particularly outrageous murders,"*⁵³ and defendants who

⁵⁰ Op. Cit., 29, 2.35.

⁵¹ Reflecting a *"wide cross-section of backgrounds and personal circumstances,"* Ibid., Appendix F, 2.

⁵² Ibid., 2.32.

⁵³ Op. Cit., 18, para. 117.

fulfil *Hodgson's*⁵⁴ general criteria for a discretionary life sentence: mentally disturbed, unstable of character and unpredictable in risk.⁵⁵

A number of other bodies have also recommended the abolition of mandatory life and retention of murder and manslaughter: the Committee on Mentally Abnormal Offenders⁵⁶, the Advisory Council, the Prison Reform Trust, 1995,⁵⁷ and JUSTICE, 1996.⁵⁸

3.2. A Single Unified Offence: Merging Murder and Manslaughter

By far the most radical proposed reform is the uniting of murder and manslaughter into a single offence of 'Unlawful Homicide.' This would leave the sentencing of each unlawful killer entirely up to the sentencing judge.

3.2.1. Arguments in favour of a single unified offence

- Simplification of a complicated area of law

Lord Kilbrandon in *Hyam*⁵⁹ endorsed this as a "*radical simplification of a complex body of law.*"⁶⁰ Wells concluded of provocation and diminished responsibility, that "*Both defences are artificial devices to overcome the hurdle of the mandatory penalty,*"⁶¹ recommending 'unlawful homicide' as a desirable simplification. There is a strong appeal to this reform; the difficulties with the murder/manslaughter distinction are considerable, and in 40 years since the Abolition of Death Penalty Act, 1965, a satisfactory balance between the two has yet to be struck.

- Greater accuracy in sentencing

Wells, stated that "*If the question were left to be taken into account in sentencing, each case could be dealt with individually, reflecting this range (of moral culpability) more accurately.*"⁶² Cross, writing in 1966, stated, "*Now that capital punishment has gone, would it not be better to leave the judges to do the best they can to reflect in their sentences the*

⁵⁴ (1967) 52 Cr. App. R 113.

⁵⁵ Under their proposed reformulation, the judge would – in open court - specify the reasons for a life sentence, and the term necessary for retribution and deterrence. This 'Penal Sanction' would be open to appeal from both sides, but free from Home Office intervention. At the 'Penal Sanction's' expiry, the prisoner's release would be considered by a tribunal, composed of a high court judge, a consultant psychiatrist and a chief probation officer. The prisoner would have the right to see all relevant documents, to appear before the tribunal, and to have legal representation.

⁵⁶ 'Final Report' (1975) Cmnd. 6244, 1975, para.s 42-63.

⁵⁷ "Report of the Committee on the Penalty for Homicide" (Lane Committee) Prison Reform Trust, 1995.

⁵⁸ "Sentenced for Life: Reform of the Law and Procedure for those Sentenced to Life Imprisonment" JUSTICE, 1996.

⁵⁹ (1975) AC 55, 98.

⁶⁰ Simester and Sullivan 'Criminal Law – Theory and Doctrine' (2001), 369.

⁶¹ *Ibid.*

⁶² Wells, "The Death Penalty for Provocation?" (1978) Crim. LR 668, 671.

difficult and disputable moral distinctions involved in the different kinds of unlawful homicide?"⁶³ The judicial freedom to sentence specifically according to the culpability of each unlawful killer, is a major advantage.

- Since the abolition of the death penalty, there is little reason to maintain the distinction.

Cross, writing about the 1965 penal reform, contended it to be "*at least arguable that a great opportunity of fusing the two offences has been missed.*"⁶⁴ He cited this question from Lord Parker: "*Is it not the true position today that there is only one offence, the offence of homicide, which varies infinitely in degree from the lowest manslaughter up to murder in the course of organised crime in a war against society?*"⁶⁵ concluding that this has "*yet to be convincingly answered.*"⁶⁶ Now that offenders can be punished just as severely under murder and manslaughter, much of the stigma of, and justification for, murder has been eradicated.

- Many prosecutors charge manslaughter

Clarkson and Keating stated that in "*many cases*" prosecutors charge manslaughter despite a murder conviction being the best fit, concluding that this "*indicates that prosecutors, at least, are often willing to rely on judges exercising their sentencing discretion reasonably.*"⁶⁷ Lord Denning, writing when capital punishment still existed, stated that "*in many cases which are in law plainly murder, juries return verdicts of manslaughter, because they do not think the death sentence is appropriate.*"⁶⁸

The true extent of this is unclear, but it raises the grave concern that the present law may be seen as unfair and unrealistic, and consequently be circumvented.

- A unified system with the retention of discretionary life, would restore value and belief in the 'life sentence.'

The Advisory Council on the Penal System stated that under a unified system, "*Life imprisonment would be reserved for those cases where both the gravity of the offence and the instability of the offender suggested that an indeterminate sentence was necessary for the protection of the public... This, in our opinion, would increase, rather than diminish, public confidence in the life sentence.*"⁶⁹ One must agree that a more careful

⁶³ Op. Cit., 24, 189.

⁶⁴ Ibid., 188.

⁶⁵ HL Deb., Vol. 268, col. 1214.

⁶⁶ Op. Cit., 24, 188.

⁶⁷ 'Criminal Law: Text and Materials' (1994), 682.

⁶⁸ Royal Commission on Capital Punishment, Cmd.8932 (1953), 27.

⁶⁹ Op. Cit., 17, 255.

application of the indeterminate sentence would give it greater conceptual certainty and moral reliability.

3.2.2. Criticisms of the proposed Single Unified offence

- A very broad range of conduct would come under one offence

Simester and Sullivan point out that it would bring under the heading of a single offence “*an enormous range of differing conduct with very different forms of culpability, already a powerful objection to manslaughter.*”⁷⁰ A practical concern is the potential for variation in sentencing across cases of similar culpability. Such a system would only be workable through the establishment of sentencing ranges reflecting the gravity of different forms of unlawful killing. However, it should be noted that this would be no different to the powers a judge currently has in sentencing outside of murder, although the breadth of the unified offence would be substantial.

- Undermining the jury’s role

Under the present law, the jury has a meaningful role in deciding between murder and manslaughter; a single unified offence would, “*take important elements of the decision out of the hands of the Jury.*”⁷¹ As pointed out in the introduction, society places a high value upon its direct involvement in the assessment and condemnation of murders.

There is the further possibility of enabling the jury to recommend the sentence it considers appropriate; although this would necessitate further development in drafting a working law.

3.2.3. Conclusions

The primary argument against this reform is the loss of the ‘murder’ label. The CLRC concluded that “*In modern English usage, the word ‘murderer’ expresses the revulsion which ordinary people feel for anyone who deliberately kills another human being.*”⁷² One possible solution would be to retain the ‘murder’ label for those given discretionary life: this might retain some of the indeterminate sentence’s declaratory significance, with fewer of the current problems.

A further difficulty of such a reform is the need to establish strong and clear sentencing guidance.

⁷⁰ Op. Cit., 67, 369.

⁷¹ Elliot and Quinn, ‘Criminal Law’ (2000).

⁷² Op. Cit., 16, 15.

The potential merits of the reform are vast. Unlawful killing is one offence of many different degrees of moral culpability, and 'Unlawful Homicide' is superior in its potential to reliably reflect this range.

However, this reform is unlikely to be enacted in the foreseeable future, as it is too radical for present day society. The murder label is ingrained in the public's understanding of the criminal justice system: such that the abolition of mandatory life is controversial, let alone the eradication of murder itself. Before such a reform is possible, the public must first come to a clearer understanding of the considerable breadth of murder and homicide.

3.3. Different degrees of murder

Another approach is to reflect the range of culpability within unlawful killing by dividing murder into different categories or 'degrees.' This approach is primarily seen in the US, with 42 states adopting this approach for murder, and a further 26 doing so for manslaughter.

The 'degrees' of murder are typically categorised as follows: First degree: generally a calculated act of killing, committed with premeditation, punished by life imprisonment or capital punishment. Second degree: a killing with intention but without premeditation, including provoked killings. Some states recognise a third degree, which can be known as manslaughter, which in some states is then further sub-categorised. A very similar approach is found in Canada.

There are number of other factors which dictate the appropriate 'degree' of murder; primarily the mode of causing death: killing with poison, with explosives, while in prison or escaping from prison, contract killing, robbery, kidnapping or rape, torture, are among the aggravating factors establishing first degree murder. The identity of the victim can elevate the degree found; in Louisiana the killing of a police officer or fireman in the course of their duty is first degree murder;⁷³ in Arizona, dangerous crimes perpetrated against children are punished more severely.⁷⁴ The identity of the killer is an important factor in some states; in New York it is first degree murder if the offender was confined to prison.⁷⁵

3.3.1. Disadvantages

- Unreliable in reflecting culpability

A prime example of this is the distinction between first and second degree murder, which is often based upon the distinction between 'premeditation'

⁷³ La. Rev. Stat., s.14.30(4).

⁷⁴ Second degree murder of an adult faces a presumptive penalty of 15 years, where as for a child it is 20 years. Ariz. Rev. Stat. Ann., s.13-604.01(A).

⁷⁵ NY Penal Law s.125.27(1)(a)(iii).

and 'intent.' This is impossible to apply with any precision and reliability. Cardozo puts it thus;

"...an intent to kill is always deliberate and premeditated...There can be no intent unless there is a choice, yet by hypothesis, the choice without more is enough to justify the inference that the intent was deliberate and premeditated." He criticises this approach as *"framed along the lines of a defective and unreal psychology."*⁷⁶

Clarkson and Keating assert mercy killings to expose the limitations of this approach, contending that though they are *"invariably premeditated killings, yet they are invariably regarded as far less blameworthy than most other types of killings."*⁷⁷ They cite, by way of example, *Repouille v US*,⁷⁸ in which the jury refused to apply the law concerning the premeditated nature of a mercy killing, instead finding second degree murder and requesting sentencing leniency. The judge handed down a suspended five year sentence, placing the defendant on probation. Hand, J., commented that *"Although it was inescapably murder in the first degree, not only did they bring in a verdict that was flatly in the face of the facts and utterly absurd – for manslaughter in the second degree presupposes that the killing was not deliberate – but they coupled that with a recommendation which showed that in substance they wished to exculpate the offender. Moreover, it is also plain, from the sentence which he imposed, that the judge could not have seriously disagreed with their recommendations."*⁷⁹

The aggravating criteria equally fail to express the culpability of the offender: the use of poison, for example, does not, in and of itself, assure the court of the elevated culpability of an unlawful killer. This approach does not permit latitude in assessing culpability, its rigidity rendering it unsuitable to reflecting the breadth and variety of the range of individual cases.

- Complicated categories and jury decisions

The law of homicide in this country is already complicated, with considerable tension between murder and manslaughter. This would not be improved by having a number of 'degrees' of murder. The Law Commission of New Zealand, in 1996, concluded of the degrees of murder approach that it *"complicated the law by introducing difficult distinctions."*⁸⁰

⁷⁶ "What Medicine can do for Law" in 'Law and Literature and Other Essays and Addresses' (1930), 99-100.

⁷⁷ Clarkson and Keating, (1994), 677.

⁷⁸ 165 F.2d 152 (2d Cir. 1947).

⁷⁹ Ibid.

⁸⁰ NZ LC, 'Battered Defendants: Victims of Domestic Violence who Offend' Discussion Paper, Wellington, 2000, para. 150.

It also considered that this approach "*significantly changes the role of juries and makes their task more difficult.*"⁸¹ If the present two-tier structure is beset with difficulties of categorisation, what then happens when two or three extra headings of murder are added? Any potential clarification is outweighed by the fundamental rigidity of this structure and its demonstrable failure to accurately reflect the culpability of unlawful killers.

3.3.2. Conclusion

It is very strongly recommended that this formulation not be adopted. It fundamentally fails to accurately represent the culpability of the offender; the basic distinction between premeditated and intended killings is flawed, as is the 'listed criteria' approach. Many of them may aggravate an unlawful killing, but not in a way which can be reliably generalised to all cases. This approach would lead to complicated directions, difficult jury decisions, and would run the risk of juries refusing to apply the law.

3.4. Conclusion to Homicide Reform

The present law of murder is in difficulties. Mitchell's research indicates that the assumption of strong public support for mandatory life may be exaggerated; further opinion polling of a larger scale and greater depth is needed. With this caveat, there are compelling arguments for both the single unified offence of 'unlawful homicide', and the limited discretionary sentencing regime.

A unified offence of 'unlawful homicide' would bring increased clarity and simplicity to the law of homicide. Sentencing ranges would need to be established to ensure collective coherence, but, where achieved, the potential benefits would be huge.

However, at this present time, such a reform is too radical. To abolish the present two-tier system, along with mandatory life, would change homicide beyond recognition; there is a need to reassess the role of homicide in modern society before its form can be accurately reformed with any assertion of permanence.

The limited sentencing discretion is a less radical reform option, and entails considerable benefits. The primary advantage is hard to overemphasise: the ability to deliver sentences specifically tailored to the culpability of the individual offender is of fundamental importance; and is crucial in justifying the retention of the discretionary life sentence.

The guidelines for sentencing remain a matter of debate: the New Zealand Law Commission, proposing a discretionary regime, argued:

⁸¹ Ibid.

*“There should be an assumption that a conviction for murder will carry a life sentence. However, where strongly mitigating factors exist, relating either to the offence or the offender, that would render a life sentence clearly unjust, the judge may give a lesser sentence. In deciding whether to exercise his or her discretion, the judge may also take into account any countervailing considerations and any aggravating factors.”*⁸²

The House of Lords Select Committee by contrast recommended that the 'life sentence' be reserved for “*particularly outrageous murders,*”⁸³ and *Hodgson*⁸⁴ defendants.’

The primary criticism of this proposal is the loss of the stigmatic nature of the indeterminate sentence, through which murder is set apart as the most heinous offence against society. The weight ascribed to this by the public is unclear; Mitchell's research indicates that the public's dominant concern is to accurately reflect culpability, especially where there is such a broad range of conduct under a single offence, and this provision would enable those cases which constitute murder and yet are of a low moral culpability, such as a mercy killing, to be proportionately punished. This might well actually enhance the validity and the stigma of the life sentence, thus meeting the primary criticisms of the proposal to abolish mandatory life.

However, this reform seems unlikely to come about in the near future due to the political objections. As stated in the introduction, murder is more than just a very serious crime, it is something of an emotive lightning-rod for the public's perception of the law as a reflection of societal values; and the abolition of the mandatory life sentence would be portrayed as condescending to murderers.

In consequence, the discussion that follows, concerning provocation, its problems and options for reform, will proceed under the assumption that mandatory life will remain for the foreseeable future; although Chapter 11 does consider the significance of a limited discretionary sentencing regime on reform of provocation.

⁸² Law Commission of New Zealand ‘Some Criminal Offences, with Particular Reference to Battered Defendants’ LC Report 73k, May 2001, Wellington, para. 154.

⁸³ *Op. Cit.*, 53.

⁸⁴ *Op. Cit.*, 54.

SECTION B

The Law of Provocation

Chapter 3: The Current Law of Provocation

1. Definition

Provocation is a partial defence to murder, which, if successfully pleaded, reduces a conviction for murder to one of manslaughter; and accordingly the sentence from one of mandatory life to one set at the discretion of the court.

Section 3 of the Homicide Act, 1957, holds a provocation plea to arise:

"Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man."

Section 3 supplements the common law, confirming that the provocation partial defence applies uniquely to murder trials, and is a matter of legal extenuation to be resolved at the trial stage. Commonly, section 3 is broken down into two questions, subjective and objective. The subjective question asks whether the defendant in fact lost his self-control because of provocation, things said or done (or both). This is a question to be answered by the trial judge. If answered affirmatively, then the jury must objectively consider whether the reasonable man could have been provoked as the defendant was, and how the reasonable man would have reacted.

2. The subjective test

The subjective test is in effect a qualifying test, asking two questions:

The first is whether the defendant was provoked by something said or done. *Browne*¹ established that the provocation must be *"something unwarranted which is likely to make a reasonable person angry or indignant."*² In *Edwards*,³ the Privy Council stated *obiter*, that an act could not constitute provocation where it was an expected response to an action of the defendant. This dictum was not followed in *Johnson*,⁴ and in *Doughty*,⁵ it was held that a baby's persistent crying could constitute provocation. At present, anything can constitute provocation.

The second question asks whether the provocation led to a loss of self-control. The leading authority is *Duffy*, in which Devlin J stated: *"Provocation is some act or series of acts done by the dead man to the accused which would cause in any reasonable person and actually causes in the accused, a sudden and temporary loss of*

¹ (1973) NI 96.

² *Ibid.*, 108, per Lowry LCJ.

³ (1973) 1 All ER 152 (PC).

⁴ (1989) 1 WLR 740 (CA).

⁵ (1986) 83 Cr App R 319.

self-control, rendering the accused so subject to passions as to make him for the moment not master of his mind."⁶ The defendant must still be in a state of loss of self-control when they kill. In *Cocker*,⁷ the defendant's wife was a depressive who continually asked him to end her life. When he finally did so, it was held that provocation could not be raised where the killing suggested calculated method and purpose, rather than a loss of self-control. In *Richens*,⁸ the Court found that the defendant needed merely to be driven by their anger to kill in a state of loss of self-control, and that possession of the *mens rea* for murder was not incompatible with this.

The implied immediacy of a "*sudden and temporary loss of self-control*" impedes a plea of provocation where a significant amount of time has elapsed between the provocative incident and the killing; especially where the defendant's response is a planned one. In *Ibrams*,⁹ the Court of Appeal affirmed the trial judge's verdict, stressing the significance of the temporal relationship between provocation and killing. Although *Ibrams* technically still has effect, there have been a significant number of cases in which judges have allowed the question of provocation to go before the jury despite a significant amount of time having elapsed between the provocative act and the killing. In *Thornton*¹⁰ and *Ahluwalia*,¹¹ two 'battered women' cases, the defendants planned their lethal attacks and were arguably not in a state of loss of self-control when they perpetrated them. The primary importance of these cases was in changing the matter of time elapsed to a question of evidential significance in considering whether the defendant was in a state of loss of self-control while perpetrating the killing.

3. The objective test

The objective test, to be considered by the jury, asks whether the 'reasonable man' would have been provoked as the defendant was, and would have done as the defendant did.

The pre-1957 Homicide Act cases of *Bedder*¹² and *Mancini*¹³ demonstrated a refusal on the part of judges to allow any characteristics of the defendant to be attributed to the 'reasonable man', for fear of compromising the objective standard. The change in the post-act cases, first made in *Camplin*,¹⁴ has been to allow a restricted degree of attribution of characteristics from the defendant to the 'reasonable man,' through making a separation between those characteristics pertaining to the gravity of the provocation upon the defendant, and those pertaining to his level of self-control.

The basis for this separation between types of characteristics is that in cases where the provocation is aimed at a particular characteristic of the defendant, the effect cannot

⁶ (1949) 1 All ER 932n (CCA).

⁷ (1989) Crim. LR 740.

⁸ (1993) 4 All ER 877.

⁹ (1981) 74 Cr App R 154.

¹⁰ (1992) 1 All ER 306 (CA).

¹¹ (1992) 4 All ER 859 (CA).

¹² (1954) 2 All ER 801.

¹³ (1942) AC 1.

¹⁴ (1978) AC 705.

be satisfactorily assessed where the 'reasonable man' does not possess that same characteristic. *Bedder*¹⁵ is a perfect example: the defendant was an impotent hunchback, mocked for his impotency by the prostitute he had hired, which, he claimed, caused him to lose self-control and kill her. For fear of compromising the standard of self-control, none of the characteristics of the defendant were permitted attribution to the 'reasonable man,' resulting in the jury being required to consider whether a 'reasonable man,' who was neither a hunchback nor impotent, could have been provoked to a loss of self-control when mocked for characteristics he did not possess. Such an outcome is clearly objectionable, yet the concerns of the court in seeking to protect the objectivity of the reasonable man were quite understandable.

In *Camplin*, Lord Diplock defined the reasonable man as possessing the level of self-control of an ordinary person of the same age and gender as the accused, but also possessing those of the defendant's characteristics relevant to the gravity of the provocation. Unfortunately *Camplin* did not clearly define what constituted admissible 'characteristics,' and some confusion ensued.

In *Newell*,¹⁶ the Court of Appeal held it to be correct to ignore the defendant's intoxication, overdose of drugs, suicide note and grief at his girlfriend's departure, in considering whether the reasonable man would have been provoked to a loss of self-control by the disparaging remarks made by the victim regarding the defendant's girlfriend, and the victim's proposition of homosexual intercourse. Strongly influenced by the New Zealand case-law, the Court stated that a 'characteristic' needed to be something of sufficient permanence and gravity, such that it might make D "a different person from the ordinary run of mankind."¹⁷ Under this definition, the only possible feature of the defendant which might have been considered a 'characteristic' was the defendant's underlying condition of alcoholism, but this was not the subject of the provocation and so was not considered.

In *Morhall*,¹⁸ the House of Lords affirmed *Camplin* with regard to the relevance of characteristics of the defendant pertaining to the gravity of the provocation, and redefined admissible characteristics from *Newell* to include race, sexual orientation, physical features or disabilities, where causally related to the provocation: Lord Goff gave the example of eczema constituting a characteristic attributable to the 'reasonable man' "for as long as the condition and D's sensitivity about it endures."¹⁹

Lord Goff's acceptance of the history and circumstances of the defendant as potentially relevant, thus undermining any requirement that characteristics need to be 'sufficiently significant and permanent,' calls the authority of *Newell* into question. The effect of *Morhall*, in affirming *Camplin*, established the 'classic line' authority with regards to what constitutes a 'characteristic,' and the standard of self-control expected of the reasonable man.

An important subset of cases affecting the development of provocation law are those in which the defendant suffered from a mental condition. Separation between the

¹⁵ (1954) 2 All ER 80.

¹⁶ (1980) 71 Cr App R 331.

¹⁷ *Ibid.*, 339.

¹⁸ (1996) AC 90.

¹⁹ Simester and Sullivan 'Criminal Law – Theory and Doctrine' (2001), 349.

