"God is a righteous judge, strong and patient: and God is provoked every day". A Brief History of the Doctrine of Provocation in England.

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Introduction

The transformation in the doctrine of provocation which took place over the centuries — until recent times almost exclusively confined to England — was not merely reviewed, but was to some extent engineered by a succession of great writers — the likes of Coke, Hale, Foster and East. And of course foremost amongst the judicial utterances from which the extraordinary array of principles emerged are names such as *Maddy* and *Mawgridge*. Then *Welsh* saw the intrusion of the reasonable man[1] herald in the modern doctrine. Any progressive measures began to be stifled by unnecessarily restrictive dicta under the banner of this artificial concept. By the time of the great modern cases — *Mancini*, *Holmes* and *Bedder* — any generosity once part of the defence had effectively been obliterated. More recently, considerable legislative and judicial innovations have been introduced to counter this harshness, with *Camplin* as the far from satisfactory pinnacle. The aim of this article is to explore the history of the doctrine and thus present an analysis of its development up to and beyond *Camplin*. The calls for reform generated by the consistently unsatisfactory nature of that development have acquired an almost revolutionary timbre.

Origins

By the time Mosaical law composed its proscriptions for killings, subtle distinctions had emerged:

> He that smiteth a man, so that he die, shall be surely put to death.
> And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place whither he shall flee.

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1 I use the phrase "reasonable man" only because it is the expression employed for centuries. Where the historical analysis is not confused thereby, I will use the preferred term "person", so as not to exclude one-half of the population. See Donovan, D and Wildman, S, "Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation" (1981) 14 *Loyola of Los Angeles LR* 435 n1.

> But if a man come presumptuously upon his neighbour, to slay him with guile; thou shalt take him from mine altar, that he may die.[2]

There is a suggestion of a distinction between what we might term intentional and unintentional killing, a hint of the notions of premeditation and stealth. But even at that early stage, the principal concern was the fact of punishment — vengeance by the next-of-kin.[3] In time, cities of refuge were established as sanctuary for someone who had killed without stealth. The Babylonian Code of Hammurabi made provision, in certain instances, for payment as recompense to the relatives of the victim.[4]

The seeds sown by the dictates of these ancient laws and the consequent practices established, bore fruit in early English law. The old dooms[5] from the reigns of the Anglo-Saxon warrior kings made various references to "morth" which signified not merely killings but any secret crimes. "Morth" was later Latinised as "murdrum" under Edward the Confessor.

Because violent death was sickeningly commonplace in the lives of the warring brawling factions of Anglo-Saxon and Norman times,[6] there was recognised a need for discriminating between deliberate cold-blooded killings, which were capital offences, and unintentional slayings, for example in the heat of passion. By the reign of Henry II (1154-1189), the King, in his zeal to control factions threatening stability, effected sweeping reforms, ensuring that all felonies, including felonious homicides, became capital offences. From Henry II's reign onwards, the sentence for a killing in the heat of passion, was hanging.

For modern eyes endeavouring to appraise the position of the law in the thirteenth century, Henry de Bracton dominates the picture. Famed for his authorship[7] of the extraordinary work, *On the Laws and Customs of England*[8], Bracton transcended the contemporary practice by focusing his attention on the "intent" with which an act was done, the mental element.[9]

Statutory enactments effected subtle changes over the following 250 years. At the end of the fourteenth century, there evolved in Parliament a heightened dissension towards the perfunctory granting of royal pardons for serious crimes, driven by a perception of an increase in professional homicides. The statute[10] of 1390 exerted notable constraints on that royal power, forbidding it altogether for the most serious offences, and in particular murder, meaning

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2 Exodus XXI, 12-14.
3 Numbers XXXV, 19, 21 and Deuteronomy XIX, 12.
4 SS 24, 207 : moneys paid to relatives of victims of bandits, and accidental killings.
5 A form of "legislation" which was declaratory of social custom.
6 See Green, T A, "The Jury and the English Law of Homicide, 1200-1600" (1976) 74 *Michigan LR* 414 at 415-416.
7 Nowadays radically questioned. Bracton is believed to have carried out editorial work on the text some twenty years after it was penned.
8 *De legibus et consuetudinibus Anglie.*
9 "[W]e must consider with what mind ... or with what intent ... a thing is done ... [Y]our state of mind gives meaning to your act, and a crime is not committed unless the intent to injure intervene", id at 101b.
10 13 Rich II, st 2, c 1: "[T]hat no charter of pardon from henceforth shall be allowed before any justice for murder, or for the death of a man slain by await, assault, or malice prepensed, treason, or rape of a woman".

homicide with stealth.[11] A 1403 charge[12] to grand jurors distinguished murder ("malice prepense") from simple homicides, titled chance medley ("chaud melle" or hot medley). By the middle of the fifteenth century, murder came to be understood as a general description for all felonious homicides.

