What future for voluntary manslaughter?

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J. Crim. L. 253 *Abstract* This article examines the Law Commission's Consultation Paper, *Partial Defences to Murder,* which was published in June 2003. There are fundamental problems with the defence of provocation. The author suggests that this partial defence should therefore be abolished and replaced by a new partial defence of self-preservation. This could provide a defence where the offender, or another person with whom he or she is closely associated, has been repeatedly subjected to serious violence or tormenting behaviour. This conduct must have caused the offender to be in a state of severe emotional disturbance at the time of the killing.

In June 2003 the Home Secretary asked the Law Commission to review the partial defences to murder of diminished responsibility and provocation, with particular regard to their impact in the context of domestic violence. The Commission was requested to look at whether the partial defences should continue to exist in their current form, or whether they should be subsumed within a single partial defence. It was also required to consider whether there should be a new partial defence to murder where a defendant used excessive force in self-defence.

The Law Commission was anxious to respond quickly to the Government's request so that it could influence the shape of planned legislation on domestic violence. It therefore published its Consultation Paper, *Partial Defences to Murder* [1] in November 2003. Because it wanted to respond in haste, it has not followed its usual practice of setting out provisional proposals, but instead identifies and considers various options for reform. In the absence of detailed provisional proposals, it is still possible to

discern the direction in which the Law Commission appears to be moving. It seems to favour leaving diminished responsibility in its current form, narrowing the defence of provocation and creating a new partial defence of self-preservation. In the light of the strong criticisms of the provocation defence, which the Law Commission itself highlights in its Consultation Paper, there are actually good grounds for going a step further than the Law Commission currently intends, and abolishing the defence of provocation altogether.

The problem with provocation

挑釁的問題

The Law Commission considers that the law on provocation is "profoundly unsatisfactory' and identifies a range of serious problems with the defence. These include:

• the defence lacks a moral foundation;

• the meaning of provocation;

**J. Crim. L. 254* • blame is placed on the victim

• revenge killings fall within the defence; and

• the objective test.

Each of these important criticisms will now be examined in turn.

No moral foundation

首先，死者促成了殺戮，因此將犯罪稱為謀殺是苛刻的。 其次，由於挑釁，被告無法行使他或她的全部精神能力。

The Law Commission identifies two justifications that have in the past been put forward for the defence of provocation.[2] First, the deceased contributed to the killing so it is harsh to call the offence murder. Secondly, by reason of the provocation the defendant was not in a position to exercise his or her full mental faculties.[3] Neither of these justifications are persuasive. As regards the first, the defence of provocation is now so widely defined that the provocation need not itself be blameworthy. As regards the second, a range of emotions can affect a person's ability to exercise his or her mental faculties, and there is no moral reason why anger should be singled out for preferential treatment by the criminal law. The Law Commission highlights this basic flaw in the defence:

The defence of provocation elevates the emotion of sudden anger above emotions of fear, despair, compassion and empathy … It is questionable whether, in moral terms, a killing is necessarily less culpable when performed in anger as a result of provocation. Indeed there is an argument that it is morally unsustainable for anger and sudden loss of self-control to found a defence.[4]

This is a fundamental criticism of the defence: it has no moral foundation. Anger does not provide any moral justification or excuse for a killing. Why should a bad-tempered man be entitled to a verdict of manslaughter where a good-tempered one would be convicted of murder?[5] Why should a person have a partial defence to murder when they kill out of anger, but someone who kills with a more creditable emotion, such as compassion, have no defence?

The meaning of provocation

Under the common law, judges used to rule as a matter of law on the question of what could and could not amount to provocation. The relevant conduct had to be inherently objectionable. Under s. 3 of the Homicide Act 1957, there is no limit as to what conduct is capable of provoking a defendant to kill. As a result, the label "provocation' has become a misnomer. The word "provoked' in s. 3 has come to be interpreted as simply meaning "caused'.[6] Today, even legitimate and **J. Crim. L. 255* innocent conduct, such as a baby crying[7] or denying that one has taken another's tools,[8] can be treated as the provocation. This removes a possible justification for allowing the defence.