While Privy Council decisions are not binding on English domestic courts, they carry a considerable authority, and in *R v Susan Shickle*,³⁶ the Court of Appeal treated *R v Holley* as overturning *Smith*: “The effect of this decision has been to tighten the second or objective, test for provocation by limiting the characteristics of the defendant with which the reasonable man may be clothed. No longer is the test, as propounded by Lord Hoffman in *Morgan Smith*, one of excusability.”³⁷

In *R v Faqir*³⁸, the Court of Appeal again treated *R v Holley* as authoritative, and endorsed the ‘separation approach.’ Scott Baker LJ, delivering the judgement of the Court of Appeal, stated Lord Hoffman's test of excusability to be an ‘unwarranted development.’ He concluded, “Properly directed the jury should therefore have applied a narrow and strict test of a man with ordinary powers of self-control rather than the wider test of excusability that was put to them by the judge.” In so-ruling, the Court of Appeal went against a clear House of Lords precedent. The present law thus remains somewhat confused.

³⁶ (2005) EWCA Crim. 1881.

³⁷ *Ibid.*, para. 65.

³⁸ (2005) EWCA Crim. 1880

gravity of the provocation and the defendant's capacity for self-control has created particular problems where the defendant suffers from a mental condition to which no reference was made by way of the provocation, but which has a bearing on their level of self-control: a primary example is the string of 'battered women' cases, which placed immense strain upon this distinction.

There are four principal cases: *Ahluwalia*, *Thornton*, *Dryden*²⁰ and *Humphreys*.²¹ *Ahluwalia* and *Thornton* concerned 'battered women' syndrome, *Dryden* an obsessive of eccentric nature, and *Humphreys* dealt with abnormal immaturity and attention seeking tendencies (through wrist-slashing). In each of these cases there was expert testimony that the conditions from which the defendants suffered were "beyond the range of normal personality disorder and constituted discrete syndromes."²² According to *Newell*, such characteristics could only be relevant with regards to the gravity of the provocation towards the defendant, but the Court of Appeal in *Ahluwalia* and *Thornton* spoke of 'battered women's syndrome' as a characteristic attributable to the 'reasonable man' with regards to the expected standard of self-control, where it constituted a specific personality syndrome established by medical evidence.

Lord Goff, in *Luc Thiet-Thuan*,²³ criticised this admission of evidence of personality syndromes. In *Luc Thiet-Thuan*, a majority of the Privy Council held that the defendant's brain damage, which caused violent impulsive behaviour in response to minor provocation, was not to be attributed to the 'reasonable man' in considering the expected level of self-control. In so ruling, the Privy Council considered itself to be following *Camplin* as affirmed in *Morhall*.

However in *Campbell*,²⁴ the Court of Appeal held that the 'reasonable man' should be endowed with the mental state of the defendant in establishing the level of self-control. In doing so, it re-affirmed the previous Court of Appeal authority which had been doubted in *Luc Thiet-Thuan*. In *Smith (Morgan)*, the Court of Appeal claimed to be bound by *Campbell*, in overturning the trial judge's direction that the jury should ignore evidence of the defendant's depression in setting the standard of self-control, on the basis that it was too restrictive. The Court of Appeal held their view to be consistent with *Camplin*, reasoning that Lord Diplock did not draw any distinction between those characteristics relevant to the gravity of the provocation and those relevant to the level of self-control.

The standing of the Privy Council (and hence the ruling in *Luc Thiet-Thuan*) is such that the Court of Appeal additionally certified a question of law to the House of Lords, inquiring whether characteristics other than age and gender are attributable to the reasonable man under section 3 of the Homicide Act 1957, with regards to the level of self-control. The House of Lords, in a 3-2 decision,²⁵ stated that mental illness could go to the jury as relevant to the standard of self-control, and that, where suitable, the judge should make it clear to the jury that an allowance should be made

²⁰ (1995) 4 All ER 987.

²¹ (1995) 4 All ER 1008.

²² Op. Cit., 19, 350.

²³ (1997) AC 131.

²⁴ (1997) 1 CR App R 199 (CA).

²⁵ *R v Smith* (2000) 3 WLR 654 (HL).

for the defendant's reduced capacity for self-control. The minority in the House of Lords disagreed very strongly with the majority, to the extent that rather than conceding the majority view as constituting the law, they simply asserted that the majority were wrong, and that *Morhall* is the current law.

There have been few cases reported since *Smith*. In *Weller*,²⁶ the trial judge declined to make specific reference to the defendant's unusually possessive and jealous nature in summing up to the jury, issuing instead a general direction requiring the jury to consider all the circumstances, making "*allowances for human nature and the power of emotions*,"²⁷ and concluding with the need for the jury to "*decide what society expects of a man like this defendant in his position*."²⁸ The conviction was upheld. In the Court of Appeal, Mantell LJ described *Smith (Morgan)*, as signifying taking 'all matters' into consideration, meaning that the judge should not tell the jury to ignore any aspect, but may give some guidance regarding the weight to be given to certain aspects, provided it is clearly established that the question is one for the jury to answer. The *Smith (Morgan)* approach was commended, and it was stated that it is not necessary to determine a 'characteristic' concerning the objective element, because "*it is all a matter for the jury*."²⁹

In *Paria v The State*,³⁰ the defendant appealed the first instance decision on the basis that the trial judge ought to have instructed the jury to take into account the appellate's depression. The Privy Council held that whether the test applied was that of *Luc Thiet-Thuan*, or *Smith (Morgan)*, the appellant's provocation plea must fail for two reasons: firstly, the appellant's entirely normal reaction to his father's cancer did not constitute mental illness and thus was not a 'characteristic'; secondly, even if it was a characteristic, it would have constituted "*sheer speculation*" for the jury to have taken it into account with regards to either the subjective or objective test.

By contrast, in *R v Holley*³¹, Lord Nicholls, giving the leading judgement, stated that "*evidence that the defendant was suffering from chronic alcoholism was not a matter to be taken into account by the jury when considering whether in their opinion, having regard to the actual provocation and their view of its gravity, a person having ordinary powers of self-control would have done what the defendant did*."³² The Privy Council held that the majority in *Smith* were "*incorrect to apply a more flexible standard to the issue of self-control*."³³ "*Under the statute the sufficiency of the provocation ("whether the provocation was enough to make a reasonable man do as [the defendant] did") is to be judged by one standard, not a standard which varies from defendant to defendant...The statute does not leave each jury free to set whatever standard they consider appropriate in the circumstances by which to judge whether the defendant's conduct is "excusable"*."³⁴ Lord Nicholls concluded by stating that the "*majority view expressed in the Morgan Smith case is erroneous*."³⁵

²⁶ (2003) EWCA 815.

²⁷ "Case and Comment *R v Weller*" (2003) Crim. LR 724.

²⁸ *Ibid.*

²⁹ *Ibid.*, para. 17.

³⁰ (2003) UKPC 36.

³¹ (2005) UKPC 23.

³² *Ibid.*, para. 37.

³³ *Ibid.*, 23.

³⁴ *Ibid.*, para. 22.

³⁵ *Ibid.*

Chapter 4: The problems facing provocation, and the impact of *Smith*

1. Introduction

The problems facing provocation are quite considerable. The decision in *Smith*¹ has fundamentally altered the partial defence, greatly contributing to its condemnation. The strength of feeling against this decision has been considerable, and has pushed the state of provocation to the forefront of criminal justice reform. The alterations the *Smith*-majority purported to make are far-reaching, yet how they will practically be enacted is unclear from the judgement; in particular, how the subjectivised evaluative standard, (inextricably linked to the jury's increased freedom) is to be controlled. The question remains: does *Smith* actually ameliorate the problems it attempted to address, without damaging the operation of the law in other regards?

The intention of the *Smith* majority in so ruling must be understood in the context of the overall development of provocation; particularly the pressures which came upon the objective standard in the provocation cases of the early 1990s, and conceptual problems concerning the broader law of homicide.

This chapter considers five principal criticisms of provocation, and the impact of *Smith* in seeking to address them:

- Firstly, the objective standard, expressed through the 'reasonable man,' led to a difficult case law and significant confusion and disagreement over the best way of establishing a workable and representative objective standard.
- Secondly, the requirement of a loss of self-control is both overly inclusive concerning violent males, and is overly exclusive, particularly concerning victims of domestic violence who kill their abusers.
- Thirdly, provocation's basis in action in anger has come under close scrutiny, particularly when the type of anger it recognises is more masculine in nature. Such privileging of a particular emotion, and indeed a particular expression of this emotion, has caused, and continues to cause controversy.
- Fourthly, the nature of provocation is such that the victim's conduct and character often become the subject of attack from the defendant.
- Finally, the conceptual basis of provocation is unclear. It has elements of justification and excuse, recent developments having significantly emphasised its excusatory nature. The effect of this shift in emphasis is analysed with reference to the sustainability of provocation as presently formulated.

2. Principal Criticisms of Provocation

2.1. Objective standard - 'Reasonable man'

¹ (2000) 3 WLR 654 (HL).

2.1.1. Problems pre-*Smith*

- The 'separation approach'

The 'separation approach,' established in *Camplin*, enabled the character and circumstances of the defendant to be recognised, while maintaining an objective standard qualified only by reference to the defendant's age and gender.

It came under tremendous pressure due to a number of factors: a lack of clarity in what constituted a 'characteristic' for the purposes of attribution to the reasonable man; greater awareness of domestic violence and the role provocation had to play, through the 'syndrome cases' of the 1990s; and a gradual acceptance of mental deficiencies as being relevant to the 'reasonable man.' All these significantly influenced the role of the objective standard in regulating the scope of provocation.

... Initial confusion concerning what constitutes a 'characteristic'

Imprecision in Lord Diplock's direction in *Camplin* resulted in judicial confusion concerning what constituted a 'characteristic' for the purposes of attribution to the reasonable man. In the subsequent case of *Newell*,² the Court of Appeal relied heavily upon the New Zealand Court of Appeal case of *McGregor*, in which North J stated: "*The characteristic must be something definite and of sufficient permanence to make the offender a different person from the ordinary run of mankind,*" enough to constitute "*part of the individual's character or personality.*"³

This approach detracted from the purpose of the separation of characteristics, which was to preserve the objective standard of self-control while assessing the gravity of the provocation through reference to those relevant characteristics of the defendant. It was only firmly rejected in 1996, in *Morhall*,⁴ in which Lord Goff gave the example of eczema as capable of constituting a characteristic where it had been referred to in the provocation.⁵

In the intervening time, the 'syndrome' cases reached the Court of Appeal.

... Syndrome Cases

The 'syndrome' cases were those in which the defendant was afflicted with a medically attested syndrome, which was the subject of provocation and also had a bearing on the defendant's level of self-control. Common to the cases of *Ahluwalia*, *Dryden*, *Humphreys* and *Thornton*, was expert testimony that these conditions were beyond those of normal personality

² (1980) 71 Cr App R 331.

³ (1962) NZLR 1069, 1081.

⁴ *McGregor* was disapproved in *McCarthy* ((1992) 2 NZLR 550), New Zealand AC.

⁵ (1996) AC 90, 99.

variation: all were sufficiently permanent in the *Newell* sense, but all of them went beyond *Newell*, impacting upon the defendant's capacity of self-control.

The recognition of 'syndrome evidence' clearly entailed conceptual difficulties for the basis of provocation as a defence for the 'ordinary person.' One possibility would have been to extend provocation to include 'life experience' syndromes i.e. those that can occur in 'ordinary persons' subjected to extreme pressure or trauma. In Australia, 'battered woman syndrome' was recognised as something that can befall "*women of reasonable firmness who should find themselves in a domestic situation such as that in which the appellants were.*"⁶ Such an approach permits a concession to 'life experience' syndromes, while maintaining the conceptual integrity of provocation. However, the Court of Appeal decisions in England and Wales went decisively further.

'Syndrome cases' provide particular difficulty for the separation approach. An apt example is the case of *Humphreys*: the defendant suffered from a personality syndrome affecting her capacity for self-control. She had been involved in drugs and prostitution, and at the age of 17 lived with a 33 year old man with whom she had a volatile relationship; he was jealous and possessive and beat her on numerous occasions. On the night that she killed him, she had cut her wrists from fear that upon his return he would beat her, and force her to engage in sexual intercourse with himself and possibly others. Upon his return, he taunted her, saying that she had not made a very good job of slashing her wrists. She stabbed and killed him. Directing the jury to consider the defendant's immaturity and wrist-slashing tendencies in assessing the gravity of the provocation, but to ignore them in assessing the standard of self-control, appears contrived, and very far from the reality of such a case.

Following a strong dissent from Lord Steyn in *Luc Thiet-Thuan*,⁷ in which he criticised the 'separation approach,' the Court of Appeal, in *Parker*⁸ and *Campbell*,⁹ clearly established the acceptance of syndrome evidence, going beyond any 'life experience' limitation. The effect of *Smith* (particularly the House of Lords decision) has been to further extend the acceptance of 'syndrome evidence' in provocation.

2.1.2. Problems due to *Smith*¹⁰

⁶ *Runjanjic and Kontinnen*, (1991) 53 A Crim R 362, 368, per King CJ.

⁷ [1997] AC 131.

⁸ *Parker* (1997) Crim. LR 760.

⁹ *Campbell* (1997) Crim. LR 227.

¹⁰ In *Smith*, the defendant and deceased were friends and fellow alcoholics. During the course of an evening of heavy drinking, an argument arose and the defendant fatally stabbed the deceased. The defendant pleaded provocation, claiming that medical evidence of the depressive illness from which he was suffering at the time of the killing should be attributed to the reasonable man regarding the expected level of self-control. The trial judge directed the jury that the defendant's mental impairment was only relevant to the gravity of the provocation, and the defendant was convicted of murder. The

The majority in *Smith* sought to respond to the pressures which had come to bear upon provocation; particularly accusations that provocation was unjustly narrow in its scope, and the objective standard was overly-complicated.

- The effect of *Smith*

The major effect of *Smith* was the subjectivisation of the objective standard and the freeing of the jury's role. The majority established a 'community standards' evaluative test, by which all materially relevant characteristics are to be attributed to the reasonable man concerning the standard of self-control. This - a reasonable man imbued with all the relevant characteristics of the defendant in assessing his self-control - represents a major subjectivisation of the evaluative standard.

The central thrust of Lord Hoffmann's leading judgement was that the 'reasonable man' standard was intended, under section 3 of the 1957 Homicide Act, to be less stringent than the previous case law. Under section 3, the jury are required to consider "*everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.*" The majority interpreted section 3 as freeing the jury to reach its own decision in assessing the defendant's actions. Lord Hoffmann stated that a judge could "*no longer tell them [the jury] that they were obliged as a matter of law to exclude 'factors personal to the prisoner' from their consideration,*"¹¹ and that the jury could "*determine not merely whether the behaviour of the accused complied with some legal standard but could determine for themselves what the standard in the particular case should be.*"¹² Effectively the judge's direction becomes, after *Smith*, at best a guide rather than a rule.

However, Lord Hoffmann did recognise that "*If there is no limit to the characteristics which can be taken into account, the fact that the accused lost self-control will show that he is a person liable in such circumstances to lose his self-control. The objective element will have disappeared completely.*"¹³

defendant appealed, and the Court of Appeal substituted a manslaughter verdict, on the basis that the trial judge had misdirected the jury in excluding the evidence of the defendant's depression regarding the standard of self-control. The Court also allowed leave to appeal to the House of Lords, certifying a question (under section 33(2) Criminal Appeal Act 1968): "*Are characteristics other than age and sex, attributable to the reasonable man, for the purpose of section 3 of the Homicide Act 1957, relevant not only to the gravity of the provocation to him but also to the standard of self-control to be expected?*" (Op. Cit., 1, 656). The House of Lords, by a 3-2 majority (Lords Hobhouse and Millett dissented, refusing to concede the majority view, contending it to be wrong, and *Morhall* to be the current law), endorsed the Court of Appeal decision. In response to the certified question, it ruled that the characteristics of the defendant could be recognised as relevant to the standard of self-control.

¹¹ Ibid.

¹² Ibid.

¹³ Ibid., 674.

He added that the ‘community standards of blameworthiness’ approach “*did not mean he [the judge] was required to leave the jury at large without any assistance in the exercise of their normative role. He could tell the jury that the doctrine of provocation included the principle of objectivity and that they should have regard to that principle in deciding whether the act in question was sufficiently provocative to be acceptable as a partial excuse.*”¹⁴

The majority’s ruling has huge consequences in allowing the jury to determine which characteristics of the defendant to attribute to the reasonable man, and to establish its own standard for the purposes of assessing the defendant’s self-control. Thus, unless the jury formulate for themselves an explicit “*reasonable man*” for the purposes of the case they are considering, the objective standard is largely subsumed into an undifferentiated jury assessment. The judge’s previous formal role in establishing the objective standard is eliminated.

- Did *Smith* effectively address pre-existing problems?

The *Smith*-majority primarily sought to address two criticisms of provocation. Firstly that the ‘separation approach’ was unrealistic and overly complicated. Secondly, that it resulted in unfair decisions.

... Did *Smith* make the law more realistic and clearer?

In his leading judgement in *Smith*, Lord Hoffmann argued that the separation approach is too difficult for juries, citing Thomas J., in *R v Rongonui*¹⁵, who described the “*glazed look in the jurors’ eyes*” as he instructed them to ignore those characteristics relevant to the gravity of the provocation, in considering the standard of self-control.¹⁶

However, precisely how the *Smith* majority’s ‘community standards’ evaluative test is to be applied by the jury, is not much clearer. It is likewise hard to discern from Lord Hoffmann’s direction how a judge is to direct a jury. While the majority did assert that a judge can no longer instruct a jury to exclude certain characteristics of the defendant, Lord Hoffmann also stated that: “*A person who flies into a murderous rage when he is crossed, thwarted or disappointed in the vicissitudes of life should not be able to rely upon his antisocial propensity as even a partial excuse for killing.*”¹⁷

Citing the Australian case of *Stingel*, in which the defendant, a jealous ex-boyfriend, stalked his former girlfriend and killed the man he observed her engaging in sexual intercourse with, Hoffmann stated that “*Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide, whether inflicted upon the woman*

¹⁴ Ibid.

¹⁵ (Unreported) 13 April 2000.

¹⁶ Op. Cit., 1, 672.

¹⁷ *Smith (Morgan)*, (2001) 1 AC 146, 169.

herself or her new lover.” He continued, “So, it is suggested, a direction that characteristics such as jealousy and obsession should be ignored in relation to the objective element is the best way to ensure that people like *Stingel* cannot rely upon the defence.”¹⁸

But this seemingly contradicts his view that it is “not consistent with section 3”¹⁹ for a judge to direct the jury to ignore any of the ‘characteristics’ of the defendant. Professor Ormerod brings out the underlying point here: “By making reference to *Stingel*, his lordship acknowledges that with some issues the jury’s moral rigour is not to be trusted.”²⁰

In dramatically enlarging the degree of freedom that the jury is to have under section 3, Lord Hoffmann struggled to establish a morally rigorous objective standard. “His Lordship is prepared to abdicate responsibility to the jury for setting moral benchmarks, but only to a point.”²¹ The result; “...it is just not true that it draws a qualitatively different line between the role of the judge and that of the jury. All are similar attempts to have the judge specify the relevant standard sufficiently to allow the jury to know which standard it is that they are expected to specify still further.”²²

Professor Ormerod emphasised this dichotomy with reference to the ‘community standards’ formulation in *Smith*: “In terms of principle and practice it is not obviously easier to identify this cut-off point than to distinguish which characteristics pertain only to the gravity of the provocation.”²³

... Has *Smith* made the law more just?

A central plank of the majority’s argument in *Smith* was that the standard of self-control should be taken as “a principle and not a rigid rule,” which “may sometimes have to yield to a more important principle, which is to do justice in the individual case.”²⁴

However, the majority’s assertion that the ‘community standards of blameworthiness’ element would enable a fairer standard of self-control, specifically tailored to the particular defendant, is not borne out by the majority judgement, or the case law since *Smith*.

¹⁸ *Ibid.*, 169.

¹⁹ *Op. Cit.*, 1, 669.

²⁰ Law Commission Consultation Paper (2003) (LCCP173), 4.83.

²¹ *Ibid.*, 4.83, Professor Ormerod.

²² Gardner and Mackelm, “Compassion without Respect? Nine Fallacies in *R v Smith*” (2001) *Crim. LR*, 632.

²³ *Op. Cit.*, 20, 4.83. i.e. the ‘separation approach.’

²⁴ *Op. Cit.*, 1, per Lord Hoffmann, 678.

The primary concern is that in subjectivising its standard of evaluation, provocation is vulnerable to jury prejudice. The subsequent case of *R v Weller*,²⁵ permits an informative (and worrying) insight regarding the new standard; “*Matters relating to the defendant, the kind of man he is and his mental state*’ are to be considered – including, in this case, his ‘*unduly possessive and jealous*’ nature – when the jury come to apply the test in section 3 of the Homicide Act 1957, which need not be phrased in terms of ‘*the reasonable man*’ but could, as in this case, be phrased as ‘*what society expects of a man like this defendant in his position*’.”²⁶ The vague ‘*what society expects*’ standard has the potential of endorsing the expression of unacceptable societal prejudices.

The objective standard in provocation has the fundamental value of regulating the scope of the defence. Its primary purpose is in determining whether the reactions of the defendant were really due to that which provoked him, some internal deficiency, or simple criminal intent.²⁷ Simester and Sullivan recognize a further value of the objective standard: “*At common law, the reasonable person standard in provocation was not only a standard for estimating fault but also a judicial controlling device to prevent what were seen as undeserving pleas from being placed before a jury.*”²⁸

But, under this new standard, control and reliability of provocation has been severely compromised. How is a judge to direct the jury that certain characteristics are not to be recognised in considering the objective standard, while also leaving the jury free to determine for themselves what the objective standard will be? “*One may wonder how the two moves are to be reconciled. If the reasonableness standard of section 3 cannot be specified by the judge without trespassing on the jury’s statutory province, how can we be confident that the effect of the statute will be to distance the reasonableness standard from the (allegedly too restrictive) common law version of it?*”²⁹ In other words, there is no reason to suppose that the changes in *Smith* will reduce the frequency of outcomes such as *Bedder*, and indeed in a different social climate they might increase.