Another bane of prosecutors, and in all probability executioners, was an extraordinary rise in the numbers of offenders pleading clergy.[13] Although the privilege was originally intended solely for ordained clergy, a legal fiction developed, ensuring its availability to anyone feigning literacy by proving capable of reciting Psalm 51 verse 1. Statutory innovations[14] between 1488 and 1547 endeavouring to curb the excessive latitude permitted by the clergy plea, recreated the distinctions[15] amongst felonious homicides, singling out murder as the most dastardly. Unlawful killings without malice aforethought remained clergyable because social customs demanded a more sympathetic judgment upon the "innocent" (and probably drunk) participants of the all too common brawl.[16]

Enter the Writers

The second half of the sixteenth century heralded the emergence of the great treatises on the criminal law.

Pleas of the Crown[17] by Sir William Staunford in its exposé of the law of homicide, was strongly influenced by Bracton, and in some eyes, was simply an updated commentary thereon.[18] Murder and chance medley were compared, but the notorious expression "malice prepense" was left unexplained. Of considerable significance at the time of its publication was William Lam-

11 The phrase "malice prepense" employed in the statute was a term of art, amounting to premeditation or true planning. For fascinating discussions on the complexities of the legislation's purpose, see Kaye, J M, "Early History of Murder and Manslaughter" (Parts 1 and 2) (1967) 83 *LQR* 365 (and 569), at 391 ff, and Green, above n6 at 462 ff.

12 Referred to in Green, above n6 at 467 fn 200. In the same footnote is a reference from 1388 to chance medley, arguably the earliest reference in existence.

13 In response to the horrendous Thomas Becket affair which had substantially ruptured Church-State relations, the Church secured from the Crown a symbolic right to try and sentence its own clergy.

14 The effect of those important statutes was summarised in the Report of the New York Law Revision Commission for 1937, at 536-7: "The result was a division of culpable homicides into two groups: murder punishable by death and comprised of homicides committed by lying in wait, assault, or malice prepensed, and all other homicides, later termed manslaughter, punishable as to those who claim benefit of clergy by a slight burn of the hand and short imprisonment."

15 Sir Richard Eliott, King's serjeant (and later Justice of Common Pleas), when considering the statute of 1512, compared murder (lying in wait with malice aforethought), and manslaughter (with chance medley without malice aforethought). The 1510 edition of the anonymous *The Boke of Justyces of Peas*, had stressed perhaps for the first time, the element of sudden encounter and affray in manslaughter by chance medley.

16 The importance of a proper appreciation of the social mores of the times is intelligently argued in Green, T A, "Societal Concepts of Criminal Liability for Homicide in Medieval England" (1972) 47 *Speculum* 669 ff.

17 *Les Plees de Coron*, published in 1557.

18 For example, Sir James Fitzjames Stephen, *History of the Criminal Law of England* (Vol III) (1883) 46. But it was highly regarded in its day: Sir Michael Foster in his *Crown Law, Discourse II of Homicide* (1762) 303 stated that "Staunford [was] the clearest and best writer on the Crown Law before Hale".

bard's *Eirenarcha*.[19] In keeping with medieval thinking, Lambard concentrated on the victim rather than the killer. Manslaughter was defined as a non-premeditated though unlawful act, for example killing in a sudden quarrel.[20]

The dominance since the twelfth century of the so-called self-informing jury in dictating the receipt of evidence and thus effectively restricting judicial legal determination was eventually whittled away. By the sixteenth century, "[t]he age of nearly unlimited jury control was passing; the age of the law and of the bench was commencing."[21]

To counter an escalation in killings arising from quarrels on the accession to the throne of James I in 1603, the notorious *Statute of Stabbing*[22] was enacted. Obviously seeking to curtail the increasing incidence of convictions for clergyable chance medley, the cloak of murder and its sentence of death was drawn over a noticeably broader set of circumstances. But the courts emasculated[23] the attempted reform.