Blaming the victim

The defence encourages a culture of blaming murder victims for their own deaths. Where the issue of provocation is raised, a trial risks focusing on the deceased's behaviour rather than the defendant's. Inevitably, the deceased is not able to answer these accusations and the whole process can be extremely distressing to the deceased's family and friends.

This is particularly insensitive and inappropriate in modern society, where the relevant provocation is the victim's purported sexual infidelity. The defence has traditionally been available when a husband has discovered his wife committing adultery. [9] But by the 20th century, with effective divorce laws, the courts regarded this rule as an anachronism and were not prepared to extend it to engaged or cohabiting couples. [10] Now, following the passing of the 1957 Act, any infidelity can amount to provocation. The Law Commission observes that an acquittal of murder on grounds of provocation can, and often does, appear to relatives of the victim to be a travesty of justice. It appears to imply a judgment by the court that the defendant's responsibility for killing the deceased was seriously lessened by the behaviour of the victim. Thus, in a case where a defendant has killed through sexual jealousy because the victim has formed an association with someone else, a verdict of manslaughter by reason of provocation often understandably appears to the victim's relatives to be an insult added to injury.

Sexual bias

The Law Commission considers that the defence has been applied in a sexist way, reflecting a male view of society. It appears to accept the suggestion that men are more likely than women to react to provocation, such as sexual infidelity, by violent anger, and therefore fall within the defence of provocation. Killings by women of their partners are more likely to be because of abuse. In the past the defence would not be available to abused women who killed their abusive partners because there is often a time gap between the last provocative act of the victim and the killing. The law adapted to take into account the time delay in the case of *R* v *Alhuwalia.* [11] This case referred to Walker's theory on battered woman syndrome [12] and the Law Commission's report contains an interesting and insightful discussion of this theory. Walker's research ***J. Crim. L. 256*** shows that women who kill their abusers may not react suddenly to provocation, and her theory was therefore useful in removing this obstacle to the defence for battered woman who kill. But reliance on Walker's theory by the courts does raise some concerns, as it reinforces negative stereotypes of women as helpless and irrational. The theory "fails to address the social, political and economic dimensions of abusive relationships'. [13]

Despite the legal developments in *Alhuwalia,* the defence of provocation may still not be available to abused women who kill, because they may not have reacted under the requisite loss of self-control. Instead, the killing may have been planned and deliberate. Walker's research could in fact be interpreted as showing that the defence of provocation is not suitable for abused women who kill. His research suggests that an abused woman may be calm rather than enraged during and after the killing of her abusive partner.

Revenge killings

Even though the loss of self-control must be sudden, following the case of *Alhuwalia,* it need not be immediate. [14] While the decision of *Alhuwalia* sought to address the sexist way that the law was being applied to abused women who kill, the Law Commission is concerned that the change in the law also allows the defence to be relied upon by defendants who have acted in revenge. It is particularly critical of the case of *R* v *Baillie* [15] where the defendant was incensed that the victim was supplying his three teenage sons with drugs. He had armed himself with a sawn-off shotgun and cut-throat razor, driven to the victim's home and shot him. The Court of Appeal ruled that the issue of provocation should have been left to the jury. The Law Commission comments:

If on facts such as those in *Baillie,* a jury accepted the defence of provocation, that would break the moral plank on which the defence of provocation has, at least since Victorian times, rested. Namely, that due to the loss of self-control, the defendant was not master of his or her own mind, and, in one way, lacked the full *mens rea* of the offence. [16]

But is there any significant moral distinction between acting due to a loss of temper and acting through revenge? The case of *Baillie* in fact illustrates that there may be more legitimate reasons for wanting revenge than for losing one's temper. The problem of revenge killings merely highlights the fact that there is no moral basis for having a defence of provocation at all.