Gardner and Mackelm criticised *Smith* as “*inviting an evaluative free-for-all*,”³⁰ and Ashworth states that the “*evaluative free for all is largely borne out by Weller.*”³¹ The loss of judicial control gives rise to the legitimate fear that “*Leaving the question to the jury’s subjectivism may*

²⁵ (2003) EWCA 815.

²⁶ Ashworth, “*R v Weller, Case and Comment*” (2003) Crim. LR 724, 725.

²⁷ Ashworth states: “*The defence of provocation implies that the loss of self-control was caused by the provocation: if the provocation was objectively slight, this suggests that the substantial cause of the loss of control was not the provocation but rather some weakness (or wickedness) in the accused’s character, and the case then becomes one of murder or mental abnormality - not provocation.*” (“*The Doctrine of Provocation*” (1976) CLJ 292, 298).

²⁸ Simester and Sullivan, ‘*Criminal Law – Theory and Doctrine*’ (2001), 346.

²⁹ Op. Cit., 22, 631.

³⁰ Ibid., 635.

³¹ Op. Cit., 26, 726.

*produce a reasonable man who is racist, sexist, and ethnocentric.*³² Lord Hoffmann did anticipate some judicial guidance “*as to the weight to be given to some aspects,*”³³ but this was not clearly established in *Weller*, and remains decidedly unclear.

2.1.3. Collapse of the distinction between Provocation and Diminished Responsibility.

An indirect but very significant effect of *Smith*'s subjectivisation of the objective standard has been to collapse the distinction between provocation and diminished responsibility. Now, both partial defences can be raised at the same time, and overlap quite considerably. This has raised problems regarding their conceptual differences, the justificatory element present in provocation but not in diminished responsibility, and their differing burdens of proof; and further demonstrates the consequence of subjectivising provocation's evaluative standard.

- Conceptual differences

Conceptually, provocation and diminished responsibility are intended to cover different areas as partial defences to murder. Classically, provocation covers those who are “*in a broad sense mentally normal,*”³⁴ whereas diminished responsibility covers the defendant “*suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions.*”³⁵ While section 3 is not a statutory definition, nevertheless on a plain reading of sections 2 and 3 it is clear that there are fundamental differences between the two: “*Diminished responsibility is the excuse for internal dysfunctions that are the prime cause of the accused's violence; provocation focuses on things done or said that are the prime cause of the violence.*”³⁶ Heaton continues: “*The provocation excuse should be a concession to extraordinary external circumstances and not to the extraordinary internal makeup of the accused.*”³⁷

Lord Hoffmann claimed that it is wrong to assume “*that there is a neat dichotomy between the 'ordinary person' contemplated by the law of provocation and the 'abnormal person' contemplated by the law of diminished responsibility.*”³⁸ The minority in *Smith*, Lords Millet and Hobhouse, accepted that there are situations in which the two defences will be run at the same time: “*diminished responsibility and provocation are both recognised as capable of operating separately. But, likewise,*

³² (2001) 23 Journal of Social Welfare and Family Law, 227, 236.

³³ Op. Cit., 1, 713.

³⁴ (1976) CLJ 292, 312.

³⁵ Section 2, Homicide Act 1957.

³⁶ Heaton, “Anything Goes” (2001) 10 Nottingham LJ 50, 54.

³⁷ Ibid., 55.

³⁸ Op. Cit., 1, 678.

they can and very often do operate in conjunction."³⁹ Lord Hobhouse rationalised this as follows; "*In English law by the 1957 Act the two defences have been kept separate and are the subject of distinct provisions – Sections 2 and 3. But the two sections clearly form two parts of a legislative scheme for dealing with defendants who should not be treated as fully responsible for their death they have caused.*"⁴⁰

Notwithstanding the need to be able to consider these defences in conjunction, the effect of *Smith* is to blur fundamentally differing defences, putting the onus on the jury to consider them both in reaching a verdict. The following sections examine additional considerations arising from this blurring, while the overall issue is considered further in Chapter 8.

- Loss of justificatory element

Gardner and Mackelm raise the point that where provocation is successfully pleaded, the defendant's actions are partly justified through the objective element; provocation's "*quasi-justificatory drift.*"⁴¹ But diminished responsibility has no justificatory element, and is entirely excuse-based. This is a problem where a defendant raises provocation, seeking to have their actions considered against the 'reasonable man' objective standard, as commonly understood to have been interpreted in *Camplin*; they seek to be "*...accorded their status as fully-fledged human beings i.e. as creatures whose lives are rationally intelligible even when they go off the rails, and who can therefore give a rationally intelligible account of how they came to do so.*"⁴² Such a defendant will not welcome the developments in *Smith*, but will rather be frustrated at this removal of an opportunity to be judged against a truly objective standard.

Due to its status as a partial defence, a defendant pleading provocation can never be completely justified, but nevertheless the justificatory element highlights another way in which to subjectivise the objective standard is to compromise provocation's nature.

- Differing burdens of proof

Under section 3, the defendant has an evidential burden of proof, which, if discharged, leaves the prosecution to prove beyond reasonable doubt that the defendant was not provoked by things done or said, had not lost self-control at the relevant time, or that no 'reasonable man' could have acted as the defendant did. By contrast, under section 2(2), the defendant, on a balance of probabilities, must prove that at the time of the killing he was suffering from an 'abnormality of mind,' "*whether arising from a condition of arrested or retarded development of mind or any inherent*

³⁹ Op. Cit., 17, 192.

⁴⁰ Ibid.

⁴¹ Gardner "Instrumentalism and Necessity" (1986) OJLS 431, 433.

⁴² Op. Cit., 22, 627.

causes or induced by disease or injury,” which ‘substantially impaired’ his mental responsibility.

The approach following *Smith*, is complicated: “*It cannot be easy even for the most conscientious and capable jury, to deal with the same evidence under different heads, applying different burdens and quantum of proof.*”⁴³ On a procedural level, these defences could not have been intended to overlap: “*It can hardly have been intended that a defence should have been available on the same facts under section three, where the onus of proof is on the crown.*”⁴⁴ Further confusion is likely where only one of the two defences is raised and the judge has an obligation to give a direction on the alternative defence if he believes on the evidence that it is possible. This will raise difficulties for defendants seeking to establish themselves as ‘rational’ under provocation, if a judge is obliged to put the diminished responsibility defence to the jury.

2.2. The requirement of a loss of self-control

The loss of self-control requirement has been heavily criticised in two respects: firstly, it is overly-inclusive, particularly towards men, permitting them to raise provocation even where the moral worth of their actions is negligible; secondly, it is overly exclusive, excluding female defendants deserving of mitigation. A third criticism, less often expressed but important nevertheless, is that a loss of self-control does not, in and of itself, demand mitigation.

2.2.1. Overly-Inclusive

The requirement of a loss of self-control, and the favouring of a closer temporal proximity between provocative incident and killing,⁴⁵ privileges a more masculine reaction in anger. “*Designation of the existence of a ‘cooling time’, not simply as evidence of cooled passion, but as legally precluding the provocation defence, was clearly premised upon a male-orientated view of behaviour.*”⁴⁶ While this requirement has since been relegated to an issue of evidential significance,⁴⁷ it continues to privilege action in anger typically of a more masculine nature.

2.2.2. Overly-exclusive

⁴³ *Op. Cit.*, 28, 353.

⁴⁴ “Commentary on *R v Smith*” (2000) Criminal LR 1004, 1005.

⁴⁵ Devlin J in *Duffy*, stated the need for a ‘*sudden and temporary loss of self-control.*’ (1949) 1 All ER 932 (CCA).

⁴⁶ Nicholson and Sanghvi, “Battered Women and Provocation: The Implications of *R v Ahluwalia*” (1993) Crim. LR 728, 730.

⁴⁷ Numerous authorities, including *Thornton* ((1992) 1 All ER 306 (CA)), and *Ahluwalia* ((1992) 4 All ER 859 (CA)).

The second criticism of the 'loss of self-control' is that it excludes women deserving of mitigation. The most common reason for women killing their husbands or partners, is in response to violence and domination.⁴⁸ Due to differences in physical strength, these killings are usually perpetrated when the abusive husband or partner is asleep or similarly vulnerable, and as such they do not fit the profile of a person provoked to a sudden and lethal loss of self-control.

Horder, looking at cases of abused women who successfully plead either provocation or diminished responsibility, noted that "*a light non-custodial sentence is usually given to the battered killer and she walks from a court a free woman.*" This result "*offends few peoples' sense of justice.*"⁴⁹ He contrasted this with those women unable to plead a loss of self-control sufficiently proximate to the event or who aren't mentally abnormal under the requirements of diminished responsibility: "*such women are convicted of murder and hence receive a mandatory life sentence, despite the great similarity between their cases and those mentioned above in which a manslaughter verdict has been brought in.*"⁵⁰ Sullivan states, "*A murder verdict in such a context is so troubling because the defendants were acting, understandably, to terminate an intolerable and continuing state of affairs. Killing was, or in the defendant's psychological condition was perceived to be, the only cause of action which would afford relief.*"⁵¹

The fundamental problem for the battered woman seeking mitigation for homicide is that neither self-defence nor diminished responsibility really reflect their particular predicament. The circumstances in which they kill, often lack the threat of imminent harm required under self-defence, and there is understandable resistance to the notion that such defendants should plead diminished responsibility, which requires them to give up any justificatory element to their plea, and plead internal defects; besides, many battered women don't fit the requirements of diminished responsibility. This leaves provocation, which is not a satisfactory fit either, due to the requirement of a loss of self-control and the related temporal constraints.⁵²

In *Ahluwalia* and *Humphreys*, it was held that a past history of abuse could be relevant to a plea of provocation, and that a loss of self-control could stem from cumulative provocation over a number of years. The requirement of close temporal proximity between provocation and killing was relegated to an evidential concern informing the enquiry as to whether the defendant had lost self-control at the material time. This development was significant in rendering provocation more sympathetic

⁴⁸ Edwards (1990), 1380, reports this as 75% in the US. There is no reason to think that the UK figure would be much different.

⁴⁹ Horder 'Provocation and Responsibility' (1992), 188, no statistic given.

⁵⁰ *Ibid.*, 189.

⁵¹ Sullivan, "Anger and Excuse: Reassessing Provocation" (1995) OJLS 421, 425.

⁵² Women generally are physically weaker, and therefore less likely to react immediately to provocation. Nicholson and Sanghvi state; "*For one thing, they learn that this is likely to lead to a bigger beating.*" (Op. Cit., 46, 730).

to the plight of women in an abusive domestic situation, but by itself was not nearly sufficient. The change was deceptive in as much as it was a minor adjustment to what remains an unsuitable partial defence for many battered women.

It had further pernicious consequences, in compromising the effectiveness of the loss of self-control requirement to prevent killings perpetrated out of a premeditated desire for revenge, from gaining standing before the law; leading to increased pressure on the objective standard.

2.2.3. The effect of *Smith*

Smith has not altered the loss of self-control standard, but in subjectivising the objective standard it has had major consequences for the scope of provocation. Following *Smith*, the criticism of the loss of self-control requirement as being overly inclusive is far stronger.

Under the 'separation approach,' characteristics of the defendant such as morbid jealousy, or an obsessive desire to control, were excluded from the reasonable man regarding the level of self-control; but, pursuant to *Smith*, they are fully attributable to the reasonable man, where relevant. This increases the risk that a defendant might receive mitigation for a killing perpetrated in the assertion of male domination or control. The loss of self-control requirement is powerless to prevent this, and, it can be argued given the objective element's subjectivisation, now encourages such an outcome. Pillsbury summarises this: "*Manslaughter verdicts in these cases treat more leniently homicide due to loss of self-control, even when the killing represents a last-ditch effort to control over another. It permits mitigation for what may be a desperate act of patriarchy.*"⁵³

Horder, writing in 1992, stated, "*One must now ask whether the doctrine of provocation, under the cover of an alleged compassion for human infirmity, simply reinforces the conditions in which men are perceived and perceive themselves as natural aggressors, and in particular women's natural aggressors. Unfortunately the answer to that question is yes.*"⁵⁴ Horder wrote this prior to the *Smith*-decision (as affirmed in *Weller*), but, distressingly, the answer to his question is now more clearly affirmative. The Law Commission concluded that provocation now "*operates as a concession not to human frailty but to the male temperament and, as a result, operates in a discretionary manner. It serves to perpetuate male violence.*"⁵⁵

2.3. Criticism of the basis in anger

⁵³ Pillsbury, (1998), 148-9.

⁵⁴ Op. Cit., 48, 192.

⁵⁵ Op. Cit., 20, 12.21.

The basis of provocation as a concession to action in anger has been strongly questioned. Beyond the problem of the nature of the anger concerned, is the issue regarding whether provocation should offer any concession to anger at all. A further consideration is whether anger should be the only emotion given this legal standing.

2.3.1. The narrow conception of 'anger'

The mitigatory justification for privileging anger is its nature as an overriding passion which can dominate a defendant's usual non-violence. Loss of self-control is an attempt at expressing this in a recognisable and quantifiable form. Sullivan points out the difficulty here: "...*there may, on occasion, be grounds for scepticism as to the reality of the loss of self-control. The man who strangles his unfaithful wife; the man who punches his crying baby: would they have acted in similar fashion if infuriated by the conduct of a person of superior strength?*"⁵⁶ The concept of anger as 'boiling the blood'⁵⁷ is outdated, failing to reflect the breadth of legitimate physiological responses in anger. Brett argues strongly that research carried-out concerning physiological responses to provocation demonstrates the notion of a 'cooling' off' period after the provocation, to be mistaken. In some defendants, anger produces a 'positive feedback system' causing anger to increase with the passing of time.⁵⁸

A loss of self-control is not a pure denial of the mens rea for murder, and so the moral value of the defendant's conduct must be assessed. There are justifiable concerns that violent action in anger "*is all too commonly regarded as natural or understandable – perhaps even appropriate.*"⁵⁹

2.3.2. Should provocation offer a concession to anger at all?

The elevated status of anger within provocation continues to cause significant controversy, and provocation is viewed by many as "*a defence which contains an unappealing message condoning anger over restraint.*"⁶⁰ Some critics argue that anger is a discreditable emotion, which the law partly condones by granting a concession to those acting in anger. Morse argues that even in the face of strong provocation, it is not that hard to refrain from killing;⁶¹ which Pillsbury echoes: "*most persons have little trouble refraining from killing even when greatly aggravated, suggesting that even provoked killings deserve significant punishment.*"⁶² Horder stated that provocation's justification "*depends on an acceptance*

⁵⁶ Op. Cit., 51, 427.

⁵⁷ Op. Cit., 49, 17&18.

⁵⁸ Brett, "The Physiology of Provocation" (1970) Crim. LR 634, 637.

⁵⁹ Horder (1992), 194.

⁶⁰ Wells, "Provocation: The Case for Abolition" in Ashworth and Mitchell eds 'Rethinking English Homicide Law' (2000) 86, 106.

⁶¹ MCCOC, 'Draft Criminal Code: Fatal Offences Against the Person' (1998), 91.

⁶² Pillsbury 'Judging Evil' (1998), 146.

that it may be morally understandable to perpetrate violence in anger in certain circumstances"⁶³ As Simester and Sullivan state, "*there is clearly something problematic about condoning, even partially, violence used not in self-defence or under duress but perpetrated in anger.*"⁶⁴ Furthermore, the early release of a person prone to lethally violent loss of self-control when provoked, is hard to justify with regards to public safety.

2.3.3. Should anger be the only emotion considered?

It is extremely difficult to justify provocation's privileging of action in anger, especially since the 'loss of self-control' requirement has been shown to be overly restrictive. It is no longer possible to justify denying other emotions a mitigatory value equal to that of anger; the issue now is whether provocation can be made to accommodate a whole range of emotions, or whether other mechanisms should share this role. This will be considered in Section B.

2.3.4. The changes in *Smith*

Smith, while not directly addressing provocation's basis in a loss of self-control, has had a significantly detrimental impact upon provocation's legitimacy as a partial defence mitigating action in anger. Following *Smith*, the unpredictability of provocation, due to the jury's freedom to determine for itself the standard to be applied, has rendered provocation morally unreliable. Consequently, provocation can no longer be relied upon to reliably mitigate anger-based action, and risks returning unpalatable results.

2.4. Victim-blame

2.4.1. Distressing and discriminatory

A singularly unattractive feature of provocation is that it can promote a culture of blaming the victim, which is very distressing for their family and friends who must endure unanswered accusations. Furthermore, some critics have argued that through this, gender discrimination within provocation is exacerbated. Examples cited include Justice Devlin, in *Duffy*, instructing that "*You are not concerned with blame here – the blame attaching to the dead man. You are not standing in judgement on him. He has not been heard in this court. He cannot now ever be heard. He has no defender here to argue for him.*"⁶⁵ By contrast, in *McGrail*,⁶⁶

⁶³ Op. Cit., 49, 194-5.

⁶⁴ Simester and Sullivan 'Criminal Law – Theory and Doctrine' (2001), 426. "...under the present law what may be particularly brutal killings are sometimes partially condoned." (Ibid).

⁶⁵ Summing up to the jury at the Manchester Assizes; repeated by Lord Goddard in the Court of Criminal Appeal.

the defendant had kicked his wife to death as she lay drunk; Popplewell J stated that she “*would have tried the patience of a saint.*”⁶⁷ Two de-contextualised examples are no basis for generalised assumptions, but they do highlight the potential for significantly differing values to be applied within provocation.

2.4.2. The effect of *Smith*

The recent shift towards recognising the mental characteristics of the defendant with regard to the reasonableness of the provocation, has reduced the focus on the actions of the victim and theoretically reduced the risk of ‘victim-blame.’ However, the jury’s freedom to determine the evaluative standard to be applied is such that it could deem a seemingly inconsequential action or attitude of the victim to constitute severe provocation, which may result in unpredictable victim blame, determined according to the specific sympathies and prejudices of a particular jury.

2.5. Provocation: conceptually confused and anomalous

2.5.1. Conceptually confused

A significant accusation against provocation is that it has drifted from its roots in wrongful action on the part of the victim,⁶⁸ and now focuses too strongly on the defendant’s subjective experience. The acceptance of any conduct as capable of constituting provocation, the gradual increase in those characteristics of the defendant deemed relevant to the standard of self-control, and the pressure of needing to mitigate the harshness of self-defence, have all contributed in eroding the element of justification and favouring the element of excuse.

2.5.2. Anomalous

Some have deemed provocation ‘anomalous’ because it operates uniquely as a partial defence to murder; the New Zealand Criminal Law Reform Committee⁶⁹ cited this reason in advocating the abolition of provocation: “*The argument for jury participation in determining levels of culpability should logically extend to all crimes and not be confined to murder.*”

⁶⁶ Birmingham Crown Court 31 July 1991, unreported.

⁶⁷ *Ibid.*

⁶⁸ In *Mawgridge*, Lord Holt CJ established four types of provocation, in addition to the victim’s striking of the defendant, sufficient to rebut the (then) implied presence of malice. These were 1) angry words followed by assault, 2) the sight of a friend or relative being beaten, 3) the sight of a citizen unlawfully deprived of his liberty, 4) the sight of a man in adultery with the accused’s wife. ((1707) Kel. 119, 135-137).

⁶⁹ Hereafter referred to as ‘NZ LRC.’

While this is a legitimate contention where all sentences are determinate, most would assert the mandatory life sentence to necessitate partial defences. The Law Commission states: "*The existence of such a partial defence is justifiable in the law of murder, although there is no similar partial defence to non-fatal offences of violence, not only because the sentence for murder is fixed by but also because of the unique gravity and stigma attached to murder.*"⁷⁰

The same argument applies to the assertion that a defendant seeking to plead provocation has the requisite mental element for murder, and should be convicted as such.

2.5.3. The effect of *Smith*

The significance of this conceptual shift is that provocation is now unstable, and the likelihood of it being able to regain its justificatory footing under the present formulation is very slight. The Law Commission has condemned it as "*hopelessly compromised.*"⁷¹

3. Conclusion: defects in the *Smith* decision

The criticisms of provocation are formidable. The loss of self-control requirement, with its limitations on the scope of provocation, is increasingly difficult to justify, especially in the light of recent developments in physiological understanding.⁷² It is rooted in provocation's concession to action in anger, which itself has come under considerable pressure. It is difficult to justify a partial defence which mitigates action in anger, while excluding other emotions; especially where it privileges male action in anger. It is important to note that some of this can be attributed to failures in the broader web of defences, both full and partial.

The objective standard, as expressed through the 'reasonable man', resulted in some clumsiness in judicial guidance, and has attracted criticism accordingly.

The decision in *Smith* has a number of defects: the subjectivisation of the objective standard, contradictions regarding directions or guidance to the jury, a collapsing of the distinction between provocation and diminished responsibility (which itself entails problems concerning their conceptual differences, the loss of the justificatory element and the burden of proof).

But perhaps the most fundamental, and most potentially pernicious change, is the way in which the lack of precision in the majority's direction has resulted in the objective standard being compromised without compensatory clarity regarding the jury's new role. Heaton asks, "*...has the innately violent person any more control over his rages than the person made temporally pugnacious by depression? What criteria are to be used to distinguish those characteristics that are ruled-out?*" An example of the

⁷⁰ Op. Cit., 20, para. 9.

⁷¹ Ibid., 12.21.

⁷² See Brett, Op. Cit., 58.

consequence of the majority's decision is *Weller*, in which the defendant's 'unduly possessive and jealous' nature was deemed relevant to the standard of self-control. Lord Hoffmann's intention that "*Male possessiveness and jealousy should not today be an acceptable reason for loss of self-control leading to homicide,*"⁷³ is one which must now rely entirely on the jury's notion of the objective standard.⁷⁴

Professor Smith summarised the impact of *Smith*: "*Apparently the question now is: 'Was the provocation enough to make a man with his substantially impaired powers of self-control (i.e. his violent disposition) do as he did?' But the jury will already have answered this question by deciding that he was (or may have been) so provoked. What a muddle!*"⁷⁵

Unsurprisingly, there has been a reaction against *Smith*. In *R v Holley*⁷⁶, the Privy Council held that the *Smith*-majority were wrong, a decision which was treated as authoritative by the Court of Appeal in *R v Susan Shickle*⁷⁷ and *R v Faqir*⁷⁸. These two decisions were significant in going against the clear precedent of the House of Lords in *Smith*, indicating the controversy of the decision. The present state of provocation is a law controversial in application, and confused in precedent.