A work of unparalleled influence[24] upon the development of the criminal law was Sir Edward Coke's *Third Part of the Institutes of the Laws of England*, published in 1628. Suddenly, the focus of attention was on the killer, not the victim. Malice aforethought was neatly defined.[25] Coke reiterated the established perceptions of implied malice, for example "the poysoning of any man", and the situation where "one killeth another without any provocation of the part of him that is slain."[26] The need to imply malice betrayed the law's mistrust[27] in attempting to deduce malice.

Coke revealed more of his innovative skills when canvassing manslaughter: "There is no difference between murder and manslaughter; but that the one is upon malice forethought, and the other upon a sudden occasion: and therefore is called chance medley."[28] The concept of blood cooling and its relevance to heat of passion in manslaughter was raised perhaps for the first time. And chance medley was granted its very own definition:

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19 The celebrated handbook for Justices of the Peace, published in 1581. Lambard's discussion and definitions are helpfully set out in T G Watkin, "Hamlet and the Law of Homicide" (1984) 100 *LQR* 282 at 285-6.

20 "[F]itly named chance medley for that in it men are meddled by mere chance, and upon some unlooked for occasion, without any former malice or evil mind in one to offer hurt to the person of the other." per Lambard, see Green, above n6 at 487 fn 262.

21 See Green, above n6 at 499.

22 (1604) 1 JacI c8.

23 Foster, above n18 at 299-300, provided a number of illustrations of the harshness of the statute not being applied by the courts; judges frequently embarked upon a very strict construction of its patently clumsy wording — "the Justice or Benignity of the Law overruling the rigorous Penning of the Statute", id at 298.

24 Stephen, above n18 at 53, viewed it with a degree of scorn: "Coke adds little or nothing to what ... has been stated by earlier writers".

25 "Malice prepensed is when one compasseth to kill, wound, or beat another, and doth it *sedato animo*. This is said in law to be malice aforethought, prepensed, *malitia praecogitata*. This malice is so odious in law, as though it be intended against one, it shall be extended towards another." Coke, *Third Institute* at 51.

26 Ibid.

27 "...the devil himself knoweth not the thought of man." per Brian CJ Y B Pasch 17 Edw IV, fol 2, pl 2.

28 Coke, *Third Institute* at 55.

"Homicide is called chance medley . . . for that it is done by chance (without premeditation) upon a sudden brawle, shuffling, or contention".[29]

Coke had very little to say expressly concerning provocation, other than the passing reference to malice being implied where there was no provocation. He wrote at a time when set fights with deadly weapons were the order of the day. The law had responded by developing rules which treated the participants as generally on an equal footing: manslaughter by chance medley, for example. But the nagging question remained unanswered:

> When the mischief is the taking of inordinate vengeance for compara- tively trifling injuries ... the question is what degree of provocation is to mitigate the legal denomination of the homicide caused by it.[30]

Enter the Judicial Statements

The seventeenth century saw a flurry of judicial activity. In *Watts v Brains*,[31] two days after quarrelling and fighting, V passed D's shop, smiled wryly and walked on, whereupon he was stabbed from behind. The Court ruled:

> If one make a wry or distorted mouth, or the like countenance upon another, and the other immediately pursues and kills him, it is murder: for it shall be presumed to be malice precedent; and that such a slight provocation was not sufficient ground or pretence for a quarrel.

Coke's own reports mention a case[32] (not cited by Coke in his *Institutes*) in which the Court determined that the sight of a friend in combat was sufficient to heat the blood to a lethal passion, and was thus merely manslaughter.

In *Royley's Case*,[33] the accused's son, with nose bloodied from a beating by another boy, complained to his father, who immediately ran a mile to strike the culprit dead. The Court also was of the opinion that this warranted a verdict of manslaughter only:

> the law shall adjudge it to be upon that sudden occasion and stirring of blood, being also provoked at the sight of his son's blood, that he made that assault ... being all upon one passion.

Needless to say, the decision attracted later criticism. Foster[34] thought the ruling "a very extraordinary one . . . Surely the Provocation was not very grievous. [The son's bloodied nose was] a Disaster slight enough, and very frequent among Boys".

Clement v Bluni[35] stands as authority for the proposition that the anger and disappointment induced by a withdrawn promise could not exonerate a killing. In *Halloway's Case*,[36] a case of a boy caught stealing wood by a forester, although the accused had merely intended to chastise the boy, it had been executed with such cruelty to someone offering no resistance, that prepensed malice was implied by the court in its finding of wilful murder.