The objective test

The objective part of the test for provocation requires that a reasonable person would also have lost his or her self-control and killed in reaction ***J. Crim. L. 257*** to the provocation. The reasonable person test seeks to impose a requirement that, even under provocation, the defendant's conduct must not have fallen below a minimum standard expected in a civilised society. But in today's society, a reasonable person never kills. Thus, if a strictly objective approach was applied, the defence would never be successful. Instead, the courts have watered down this objective standard, and will take into account certain of the defendant's characteristics when applying the reasonable person test. But the courts have had considerable difficulty determining to what extent the defendant's personal characteristics should be taken into account. Following the House of Lords' decision in *Smith (Morgan),* [17] the jury should be sovereign in determining which characteristics to take into account. It will only be in very exceptional cases that a judge should tell a jury to exclude a characteristic from its consideration. The effect of the decision is to lower significantly the threshold of self-control that the law is entitled to demand of all members of society. The Law Commission considers that the House of Lords went too far. It is of the view that leaving the decision to the essentially subjective judgment of individual jurors is wrong because it is likely to lead to idiosyncratic and inconsistent decisions. Russell Heaton's criticism of this area of law is cited with apparent approval:

The provocation excuse should be a concession to extraordinary external circumstances not to the extraordinary internal make-up of the accused. The moral foundation for the extenuation is the necessity for very serious provocation…. If the reaction is essentially due to the internal character of the accused, his or her excusatory claim, if any, should sound in diminished responsibility. That is the proper defence for the abnormal. "The defence of provocation is for those who are in a broad sense mentally normal' [18] but who snap under the weight of very grave provocation. [19]

The Law Commission concludes:

We consider that the academic criticisms made of the reasoning of the majority in *Smith (Morgan)* have considerable force. [20]

The real problem with this area of the law is the existence of fundamental contradictions in the defence itself: a reasonable person does not kill, and there is no moral reason why a person who has lost their temper should benefit from a defence. The courts are trying to achieve justice by taking into account the "right' characteristics of the defendant in applying the reasonable person test. But there are, in fact, no characteristics which can justify a partial defence based on a loss of temper. Contradict

Diminished responsibility

The Law Commission seems to accept that the defence of diminished responsibility has worked reasonably well in practice:

J. Crim. L. 258 Generally speaking, although section 2(1) can properly be criticised as conceptually flawed, it seems to have operated in practice broadly as intended, i.e. in producing convictions for manslaughter rather than murder in the case of those who kill while in a significantly abnormal (and not self-induced) mental state. The judicial approach to the subsection has been essentially pragmatic. It is interesting to note that the leading authority on the subsection remains the Court of Appeal's decision in *Byrne.* In contrast to provocation, the House of Lords has had occasion to visit the subsection on only one occasion in almost fifty years. [21]

Diminished responsibility is being used on occasion pragmatically, where the court feels sympathy for the defendant and the requirements of the defence of provocation are not satisfied. For example, in *Alhuwalia* [22] the defence was applied to an abused woman who killed her abusive partner. But such cases put a strain on the law of diminished responsibility because, strictly speaking, the requirements for this defence may not have been satisfied. The Law Commission observes:

There appears to be some inconsistency in the willingness of psychiatrists to testify on the diagnosis of the defendant's mental health. Some experts may be uncomfortable with classifying as an "abnormality of mind' what essentially may be ordinary reactions to a highly stressful situation such as an abusive and violent relationship. This element of arbitrariness is far from ideal. [23]

Labelling such women as mentally ill also plays up to negative stereotypes of vulnerable women:

This, in effect, pathologises a woman's actions and implies that had her mental faculties not been impaired she would have continued to be a "happy punch bag'. There is the further irony that the more robust the defendant is the less likely it is that she will succeed on a defence of diminished responsibility. [24]

Reliance on diminished responsibility in this context places the focus of the defence on the woman's state of mind, when it would have been more appropriate to emphasise the abuse she had suffered.

Professor Mitchell's research [25] may suggest that the current law is too harsh on mentally ill offenders, as his research has found that public opinion is against the criminal prosecution of those who kill when they are mentally ill. If this does accurately reflect public opinion, then the way forward would seem to be a reform of the defences of being unfit to plead and insanity, rather than the defence of diminished responsibility. This is because there is no reason why the law should be lenient to the mentally ill who have killed and not when they have committed more minor offences.