⁷³ *Ibid.*

⁷⁴ This is utterly undesirable. The judiciary is relegated to hoping that a vague objective standard might be consistently applied from one jury to the next.

⁷⁵ *Op. Cit.*, 44, 1007.

⁷⁶ (2005) UKPC 23.

⁷⁷ (2005) EWCA Crim. 1881.

⁷⁸ (2005) EWCA Crim. 1880

Introduction to Reform of Provocation

It is clear from the previous section that provocation is in a state of considerable turmoil; the Law Commission, in 2003, concluded it to be “*hopelessly compromised*.”¹ Its overly subjectivised state - rendering it insufficiently stable and vulnerable to the prejudices of the jury - has led to its general condemnation. In this section, the different options for reform will be scrutinised.

To begin with, the possibility of stabilising provocation in its currently subjectivised form (Chapter 5) is considered. The New South Wales Law Reform Commission recommended a subjectivised plea, and in Ireland such a formulation currently exists. These examples from abroad will be factored into a discussion of the viability of a subjectivised plea.

Then, the viability of a plea based in wrongful action on the part of the victim, retaining the ‘loss of self-control’ framework, is considered (Chapter 6). Many have asserted that for provocation to restore moral legitimacy it must be returned to its roots in wrongful action from the victim. The Irish Law Reform Commission, in 2003, recommended reform of provocation, with a justificatory emphasis, retaining the loss of self-control model, and the ‘separation approach.’

In 2004, the Law Commission proposed new ‘principles’ for provocation, based in killing in response to ‘gross provocation’, killing in response to ‘fear of serious violence’, and a combination of both. This reformulation is assessed, concerning how workable it would be in practice, and whether it would improve the present law (Chapter 7).

The Model Penal Code’s partial defence of ‘Extreme Mental or Emotional Disturbance’ is considered, in the light of those US states in which it has been adopted, the success with which it has met, and its suitability in the present system of homicide law in England and Wales (Chapter 8).

Finally the case for abolition is assessed (Chapter 9).

¹ ‘Partial Defences to Murder’ (2003) (LCCP173), 12.21.

Chapter 5: Subjectivised Provocation Plea

1. Introduction

In *Smith*, the House of Lords subjectivised the evaluative standard, establishing a 'principle of objectivity' to which the jury should have regard in assessing "*whether the act in question was sufficient provocation to be acceptable as a partial excuse.*"¹ Imprecision in the evaluative element has led to provocation being dangerously widened, and it is generally considered to be both unstable, and unacceptable.

Before assessing the wholesale reform options, it is worth considering whether provocation can be stabilised as a subjectivised plea. Crucially, the standard of evaluation must be established with sufficient precision to give provocation the moral rigour it currently lacks. In assessing this option, other common law jurisdictions in which such a subjectivisation has been adopted, or considered, will be evaluated.

2. Subjectivised pleas in other states

2.1. Ireland

Irish provocation law followed the pre-Act law of England and Wales, enforcing the objective standard through the reasonable man devoid of the defendant's characteristics, until 1978, when the Court of Criminal Appeal in *People (DPP) v MacEoin*,² reviewed the law of provocation. Kenny J formulated the new test:

*"[T]he trial judge...should rule on whether there is any evidence of provocation which, having regard to the accused's temperament, character and circumstances, might have caused him to lose control of himself at the time of the wrongful act, and whether the provocation bears a reasonable relation to the amount of force used by the accused."*³

While intending to subjectivise provocation through considering the temperament, character and circumstances of the defendant, regarding the standard of self-control, the retention of the proportionality requirement caused

¹ *R v Smith*, (2000) 3 WLR 654, 668.

² (1978) IR 27. Delivered only eleven days after *Camplin*, *MacEoin* made no reference to *Camplin* or the 'separation approach.' Prior to *MacEoin*, the law still stood as it had in *Duffy* and *Bedder*, causing Kenny J to declare the objective test "*profoundly illogical.*" (Ibid., 34). In his judgement, Kenny J relied heavily upon the minority judgement of Murphy J in the High Court of Australia case of *Moffa v The Queen* ((1977) 138 CLR 601), the only contemporary common law authority promoting a similar subjective standard.

³ (1978) IR 27, 34.

confusion, provoking considerable criticism⁴ and strong questioning of the Court of Criminal Appeal's commitment to a subjectivised plea.⁵

In subsequent cases, the proportionality requirement has been treated as a guide in evaluating the evidence as a whole, but without definitive resolution.⁶ Several attempts by the Court of Criminal Appeal to clarify MacEoin have failed, and in *People (DPP) v Kelly*,⁷ the Court of Criminal Appeal "warned against quoting from the judgement in MacEoin because of what it regarded as its confusing discussion of the law."⁸

In *People (DPP) v Davis*,⁹ the Court of Criminal Appeal recognised the heavy criticism of the subjective test,¹⁰ and accepted the need to re-examine provocation. It also recognised that policy considerations have changed over time, certain factors having become publicly visible since *MacEoin*, such as 'road rage' and other socially repugnant types of behaviour, asserting that the defence should be "circumscribed or even denied where [allowing it would] promote moral outrage."¹¹ Furthermore, the court noted that the roots of the defence are action in response to acts of considerable provocation.

Most recently, in *People (DPP) v McDonagh*, the Court of Criminal Appeal (made up of different members from *People (DPP) v Davis*) stated that the law "applies a purely subjective test," but in the case itself there was insufficient evidence of provocation, and *People (DPP) v Davis* was not cited, so that *McDonagh* fails to authoritatively clarify the judicial position.

The Law Reform Commission of Ireland considered the troubled case law to illustrate the "difficulties surrounding the interpretation and application of the *MacEoin* Judgement."¹² It recommended that provocation be retained, but in a modified form,¹³ re-emphasising the justificatory nature of provocation's roots and adopting the 'separation approach' established in *Camplin*. It commented

⁴ In response to Kenny J's declaration that the objective test was "profoundly illogical," Stannard argues that the resultant standard is no less illogical. ("Making Sense of *MacEoin*" (1998) 8 ICLJ 20).

⁵ "...it has been argued that the deliberate inclusion of a proportionality element casts doubt on the depth of the Court of Criminal Appeal's commitment to the wholesale subjectivisation of the provocation standard." (Law Commission, 'Partial Defences to Murder' (2003) (LCCP173), Appendix C, para. 8); echoed by McAuley "Anticipating the Past" (1987) 50 MLR 133, 153-154.

⁶ The LRC of Ireland, commented that the "...precise role of the proportionality component has not been convincingly resolved...it remains unclear as to precisely what the Court in *MacEoin* hoped to achieve...whether its emphasis on proportionality was designed to ensure that some element of objectivity would be preferred as part of the test or whether the Court merely included proportionality as a guide to the type and quantum of evidence that would support a plea of provocation." (LRC CP 27-2003, 4.10).

⁷ *People (DPP) v Kelly* ((2000) 2 IR 1). Other cases where attempts to clarify the law failed were: *People (DPP) v Mullane* (Court of Criminal Appeal 11 March 1997, 8), *People (DPP) v Noonan* ((1998) 2 IR 439).

⁸ Op. Cit., 6, 4.11.

⁹ (2001) 1 IR 146.

¹⁰ "...given the subjective nature of the test, the charge that it is virtually impossible for the prosecution to rebut evidence of provocation once the plea has been raised seems justified." (Op. Cit., 6, para. 4.37).

¹¹ *Ibid.*, 159.

¹² *Ibid.*, 4.33.

¹³ *Ibid.*, 7.28-7.41.

that where the 'wrongful act' roots of provocation are overlooked, "*the plea is apt to slip its moorings and lose its bearings. As the Irish experience illustrates, the ensuing voyage can be a very disorientating experience.*"¹⁴

MacEoin's reference to proportionate force makes the Irish experience a less clear test of subjectivisation than it might have been. Nevertheless, it would be reasonable to conclude of the experience of Irish provocation law, that a working subjectivisation of the objective standard has proven difficult to formulate or implement, and that they are currently inclined to abandon the attempt.

2.2. New Zealand

In New Zealand, the objective standard was constituted as it had been in England and Wales, through the 'reasonable man'¹⁵ devoid of any characteristics of the defendant. This standard was considered to be overly harsh,¹⁶ and in 1961 a new Crimes Act was enacted, section 169 of which set out the law of provocation. Section 169 reads in part:

"(2) *Anything done or said may be provocation if -
In the circumstances of the case it was sufficient to deprive a person having the power of self-control of an ordinary person, but otherwise having the characteristics of the offender, of the power of self-control...*"

This provision is the crux of the law of provocation in New Zealand; its drafters clearly sought to move away from the strict objective approach,¹⁷ but how that was intended to work in practice remains unclear.

In *McGregor*,¹⁸ the first decision after the enactment of section 169, North J, delivering the judgement of the court, concluded that section's intended softening of the objective standard involved taking account of the defendant's personal characteristics when considering the standard of self-control of an 'ordinary person.' This was heavily criticised, as making the 'ordinary person' a replicate of the defendant.¹⁹

The cases since, have principally interpreted section 169 as intending that the defendant's characteristics be taken into account when considering the gravity of the provocation, but not when considering the standard of self-control.²⁰

¹⁴ *Ibid.*, 7.30.

¹⁵ Following the 1961 Crimes Act, this became the 'ordinary person.'

¹⁶ Sir George Finlay, invited by the Government of New Zealand in 1958 to review the new bill, recognised it as necessary to remedy the "*obvious injustice*" of *Bedder*. (Finlay, 'Report on the Crimes Bill 1957' (1958), 72).

¹⁷ "...the drafters of the new Act did attempt the task of investing a reasonable man with the characteristics of the accused..." (Op. Cit. 5, 128, Law Commission).

¹⁸ (1962) NZLR 1069.

¹⁹ Sir Francis Adams (1971), 1264-1269.

²⁰ *R v McCarthy* ((1992) 2 NZLR 550; (1992) 8 CRNZ 58 (CA)), *R v Campbell* ((1997) 1 NZLR 16; (1996) CRNZ 117(CA)), *R v Rongomui* ((2000) 2 NZLR 385).

In *R v Makoare*,²¹ the Court of Appeal declined to reconsider the 'separation approach' in the light of *Smith*, reasoning that section 169 is substantially different from that established in *Smith*, and provocation in England and Wales operates alongside diminished responsibility, which is not recognised in New Zealand. The Court also held the fact that provocation was then under consideration by the Law Commission, and that Parliament was due to consider the "Degrees of Murder Bill,"²² to be limiting on its decision. It unanimously called for statutory reform, and concluded that this process would not be helped through further change by the courts.

In its final report, published in May 2001, the New Zealand Law Commission reported that a majority of consultees favoured abolition of provocation, although most agreed that while mandatory life remained, provocation should be reformed.²³ It rejected the subjective test qualified by a 'community standards' element, (as proposed in New South Wales), on the basis that the 'lesser culpability' argument is applicable to all circumstances of intentional killing, and would be disproportionately singled-out to accommodate provocation²⁴; and concluded in favour of abolishing provocation.

Despite taking a different approach to Ireland, it would seem that the New Zealand experience is again that a working subjectivisation of the objective standard has proved difficult to formulate or implement. They also are currently inclined to abandon the attempt, although taking a different direction in pursuit of a solution.²⁵

2.3. Australia

Of the Australian states, New South Wales is considered to be the most progressive regarding provocation. The provocation defence was enacted into law through the NSW Crimes Act 1900, section 23,²⁶ which has operated very similarly to *Camplin*. It is important to note that the legislative amendments of 1990 gave the courts a full sentencing discretion.

Following heavy criticism of the objective test, focusing on the limitations of the 'ordinary person' test and the 'separation of characteristics' approach,²⁷ the New South Wales Law Reform Commission reviewed provocation. It

²¹ (2001) 1 NZLR 318.

²² The Bill was later withdrawn.

²³ NZ LC Report 73, 'Some Criminal Defences with Particular Reference to Battered Defendants,' (2001), Chapter 5, 107-109.

²⁴ NSW LC 'Partial Defences to Murder; Provocation and Infanticide' R 83 (Sydney '97) cited in NZ LC R 73 para.s 112-113.

²⁵ The Sentencing Act 2002, abolished mandatory life.

²⁶ S. 23(2)(b) requires that the "*conduct of the deceased was such as could have induced an ordinary person in the position of the accused to have so far lost self-control as to have formed an intent to kill, or to inflict grievous bodily harm upon, the deceased.*"

²⁷ See *Moffa*, (1977) 138 CLR 601, 625-626, per Murphy J.

In *Masciantonio*, McHugh J asserted that the inconsistency perpetrated by the distinction could only be rectified through abolition of the ordinary person test, which he considered beyond judicial mandate. ((1995) 183 CLR 58, 73).

considered a number of possibilities, finally recommending a subjective test, taking into account the "*circumstances and characteristics*" of the defendant in combination with a 'community standards of blameworthiness' objective element.²⁸

Concerns that this approach leaves the jury undue latitude in determining the outcome of a plea of provocation were noted by the LRC, but deemed inherent to any jury system, and therefore acceptable.²⁹

Unlike Ireland and New Zealand, New South Wales has not yet undergone the experience of implementing a working subjectivisation of the objective standard. The model that they propose is interesting but untested.

3. Conclusion

For a subjectivised evaluative standard to work, it must successfully pass two tests: the scope of its application must be just, for example including the victims of domestic abuse, and excluding the habitually violent; and the risks inherent in the increased role of the jury in determining provocation must be acceptably minimized.

The New South Wales LRC, in considering its proposed subjectivised formulation, concluded the risk of the jury returning a morally deficient decision to be inherent to any jury system and therefore acceptable.³⁰ However, the size of the risk is related to the latitude the jury is given, and for a major crime, where reduced judicial control is accompanied by the jury empowerment to independently apply a generalised test of 'community standards,' this risk is surely too great. Additional safeguards, or an alternative approach, are necessary.

The issue of scope has been highlighted by the general trend of provocation moving away from its roots in justification towards a plea based in excuse, leading to increased criticism of the 'loss of self-control' requirement. The New Zealand LRC found that this requirement, even where relegated to an issue of evidential concern, continues to operate to the exclusion of victims of domestic violence, while permitting its perpetrators to avail themselves of provocation.³¹

A provision based on a subjectivised standard has proven so difficult to formulate and administer, that the tendency on the part of different jurisdictions to retreat from this approach is quite understandable.

²⁸ "[T]he accused, taking into account all of his or her characteristics and circumstances, should be excused for having so far lost self-control as to have formed an intent to kill or to inflict grievous bodily harm or to have acted with reckless indifference to human life as to warrant the reduction of murder to manslaughter." (Proposed section 23(2)(b), Op. Cit., 24, 2.50-2.58, 2.81).

²⁹ Ibid., 2.83.

³⁰ Op. Cit., 24, 2.144.

³¹ Op. Cit., 23, Chapter 5, 105, citing a number of cases where provocation partially excused unacceptable conduct: *R v Tepu* (11 December 1998) unreported, High Court, Wellington Registry, (T 889-98); McDonald "Provocation, Sexuality and the Actions of 'Thoroughly Decent Men'" ((1993) 9 Women's Studies Journal 126); "Minnitt" *The Evening Post*, Wellington, New Zealand, 5 August 1980, 34.

The requirement of a loss of self-control, although now only evidential, continues to shape the scope of provocation. This, combined with the general acceptance of any conduct as capable of constituting provocation, has placed considerable pressure upon the objective element as the means of regulating the scope of provocation. The consequences of *Smith (Morgan)* and the experiences in Ireland and New Zealand, demonstrate the dangers of overly-subjectivising the objective element and one must conclude that if provocation is to remain a partial defence based upon a loss of self-control, it can only do so with a rigorous objective standard.

Chapter 6: Retention of Loss of Self-Control, with Emphasised Justificatory Standard

1. Introduction

Provocation, as it currently operates, is unacceptable. As seen in chapter 5, attempts to stabilise it as a subjectivised plea have failed. The Law Commission recently reported that: “*there was overwhelming agreement among consultees that the law of provocation is unsatisfactory and that its defects are beyond cure by judicial development of the law.*”¹ *Smith’s* subjectivisation of the objective standard has crucially undermined provocation’s moral legitimacy, engendering broad condemnation.

The extent to which these criticisms and calls for reform are in response to *Smith*, or are aimed more broadly at provocation, is unclear. There is a danger of recent developments tarring all elements of the partial defence; inertia for reform risks condemning the entire defence, and to reform without carefully considering provocation’s conceptual roots may be to eliminate elements of great worth which might be retained and improved. Consequently, it is necessary to assess the possibility of a reformed plea adopting the ‘classic line’ approach of *Camplin* and *Morhall*, which established the ‘separation of characteristics’ evaluative standard, (recently reasserted in *R v Holley* and *The Queen v Shickle*).

In questioning the possibility of such a formulation, the law as it stood will be considered, along with the experiences of similar models in other common law jurisdictions.

2. ‘Classic Line’ Provocation and Criticisms

2.1. Objective Standard

Under the ‘classic line,’ the ‘separation of characteristics’ approach was fundamental in permitting recognition of the defendant’s character and circumstances in assessing the gravity of the provocation, while maintaining an independent objective standard of self-control. This standard was crucial in regulating provocation’s scope, and has been adopted widely in jurisdictions where it exists as a partial defence to murder. However, the ‘reasonable man’ standard meant that judges and juries were faced with complicated directions.

The Australian partial defence of provocation originated from the English ‘reasonable man’ model. In *Stingel v The Queen*,² it was established that, concerning the standard of self-control, only the age of the defendant could be

¹ LC, Final Report, (2004) 173, 3.32.

² (1990) 171 CLR 312 (HCA).

attributed to the ordinary person, and in *Masciantonio*, it was held that the ethnic and cultural background of the accused was not to be attributed.

However, the concept of an 'ordinary person' provoked criticism;³ Murphy J in *Moffa*⁴ deemed it unrepresentative of actual experience, calling for its replacement with a purely subjective test of actual loss of self-control;⁵ this proposal has also been made by three Australian law reform bodies.⁶ Despite this, the Law Commission of England and Wales reported that "*the objective test has continued to receive strong judicial and legislative support in the Australian jurisdictions possessing the defence of provocation.*"⁷ This is perhaps indicative of a difference in views between the theoretical advantages of a subjectivised test, and the likelihood of their practical workability.

Significantly, the 'separation approach' has been largely successful in India. In the leading case of *Nanavati v State*⁸, the Supreme Court modified the evaluative standard, imbuing the 'ordinary person' with the defendant's cultural and ethnic status. Crucially, however, the homogeneity of ethnic groups in India enables a more legitimately culturally-weighted approach than is possible in more ethnically integrated societies.

In New Zealand, the interpretation of section 169(2) of the New Zealand Crimes Act 1961, has engendered strong disagreement. In *McGregor*, it was held to subjectivise the 'ordinary person,' but in the last fifteen years the separation of characteristics approach has been the dominant interpretation.⁹ The situation remains far from settled.¹⁰

In 2001, the New Zealand Law Commission recommended the abolition of provocation; amongst its reasons stating the law to be overly complicated for both judges and juries.¹¹ The 2002 Sentencing Act abolished mandatory life, although there remains a strong presumption in favour of a life sentence. Since the Act's inception, there has been no notable push for the abolition of provocation.

³ Yeo "Power of Self-Control in Provocation and Automatism" (1994) 14 Sydney LR 3, 7.

⁴ (1977) 138 CLR 601.

⁵ "It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances...The objective test should be discarded. It has no place in rational criminal jurisprudence." (Ibid., 625-626).

⁶ The Criminal Law and Penal Methods Reform Committee of South Australia, 4th Report, 'The Substantive Criminal Law' (Adelaide, 1977); Law Reform Commissioner, Victoria, 12th Report, 'Provocation and Diminished Responsibility as Defence to Murder' (LRCV, Melbourne, 1982).

⁷ Law Commission, Consultation Paper, Part V, Chapter 1, 1.30., NSW LRC, Report 83, 'Partial Defences to Murder: Provocation and Infanticide' (Sydney 1997).

⁸ AIR 1962 SC 605.

⁹ Most recently in *R v Rongonui* (2000) 2 NZLR 385. The previous decisions were *R v McCarthy* (1992) 2 NZLR 550, and *R v Campbell* (1997) 1 NZLR 16.

¹⁰ In *Rongonui*, Elias CJ criticised this as "*highly artificial*," and the distinction as "*over-subtle*," making the "*application of the law of provocation complex*" and "*uneven*." ((2000) 2 NZLR 385, para.s 111-113).

¹¹ NZLC R 73 (2001), para.s 112-113.

While the problems with the 'separation of characteristics' approach are well documented, it is noteworthy that the Irish LRC, in 2003, recommended the adoption of a formulation with a strong objective standard, tempered through the 'separation of characteristics' approach.¹² There are some important differences from the 'classic line'; the objective standard is expressed through the 'ordinary person',¹³ the justificatory element is strongly reinstated, and there is a requirement of proportionate response to the provocation. This, the Commission contends, will "*curtail the unduly broad sweep of the current law in Ireland.*"¹⁴

2.2. Loss of Self-control

The loss of self-control requirement has been heavily criticised, and condemned as beyond judicial rescue. It stems from a time when provocation was considered to cause a sudden and temporary 'boiling of the blood'¹⁵; however, this has now been shown to represent just one of a number of models of physiological response to provocation.¹⁶ In light of this, the loss of self-control requirement cannot effectively reflect the culpability of defendants receiving provocation.