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29 Id at 57.
30 Per Stephen, above n18 at 60.
31 (1600) Cro Eliz 778; 78 ER 1009.
32 (1612) Co Rep 87; 77 ER 1364.
33 (1612) Cro Jac 296; 79 ER 254.
34 Foster, above n18 at 294.
35 (1625) 2 Roll Rep 460; 81 ER 916; also Kel 134.
36 (1629) Cro Car 131; 79 ER 715.

Lanure's Case[37] lends support to the principle that D's immediate deadly retaliation for V's violent assault with a whip (whilst riding) would reduce the crime to manslaughter. A notable decision on the scope of the *Statute of Stabbing* was *The Protector v Buckner*.[38] The trespass by forcible entry and imprisonment without process of law, carried out by persons demanding payment of an overdue debt, was held to be on the same footing as thieves assaulting a householder. The accused was thus not guilty of murder in stabbing one.

Legg's Case[39] reiterated Coke's principle that a killing without evidence of sudden quarrel was murder, and that the onus of proving a quarrel lay on the defendant. Kelyng[40] referred to an extraordinary conference attended by all the judges of England, which examined and substantiated a number of fundamental points of law relevant to *Lord Morley's Case*.[41] Agreement was reached:

> that no words ... are in law such a provocation, as if a man kill another for words only will diminish the offence of killing a man from murder to manslaughter ... But if upon ill words, both the parties suddainly fight, and one kill the other, this is but manslaughter, for it is a combat betwixt two upon a suddain heat ... [and further] ... that if upon words two men grow to anger, and afterwards they suppress that anger, and then ... have other diversions for such a space of time as in reasonable intendment, their heat might be cooled, and some time after they draw one upon another, and fight, and one is killed, this is murder ... a premeditated revenge upon the first quarrel ...[42]

The rules as to proper correction were more thoroughly formulated in *Grey's Case*,[43] where an insolent servant had his skull broken with an iron bar by his chastising master.

> For if a father, master, or school-master, will correct his child, servant, or scholar, they must do it with such things as are fit for correction, and not with such instruments as may probably kill them.

These principles were vigorously confirmed in *Keite's Case*.[44]

The question of to what extent an unlawful arrest was a provocation to third parties arose first in Hugget's Case,[45] and later in Tooley's Case.[46] A majority in both deemed the subsequent killing only manslaughter. As Holt LCJ in Tooley proclaimed,[47] "where the Liberty of the subject is invaded, it is a provocation to all the subjects of England". The minority in Hugget cautioned that it was "of dangerous consequence to give any encouragement to private men to take upon themselves to be the assertors of other men's liberties".[48]

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37 17 Car 1 (1642) 1 Hale PC 456.
38 (1655) Style 467; 82 ER 867.
39 (1663) Kel 27; 84 ER 1066.
40 Sir John Kelyng, Chief Justice of King's Bench. His reports were published posthumously by one of his successors, Sir John Holt, in 1708.
41 (1666) Kel 54; 84 ER 1079.
42 Id, Kel at 55-56; 84 ER at 1080.
43 (1666) Kel 64; 84 ER 1084.
44 (1697) 1 Ld Raym 138; 91 ER 989.
45 (1666) Kel 59; 84 ER 1082 (also known as *Hopping and Hungate*).
46 (1709) 2 Ld Raym 1296; 92 ER 349.
47 Id, 2 Ld Raym at 1302; 92 ER at 353.
48 (1666) Kel at 61; 84 ER at 1083.

Foster, in his *Discourse on Homicide*,[49] unleashed a stinging verbal onslaught against the *Tooley* decision. In *Hugget*, there was a mutual combat in the heat of passion, and at the time of the affray, a rescue was possible. In *Tooley*, there was time for cool reflection. And in the later case, the accused was ignorant of the warrant's illegality at the time. Foster thus made nonsense of the majority's decision:[50]

> The Provocation ... must be something which the Man is conscious of, which he feeleth and resenteth at the Instant the fact which He would extenuate is committed; not what Time or Accident may afterwards bring to Light.

One of the most celebrated cases in the whole domain of provocation was *Maddy's Case*.[51] The accused, arriving home to find his wife in the act of adultery with the deceased, instantly struck him with a stool and killed him.

> And the Court were all of the opinion that it was but manslaughter, the provocation being exceeding great, and found that there was no precedent malice.[52]

The court had noted an earlier decision in which the accused knew of his wife's infidelity and swore revenge, and chancing upon the couple engaged in intercourse, killed the adulterer. It had been held to be murder because of his previous declaration of intention. *Maddy's Case* has continued to be cited well into this century by some of the leading cases on provocation.[53]

This was an important period in the law's development, and as Stephen so aptly remarked,[54] "[t]hese cases . . . are a curious instance of the gradual and casual manner in which a large part of the law came into existence".