***J. Crim. L. 259** **Self-defence**

A submission of self-defence either succeeds and leads to an acquittal or is rejected. This all or nothing approach has been criticised over the years as too restrictive. The Law Commission, however, does not appear to accept this criticism. It considers that the apparently all or nothing approach is actually mitigated in two ways. First, the courts recognise that in defending oneself, one cannot be expected to weigh to a nicety the exact level of defensive action required. [26] Secondly, facts which fall short of self-defence may, nonetheless, form the basis for a conviction for manslaughter because, for example, they show a lack of *mens rea.* The Law Commission concludes:

The combination of these two ameliorating passages means that the absence of a partial defence of excessive force in self-defence is, in practice, less of a problem than it might initially appear to be. [27]

The Law Commission considers the availability of self-defence for battered women who kill their abuser. The defence is only available if the force used by the women is reasonable and necessary to protect them from an imminent attack. It is, therefore, not available to an abused woman who fears violence in the future and kills her abuser when, for example, he is asleep or has his back to her. Aileen McColgan has argued that the law discriminates against women in this context:

The relative scarcity of female killers has resulted in a paradigmatically male ideal model and this, together with the incompatibility of aggressive force with stereotypical femininity, means that the apparently gender-neutral concept of reasonableness is actually weighted against the female defendant. [28]

In addition, Susan Edwards has pointed to research which shows significant differences between the way men and women kill. Men who kill their female partners tend to do so by the use of bodily force whilst women who kill their male partners use knives in 83 per cent of cases. Where guns and knives are used a conviction for murder is more likely. [29]

Avenues for reform

The Law Commission identifies a range of possible avenues for reform. These include:

1. abolishing or redefining the defence of provocation;

2. reforming the defence of diminished responsibility; and

3. creating a new defence of self-preservation.

J. Crim. L. 260** ***Provocation: abolition or redefinition?

As regards the defence of provocation, the Law Commission is clear that reform is necessary:

We do not believe that the law of provocation should remain as it is. We have examined the problems of the present law in detail … They are deep and wide. [30]

It considers that judges alone cannot cure the defence's defects and that legislation is required. At this stage in its proceedings, the Commission seems inclined to redefine provocation to narrow its scope, rather than to abolish it altogether. In fact, the problems with the defence are so fundamental that a mere redefinition would still leave an unsatisfactory defence.

The Law Commission considers replacing the requirement of a sudden loss of temper, with a requirement of an "extreme emotional disturbance'. [31] However, it recognises that:

Acting under "extreme emotional disturbance' is a formulation which could be given a very wide interpretation. Many, if not most, people who kill are in a heightened emotional state about something. [32]

The Commission is anxious that provocation should not cover revenge killings, but those seeking revenge could describe themselves as acting under "extreme emotional disturbance'.

The defence would no longer be available where the provocation was self-induced and the earlier conduct of the defendant was morally evil (such as blackmail), or morally neutral (such as a baby crying).

As regards the objective part of the test for provocation, the Commission considers that some form of objective standard is required, otherwise killings such as road rage could fall within the defence. It concluded from its comparative law studies that in the countries which had moved closest to a subjective test--Ireland and South Africa--the results had led to "considerable disquiet amongst the judiciary'. It considers that three possible objective tests could be used.

• the approach of the majority in *Smith (Morgan)*; [33]

• the approach of the minority in *Smith (Morgan)*;

• the recommendations of the New South Wales Law Reform Commission. [34]

The test proposed by the New South Wales Law Reform Commission is whether, taking into account all the characteristics and circumstances of the accused, he or she should be excused for having lost their self-control and killed and have their liability reduced from murder to manslaughter. [35] Thus, the jury is required to form a value judgment as ***J. Crim. L. 261*** to whether defendants deserve to be convicted of murder or manslaughter, taking into account all of their characteristics and all the circumstances. It is quite similar to the majority approach in *Smith (Morgan)*.

At this stage in its deliberations, the Law Commission seems inclined simply to refine the defence of provocation, rather than abolish it. If the defence were to be abolished, it is of the view that the mandatory life sentence would also need to be abolished so that the issue of provocation could be taken into account when sentencing. [36] This is a disappointing conclusion. It is highly unlikely that any government in the near future is going to be prepared to abolish the mandatory sentence for murder. The Law Commission's reasoning is also not convincing. There are many offenders who are currently convicted of murder who have mitigation which is not relevant to provocation. This mitigation is taken into account in the decision as to when the offender will be released on licence.