Problems with the loss of self-control requirement have been greatly exacerbated by the emphasising of provocation's basis in excuse, permitting trivial conduct to be recognised as provocation, and enabling the legal expression of unacceptable values concerning male possession and control of women. Such is the strength of feeling against this, that provocation's moral legitimacy must be restored to justify its retention: this, it is contended, can only be done through the adoption of a rigorous element of justification. This would enable the exclusion of undeserving pleas, filtering out those premised upon morally repugnant attitudes of racism, homophobia, possession or control; enabling the loss of self-control standard to better function as intended, in excluding premeditated killings. However, retention of the loss of self-control requirement is extremely unlikely owing to its exclusion of defendants more deserving of mitigation than many it includes.

3. Conclusion

For a plea of provocation to be viable, there is a very great need to restore its moral legitimacy. This is best done through a return to a strong justificatory standard, and a morally rigorous objective standard.

¹² 'Consultation Paper on Homicide: The Plea of Provocation' (LRC CP 27-2003), 7.36-7.41.

¹³ Such is the stigma attached to the 'reasonable man' that this represents a wise reformulation.

¹⁴ Op. Cit., 11, 7.38.

¹⁵ Horder 'Provocation and Responsibility' (1992), Chapter 1.

¹⁶ Brett, "The Physiology of Provocation" (1970) Crim. LR 634. The requirement of immediate or sudden response to provocation, continues to exist in Ireland and Scotland, but is no longer required in India, Australia's Northern Territory, Capital Territory, NSW, South Australia and Victoria.

The separation approach has struggled for a number of reasons: the awkward 'reasonable man' construction, the pressure of the 'battered women' cases, and the loss of self-control requirement. The last of these is very significant, and indeed is the primary problem with the present law of provocation; it is not possible to return to a partial defence based in justification while the loss of self-control requirement is retained. Sudden anger can no longer be uniquely privileged in this manner.

The present condemnation of provocation has been both vigorous and comprehensive. Provocation cannot remain as it is presently constructed - it must be significantly changed. For this reason, a return to the 'classic line' formulation, with the emphasis of the justificatory standard, is not possible.

Chapter 7: Law Commission Formulation of Provocation

1. Introduction

In its final report, the Law Commission proposed a formulation for a new partial defence of provocation,¹ “seeking to identify the principles which should govern any legislative reform.”²

The Commission identified the primary problem with provocation as being that it permits morally undeserving defendants to raise the defence, while also excluding those morally deserving. Since *Smith*, the plea has become “far too loose, so that a judge may be obliged to leave the issue to the jury when the conduct and/or the words in question are trivial.”³ The requirement of a loss of self-control has also caused considerable problems, and, despite being relegated to an element of evidential concern, it continues to do so “especially in the ‘slow-burn’ type of case”⁴ of cumulative provocation.

In response to this, the Law Commission’s proposed formulation makes two significant changes from the present defence:

The first is re-emphasising an element of justification:

“...we think that the moral blameworthiness of homicide may be significantly lessened when the defendant acts in response to gross provocation in the sense of words or conduct (or a combination) giving the defendant a justified sense of being severely wronged. We do not think that the same moral extenuation exists if the defendant’s response was considered, unless it was brought about by a continuing state of fear.”⁵

The second is the abolition of the loss of self-control requirement, which the Law Commission considered too ambiguous a concept; “it could denote either a failure to exercise self-control or an inability to exercise self-control.”⁶ It concluded that “...the requirement of loss of self-control was a judicially invented concept, lacking sharpness or a clear foundation in psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence - that it should not be available to those who kill in considered revenge.”⁷

2. LC Proposed Formulation and Explanations

The Law Commission’s proposed formulation contains two prerequisites:

¹ LC Final Report, (2004) No. 173, 3.60–3.168.

² Ibid., 3.16.

³ Ibid., 3.20.

⁴ Ibid.

⁵ Ibid., 3.63.

⁶ Ibid., 3.28.

⁷ Ibid., 3.30.

*"We consider that the first prerequisite of a defence of provocation should be that the defendant acted in response to (1) gross provocation or (2) fear of serious violence towards himself or herself or another, or (3) a combination of (1) and (2)."*⁸

The second is *"that a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way."*⁹

2.1. Two Triggers

The Commission identified two 'triggers' for the partial defence; gross provocation, and fear. Gross provocation is characterised as: *"... words and or conduct which caused the defendant to have a justifiable sense of being seriously wronged."*¹⁰ The jury's assessment of "justifiable" is not purely objective; it must consider the *"situation in which the defendant found him or herself and take into account all the characteristics of the defendant which they consider to be relevant."*¹¹ This is to be done through a 'standards of a civilised society' criterion, excluding attitudes of the defendant running contrary to this.¹² Of the response to fear, the Commission intended that before the partial defence arises, the jury will first (where it has been raised) consider self-defence.¹³ Under the present system;

*"If the defence want to obtain an acquittal, it is unhelpful to present D as somebody who lost self-control. Running a defence of provocation based on loss of self-control resulting from years of abuse makes it correspondingly difficult to present D's acts as proportionate to the immediate risk. We are told that sometimes in such cases a defendant may plead guilty to manslaughter, although arguably D's conduct may have been in lawful self-defence, for fear of the risk of conviction of murder with the mandatory sentence."*¹⁴

Under the proposed formulation it would be possible to run both self-defence and provocation, without one undermining the other.

The Commission stated that *"The defence should only be available if a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way."*¹⁵ This is a jury decision, to be made with reference to all of the defendant's characteristics, excluding those relevant only to the defendant's self-control,¹⁶ with the exception of age, which the Commission contended was

⁸ Ibid., 3.66.

⁹ Ibid., 3.67.

¹⁰ Ibid., 3.68. The causal link between the provocation and the killing must be proven (Ibid., 3.69).

¹¹ Ibid., 3.70.

¹² *"No fair-minded jury, properly directed, could conclude that it was gross provocation for a person of one colour to speak to another person of a different colour. In such a case the proper course would therefore be for the judge to withdraw provocation from the jury."* (Ibid., 3.71).

¹³ Ibid., 3.86.

¹⁴ Ibid., 3.88. By way of example the case of *Osborn* (Sunday Telegraph 09/05/04, 20) is cited, in which the defendant pleaded manslaughter despite his case being closer to that of self-defence, because the all-or-nothing nature of self-defence carried a much higher risk of a murder conviction.

¹⁵ Op. Cit., 1, 3.109.

¹⁶ *"In other words, we prefer the minority position in Smith..."* (Ibid).

crucial to an assessment of the defendant's capacity for self-control.¹⁷ It clarified:

*"The test under our proposal is not whether the defendant's conduct was reasonable, but whether it was conduct which a person of ordinary temperament might have been driven to commit (not a bigot or a person with an unusually short fuse). We believe that a jury would be able to grasp and apply this idea in a common-sense way."*¹⁸

2.2. LC Addresses Concerns

The Law Commission noted a "a common concern" raised by academics and senior members of the judiciary, concerning "whether conduct in response to provocation and conduct in response to fear should be joined in a single defence, or whether there should be a separate partial defence for those who kill in fear, but who do not attract the full defence that they acted in lawful self-defence."¹⁹

Some consultees claimed the two to be conceptually different:²⁰ a defendant successfully pleading provocation, knowingly acted unlawfully but with sufficient external excuse or justification to deserve to be partially mitigated, whereas a defendant pleading excessive force in self-defence believed themselves to be employing necessary force, but in fact employed unlawfully excessive force. The Law Commission responded to this, citing from the Royal College of Psychiatrists;

*"Physiologically anger and fear are virtually identical, whilst many mental states that accompany killing also incorporate physiologically both anger and fear. Hence, the abused woman who kills in response even to an immediate severe threat will also be driven at least partly by anger at the years of abuse meted out to her, and perhaps her children."*²¹

The Commission also justified the combination of fear and provocation "from a moral viewpoint," claiming that "there is a common element namely a response to unjust conduct (whether in anger, fear or a combination of the two)."²²

3. Strengths of this formulation

The breadth of this formulation would enable greater representation of the plight of many provoked defendants, particularly battered women, in law. It would also enable provocation and self-defence to be pleaded simultaneously, whereas presently they detract from each other. There is little doubt that this is more representative of such defendants, who experience a situation in its entirety rather than through isolated emotions.

¹⁷ Ibid., 3.110.

¹⁸ Ibid., 3.127.

¹⁹ Ibid., 3.93.

²⁰ Ibid., 3.94.

²¹ Ibid., 3.99.

²² Ibid., 3.101.

The strong proposed objective standard imbues provocation with a greater moral reliability, fundamental given its contentious nature and the potential for unpalatable results. For this reason, the return to the 'separation approach' - through which an independent standard of evaluation is established - is greatly welcome. The expression adopted by the Law Commission is clearer and addresses the primary concerns regarding the 'reasonable man' of Section 3.

The return to a basis in justification is also welcomed, and is true to provocation's roots in wrongful action on the part of the victim. The recent trend of recognising any action as capable of constituting provocation - for example the mere crying of a baby - is clearly troublesome. The mere 'vicissitudes' of life should not enable defendants to avail themselves of partial defence based in rational and reasonable response to grave external provocation.

4. Shortcomings of this formulation

4.1. Breadth of formulation

The primary concern centres on the breadth of the third ground, which combines 'gross provocation' and 'fear of serious violence,' potentially encompassing a very wide range of conduct. The Royal College of Psychiatrists, cited by the Law Commission, stated that "*the abused woman who kills in response to even an immediate severe threat will also be driven at least partly by anger at the years of abuse meted out to her, and perhaps her children.*"²³

While this is probably true, it is worryingly possible to foresee a case where the borderline 'considered revenge' nature of killing will be clouded by a strong moral dilemma; for example, it is hard to imagine a jury returning a murder conviction where a sympathetic defendant reacts to years of sustained abuse by calculatingly killing their unsympathetic abuser. Perhaps such a case deserves mitigation, but to permit such an outcome would undermine the law's clear commitment to strongly condemning killings perpetrated out of 'considered revenge.'

In view of this, the Law Commission made it clear "*The defence should not be available if the defendant acted in considered desire for revenge.*"²⁴ It accepted that there "*may be borderline cases on the facts, but we think that the distinction is one which a jury would be able to recognise and apply.*"²⁵ This confidence is hard to share; how clearly identifiable such cases would be in practice is unclear.

²³ Ibid., 3.99.

²⁴ Ibid., 3.135. "*In our provisional conclusions we used the words "premeditated" but it has been suggested to us that "considered" might be a better word.*" (Ibid., 3.315).

²⁵ Ibid., 3.135.

The Commission also stated the unified partial defence²⁶ to be advantageous in simplifying the jury's decision: "*from a practical perspective it is desirable to try to keep jury directions as broad as simple as possible.*"²⁷ The danger is that in over-simplifying, the precision of the partial defences might be replaced by morally-driven jury decisions. This risk would need regulation through the objective standard, which would need to be carefully managed and applied by the courts.

4.2. Objective standard

The proposed objective standard has raised some questions: "*The defence should be available if a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.*"²⁸ The use of the word 'might' has caused some concern, having the potential to be too broad in its application. The Commission considered this; "*The difficulty is that if a test including the word 'would' were strictly applied, it would be near to impossible, because even under extreme provocation killing is not the probable reaction of a person of ordinary temperament.*"²⁹ Either form of expression may be overly-inclusive or exclusive, and the ability to precisely limit the range of potential outcomes is itself limited.³⁰

The potential risk is mitigated to a degree by the requirement that "*A judge should not be required to leave the defence of provocation to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.*"³¹ This freedom, "*coupled with the supervision of the appellate courts,*" the Commission claims, "*will enable the law to set boundaries in a reasoned, sensitive and nuanced way.*"³² The fact that there will be cases that will need to be decided on the facts was readily accepted by the Commission; "*Unless the law is reduced to a formula which removes any evaluative function from the judge and jury (which we would not favour) there are bound to be borderline cases.*"³³

The worry is that the borderline cases may be decided differently according to the considerable scope afforded to the natural preferences and values of

²⁶ Unifying response to 'gross provocation' and response in 'fear of serious violence.'

²⁷ Op. Cit., 1, 3.100.

²⁸ Ibid., 3.109. Underline added.

²⁹ Ibid., 3.128.

³⁰ The phrase "*in a same or similar way*" also has a broadening potential. (Ibid., 3.66).

³¹ Ibid., 3.141. The Commission, considered the Australian case of *Stingel* (1990) 171 CLR 312 HCA: "*Under our approach provocation should not be left to the jury in such a case because we do not see how any reasonable jury, properly directed, could conclude there had been a gross provocation or that a person of ordinary tolerance and self-restraint might have acted in the same way as the defendant.*" (Ibid., 3.144). The Commission also cited *Doughty*, in which the defendant claimed the crying of a baby to constitute provocation ((1986) 83 Cr App R 319), and *Dryden*, in which the defendant killed a court official enforcing a court order ((1995) 4 All ER 987), as cases that "*ought not to be left to the jury.*" (Op. Cit., 1, 3.148).

³² Ibid., 3.142.

³³ Ibid., 3.147.

individual judges under the third ground, which combines fear of serious violence and gross provocation.

4.3. Exclusion of other emotions

Another significant criticism is the exclusion of other emotions. Extending provocation to include fear of serious violence is a welcome recognition of the mitigatory effects of this emotion, but it is significant that this formulation excludes others such as despair or grief, to which Mackay and Mitchell add compassion or disgust.³⁴ The Law Commission recognised that “*provocation may give rise to a range of emotions, e.g. anger, fear, disgust and despair,*” but considered that it was not “*necessary to incorporate a list of all such emotions in a definition of provocation.*”³⁵ Mackay and Mitchell’s assertion that this is “*effectively sidestepping the issue*”³⁶ seems to the point.

5. Conclusion

Certain features of this proposed formulation are strongly welcomed: the return to the ‘separation approach,’ the reinstatement of judicial control, the reemphasising of the justificatory standard, and the expansion of provocation from anger to recognising fear of serious violence. Undoubtedly it is an improvement upon the present provocation defence, and as Ashworth says, “*I think the proposals represent a fine attempt to tread the difficult lines.*”³⁷

However, there are certain concerns which make it difficult to wholeheartedly endorse this provision. The third ground for the plea is broad, potentially dangerously so. Whether the power of the judge to restrict the availability of the provocation plea would consistently remedy this is unclear, and the borderline cases could be very difficult to distinguish with any sort of overall consistency. The exclusion of other characteristics which also reduce culpability is difficult to rationalise, and this limitation may serve to encourage vague extensions of the provision so as to incorporate deserving cases founded in other emotions.

³⁴ “But is this Provocation? Some Thoughts on the Law Commission’s Report on Partial Defences to Murder” (2005) Crim. LR 44, 49.

³⁵ Op. Cit., 1, 3.103.

³⁶ Op. Cit., 34, 2.

³⁷ Op. Cit., 1, 3.82.

Chapter 8: Extreme Mental or Emotional Disturbance

1. Introduction

Section 210.3(1)(b) of the US Model Penal Code³⁸ (1962) establishes 'Extreme Mental and Emotional Disturbance'³⁹ as a partial defence to murder. In a number of US states it has replaced provocation. Some interest has been shown in England and Wales, particularly from Mackay and Mitchell. In the light of *Smith*, and the increasing proximity between provocation and diminished responsibility, they contended a logical step to be to combine both partial defences in a single unified partial defence, modelled on section 210.3(1)(b). The Law Commission, in its final report, noted that; "*a significant number of respondents, including particularly representative bodies of the legal profession, women's groups and JUSTICE, thought that a test involving extreme emotional disturbance would be preferable to a test based on a loss of self-control.*"⁴⁰

Section 210.3(1)(b) reads as follows:

"[A] homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be."

This differs from provocation in two important ways: Firstly, there are no limitations on the jury's power to return a manslaughter verdict; it only needs to be satisfied that the defendant acted under the influence of EMED for which there exists reasonable explanation. Secondly, the reasonableness of the reason for the defendant's actions is determined from the defendant's perspective with the defendant's perceptions. The reasonableness of the defendant's actual actions is not assessed at all.

2. The US Experience

The controversial nature of EMED is clear from the degree and nature of its acceptance into US law. Kadish identified "*some thirtyfour jurisdictions that revised their criminal codes in the post MPC era,*" noting that "*none adopted the MPC proposal whole.*"⁴¹ Five omitted the term 'mental' from 'extreme mental or emotional disturbance.' Roughly a dozen made considerable changes, mostly tempering its subjectivity: Oregon is an apt example: the reasonableness of explanation was changed from the "*viewpoint of a person in the actor's situation under the circumstances as he believes them to be,*" to that of "*an ordinary person,*" the circumstances to be considered as he "*reasonably*" sees them; and New

³⁸ Hereafter 'MPC.'

³⁹ Hereafter 'EMED.'

⁴⁰ LC, Final Report (2004) No. 173, 3.49.

⁴¹ *Ibid.*, Appendix F, 5.

Hampshire, requires EMED to have been “*caused by extreme provocation.*” Maine and Ohio initially adopted EMED (to varying degrees), but both later replaced it with formulations more traditionally associated with provocation.⁴²

These changes indicate discomfort with the wholesale adoption of Section 210.3(1)(b), over “*the degree of subjectivity*” and “*its omission of the explicit requirement of a provocative action, both of which served to create a great and largely unguided discretion in the jury.*”⁴³

Nevertheless, despite reluctance in the US to wholly adopt the MPC formulation, EMED has had a significant impact.

3. UK Advocates Mackay and Mitchell

3.1. The basis for their plea

Mackay and Mitchell, the primary proponents of EMED in the UK, have endorsed its adoption on the basis that provocation and diminished responsibility have the same root in ‘disturbance of reason’ and so can, and should, be unified in a single partial defence.

They asserted that the *Smith*-majority was:

“...*wrong to continue to emphasise the need for “loss of self-control” at the expense of disturbance of reasoning. In doing so they seek to maintain a distinction between provocation and diminished responsibility that is gradually being eroded.*”⁴⁴ They continue, “*Better then to accept this and to introduce a plea that more clearly reflects the fact that both provocation and diminished responsibility are concerned with rationality defects.*”⁴⁵

They advocate the MPC ‘EMED’ provision, which they renamed EED, subject to some alterations:

“*A defendant who would otherwise be guilty of murder is not guilty of murder if the jury considers that at the time of the commission of the offence, he was under the influence of extreme emotional disturbance and/or suffering from unsoundness of mind either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter.*”⁴⁶

⁴² Ohio: requires “*serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force...*” (2903.03 (A) ‘Voluntary Manslaughter’). The 1982 amendment changed the language from “*while under the influence of extreme emotional stress*” to “*while under the influence of sudden passion or in a sudden fit of rage.*” (H 511). *Ibid.*, 7.

⁴³ *Ibid.*

⁴⁴ Mackay, looking at manslaughter convictions where both provocation and diminished responsibility were pleaded, found that juries are generally not required to specify which partial defence formed the basis of their decision. There is not the space to look into this more closely ((1988) Crim. LR 411).

⁴⁵ “Provoking Diminished Responsibility: Two pleas Merging Into One” (2003) Crim. LR 745, 757.

⁴⁶ *Ibid.*, 758.

3.2. Advantages of this proposal

3.2.1. EED as emotion-neutral

EED does not privilege action in sudden anger; a charge levelled at provocation's 'loss of self-control' requirement, which favours killers of a type more likely to re-offend,⁴⁷ and disadvantages women whose response to provocation is less often immediate anger. Jefferson highlights this: "*it is strange that provocation is a defence to those who give way to their emotions, but no defence to those who kill under duress or who perform a mercy killing.*"⁴⁸ Mackay and Mitchell state "*it is time to move away from an outmoded plea based on anger to a defence which more fairly recognises the gamut of human emotions.*"⁴⁹

Emotion-neutrality focuses on the intensity of the emotion experienced rather than the particular emotion, avoiding the overly-restrictive profile of a 'provoked defendant'; this could have very positive consequences for the legal representation of battered women. Mackay and Mitchell state that they would not be surprised if a jury found EED concerning a mercy killing, and accordingly convicted the defendant of manslaughter, enabling "*the criminal justice system to avoid convicting genuine mercy killers of murder without having to artificially stretch the diminished responsibility defence - and place an enormous burden on the sympathies of forensic psychiatrists.*"⁵⁰

3.2.2. Jury Freedom

Mackay and Mitchell assert the increased jury freedom to be advantageous, enabling a better reflection of the defendant's culpability. Recognition of the common root of provocation and diminished responsibility enables the jury to address mitigating factors which normally would be artificially separated or even suppressed.⁵¹

3.2.3. Simplification

Mackay and Mitchell assert 'disturbance of reasoning' to be the common root of both provocation and diminished responsibility: "*Both diminished responsibility and provocation defendants find themselves in disturbed emotional states*"⁵²; adding that the gradual acceptance of psychiatric

⁴⁷ Defendants reacting with sudden violence upon provocation are surely more likely to repeat such behaviour than defendants subjected to years of abuse who finally act to terminate an intolerable situation.

⁴⁸ 'Criminal Law' (1999), 85.

⁴⁹ "Replacing Provocation: More on a Combined Plea" (2004) Crim. LR 219, 223.

⁵⁰ Ibid. This is also referred to in The Butler Report, Cmnd. 6244 (1975), 19.5.

⁵¹ Op. Cit., 8, 751-752.

⁵² Op. Cit., 12, 221.

evidence in provocation made it “*virtually impossible to disentangle the issues of loss of self-control, abnormality of mind and substantial impairment of mental responsibility.*”⁵³ The Law Commission referred to EED as advantageous in resolving the current inequality between provocation and diminished responsibility.

4. Arguments against EED

There remain strong arguments against EED, focusing on its lack of discrimination, its attempt to unite differing rationales, the assertion that diminished responsibility is an ‘equal partner’ in EED, and a lack of precision in the jury direction.