Sir Matthew Hale's treatise on Crown Pleas[55] represented the culmination of an impressive stage in that transformation. Hale produced a masterfully comprehensive if somewhat haphazard account of the law of homicide. Hale asked "what is such a provocation, as will take off the presumption of malice in him, that kills another".[56] Then he proceeded to furnish the abovementionedillustrations.[57] But Hale made an interesting reference to an anonymous case,[58] one of the earliest examples of self-induced provocation.

> A and B are at some difference. A bids B take a pin out of the sleeve of A intending thereby to take an occasion to strike or wound B which B doth accordingly, and then A strikes B whereof he died; this was ruled murder,

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49 Foster, above n18 at 314-317.

50 Baron Alderson in *Warner* ((1833) 1 Mood 380; 168 ER 1311) stated that Foster had "overruled" *Tooley*. See A J Ashworth, "The Making of English Criminal Law, (4) Blackstone, Foster and East." [1978] *Crim LR* 389 at 395.

51 Or *Manning's Case* (1672) 1 Vent 159; 86 ER 108.

52 "...jealousy is the rage of a man, and adultery is the highest invasion of property":Kel 137; 84 ER 1115.

53 But see Singer, R, "The Resurgence of Mens Rea: I — Provocation, Emotional Disturbance, and the Model Penal Code" (1986) 27 *Boston College LR* 243 at 259, where it is energetically argued that in neither *Royley* nor *Maddy* was there evidence of Coke's notion of chance medley. They are truly cases where "heat of passion" was focussed on to explain why the killings escaped a murder verdict.

54 Stephen, above n18 at 63.

55 Hale, *Historia Placitorum Coronae* (*The History of the Pleas of the Crown*) (1736) Vol 1. Although not published until 1736, it was certainly completed by 1676.

56 Id at 455.

57 Id at 455-7.

58 Id at 457.

1. Because it was no provocation, when he did it by the consent of A.
2. Because it appeared to be a malicious and deliberate artifice thereby to take occasion to kill B.

The 18th Century — Mawgridge, Oneby *and* Foster

The beginning of the eighteenth century saw the reporting of two significant decisions. In the first of these, *Mawgridge*,[59] Sir John Holt LCJ embarked upon a thorough examination of the history of the law of homicide, with an exhaustive analysis of the relevant case law up to that time. D, who had been a guest of V, was obnoxious to other guests, and then threatening to his host, hurling a wine bottle and finally running the latter through with his sword. The hapless host had offered no provocation to warrant Mawgridge's actions, apart from reprimanding D. The Court thought his conduct signified express malice. Holt profferred the classic definition of malice: "a design formed of doing mischief to another . . . He that doth a cruel act voluntarily, doth it of malice prepensed".[60]

Holt was able to draw on a wealth of authorities, and thus expounded the principles already resolved. An interesting insight into early eighteenth century attitudes is gained when reading what Holt believed had always been deemed sufficient provocation.

> [I]f one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead, and he that is so assaulted shall draw his sword, and immediately run the other through, that is but manslaughter[61]

because such actions were a breach of the peace, an indignity to the person assaulted, and would cause apprehension that more was to follow. In his conclusion that Mawgridge was guilty of murder, Holt stated "how necessary it is to apply the law to exterminate such noxious creatures".[62]

It is worth mentioning William Hawkins' treatise[63] as another in the sequence of eminent publications which was regarded as being of considerable authority. Hawkins defined manslaughter as:

> [Homicide] which is without Malice is called Manslaughter, or sometimes chance-medley, by which we understand such killing as happens either on a sudden quarrel, or in the Commission of an unlawful Act, without any deliberate Intention of doing any Mischief at all.[64]

The principles enunciated in *Mawgridge* were scrutinised in the equally challenging case of *Oneby*.[65] In response to an inoffensive joke, D angrily abused V and hurled a wine bottle, then an hour later rejected V's attempted reconciliation with an express declaration of his intention to take V's life. Lord Raymond declared that "the law will imply malice from the nature of the original action, or first assault, tho' blows pass between the parties".[66] In

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59 (1707) Kel 119; 84 ER 1107.
60 Id, Kel at 127; 84 ER at 1111.
61 Id, Kel at 136; 84 ER at 1114.
62 Id, Kel at 138; 84 ER at 1115.
63 *A Treatise on the Pleas of the Crown*, published in 1716.
64 Id, vol I, Chapter XXX, Section 1 (at 76).
65 (1727) 2 Ld Raym 1485; 92 ER 465.
66 Id, 2 Ld Raym at 1488; 92 ER at 467.