In fact, the Law Commission should take this opportunity to encourage the government to make a brave move away from the antiquated law of provocation and develop a partial defence of self-preservation, which reflects the concerns of modern-day society. The current defence of provocation lacks a moral foundation. Its replacement with a new defence of self-preservation is the way forward. The Law Commission lists certain scenarios [37] which it feels would wrongly fall within murder if the defence of provocation was abolished altogether. However, an appropriately defined partial defence of self-preservation could cover some of these scenarios and the others deserve the label of murder.

Reform of diminished responsibility

The Law Commission recognises that the current defence of diminished responsibility is working quite well. It is therefore not inclined to abolish it, but considers whether its definition should be changed. It offers a range of alternative definitions including that provided by the Butler Report,[38] one put forward by the Criminal Law Revision Committee[39] and its own (presumably favoured) definition:

Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from an 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) and that abnormality of mind was a significant cause of his acts or omissions in doing or being a party to the killing.

In fact, when a defence has been working reasonably well, it seems to be tempting fate to start changing its definition. In particular, there would be no benefits in having a single merged defence that covered both provocation and diminished responsibility, beyond officially recognising that the current definitions of these defences have started to merge at their borders.[40] The Law Commission does not seem to favour this move, recognising that it risks "artificially pathologising the victim'.[41] It would, however, be desirable to change the burden of proof on the defence to an evidential burden, and the Law Commission supports this change.

法律委員會似乎不贊成此舉，認識到此舉有"人為地將受害者病理化"的風險

Self-preservation

Under the current law, if a woman in an abusive relationship kills her partner in order to protect herself from further violence, she may have no defence to murder--under provocation, diminished responsibility or self-defence. She will therefore be punished with life imprisonment where such a sentence may be disproportionate to her guilt. The Law Commission considers the creation of a new partial defence to murder of self-preservation which would be available to abused women who kill, though it would not be limited to such offenders.[42] It might, for example, be available to victims of racial abuse or bullying who lash out and kill their tormentors. The Commission would prefer to call this defence "the pre-emptive use of force in self-defence'.[43] Unfortunately, this label is neither succinct nor memorable. By contrast, the label self-preservation captures the desperate situation in which a battered woman, and other vulnerable people, may find themselves, providing the moral justification for this new partial defence. The Law Commission is concerned that the label "self-preservation' conjures up wider situations, in particular those associated with a defence of necessity, which it says "is not a defence to murder'. In fact, the public and private defences and duress are all specific forms of necessity and there are strong arguments that necessity itself can now be a defence to murder following the case of *Re A (Children).*[44]

The exact scope of any new defence is not made clear by the Law Commission and it does not at this stage proffer a possible definition.[45] It could be defined to provide a defence where the offender, or another person with whom he or she is closely associated, has been repeatedly subjected to serious violence or tormenting behaviour.[46] The defence could be available where force has been used not just to protect oneself, but also to protect another. For example, a son may kill his mother's violent partner to protect her from further violence.[47] The violence or torments would have had to be directed against a person and not against property.

This conduct must have caused the offender to be in a state of severe emotional disturbance (which could include emotions of fear as well as anger) at the time of the killing. The defendant must have had the honest belief that killing was the only way to prevent grave future violence or torment to him or herself or another.[48] That belief need not have been reasonable.[49] Nor should there be any requirement that the amount of force used was reasonable.

A possible definition of the new defence is:

A person will have a defence to murder so as to reduce their liability to manslaughter if he/she (or another person to whom he/she was closely associated) had

(a) before the killing, been subjected by the victim to repeated, serious violence or tormenting behaviour; and

(b) reacted in a state of severe emotional disturbance in the honest belief that this was the only way to protect him or herself (or the other person) from further serious violence or torments.

Conclusion

People who lose their temper and kill are morally at fault and a danger to society: they deserve the label and sentence of a "murderer'. At the moment, women who kill after years of abuse often fall outside the main defences available to defendants, yet they deserve some sympathy from the courts and a manslaughter verdict would frequently be more appropriate. A completely new defence of self-preservation is therefore required. This defence would shift the emphasis onto what should be the central issue of the defence: the terrible and dangerous abuse suffered by the victim. Undoubtedly, the woman's response to this abuse--killing--was wrong, and as a result she would only ever benefit from a partial defence.