4.1. Too indiscriminating

The basis of EED in excuse means that no plea can be excluded for a lack of moral worth, the focus is entirely on the intensity of the emotion experienced by the defendant. This has led to cogent criticism that the “*new defence would be too indiscriminating.*” Robinson states:

*“Ad hoc determination means that similar cases are likely to be treated differently, that the law will be unpredictable, and that there is created the possibility of abuse of discretion by decision-makers, judge or juror...The results may depend more on who the defendant gets as a trial judge or jury than on whether he deserves an extreme emotional disturbance mitigation.”*⁵⁴ This is a primary reason for the reluctance on the part of many US states to adopt all, or even any, of section 210.3(1)(b).⁵⁵

Chalmers cited two US decisions in which evidence from the defendant that he had regularly violently abused his partner before killing her was deemed to be relevant in supporting his plea of EED: “*while both defendants were convicted...such decisions might give pause for thought in the context of the current reform project.*”⁵⁶ Chalmers explains this concern: juries weighing an EED plea must “*...consider reducing murder to manslaughter where the victim had “provoked” the defendant by merely leaving or seeking to leave, the parties’ relationship. By contrast, in states which retained a “traditional” provocation plea, the issue did not reach the jury in any single one of the cases studied by Nourse.*”⁵⁷ Kadish notes that in the cases referred to by Nourse the juries returned verdicts of murder, but accepts that “*remitting issues to the bare sympathies of the juries invites the illicit and the prejudiced.*”⁵⁸ Gardner and Mackelm strongly voiced their misgivings: “*...such a new defence would...require lust, jealousy, and hatred to be given exactly the same legal*

⁵³ Op. Cit., 8, 748-749.

⁵⁴ Robinson, “The Modern General Part; Three Illusions” in Shute and Simester, ‘Criminal Law Theory: Doctrines of the General Part’ (2002), 75, 90-91.

⁵⁵ Op. Cit. 4, para. 7.

⁵⁶ “Merging provocation and Diminished Responsibility: Some Reasons for Scepticism” (2004) Crim. LR 198, 210.

⁵⁷ Ibid.

⁵⁸ Op. Cit., 4, para. 11.

*credence as fear, despair and anger. It would be ripe for exploitation by rapists and racists.*⁵⁹

Mackay and Mitchell, recognising this danger, qualified their proposed formulation;

*“...to make sure that such traits are excluded a policy provision could be inserted into our defence. This might read: ‘The temperament of the defendant shall not be taken into account by a jury in its determination of whether he or she was under the influence of extreme emotional disturbance.’”*⁶⁰ In the light of this, they stated *“our combined defence may not be as indiscriminating as Gardner and Mackelm fear.”* However, they then continued *“...But this may be no bad thing, as one of the many criticisms levelled at provocation is that it assists angry men but at the same time fails to help women who are driven to kill as a result of cumulative domestic abuse and violence.”*⁶¹

This qualification, which they then qualify by stating *“But this may be no bad thing”* does little to assuage the concerns raised above. The fear remains that in seeking deliverance from an overly-restrictive provocation formulation, an overly-broad EED formulation would have a similar effect to *Smith*, in compounding pre-existing problems. Any broadening of the law should be approached with extreme caution.

4.2. Different rationales

The Law Commission raised the argument that provocation and diminished responsibility have fundamentally different rationales: *“The ethical distinction is that provocation is a partial excuse for wrongdoing while diminished responsibility consists of a partial denial of responsibility.”*⁶² An excuse seeks to *“provide a decent rational explanation for what one did,”* but a denial of responsibility claims that *“because at the time one was not a sufficiently rational being...no rational explanation for what one did is called for.”*⁶³ Chalmers emphasised the distinction: regarding *“...provocation, the defendant is considered fully responsible and judged by the standard of a fully responsible agent...but, in respect of his particular actions, full condemnation (in the form of a murder conviction) is inappropriate. By contrast, a diminished responsibility plea is based on a diametrically opposed contention: that the defendant is not (or at least, was not at the time of his actions) a fully responsible agent.”*⁶⁴

Mackay and Mitchell challenged this assumption, stating that the two pleas have *“more in common with one another than might initially be assumed.”* They continued, *“what ought to be required...is such an extreme level of emotional*

⁵⁹ “No Provocation without Responsibility; a Reply to Mackay and Mitchell” (2004) Crim. LR 213, 215.

⁶⁰ Op. Cit., 12, 223.

⁶¹ Ibid.

⁶² Op. Cit., 3, 12.80.

⁶³ Op. Cit., 22, 213.

⁶⁴ Ibid., 204.



disturbance at the time of the killing that the accused can no longer be regarded as acting rationally...the states of mind of provoked and diminished responsibility defendants are both 'abnormal' in the sense that they are not thinking (or acting) as fully rational beings."⁶⁵ They cited Lord Hoffmann's judgement from *Smith* in support:

*"...the possibility of overlap seems to me to fall inevitably from consigning the whole of the objective element in provocation to the jury. If the jury cannot be told that the law requires characteristics which could found a defence of diminished responsibility to be ignored in relation to the defence of provocation, there is no point in claiming that the defences are mutually exclusive."*⁶⁶

In support of a common rationale, Mackay and Mitchell argued that section 210.3(1)(b) demonstrates that EED and unsoundness of mind can operate together in influencing the defendant's behaviour. They cited *State v Dumalo*, contending that section 210.3(1)(b) had been interpreted as *"taking account of mental abnormalities that have been recognised in the developing law of diminished responsibility' and so in essence merging the two pleas."*⁶⁷ However, Chalmers claimed this citation to have been de-contextualised and to be *"liable to mislead."* He cited in full from the judgement:

*"The phrase 'actor's situation,' as used in S.210.3(b) of the MPC, is designedly ambiguous and is plainly flexible enough to allow the law to grow in the direction of taking account of mental abnormalities that have been recognised in the development of the law of diminished responsibility."*⁶⁸

4.3. Diminished Responsibility not intended to be 'equal partner'

Chalmers asserted that diminished responsibility is not, and was not intended to be, an *"equal partner"* to provocation in EED: *"Indeed, the Hawaiian courts have made it clear that, as intended by the Model Code's drafters, diminished responsibility cannot in and of itself amount to EMED sufficient to reduce murder to manslaughter."*⁶⁹ In support, Chalmers cited *State v Manlolo*, in which the court stated that *"in our opinion, even a strained construction of the provisions of Section 707-702(2)"*⁷⁰ would not permit *'diminished mental capacity'* as a defence which would reduce the offence of murder to an offence of manslaughter.⁷¹

4.4. Lack of Precision in jury Direction

⁶⁵ Op. Cit., 12, 221.

⁶⁶ *Smith* (2000) 4 All ER 289, 307-308.

⁶⁷ Op. Cit. 8., 758.

⁶⁸ MPC, accompanying notes, 72.

⁶⁹ Op. Cit., 19, 201.

⁷⁰ The provision which sets out EMED in Hawaii.

⁷¹ 600 P.2d 1139 (Haw.1979), 1040.

Chalmers continues; *"The Hawaii courts have, in fact, insisted that an EMED plea be based on the defendant having been exposed to an "unusual and overwhelming stress," (State v Perez 76 P.2d 379, 387 (Haw. 1999) which seems remarkably close to a provocative act requirement."* (Op. Cit., 19, 201).

Mackay and Mitchell's requirement that the emotional disturbance "*affected his [the defendant's] criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter,*" is a worryingly imprecise jury direction. Precisely what constitutes 'to a material degree,' and when the offence 'ought' to be reduced to manslaughter, is unclear; as exemplified in *State v Raguseo*,⁷² where the jury asked for the plea of 'extreme emotional disturbance' to be re-explained on four occasions. On the first three, they were re-instructed according to the precedent of the Supreme Court of Connecticut in *State v Elliot*.⁷³ On the fourth occasion, the trial judge supplemented the standard direction by directing that the jury's assessment of the reasonableness of the reason for the defendant's emotional disturbance was to be determined according to the 'reasonable person.' This clarification, bringing the law back to familiar territory, highlights the breadth of the formulation and the difficulties this causes for juries.

5. Conclusion

In summary, the basis of the EED is an appealing one. Focusing on the intensity of emotion that afflicted the defendant instead of assessing the defendant's response to provocation (however trivial) permits an emotion-neutral partial defence. But ultimately EED fails to satisfactorily reflect both provocation and diminished responsibility; their significantly different foundations cannot easily be reconciled. Kadish, an advocate of EED, states that "*if diminished responsibility were to be retained I would think it better to keep it separate because to combine the defences would tend to confuse their very separate underlying rationales.*"⁷⁴ If, as Mackay and Mitchell assert, EED is a unification of the two, then its chequered history serves as an apt illustration of the inherent difficulties.

Kadish recognised the fundamental problem concerning the original EMED formulation: "*It leaves the jury with virtually no guidance except their bare visceral response in determining what abnormalities in the actor's situation should count and which not, and efforts by trial judges to develop some guidance would probably maintain the nightmarish experience [of Smith] you describe.*"⁷⁵ Instead he suggested "*considering what many states have done, retaining the EED formulation but rejecting its highly subjective qualification.*" In so recommending, Kadish seems to feel that EED would be morally reliable, were its subjectivity to be tempered.

However, even with this change, the breadth of the defence, alongside the considerable jury power would entail a significant risk of abuse. Chalmers argues that the merged plea would "*improperly hand over the question of the appropriate distinction between murder and manslaughter to the jury without providing appropriate guidance (or, perhaps, any guidance) as to how the jury should approach their task.*"⁷⁶ It is with worrying ease that one can foresee a sympathy-lottery scenario, where a jury could claim the requisite 'material degree' in retroactively

⁷² 622 A.2d 519 Conn. 1993.

⁷³ 411 A.2d 3. Conn. 1979.

⁷⁴ Op. Cit., 4, para. 27.

⁷⁵ Ibid., 20.

⁷⁶ Op. Cit., 19, 211-212.

justifying a morally desirable result; for example a battered woman, killing her oppressor in cold blood, but receiving a manslaughter verdict. While such a defendant is no doubt deserving of much sympathy, the law should be very careful of creating conditions in which a jury can mitigate a thinly disguised cold-blooded revenge killing. Indeed, the Law Commission, in its final report, concluded; "*We would not recommend importing a defence based on EMED. We think it is too vague and indiscriminate.*"⁷⁷

While the partial defence would without doubt benefit some women defendants, this would be superficial, failing to address the problem of self-defence and its requirements of imminence and proportionality. The recent experience of a broadening of provocation should engender extreme caution before introducing another broad partial defence. While Mackay and Mitchell's qualification to their EED formulation would somewhat restrict the scope of the defence, this would not be an adequate safeguard. The possibility of a partial defence governed by jury-decision in which their prejudices are permitted weight in decision-making is not acceptable.

Kadish's further restrictions, through tempering the subjectivity of the standard of evaluation, would undoubtedly reduce the risk of unpalatable jury decisions, but quite how a jury is to apply a more objective standard in assessing whether intensity of emotions affected culpability to a 'material degree' such that a manslaughter conviction is preferable, remains to be clearly established by any such advocates of EMED.

It is not possible to strongly endorse this partial defence. Its conceptual foundation is unclear, and the absence of a definite standard of evaluation renders its adoption too uncertain.

⁷⁷ Op. Cit., 3, 3.59.

Chapter 9: Abolition of Provocation

1. Introduction

In 2003, Solicitor General Harriet Harman stated that she was “*amazed at the number of cases where a person received a short sentence for killing someone because they used provocation to claim manslaughter.*”¹ Indeed, the focus on domestic violence of the Law Commission’s review into the partial defences, is due to strong concerns that provocation allows “*men who kill their wives in a burst of anger to receive lenient sentences but not battered women who kill violent husbands after years of abuse.*”²

Various commentators have advocated the abolition of provocation, and under the 2003 Criminal Justice Act, this option is significantly more viable. Final evaluation of this is deferred to the closing chapter; however key elements are discussed here.

2. Discussion of arguments for and against abolition

Any argument for the abolition of provocation must not only prove that it is preferable to the present law, but that it is also preferable to any of the reform options.

The primary argument for abolition, is that provocation is unacceptably gender-biased. Horder, stated “*the doctrine as a whole cannot survive an attack mounted from the broader perspective of gender politics.*”³ He cited Home Office statistics, of a 52.5% success rate for women pleading provocation, as unacceptably low given that three-quarters of those women will have suffered domestic violence, and concluded that provocation must be abolished.⁴

While this is a strong argument, it is not conclusive. Sullivan asks; “*if we are to abolish provocation, what is to become of the 52.5 per cent of women who do benefit from the defence?*”⁵ Nourse echoes this: “*Advocates of abolition face an obvious question: If we abolish the defence, what becomes of the woman who, distraught and enraged, kills her stalker, her rapist, or her batterer?*”⁶ The Canadian Association of

¹ The Guardian, “*Law on provocation in killings ‘a mess.’*” (October 31st 2003, Clare Dyer, Legal Correspondent).

² Ibid.

³ Horder ‘Provocation and Responsibility’ (1992), 192.

⁴ Ibid.

⁵ Sullivan, “Anger and Excuse: Reassessing Provocation” (1995) OJLS 421, 426. Howe states; “*Horder’s conclusion...is falling on deaf ears...commentators...overlook the fact that his book-length history of the provocation defence is an extended argument for abolition.*” (‘More Folk Provoke their Own Demise’ (1997) 19 Sydney LR 336, 363). This assertion is strongly contested; Horder’s conclusion to his work comes as a surprise. Sullivan summarises; “*For much the greater part of the book anger is perceived, in appropriate circumstances, as exhibiting virtue and leading, on occasion to conduct deserving not merely of mitigation but of complete exoneration.*” Horder himself acknowledges this unexpectedness: it is all to be “swept aside in the space of one short concluding chapter.” (Op. Cit., 5, 421).

⁶ Nourse, “Passion’s Progress: Modern Law Reform and the Provocation Defense” (1997) Yale LJ 1331, 1390.

Elizabeth Fry Societies,⁷ which has argued strongly for the abolition of provocation in Canada, recognises that where mandatory life remains, the answer to provocation's problems lies not in its abolition: "...some women...may unjustly be denied access to self-defence and...should be able to rely on provocation to at least reduce the offence to manslaughter...it would be a gross injustice to deny them access to any mitigation of sentencing in such circumstances."⁸

As already established, despite its significant failings, provocation does provide valuable mitigation. Jefferson concludes "if murder is to continue to be regarded as the most heinous crime, its gravity marked by a mandatory sentence, provocation would remain a useful defence."⁹

Where abolition of provocation has been recommended, it has been contingent upon a move to discretionary sentencing for murder.¹⁰ The Law Commission reported: "We know of no common law system where provocation has been abolished as a defence to murder but a mandatory sentence of life imprisonment retained, nor of any law reform body which has made such a recommendation,"¹¹ and concluded that "Consultees were overwhelmingly of the view that it would be wrong to abolish the defence of provocation while the mandatory sentence remains, and we share that view."¹²

In the light of the 2003 Criminal Justice Act, the present mandatory life sentence is now a strange mixture of determinacy and indeterminacy. While there is scope for provoked killers to receive sentencing proportionate to their culpability, under fair labelling, to receive a sentence of 'mandatory life' is misleading and devalues the offence of murder.

3. Conclusion

In 2003, Harriet Harman stated "*The Law Commission signals that provocation has had its day...murder will now mean murder for these people and they will face the full consequence.*"¹³ These strong views concerning the role of provocation in domestic violence are understandable, but in the broader context of the valuable function provocation performs for battered women (and many others), such sweeping condemnation is misplaced. The decision in *Smith*¹⁴ raises concerns for provocation's moral dependability, but this does not clearly condemn outright the present formulation, and certainly does not condemn possible replacements. Where mandatory life is to be retained as the punishment for murder, abolition of provocation is not plausible as a course of action. While the present mixture of

⁷ Canadian organisation representing women and girls in the justice system, hereafter referred to as 'CAFES.' (<http://www.elizabethfry.ca/>).

⁸ *Ibid.*, 2.

⁹ Jefferson 'Criminal Law' (1999), 84. "...provocation, even with its defects, provides a valuable instance of reasons for conduct being made relevant to responsibility." (*Op. Cit.*, 5, 421).

¹⁰ New Zealand CLRC, (recommendations embodied in the 'Crimes Bill' 1989), and the MCCOC.

¹¹ LC Final Report No. 173 (2004), 3.33.

¹² *Ibid.*

¹³ *Op. Cit.*, 1.

¹⁴ (2000) 3 WLR 654 (HL).

indeterminate and determinate sentencing within mandatory life is acknowledged, it would be a misrepresentation to convict grossly provoked murderers of 'mandatory life,' and would only serve to exacerbate the exaggerated scope of the offence of murder and its unique punishment.

SECTION C

Conclusion to Provocation Reform

THE UNIVERSITY OF CHICAGO

PHYSICS DEPARTMENT

PHYSICS 311

Chapter 10: A Criteria-Based Analysis of Provocation Reform

This thesis seeks investigate the different reform options for provocation, within the law of murder.

The discussion concerning provocation has been characterised by an absence of agreed standards by which to evaluate the present law and assess the different options for reform. From the experience of the 'classic line' cases, the developments of the last 15 years, and the primary options for reform, certain criteria have established themselves as of dominant importance to the discussion of provocation reform. These criteria are established and then applied to the different reform options, before conclusions are drawn with regards to provocation within the present law of murder, and pursuant to the homicide reform discussion of chapters 1 and 2.

The following criteria are derived from the writings of commentators, judges, and from the author's own judgement based on decisions, criticisms and discussions. The object is to provide some measurable and practical standards by which the different reform options can be considered.

Each criterion is structured according to the following layout:

- A brief explanation of the criterion.
- Where it has been seen in law.
- How well it worked.
- Where it has been discussed in this thesis.
- Any caveats.

Where the significance of neglecting the criterion is sufficiently grave, a brief paragraph highlighting the effects of its omission will be inserted after the paragraph discussing whether the criterion worked.

Each of these criteria will be established, and discussed briefly before they are applied to each of the reform options.

1. Evaluative criteria established

1.1. The objective standard must be sufficiently rigorous that it prevents subjective assumptions and sympathies from forming the sole basis for a decision.

- Where?

A very strict objective standard was seen prior to the 1957 Homicide Act, precluding any reference to the characteristics of the defendant. Subsequently, under the 'separation approach,' the objective standard was somewhat tempered through the attribution of those characteristics of the defendant relevant to the gravity of the provocation, to the reasonable man.

- Did it work?

It is contended that the 'separation approach' worked well in establishing a strong objective standard, imbuing provocation with a moral reliability.

- Consequences of omission?

The consequences of neglecting this are clearly exhibited by *Weller*, in which the defendant's possessive and jealous nature was permitted consideration in evaluating his actions.

- Where discussed?

This criterion is discussed in chapter 4, 2.1.

- Caveats?

The objective standard must be balanced, or else it can operate very harshly, as seen in *Bedder*, and *Mancini*, in which the actions of the defendants were considered against the standard of a reasonable man devoid of their characteristics.

1.2. If expressed through the 'reasonable man' (or a similar legal construct), there must be sufficient definition so as to enable precision in the jury's normative role.

The definition should clearly identify – or enable clear identification of – the range of relevant characteristics that can or should apply.

-Where?

The nearest the law of provocation in England and Wales has been to achieving this balance between objective rigour and subjective recognition of the characteristics of the defendant has been through the 'separation approach' established in *Camplin*.

- Did it work?

The 'separation approach' established a strong objective standard, which could be relied upon to produce reasonably consistent decisions.

- Consequences of omission?

Failure to meet this criterion results in an ill-defined and unreliable jury function.

- Where discussed?

This is discussed in chapter 4, 2.1.2 and 2.1.3.

- Caveats? ¹

The 'separation approach' did produce a seemingly counter-intuitive dilemma, in which characteristics of the defendant relevant to both the gravity and the self-

¹ Hereafter the headings are discontinued, but the structure remains throughout.

control, while being recognised in relation to the former had to be ignored with regards to the latter. A better definition might avoid this dilemma.

1.3. The objective standard must not be overbearing - it needs to make sufficient reference to the defendant so as to be a fair standard, and not an overly harsh one.

Quite what constitutes 'sufficient' reference is a matter of considerable debate. It is contended that the 'separation approach' struck a good balance between reference to the defendant's character, and retention of a clear objective standard. The decision in *Smith* is contended to have fundamentally compromised the objective standard.

Section 3 and the 'separation approach' were significant improvements on the previous law in tempering the harsh objective standard. *Smith* subsequently overly-subjectivised the objective standard.

This was discussed in chapter 4, 2.1.1, 2.1.2 and 2.1.3.

The *Smith* decision subjectivised the evaluative standard, but to the detriment of its moral reliability. The balance between a rigorous objective and defendant-specific tailoring must be very carefully maintained; *Smith* demonstrates the problem of failing to do so.

1.4. Provocation must fairly represent all those who due to provocation have a reduced moral culpability, regardless of the particular emotion they experienced; or form part of a considered web of defences, full and partial, covering the range of emotions, which reduce culpability.

Provocation has always been based in response in anger to provocative actions or words, and therefore only mitigates action in anger.

Provocation cannot be said to effectively mitigate action in anger, in the light of recent discoveries establishing the diversity of legitimate physiological responses in anger. The loss of self-control requirement has limited the recognition of types of anger-based response, and excluded other emotions. It is now largely perceived to be illegitimately exclusive.

This is discussed in chapter 4, at 2.1, 2.2, 2.3

A single partial defence cannot be both morally rigorous and sufficiently broad so as to cover all emotions deserving of mitigation. While the 'loss of self-control' requirement is undoubtedly unacceptably restrictive, to require a single partial defence to cover all emotions is unrealistic.

1.5. Provocation's conceptual foundation must be clearly stated and adhered to.

Provocation, since its creation, has been a partial defence for the ordinary person in extraordinary circumstances, mitigating defendants where they have been wronged. Despite recent derogation from this, it is generally accepted to be the historical conceptual basis for provocation.

It is very difficult to analyse the success of particular approaches to provocation due to the dearth of specific statistics. Provocation has primarily struggled due to the loss of self-control standard, and has never had great stability, marked by the many changes to the partial defence, even over the last 50 years.

Without clear conceptual foundation, provocation is unreliable, and prone to delivering unpalatable results. Provocation's present identity crisis is in large part due to the subjectivisation of the objective standard, and the derogation of the justificatory element.

This is discussed in chapter 4, 2.5.

It may not be possible to establish a clear foundation. Provocation contains elements of justification and excuse, and there has been considerable discussion concerning how these should be balanced, and whether provocation should be changing.

1.6. Provocation must be kept clear of diminished responsibility to remain conceptually sound and viable.

Provocation has historically been separate from diminished responsibility, looking to external factors causing a loss of self-control. The acceptance of mental deficiencies as relevant to the standard of self-control is a comparatively recent development.