contrast, express malice was "when the mischievous design is formed against any particular person, which may be made evident as well by circumstances as by the express declarations of the person killing.[67] He resolved that the requisite provocation to lessen the crime from murder to manslaughter had to arouse

> such a passion, as for the time deprives him of his reasoning faculties; for if it appears, reason has resumed its office; if it appears he ... deliberates ... before he gives the fatal stroke ... the law will no longer under that pretext of passion exempt him from the punishment ... he justly deserves.[68]

Thus the court found that D's passion had indeed had sufficient time to cool, and that his words and actions signified deliberation.

The outstanding dissertation of the eighteenth century was Sir Michael Foster's *Crown Law*.[69] In the introduction to his *Discourse on Homicide* Foster referred to provocation as homicide "owing to a sudden Transport of Passion, which through the Benignity of the Law, is imputed to Human Infirmity."[70] With regard to self-defence, Foster introduced a new classification, namely homicide *se defendendo* upon chance-medley. He recognised "the Antient Legal Notion of Homicide by Chance-Medley" as being "when Death ensued from a combat between the Parties upon a sudden Quarrel",[71] and strongly disassociated himself from Hale's improper equating of chance-medley with accidental death (*per infortunium*).

For Foster, no words or gestures ever amounted to sufficient provocation, without an actual assault upon the person.[72] Intention was paramount; the weapon used could signify malice, or strongly disclaim any intention to kill. One had to examine the whole circumstances of the case. For example, in *Stedman's Case*,[73] after trading insults, a woman struck a soldier in the face, for which he hit her in the chest, then chased her and stabbed her in the back. Although prima facie murder, it was revealed the woman struck him with an iron patten. As Foster pointed out, "[t]he Smart of the Man's Wound, and the Effusion of Blood might possibly keep his Indignation boiling to the moment of the Fact".[74]

With respect to sudden affrays caused by provocation, Foster observed:

> the Blood, already too much Heated, kindleth afresh at every Pass or Blow. And in the Tumult of the Passions, in which meer Instinct Self-Preservation, hath no inconsiderable Share, the Voice of Reason is not heard. And therefore the Law in Condescension to the Infirmities of Flesh and Blood hath extenuated the offence.[75]

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67 Id, 2 Ld Raym at 1489-1490; 92 ER at 468.
68 Id, 2 Ld Raym at 1496; 92 ER at 472.
69 Foster, above n18.
70 Id at 255.
71 Id at 275.
72 But see Singer, above n53 at 253 ff, for an enlightening analysis of the early law and his cogent argument that no such "rule" actually existed.
73 (1704) MSS Tracey and Denton; Fost 292.
74 Per Foster, above n18 at 292. See also *Tranter and Reason* (1721) 1 Stra 499; Fost 292.
75 Per Foster, above n18 at 296.

Foster reiterated the by now well-established principle, that "if there is sufficient Time for Passion to subside, and for Reason to interpose, such Homicide will be Murder".[76]

In Sir William Blackstone's *Commentaries*,[77] Foster's innovation of homicide *se defendendo* upon chance-medley was adopted by Blackstone to the exclusion of the more historical notion of chance-medley upon sudden affray, which he assumed had lapsed.[78]

Thereafter, case law dominated the scene. In *Mason's Case*,[79] after being bettered by V in a fight inside a tavern, D swore revenge. He returned, challenged V to a fight, and stabbed the latter with a concealed dagger. The court ruled that the inducement to fight and the blows by the deceased were a provocation sought with guile by the accused to manufacture an excuse. This case stands out as a wonderfully clear illustration of self-induced provocation at its most devilish. And in *Taylor*,[80] the Court found the unprovoked verbal abuse coupled with a violent ejectment fom a tavern to have been sufficient provocation to warrant killing the tormentor.

Ill words had been traded in *Snow's Case*.[81] Later, and in contrast to *Mason*, V attacked D and in the ensuing rolling struggle, D stabbed the deceased with a knife with which he had been working and which he still held in his hand. It was held to be only manslaughter, because the knife had not been a concealed weapon, but, still being held, was used in the heat of the struggle.[82] In *Wigg's Case*,[83] and in *Fray*,[84] both involving a chastisement which led to death, the Court's focus was on whether the retaliation was excessive, and whether there was any intention to kill.[85]

The 19th Century — The Principles are Confirmed

Sir Edward Hyde East's *Pleas of the Crown*[86] has been regarded by many as the forerunner of the modern day textbook. The chapter on provocation professed to analyse "under what circumstances it may be presumed that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but imputable to human infirmity alone".[87] And following on from the early authorities, East incisively observed:

> where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and

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76 Ibid.