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Footnotes

1 Law Com. Consultation Paper No. 173, 31 October 2003.
2 Law Com. Consultation Paper No. 173, para. 12.11.
3 See S. Yeo, *Partial Excuses to Murder* (Gaunt: 1991) 19-20.
4 Law Com. Consultation Paper No. 173, paras 4.163-4.164.
5 See Avory J, in *R* v *Lesbini* [1914] 3 KB 1116 at 1118.
6 Law Com. Consultation Paper No. 173, para. 4.8. The Judicial Studies Board specimen direction to the jury (April 2003) as to the "special meaning' of provocation in this defence is: "A person is provoked if he is caused suddenly and temporarily to lose his self-control by things that have been [said and/or done] by [X and/or others]'.
7 *R* v *Doughty* (1986) 83 Cr App R 319.
8 *R* v *Smith (Morgan)* [2001] 1 AC 146.
9 *R* v *Mawgridge* (1707) Kel J 119 at 137; 84 ER 1107 at 1115.
10 *R* v *Palmer* [1913] 2 KB 29 at 31, *R* v *Greening* [1913] 3 KB 846 at 849, *Holmes* v *DPP* [1946] AC 588 at 598, *per* Viscount Simon.
11 (1993) 96 Cr App Rep 728.
12 L. E. Walker, *The Battered Woman Syndrome,* 2nd edn (Springer: New York, 1999); *Terrifying Love: Why Battered Women Kill and How Society Responds* (Harper & Row: New York, 1989).
13 Law Com. Consultation Paper No. 173, para. 10.12.
14 *R* v *Ahluwalia* [1992] 4 All ER 889.
15 [1995] Crim LR 739.
16 Law Com. Consultation Paper No. 173, para. 4.28.
17 [2001] 1 AC 146.
18 A. Ashworth, "The Doctrine of Provocation' (1976) 35 CLJ 292 at 312.
19 R. Heaton, "Anything Goes' (2001) 10(2) *Nottingham Law Journal* 50 at 55-6.
20 Law Com. Consultation Paper No. 173, para. 4.150.
21 Ibid. at para. 7.91.
22 (1993) 96 Cr App Rep 728.
23 Law Com. Consultation Paper No. 173, para. 10.77.
24 Ibid. at para. 10.78.
25 B. Mitchell, "Further Evidence of the Relationship Between Legal and Public Opinion on the Law of Homicide' [2000] Crim LR 814 at 820.
26 *R* v *Palmer* [1971] AC 814 at 832.
27 Law Com. Consultation Paper No. 173, para. 9.9.

28 A. McColgan, "In Defence of Battered Women Who Kill' (1993) 13 *Oxford Journal of Legal Studies* 508 at 515.
29 S. Edwards, "Injustice that Puts a Low Price on a Woman's Life', *The Times* (2 September 2003) Law Supplement, at 5.
30 Law Com. Consultation Paper No. 173, para. 12.2.
31 Ibid. at para. 12.35.
32 Ibid.
33 [2001] 1 AC 146.
34 New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide: Report 83* (1997) para. 2.81.
35 Ibid. at para. 2.82.
36 Law Com. Consultation Paper No. 173, para. 12.23.
37 Ibid. at para. 12.25.
38 *Report of the Committee on Mentally Abnormal Offenders,* Cmnd 6244 (1975) para. 19.17.
39 Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person,* Cmnd 7844 (1980).
40 Law Com. Consultation Paper No. 173, para. 12.81.
41 Ibid. at para. 10.93.
42 The Criminal Law Revision Committee recommended the introduction into English law of a new partial defence to murder where excessive force was used in self-defence: Criminal Law Revision Committee, Fourteenth Report, *Offences Against the Person,* Cmnd 7844 (1980) para. 288.
43 Law Com. Consultation Paper No. 173, paras 9.25 and 10.95.
44 [2001] Fam 147. See C. Elliott and F. Quinn, *Criminal Law* (Pearson Education: Harlow, 2002) 303.
45 Law Com. Consultation Paper No. 173, paras 9.40-9.43.
46 Ibid. at para. 12.88.
47 Ibid. at para. 10.105.
48 Ibid. at para. 10.101.
49 Ibid. at para. 10.102.