Provocation functioned far better when kept clear of diminished responsibility (compare the conceptual cohesion in *Morhall*, with that of *Weller*). The 'separation approach' ensured a rational, objective standard, and while this was the case, provocation was morally more reliable, despite the loss of self-control standard.

This is discussed in chapter 4, 2.1.3.

Under the 'classic line,' provocation at times operated very closely to diminished responsibility; the proximity of the two pleas must be recognised, while their differing rationales retained. Furthermore, provocation's inherent complexity must be acknowledged; its combining elements of justification and excuse ensure that it will never be the most simple of pleas.

1.7. There must be an explicit requirement of a provocative action or incident.

Traditionally under provocation, the requirement of a provocative action or incident is a necessary part of establishing that the defendant's action was in response to an external influence.

This requirement has proven problematic, due to the accompanying temporal assumptions of the loss of self-control, which have been strongly criticised and proven to represent just one of a number of responses to provocation, and not a legitimately exclusive definition.

This is discussed in chapter 4, 2.2 and 2.3.

The concept of a provocative action or incident has been challenged on the basis that the law should not mitigate action in anger, and criticism has also focused on the problem of 'victim-blame.'

1.8. Provocation must be simple to understand and apply

It is doubtful that provocation, at any time, has been simple to understand and apply. It is contended that under the 'separation approach' the basis for provocation was clearer, although the acceptance of any conduct as capable of constituting provocation caused confusion, enabling further moves towards an excuse-based plea.

The 'reasonable man' of section 3 has caused complication in the jury's role, particularly under the 'separation approach.' Under a clearer formulation, the 'separation approach' is contended to be superior to the conceptual confusion of *Smith*.

This is briefly discussed in chapter 4, 2.1.1-2.1.3.

Provocation, as a partial defence, sits in an awkward position between the right to life and the need to recognise the reduced moral culpability of gravely provoked killers. Its drafting and function inevitably reflect this tension, and therefore it will always entail a degree of complexity.

1.9. Particular attention needs to be paid to the risk of 'victim blame' resulting from any particular formulation.

There is a danger of a provocation plea unduly focusing on the victim, who cannot answer accusations made against them. This can be extremely distressing for their family and friends.

It is not possible to state where this has been seen in law. It would appear most related to the strength of element of justification, which focuses on the external provocation suffered by the defendant. However, under a subjectivised plea, the

jury's freedom to determine what constitutes provocation may result in their deeming the victim's conduct particularly blameworthy, according to grossly subjectivised standards.

This was discussed in chapter 4, at 2.4.

This problem is somewhat inevitable given the nature of provocation, and would best be addressed through careful judicial supervision.

1.10. The judge must have freedom to direct the plea

Prior to the Homicide Act 1957, section 3, the judge had considerable power over a plea of provocation. Subsequently, under the 'separation approach,' the judge was empowered to direct which characteristics of the defendant were to be taken into account in assessing how the reasonable man would have reacted.

The 'separation approach' was a reasonably effective arrangement, enabling judicial control of this controversial plea. The majority of the House of Lords in *Smith* clearly thought this overbearing, Lord Hoffmann holding that the judge's power to direct the jury should be greatly restricted.

The importance of the judge's role is discussed in chapter 4, 2.1.2.

The 1957 Homicide Act was intended in part to address the overbearing judicial power to determine when provocation applied. The pre-Act situation was undesirable, the absence of clearly defined parameters raising the potential for derogation of the jury's role.

1.11. Judges must not have too much power and be able to influence provocation according to their personal values

Prior to section 3 of the 1957 Homicide Act, judges had extensive power to exclude a plea of provocation. Section 3 of the Homicide Act was enacted to ensure that where provocation led to a loss of self-control, which in turn led to a killing, the plea would go before the jury.

Section 3 was effective in reducing judicial control. Under the 'separation approach,' the judge was empowered to direct the jury in evaluating the actions of the defendant according to the objective standard established in *Camplin*. The majority in *Smith* strongly felt this power to be exorbitant, and eliminated judicial restriction.

The effect of strictly limiting the judge's power was discussed in Chapter 4, 2.1.2.

While it is crucial that the judge is not overly powerful, in recent times the pendulum has swung too far the other way. The judge has a crucial role within provocation, which should be to assist the jury in ensuring that their objective

assessment is carried out correctly. *Smith*'s restriction of the judge's power to direct the plea, has been unclear and uncomfortable, betraying the majority's misgivings at enlarging the jury's freedom.

1.12. Jury must have sufficient freedom to carry out its normative evaluative role

Section 3 of the 1957 Homicide Act reduced judicial control over provocation, leaving the jury free to consider every case in which provocation had caused the defendant to be provoked to loss of self-control leading to killing. *Smith* further freed the jury's role, enabling a jury to "*determine for themselves what the standard in the particular case should be.*"²

Section 3 marked a significant change in the role of the jury, and it is contended that the subsequent 'separation approach' established a strong but reasonably balanced jury role. However, some felt strongly that the jury's role was overly restricted by the judge's power to exclude certain characteristics from attribution to the reasonable man when considering the standard of self-control. *Smith* established greater jury freedom, but at the cost of precise role-definition.

This has not been discussed in this thesis as the present trend is already towards increased jury freedom, rather than restriction. The advent of section 3 is not discussed in this thesis; the *Smith* decision is discussed in chapter 4.

The freedom the jury has, impacts on the moral dependability of provocation. *Smith*, in significantly freeing the jury, is contended to have gone too far, with damaging consequences.

1.13. The jury must not have so much freedom that it is able to define the standard it is to apply in its role, without judicial guidance.

Provocation involves complicated factors that must be balanced in reaching a verdict. An absence of clarity in the jury's role will lead to decisions influenced by the personal beliefs and prejudices of the jury.

The 'classic line' cases involved a strong judicial role. The jury's function was precisely stated, and guidance given from the judge.

The 'classic line' direction was not particularly straightforward due to the 'separation of characteristics' and the reasonable man. Some complication is inevitable, given that provocation is a complicated partial defence, but with better drafting, the standard is quite manageable.

This was discussed in Chapter 4, 2.1.2-2.1.3 and Chapter 8, 4.4.

² (2000) 3 WLR 654 (HL), 668.

The majority in *Smith* strongly felt that the 'classic line' was overly restrictive, preventing the jury from exercising its function under section 3, Homicide Act 1957.

2. Application of the established criteria to the different reform options for provocation.

2.1. Subjectivised plea of provocation

2.1.1. The objective standard must be sufficiently rigorous so that it can be trusted to produce morally reliable results.

This criterion strikes right at the heart of the subjectivised plea, exposing the absence of a strong objective standard, to regulate provocation. The Irish experience is an apt illustration of the difficulties inherent in the subjectivised plea.

2.1.2. If the objective standard is expressed through a 'reasonable man,' then he must be sufficiently defined so as to ensure clarity and precision in the jury's normative role.

Subjective formulations generally have either a 'community standard of blameworthiness' evaluative element, or a 'reasonable man' heavily qualified by reference to the characteristics and circumstances of the defendant. This leaves a very broad standard for the jury to apply.

2.1.3. The objective standard must not be so rigorous that it fails to recognise relevant characteristics of the defendant, and so operate harshly.

The 'community standard of blameworthiness' test may permit a greater chance of a harsh verdict: its latitude enabling a jury to return an unreasonably harsh verdict according to their personal prejudices.

2.1.4. Provocation must be equally representative of all those who, due to having received provocation, have a reduced moral culpability, regardless of the particular emotion they experienced.

The retention of the loss of self-control requirement continues to favour action in anger, typically of a more 'sudden' nature. This clearly is not part of a broader scheme of defences covering other emotions that have the effect of reducing the moral culpability of a killing, such as fear, or despair, and constitutes a significant limitation of this formulation.

2.1.5. Provocation's conceptual foundation must be clearly established and rigorously adhered to.

The 'community standard of blameworthiness' element is more excuse-based than that traditional provocation plea, enabling the defendant's internal state to be taken into account. Provocation, historically, considered the effects of external stressors upon an 'ordinary person.' The experiences of the subjectivised plea following *Smith*, and abroad, demonstrate the discomfort most states feel in moving to a subjectivised formulation.

2.1.6. Provocation must be kept clear of diminished responsibility, both in theory and in practice.

The subjective plea permits the jury to consider all characteristics of the defendant, where relevant, and this can include characteristics belonging also to diminished responsibility.

2.1.7. There must be an explicit requirement of a provocative action or incident.

The subjectivised formulation retains this element, but the provocation can be anything and does not have to be unlawful or even objectively grave.

2.1.8. Provocation must be simple to understand and apply

The post-*Smith* experience demonstrates that the subjectivised standard is difficult to clearly define and practically apply; this was also seen in the Irish experience. The New South Wales formulation is untested, and therefore difficult to comment on.

2.1.9. Particular attention needs to be paid to the risk of 'victim blame' resulting from any particular formulation.

The subjectivised plea focuses more on the defendant's experience, and less on the conduct of the victim. However, the subjectivity of the enquiry might result in the jury prejudicially deeming a certain action of the victim to have been gravely provocative; the extent to which this would be circumscribed through the 'community standards' element is unclear.

2.1.10. The judge must have sufficient freedom so as to be able to direct the plea.

Quite how the 'community standards of blameworthiness' element is to be applied is uncertain. If it frees the jury's role, then judicial power must correspondingly be restricted. Following *Smith*, the judge can give some guidance concerning which characteristics should be given more weight, but the jury is largely free to determine the standard to be applied.

2.1.11. The judge must not have so much power such that it impinges on the jury's role/function.

This is unlikely given that the move to a subjectivised approach has been in part a reaction against the perceived over-bearing judicial powers of the 'separation approach.' It will depend to a large extent on the precise drafting of the plea.

2.1.12. The jury must have sufficient freedom to carry out its normative evaluative role.

This would be the case.

2.1.13. The jury must not have so much freedom that it is able to define the standard it is to apply or exercise its role without guidance from the judge.

This is a critical concern; if a jury can define for itself the 'community standards of blameworthiness' standard, it might well result in some unpalatable results.

2.2. Provocation Reform Criteria applied to the plea of provocation with an emphasised justificatory standard.

2.2.1. The objective standard must be sufficiently rigorous that it can be trusted to produce morally reliable results.

A primary strength of this formulation is that it returns to a provocation plea with a strong objective element, clearly establishing the standard by which the actions of the defendant are to be judged through the 'separation approach.'

2.2.2. If the objective standard is expressed through a 'reasonable man,' then he must be sufficiently defined so as to ensure precision and clarity in the jury's normative role.

Under this proposed formulation the reasonable man is well defined and well established, giving the jury a precisely defined standard with which to work.

2.2.3. The objective standard must not be so rigorous that it fails to recognise relevant characteristics of the defendant, and so operate harshly.

In *Smith*, the primary criticism of the 'separation approach' was that it unduly restricted the jury's function, permitting only age and gender to be taken into account in assessing the standard of self-control.

However, the restriction is intentional, protecting the integrity of the objective standard, and provocation's moral reliability. The 'reasonable man' construction has resulted in a contrived hypothetical defendant with a seeming split personality, but where explained in a clearer manner, the standard is contended to be quite workable.³

2.2.4. Provocation must be equally representative of all those who, due to receiving provocation, have a reduced moral culpability, regardless of the particular emotion they experienced.

The retention of the 'loss of self-control' requirement effectively limits provocation to the emotion of anger, specifically 'sudden anger,' and tends to exclude emotions such as despair and fear due to its inherent temporal assumptions. This means that defendants who kill out of fear or despair are usually excluded.

2.2.5. Provocation's conceptual foundation must be clearly established and rigorously adhered to.

A re-emphasised justificatory standard alongside a strong objective standard is much closer to the historical conceptual foundation of provocation than is the present law.

2.2.6. Provocation must be kept clear of diminished responsibility, both in theory and in practice.

The return to a strong objective standard, the retention of a requirement of a provocative act, and the element of justification, all clearly denote a formulation quite distinct from that of diminished responsibility.

³ See Lord Millett's example direction in *Smith*, *Ibid.*, 715E.

2.2.7. There must be an explicit requirement of a provocative action or incident.

This plea reinstates an element of justification, requiring that the defendant have been provoked by illegal or unwarranted conduct deemed objectively grave. It is an essential element in this formulation.

2.2.8. Provocation must be simple to understand and apply

The primary difficulty with the 'classic line' approach was due to section 3's 'reasonable man,' and the resultant 'split personality' direction to the jury. However, where the 'reasonable man' is clearly and carefully explained as a legal mechanism facilitating both a subjective assessment of the gravity of the provocation, and an objective evaluative standard of the defendant's conduct, it is contended to be an acceptable standard.

2.2.9. Particular attention needs to be paid to the risk of 'victim blame' resulting from any particular formulation.

Formulations with a strong justificatory element inevitably focus on the conduct of the victim. There is a legitimate concern that this might result in 'victim-blame,' and would need careful judicial control.

2.2.10. The judge must have sufficient freedom to as to be able to direct the plea.

The post-*Smith* experience has demonstrated the importance of judicial empowerment over the provocation plea. Under this formulation, for the plea to reach the jury, the judge would need to consider that a reasonable jury might find provocation. Upon deciding so, the judge would direct the jury as to the standard they are to apply.

2.2.11. The judge must not have so much power such that it impinges on the jury's role/function.

The *Smith* majority alleged the 'separation approach' to fail under this criterion. Under this present formulation, the judicial power to exclude a plea could result in overbearing judicial control. However, with a clearly established objective standard, and a well-defined jury role, the judge will have considerably less worry in permitting plea to go before the jury.

2.2.12. The jury must have sufficient freedom to carry out its normative evaluative role.

Under this formulation, the jury's role would be more narrowly defined than it presently is, due to the objective standard defining how they are to assess the conduct of the defendant, and the judge's power to exclude the plea. However, in light of *Smith*, this is contended to be entirely appropriate.

2.2.13. The jury must not have so much freedom that it is able to define the standard it is to apply or exercise its role without guidance from the judge.

The jury's role would be limited by the objective standard, which would be explained by the judge. This should effectively circumscribe the jury's power.

2.3. The Law Commission's proposed formulation.

2.3.1. The objective standard must be sufficiently rigorous that it can be trusted to produce morally reliable results.

This proposed formulation reverts to the 'separation approach,' thus reasserting a strong objective standard.

2.3.2. If the objective standard is expressed through a 'reasonable man,' then he must be sufficiently defined so as to ensure certainty and precision in the jury's normative role.

Under this formulation, the objective enquiry asks whether a "*person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.*"⁴ While a significant improvement on the present standard of evaluation, some factors cause concern; particularly the use of the word 'might,' and the phrase 'same or similar.' The combination of these two expressions might result in a jury being given undue latitude in applying the objective standard.

2.3.3. The objective standard must not be so rigorous that it fails to recognise relevant characteristics of the defendant, and so operate harshly.

The objective standard is a strong one, the 'separation approach' enabling some reference to the defendant's character, while maintaining a separate standard of evaluation. The *Smith* majority's assertion of this to be overly harsh in application is not shared.

⁴ Op. Cit., 2, 3.109.

2.3.4. Provocation must be equally representative of all those who, due to receiving provocation, have a reduced moral culpability, regardless of the particular emotion they experienced.

The Law Commission's proposed formulation represents a strong attempt at broadening the scope of provocation, while retaining much of the framework of the 'classic line' formulation. In accepting 'fear of serious violence' towards the defendant or another as grounds for provocation, the Law Commission seeks to, in a single partial defence, combine provocation with excessive force in self-defence. While this improved representation of defendants is welcomed, the failure to cover emotions such as despair, grief, or compassion, is not adequately justified.

2.3.5. Provocation's conceptual foundation must be clearly established and rigorously adhered to.

The proposed plea is grounded in anger and fear, which the Law Commission contends have significant physiological similarities rendering them suitable as a two-fold basis for a partial defence. The return to a basis in justification does bring provocation significantly closer to self-defence, but there remain serious concerns over the scope of this formulation. It is not clear why anger and fear are singled-out, over other emotions equally deserving of mitigation.

2.3.6. Provocation must be kept clear of diminished responsibility, both in theory and in practice.

This formulation clearly re-establishes the difference between provocation and diminished responsibility; provocation as a partial defence for 'ordinary persons in extraordinary circumstances,' and diminished responsibility as a partial defence looking to internal defects of the defendant reducing their culpability.

2.3.7. There must be an explicit requirement of a provocative action or incident.

The Law Commission formulation is based upon 'gross provocation' or 'fear of serious violence.' The third ground, which recognises a combination of both, raises concerns that a case involving mild provocation with some fear of violence, where the victim is unsympathetic, might result in a 'sympathy lottery' scenario, enabling juries to use the third heading to grant undeserving pleas legal standing.

2.3.8. Provocation must be simple to understand and apply

The return to a strong objective standard, alongside a re-emphasised basis in justification clearly re-establishes provocation's conceptual foundation. However, the inclusion of 'fear of serious violence' is confusing in its exclusion of other emotions, especially where combined with 'gross provocation' under the third basis of the plea.

2.3.9. Particular attention needs to be paid to the risk of 'victim blame' resulting from any particular formulation.

The justificatory nature of the 'gross provocation' ground for the plea inherently carries a risk of the victim's character being denigrated. The difficult balance between rightful blame of the victim, and exaggerated assassination of their character is best left to judicial management.

2.3.10. The judge must have sufficient freedom so as to be able to direct the plea.

The proposed objective standard asks whether a "*person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.*" It is assumed that the judge would have an active role in explaining its operation to the jury. The Law Commission's formulation also gives judicial power to exclude the plea: "*A judge should not be required to leave the defence of provocation to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.*"⁵

2.3.11. The judge must not have too much power such that it impinges on the jury's role/function.

The jury's role is well defined and significantly limited by the objective standard. While there is a danger that the judge's power to exclude a plea (where he contends that no reasonable jury would find provocation) could result in overbearing judicial control, with a clearly defined objective standard, judges should feel confident in letting pleas go before juries.

2.3.12. The jury must have sufficient freedom to carry out its normative evaluative role.

This proposal restricts the jury's role. The judge can only permit a plea to go before the jury if satisfied that a reasonable jury might find provocation, and then the jury's normative role is limited to assessing the

⁵ Ibid., 3.141.

defendant's actions by reference to a 'person of ordinary tolerance and self-restraint.' However, given the recent experience of subjectivisation of provocation this precise limiting of the jury's role is welcomed.

2.3.13. The jury must not have so much freedom that it is able to define the standard it is to apply/exercise its role without guidance from the judge.

There is a concern that the expression "*a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way*" leaves too great a scope for the jury. By putting 'might' and 'similar' together, a jury could come up with a significantly watered down response from the 'ordinary person,' and so significantly diminish the impact of the objective standard.

2.4. Extreme Mental or Emotional Disturbance

2.4.1. The objective standard must be sufficiently rigorous so that it can be trusted to produce morally reliable results.

Section 210.3(1)(b) of the MPC is a highly subjective plea, which doesn't assess the defendant's actions, but rather the explanation for their actions "*from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.*"

Mackay and Mitchell's proposal is significantly altered, asking whether the defendant was:

*"(a) Under the influence of extreme emotional disturbance and/or
(b) Suffering from unsoundness of mind
either or both of which affected his criminal behaviour to such a material degree that the offence ought to be reduced to one of manslaughter."*

However, the standard to be applied remains vague: "*To such a material degree*" is very imprecise, and does little to instil confidence in the moral reliability of the plea.

2.4.2. If the objective standard is expressed through a 'reasonable man,' then he must be sufficiently defined so as to ensure precision and clarity in the jury's normative role.

There is no 'reasonable man' under this formulation (although some of the US states, when seeking to introduce the EMED plea, have introduced a 'reasonable man' standard).⁶

⁶ Maine and Ohio.

2.4.3. The objective standard must not be so rigorous that it fails to recognise relevant characteristics of the defendant, and so operate harshly.

The objective enquiry is quite weak, although this lack of precision raises the possibility of a harsh verdict according to jury prejudices.

2.4.4. Provocation must be equally representative of all those who, due to having received provocation, have a reduced moral culpability, regardless of the particular emotion they experienced.

The major strength of EMED is that it is emotion-neutral. Rather than looking for some partial merit in the emotion experienced by the defendant, it looks at the intensity of their experience and whether this affected the defendant's criminal behaviour enough to warrant a reduction in class of offence.

2.4.5. Provocation's conceptual foundation must be clearly established and rigorously adhered to.

The conceptual ground for EMED or EED is clearly in excuse. The workability of this is unclear, and evidence from the US states that have considered or sought to enact section 210.3 (1)(b) is that its basis in excuse is difficult to accept; in the vast majority of cases its subjectivity has been tempered, in some cases to the extent of introducing an objective standard.⁷ There clearly is considerable unease about the subjectivity of this plea, and the resultant plea is somewhat confused.

2.4.6. Provocation must be kept clear of diminished responsibility, both in theory and in practice.

Mackay and Mitchell consider a single united plea of EED to be the conceptually logical outcome of the recent developments in provocation law. However, there is a clear conceptual difference between provocation, which considers the external effects of circumstances on the defendant who is broadly ordinary, and diminished responsibility, in which the criminal liability of the defendant may be reduced due to internal conditions. Mackay and Mitchell assert both to have the same common root in disturbance of reasoning; this is strongly contended to be incorrect. (See Chapter 8, 4.2 and 4.3 for the discussion).

⁷ For example Oregon.

2.4.7. There must be an explicit requirement of a provocative action or incident.

There is no such requirement for EMED. The focus is entirely on the defendant's experience of emotion, rather than on external provocation.

2.4.8. Provocation must be simple to understand and apply

The EMED formulation is fraught with difficulties. The standard is so significantly subjectivised that it is in very real danger of being applied with unacceptable latitude by the jury. The case of *State v Raguseo*,⁸ (see chapter 8 at 4.4) is perhaps indicative of the confusion and discomfort inherent in this plea.

2.4.9. Particular attention needs to be paid to the risk of 'victim blame' resulting from any particular formulation.

There is no danger of that here - the moral blameworthiness of the defendant has no discernible value concerning this formulation. The focus is entirely on the intensity of the emotion experience by the defendant.