77 *The Commentaries on the Laws of England*, published between 1765 and 1769, in four volumes, Book IV being on Public Wrongs, and was published in 1769.

78 Book IV, id at 184. He was later properly corrected by Serjeant Stephen who reasserted the notion that chance medley "equally applies to manslaughter on a sudden quarrel." See Henry John Stephen, New Commentaries on the Laws of England (Vol IV) (1845) 103 note (t).

79 (1756) Fost 132; 1 East PC 239.

80 (1771) 5 Burr 2793; 98 ER 466.

81 (1776) 1 Leach 151; 168 ER 178.

82 See also *Smith* (1837) 8 Car&P 160; 173 ER 441.

83 (1784) 1 Leach 378(a); 168 ER 291.

84 (1785) Old Bailey; 1 East PC 236.

85 See the problem case from 1675, cited by Hale, above n55 at 456, where the Court unsuccessfully wrestled with the same question.

86 *A Treatise of Pleas of the Crown* published in 1803 in two volumes.

87 Id, Vol 1 at 232.

> beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty.[88]

But the learned author, seemingly inspired by the Bard, added an important caution — a caution for years forgotten or ignored —

> in those cases where the mercy of the law interposes in pity to human frailty, it will not try the culprit by the rigid rule of justice, and examine with the most scrupulous nicety whether he cut off the exact pound of flesh.[89]

The nineteenth century was saturated with case law. *Ayes*,[90] although illogical in its outcome, was one of the earliest examples of a judge directing the jury that drunkenness was not an extenuation of the offence. In *Lynch*,[91] Lord Tenterden articulated the following charge:[92]

> If you think that there was not time and interval sufficient for the passion of *a man proved to be of no very strong intellect* to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. [emphasis added]

Traditionally, the determination of 'whether there was sufficient time for passions to cool' was, presumably, a question directed to what the jury, in their eyes, deemed was sufficient. Here, the debate was whether there was time for the passions of a man *like this man* with his peculiarity of low intellect, to cool.

The Court in *Hayward*[93] warned that:

> the jury must recollect that the weapon ... was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place ... the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion.[94]

In *Thomas*[95] Parke B asserted that the law demanded that the killing "should be clearly traced to the influence of passion arising from that provocation".[96] Here was a clearly enunciated requirement that there be a causal connection. Further Parke B stressed that although voluntary drunkenness would not excuse the commission of a crime, once provocation had been established, "passion is more easily excitable in a person when in a state of intoxication than when he is sober."[97]

The principle in *Maddy's Case* was extended in *Fisher*[98] where it was held that a father would only have been guilty of manslaughter had he killed on the spot someone committing sodomy upon his son. It was clearly a premeditated killing where the father, informed of the outrage, stalked the perpetrator for

88 Id, Vol 1 at 234, supported by the Criminal Law Commissioners, Fourth Report (1839) Parlt Paps at xxv. But see Singer, n53 above at 262 et seq, who argues that the proportionality rule was an invention of East's, without solid foundation in law.
89 East, 1 PC at 239.
90 (1810) Russ&Ry 166; 168 ER 741.
91 (1832) 5 Car&P 324; 172 ER 995.
92 Id, 5 Car&P at 325; 172 ER at 996.
93 (1833) 6 Car&P 157; 172 ER 1188.
94 Id, 6 Car&P at 159; 172 ER at 1189.
95 (1835) 7 Car&P 817; 173 ER 356.
96 Id, 7 Car&P at 819; 173 ER at 357.
97 Id, 7 Car&P at 820; 173 ER at 358.
98 (1837) 8 Car&P 182; 173 ER 452.

two days before stabbing him to death. *Royley's Case*[99] was indirectly criticised.