2.4.10. The judge must have sufficient freedom so as to be able to direct the plea.

A significant feature of this formulation is that the judge has little power and must permit the jury to consider everything in assessing the plea. The judge does have a role where called upon by the jury to explain its function, but otherwise has no power over the scope of the plea.

2.4.11. The judge must not have too much power such that it impinges on the jury's role or function.

There seems little risk of that under this formulation.

2.4.12. The jury must have sufficient freedom to carry out its normative evaluative role.

The jury has huge freedom here, and there is no danger of it being deprived of this, unless it is reduced through judicial interpretation, as happened in the US.⁹

⁸ 622 A.2d 519 Conn. 1993.

⁹ For example Ohio.

2.4.13. The jury must not have so much freedom that it is able to define the standard it is to apply or exercise its role without guidance from the judge.

This is a grave concern. Under the MPC formulation, the jury has very wide-ranging power to determine the outcome of the plea, with reference only to the reasonableness of the defendant's explanation or excuse. Even under Mackay and Mitchell's reformulation, the latitude afforded to the jury remains considerable.

Chapter 11: Conclusion to Provocation Reform

The adoption of criteria-based approach has enabled a clearer comparison of the different provocation reform options. The first part of this chapter draws provisional conclusions from this concerning reform of provocation.

However, the impact of the law of murder upon provocation is of the greatest significance. Accordingly The second part of this chapter takes a final view of provocation reform in the light of the murder law reforms advised in chapters 1 and 2: in particular, the now viable option to abolish provocation.

3. Conclusions from the Application of Provocation Criteria

3.1. Problem of the excusatory pleas

Those pleas of a more excuse-based nature struggled against the criteria established and applied above. The subjectivised plea is unreliable, and its retention of the widely condemned 'loss of self-control' requirement is now unjustifiable. For this reason, the subjectivised plea is considered the weakest of the reform options available.

The plea of EMED (or EED) also struggles because of the absence of an objective standard. Nourse highlights the dangers of such emotion-centred mitigation:

*"The problem comes when we focus on cases in which the emotion is based on less compelling reasons - when women kill their departing husbands or men kill their complaining wives. Under conventional liberal theory, if extreme emotion is shown, these cases should be handled no differently from cases where victims kill the rapists and stalkers and batterers. The quantity or intensity of the emotion provides the excuse, not the reason for the emotion."*¹

This encapsulates the inadequacy of EMED; the potential for unacceptable results precludes its adoption.

3.2. The justificatory formulations: superior, but still problematic.

The formulations based in justification are eminently more feasible; a requirement that the provocative element be illegal or unwarranted would go some way to excluding unworthy pleas.

Regarding the formulation discussed in Chapter 6, the retention of the 'loss of self-control' model is highly problematic. The Law Commission stated that it *"was a judicially invented concept, lacking sharpness or a clear foundation in*

¹ Nourse "Passion's Progress: Modern Law Reform and the Provocation Defense" (1997) 106 Yale LJ 1331, 1389-92.

psychology. It was a valiant but flawed attempt to encapsulate a key limitation to the defence - that it should not be available to those who kill in considered revenge."² The loss of 'self-control' requirement served a purpose, but is now antiquated and must be abolished.

The Law Commission's proposed formulation is a stronger candidate for replacing the current partial defence. The proposed objective standard, returning to the 'separation of characteristics' approach, is welcome. Their formulation: "*that a person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way,*"³ is as clear as any evaluative standard could be in what remains a complicated partial defence.

The primary concern regarding this proposal is its breadth. The third ground, combining gross provocation and fear of serious violence, is potentially extremely broad. It is feared that with the emphasis on the wrongdoing of the victim, a jury might use this latitude to return a decision based on a dislike of the victim, rather than a consideration of the defendant's culpability. While this is tempered by the judicial power to exclude a plea where the judge contends that a reasonable jury could not find provocation, the third heading remains open to overbearing influence according to personal values. Furthermore, the exclusion of other emotions is not clearly explained or justified by the law commission.

3.3. Suggested formulation

A suggested formulation is offered, prior to a discussion of its strengths and weaknesses.

3.3.1. Justificatory element

This proposed plea is based in wrongful action by the victim. The jury would consider whether the defendant was provoked by "*words and/or actions*" to a "*justifiable sense of being seriously wronged.*"⁴ The gravity of the provocation would be assessed "*from the point of view of an ordinary person in the circumstances of the defendant, taking into account those characteristics of the defendant where relevant.*" Any of the defendant's beliefs which are contrary to right and desirable societal values would be excluded from the jury's consideration by the judge.

The loss of self-control requirement is abolished.

3.3.2. Standard of evaluation

² Final Report (2004) No. 173, 3.26, 3.28, 3.30.

³ Ibid., 3.67.

⁴ Ibid., 3.68.

The defendant's actions would be considered against an 'ordinary person' standard. The Law Commission's proposed standard enquires whether a "*person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or a similar way.*"⁵ The expression 'or similar' would be removed in favour of slightly narrowing the breadth of the enquiry. This is an important change: a standard containing both 'might' and 'or similar' indicates of a lack of evaluative rigour.⁶ Requiring the jury to determine that a "*person of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same way*" is contended to be a better approach; one which establishes an independent objective standard, clear and workable, for the jury to apply.

3.3.3. Judicial powers

The judge would be given control of the plea as follows: "*The judge must consider that a reasonable jury might make a finding of provocation, before they can permit the plea of provocation to go before the jury.*" This is deemed necessary in light of the complex and controversial nature of provocation.

The abolition of the loss of self-control standard would necessitate a specific provision stating that "*where the judge considers that the defendant acted not in response to grave provocation, but out of revenge, the plea is to be excluded.*"

3.3.4. Direction

It is suggested that the following would make a suitable opening guidance from the judge in setting the context of a plea of provocation.

"We each have a duty as citizens to abide by the law. The taking of life is the gravest offence possible against another human being, and breaches the most fundamental of rights - the right to life. For this reason, it is only in exceptional circumstances that the law considers such a person to have been provoked so gravely that they deserve to be convicted of manslaughter instead of murder."

3.3.5. Discussion of this formulation

- Narrow scope

This formulation doesn't address the breadth of emotions beyond anger which are capable of reducing culpability, and for this reason may be accused of unjustifiably privileging anger. This is accepted, but justified

⁵ Ibid.

⁶ See Chapter 7, 4.2.

for the following reasons: Firstly, where a partial defence encompasses a broad range of emotions, it can lead to a 'lowest common denominator' standard of evaluation, leaving too great a scope for decisions to be driven by particular jury sympathies. Secondly, this thesis is limited to a consideration of provocation, and as such the other partial defences are beyond its scope. For example, a partial defence based upon self-defence is contended to be a strong plea, and one which would enable a better reflection and legal representation of the circumstances facing many battered women. Furthermore, this would relieve some of the pressure which has come to bear upon provocation due to the absence of an alternative plea better reflecting the plight of battered women. Unfortunately a fuller discussion of this plea was not possible within the scale and terms of reference of this work.

- Restriction of the role of the jury

The role of the jury is clearly circumscribed, and may be claimed to be unduly restrictive. However this is strongly contended to be appropriate given the recent history of provocation. Such is the controversial nature of the plea, and its impact upon the value of murder, that it cannot be rendered morally unreliable for the sake of greater jury freedom; a strong objective standard, precisely establishing the jury's evaluative role, is needed. The judicial power to exclude a plea might be a cause for concern, especially with the pre-Act case law in mind; however, under this formulation the objective standard and the jury's role are sufficiently clearly established that a judge should have few qualms in permitting a plea to go before a jury.

- Return to the 'separation approach'

The return to a plea based in the 'separation approach' is contended to be workable where clearly formulated. Under the 'classic line' the difficulty of this approach was due to the 'reasonable man' of section 3, and his seeming 'split-personality' with which the jury had to contend. However, as reformulated, the standard is contended to be much clearer, and more workable.

3.4. Conclusion

This plea is contended to be the strongest reform option of those considered. Reinstating a strong objective standard, with a return to the basis in justification, is the means to reinstating provocation's moral legitimacy, while the limited scope of the formulation is deemed necessary in establishing a moral reliability to the provocation plea.

Certain qualifications must be made to the endorsement of this formulation. As a single partial defence it will never be able to reflect the different permutations of culpability across all the circumstances in which people are provoked to kill. The under-representation of the plight of those who are driven to kill by

emotions other than anger, needs to be specifically addressed through the reform, or through creation of specific legal mechanisms; seeking to broaden provocation and in so doing to address the breadth of conduct deserving of mitigation risks, repeating the “*superficially liberal ruling*”⁷ of *Smith*. Provocation must be reformed, and reformed with conceptual integrity – and the broader considerations of murder law handled within their own terms.

4. Reform of Provocation in the light of the discussion concerning reform of the laws of murder

4.1. Introduction

A crucial effect of any reform to the law of murder is the opportunity it provides for reform of provocation. More specific effects are considered here.

In chapter 2, the abolition of mandatory life in favour of a limited sentencing discretion was established as the preferred reform option for murder. This would significantly impact provocation reform, eliminating provocation’s primary function of mitigating the mandatory life sentence, and would render the option to abolish provocation a viable one.

However, the move to a discretionary sentencing regime is radical, and is unlikely to happen in the near future. In this case, provocation retains its role, and the proposals in 1.3 need to be carried through.

With this in mind, the following discussion briefly considers the impact of the changes recommended in chapters 1 and 2 on the provocation reform options already considered, before examining their effect on the option to abolish provocation.

4.2. Effects of murder law changes on the proposed Provocation reforms

4.2.1. Reform of gbh-intent

Any narrowing of gbh-intent will reduce the number of gbh-intent murder defendants, and correspondingly the number improperly pleading provocation as a defence: this should make provocation clearer and more reliable in general operation, under the proposed reform, and reinforces its superiority to more subjective alternatives.

4.2.2. Reform of secondary intent

⁷ “Compassion without Respect? Nine fallacies in *R v Smith*” (2001) Crim. LR 623, 625.

The possible changes in secondary intent are unlikely to impact any of the provocation reform options

4.2.3. Broadening of murder law

Broadening of the ambit of murder to encompass “*wicked recklessness*” or “*extreme indifference to life*” are both likely to generate increased numbers of improper pleas of provocation: the strict nature of the proposed provocation formulation is advantageous in circumstances where juries may find the range of considerations greatly increased.

4.3. Arguments for the Abolition of Provocation

4.3.1. Provocation favours action in anger

The scope of provocation exposes an absence of coherent development of the criminal defences. Provocation, as presently defined, mitigates action in anger, more specifically ‘sudden anger;’ this is difficult to understand when defendants just as deserving of mitigation are convicted of murder because they reacted out of fear or despair instead. Likewise coercion, in most common law jurisdictions, is no answer to murder; “*yet a defendant who kills in the face of a threat to his or her own or a loved one’s life seems no less deserving of a manslaughter verdict than the provoked killer.*”⁸ Even the Law Commission’s proposed formulation only broadens provocation to include fear of serious violence, failing to represent other equally mitigating emotions.

4.3.2. Provoked killings are intentional

A provoked killer formulates the intention to kill or cause gbh, and acts with this intent; provocation is not a denial of *mens rea*. This is of huge importance. As the Model Criminal Code Officers Committee stated: “[P]eople who lose self-control are not perceived as being in the same category as people who act automatically or without intention. The person who acts in circumstances of extreme passion does act with conscious volition [and] such people do intend their actions and results thereof.”⁹ The New Zealand LRC extends this argument: “*The notion of an intentional killing being reduced to manslaughter, which most lay people think of as non-intentional killing, confuses people, in particular those close to the victim.*”¹⁰

⁸ ILRC ‘Consultation Paper on Homicide: The Plea of Provocation’ (LRC CP27-2003) (October 2003), 6.32.

⁹ Australian Model Criminal Code Officers Committee ‘Discussion Paper on Fatal Offences Against the Person’ (1998), 87. Hereafter ‘MCCOC.’

¹⁰ NZ LRC ‘Some Criminal Defences with Particular Reference to Battered Defendants’ Report 73 (2001) Wellington, 110.

If intentional killings evading a murder conviction are not reliably accompanied by reduced moral culpability, the integrity of murder is compromised.

4.3.3. Inconsistency with other offences where provocation goes toward sentencing

Some have argued that provocation should only be a matter for consideration at the sentencing stage.¹¹ Under the present system this is not possible, but under a discretionary sentencing regime it would become a distinct possibility. Provocation has been criticised as a “*blunt and unwieldy*”¹² instrument, a crude mechanism designed to accommodate the indeterminate sentence; and were mandatory life to be abolished, this “*elevated status*,”¹³ would be far harder to defend.

4.3.4. Overly complicated

The New Zealand LRC, in its 2001 review of criminal defences, cited the argument that provocation is overly complicated: “*Because of the difficulties judges and juries have with the defence, there is a real concern that it is being applied unevenly from trial to trial. There must be cases where the jury simply decides the matter according to the level of sympathy felt for the defendant.*”¹⁴ This concern is shared, although there are no figures on how widespread this problem may be.

4.3.5. Gender biased

The MCCOC argued that provocation is a gender-biased plea which fails to represent the normal pattern of aggression in women; asserting this to be so deeply established that the only suitable solution is outright abolition.¹⁵

This was challenged by the Irish LRC: “*although there is some evidence [of this]...studies in Victoria and New South Wales...[have] reached the opposite conclusion.*”¹⁶ However, Horder, reviewing statistics similarly suggestive of provocation favouring women, concludes that the proportion of these who would have suffered significant domestic violence is such that in reality provocation is biased against women.

¹¹ Ibid.

¹² Wells, “The Death penalty for Provocation?” (1978) Crim. LR 668, 671.

¹³ Op. Cit., 2, 89.

¹⁴ Op. Cit., 10, 110.

¹⁵ Op. Cit., 2, 87.

¹⁶ Op. Cit., 8, 6.37.

The New Zealand LRC concluded its report on ‘Some Criminal Defences with Particular Reference to Battered Defendants,’ stating that “*Provocation is gender biased: the difficulties of the defence are heightened for the defendant who has offended in the context of a battering relationship.*”¹⁷

Accurate statistics are difficult to obtain due to the tendency not to distinguish between different types of manslaughter conviction, but those available suggest that provocation disproportionately favours men.¹⁸

4.3.6. Artificial

Wells argues strongly that provocation is an artificial defence, failing to accurately represent the circumstances of the defendant; “*The result is a defence that constrains and constructs homicides into distortions of people’s lives, adversely affecting victims’ families, defendants, and more generally lending legitimacy to superficial examples of violence.*”¹⁹ The absence of other partial defences (such as ‘excessive force in self-defence’) has led to a favouring of a particular profile of the provoked defendant deserving of mitigation, failing to represent the reality of many defendants facing provocation.

4.3.7. Those who lose self-control and kill may re-offend

The mandatory life sentence is often justified as necessary in protecting the public from dangerous offenders, and yet provocation can operate in contradiction of this aim: those who kill in a state of sudden loss of self-control in response to provocation, are much more likely to re-offend than battered women responding to years of sustained abuse by killing their abuser (yet these often will be excluded from provocation for want of being in a state of ‘loss of self-control’). In this, provocation may legitimately be accused of enabling dangerous offenders to receive determinate sentences, and be released without any assessment of their danger to the public.

4.4. Arguments for the Retention of Provocation

4.4.1. Provoked killings are morally less culpable than unprovoked ones, and this should be addressed at trial stage

¹⁷ Op. Cit., 10, 108.

¹⁸ See Edwards “Battered Women who Kill” (1990) 140 New LJ 1380.

¹⁹ “Provocation: the Case for Abolition”, Ashworth and Mitchell Ed.s ‘Rethinking English Homicide Law’ (2000), 86.

This argument states that, according to the principle of ‘fair labelling,’ provoked killers should not be convicted of murder.²⁰ Ashworth states that “*there are significant moral distinctions between murder, killing upon provocation, and killing while suffering from diminished responsibility, and we should think hard before abandoning all hope of designing a law to capture those distinctions.*”²¹ Under an indeterminate sentencing regime, this is a potent argument; but under a discretionary regime, the ‘significant moral distinctions’ can be better reflected through specific sentencing.

4.4.2. Gender-bias overstated

The Irish LRC stated that the “*argument that the defence is irremediably discriminatory in its effects seems overstated.*”²² The absence of broad, in-depth research renders it difficult to accurately establish the scale of this problem. There is a clear favouring of male reactions in anger, but its extent remains unclear.

There are significant issues concerning its application, and it is a legitimate criticism that provocation, in mitigating actions in anger which are by nature more masculine, sends out a wrong message. This is amplified in the absence of other partial defences more representative of the dilemma facing battered women.

4.4.3. Problems will resurface elsewhere if provocation is simply abolished

In 2003, the Irish LRC stated; “*following abolition, the concept of intention could become the new battleground for the provoked killer seeking a manslaughter verdict.*” It argued that the problems associated with this would “*make the current difficulties associated with the plea of provocation pale into insignificance.*”²³ The Law Commission of England and Wales recognised a similar risk that “*a jury, whose sympathy for the defendant is evoked by the circumstances of the killing, would be reluctant to convict, despite very strong evidence that the defendant killed with the mens rea for murder.*”²⁴

This is an important concern, but it is contended that where the sentencing regime for murder permits a more accurate reflection of the culpability of defendants, juries would have fewer problems in convicting a defendant of murder.

²⁰ Ibid.; Ashworth ‘Principles of Criminal Law’ (1999), 284; CLRC ‘Offences Against the Person (1980) Cmnd 7844’ 14th Report, 76.

²¹ “Commentary on *Weller*” (2003) Crim. LR 724, 726.

²² Op. Cit. 8, 6.40.

²³ Ibid.

²⁴ ‘Partial Defences to Murder’ (2003) (LCCP173), 12.22(3)

4.5. Conclusion

A majority of review bodies favour the retention of provocation where there is a discretionary sentencing regime. In England and Wales, both the CLRC and the Select Committee of the House of Lords recommended that the partial defence should be retained regardless of whether the sentence for murder is discretionary or not.²⁵ Likewise, the four Australian states that have introduced a sentencing discretion for murder have retained their partial defences,²⁶ and the Irish LRC concluded its report on provocation in favour of its retention.²⁷ The Law Commission of England and Wales, stated that it favoured “*the reform rather than the abolition of the defence,*” reasoning that “*most civilised systems of law have gradations of homicide which allow for the existence of extenuating circumstances.*”²⁸

Despite the force of these recommendations, this author strongly feels that provocation should be abolished, contingent upon a move to a limited discretionary sentencing power for murder.

The fundamental reason is that a provoked killer remains an intentional killer: they have intentionally transgressed the most fundamental of rights, the right to life. In some circumstances the offender will have suffered extreme provocation, but the defence’s inability to adequately reflect these cases or circumstances, renders it unjust.

The Law Commission’s proposed formulation covers anger and fear of serious violence, but fails to satisfactorily justify the exclusion of other emotions, and raises concerns over the effect of the breadth of the third ground. Even the proposed formulation of 1.3 has significant drawbacks, prioritising anger over other emotions, failing to address the narrowness of provocation in the absence of a partial defence to mitigate the harshness of self-defence. Each proposed formulation has significant limitations, struggling against the need to represent the breadth of circumstances in which defendants are provoked to kill, while ensuring moral reliability.

The arguments in favour of abolition are very strong. Wells stated:
*“A substantive defence is a somewhat blunt and unwieldy instrument with which to deal with the inevitably wide spectrum of murder containing an element of provocation. Some will be clear cut, others on the borderline. If the question were left to be taken into account in sentencing each case could be dealt with individually, reflecting this range more accurately.”*²⁹

²⁵ Op. Cit., 13, CLRC, 76; House of Lords Select Committee, Session 1988-89 (HL Paper 78-1), 142.

²⁶ No mandatory sentence for murder exists in Tasmania (Criminal Code (Tas) s 158); NSW (Crimes Act 1990 (NSW) Ss19A(3), 442); Victoria (Crimes Act 1958 (Vic) s3); all the state jurisdictions have a provocation defence.

²⁷ Op. Cit., 8, 6.41.

²⁸ Op. Cit., 2, 344.

²⁹ Op. Cit., 11, 671.

The New Zealand LRC echoed this argument; "*We recommend abolition of the partial defence of provocation. Matters of provocation can be taken into account in the exercise of a sentencing discretion for murder.*" It went on to state that "*Provocation can be considered on sentencing in a broad, non-technical way that avoids the difficulties posed by the technicalities of the legal defence.*"³⁰

It is difficult to endorse retention of provocation in any form when there remain significant questions over its very basis in law. Sullivan stated, "*there is clearly something problematic about condoning, even partially, violence used not in self-defence or under duress but perpetrated in anger.*"³¹ The Law Commission echoed this: "*many would challenge the idea that in today's society the provocative behaviour of a victim should ever be regarded as partial justification for a defendant responding by killing with the intent required for murder.*"³²

New Zealand LRC questioned the retention of a partial defence rooted in archaic values; "*The defence arose at a time when society supported an angry retaliation for slights against a man's "honour." Despite later developments, this historical genesis can still be seen in the modern defence.*"³³

Provocation is an important factor affecting the moral culpability of the defendant, but it is not reliably reflected through a substantive legal mechanism. A discretionary sentencing regime, by contrast, would enable a very specific approach to sentencing.

Last words

This author strongly feels that if the sentencing regime for murder is reformed, and a limited discretionary sentencing power established in a timely fashion, then provocation should be abolished, and the matter of provocation left as an element which goes to sentencing. If, however, this does not happen, the formulation favoured in 1.3 should be introduced. It would be unforgivable if the lessons and discussion of the last fifty years failed to produce a workable resolution to murder and provocation.

³⁰ Op. Cit., 10, 120. New Zealand stated that in response to its consultation paper, "*The submissions were marginally in favour of abolition if the mandatory life sentence for murder is abolished.*" (110).

³¹ Sullivan, "Anger and Excuse: Reassessing Provocation" (1995) OJLS 421, 426.

³² Op. Cit., 24, 12.13.

³³ Op. Cit., 19, 117.

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