> In all cases the party must see the act done.[100] What a state should we be in if a man, on hearing that something had been done to his child, should be at liberty to take the law into his own hands, and inflict vengeance on the offender.[101]

Coleridge J in *Kirkham*[102] pin-pointed a critical dilemma: "The law . . . has at once a sacred regard for human life and also a respect for man's failings, and will not require more from an imperfect creature than he can perform."[103] The judge concluded his remarks with a celebrated instruction for the jury:

> you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because, though the law condescends to human frailty, it will not indulge human ferocity.[104] It considers man to be a rational being, and requires that he should exercise a reasonable control over his passions.[105]

In times past, courts had settled on a bald statement of a rule; for example, an act of thuggery (in retaliation or chastisement) implied malice. Here was an attempt to 'rationalize' that rule. But apparently D's imperfections were not to include irrationality. Baron Alderson in *Macklin's Case*[106] reaffirmed that approach and agreed that brutality and therefore malice might be inferred from acts of continued violence well after injury had been inflicted.[107]

The venerable doctrine that mere words could never amount to sufficient provocation was under review in *Sherwood*.[108] Pollock CB conceded that a manslaughter verdict was possible,

> if there be a provocation by blows which would not of itself render the killing manslaughter, but it be accompanied by such provocation by means of words and gestures as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow.[109]

Therefore, the provocative conduct, and not simply a single act had to be analysed, and its total effect assessed.[110] Although not cited, the 1612 case from

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99 (1612) Cro Jac 296; 79 ER 254, above n33.

100 In *Pearson's Case* (1835) 2 Lewin 216; 168 ER 1133, a groundless drunken suspicion of infidelity was patently not sufficient. See also *Kelly* (1848) 2 Car&K 814; 175 ER 342.

101 8 Car&P 182 at 186; 173 ER 452 at 454. However, the jury ruled only manslaughter, recommending mercy "on account of the greatness of the provocation".

102 (1837) 8 Car&P 115; 173 ER 422.

103 Id, 8 Car&P at 117; 173 ER at 423.

104 In *Thomas*, Parke B had remarked on this very point: "Suppose a blow were given, and the party struck beat the other's head to pieces by continued cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would be murder." 7 Car&P 817 at 819; 173 ER 356 at 357.

105 8 Car&P 115 at 119; 173 ER 422 at 424.

106 (1838) 2 Lewin 225; 168 ER 1136.

107 See also *Shaw* 6 Car&P 372; 172 ER 1282: "if two persons fight, and one of them overpowers the other, and knocks him down, and then puts a rope around his neck, and strangles him, that is murder." per Patteson J.

108 (1844) 1 Car&K 556; 174 ER 936.

109 Id, 1 Car&K at 557; 174 ER 936.

110 See also *Smith* (1866) 4 F&F 1066; 176 ER 910. There, a wife's spitting in her husband's face was seen as the last straw after prolonged outrageous abuse.

Coke's Reports[111] was ample precedent for excusing a killing committed in aiding a relative (or friend) under attack: *Harrington*.[112] In that case, a father who witnessed his daughter being assaulted by her husband, stabbed his son-in-law.

And so the law persisted in its struggle to balance objectives: to respect the sanctity of human life, whilst at the same time seeking an understanding of human weaknesses fuelled by provocative conduct. In keeping with changing social attitudes, judges laid stress on the distinction between grave and petty provocations. Quite simply, the law had come to demand greater self restraint.

The Reasonable Man[sic] is Born

In the development of the law of provocation, the turning-point of the nineteenth century was *Welsh*.[113] After losing a court action against V, D gave vent to his rancour by stabbing the latter, without any real semblance of provocation from V. Keating J, in keeping with established authorities, rightly stated that "[t]he law . . . does not say that if a man, without sufficient provocation, gives way to angry passion, and does not use his reason to control it ..[he] is excused".[114] But then he rather presumptuously asserted:[115]

> The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion ... [I]n law it is necessary that there should have been serious provocation in order to reduce the crime to manslaughter, as, for instance, a blow, and a severe blow — something which might naturally cause an ordinary and reasonably minded man to lose his self-control and commit such an act.

The aforementioned current thinking had stressed the need for a serious assault, which could involve a vicious verbal attack in conjunction with a mild physical assault. A severe blow was a much more stringent prerequisite. In one breath his Honour spoke of "such . . . provocation as *would* [excite]", and in the next, "something which *might* naturally cause",[116] thus begetting a stubborn ambiguity of the certain/possible mould. Further, when discussing intentional killing and malice aforethought, his choice of expression was clumsy and so inspired later misconceptions.

And what was this hypothetical creature, the reasonable man? Words like "ordinary" and "reasonable" were employed interchangeably, but we are blessed with very little definition; no doubt it was assumed the term was something anyone could comprehend. As one writer has reasoned:[117] "The arrival of this test culminated the criminal law's movement in this area toward considering not the moral culpability of the defendant, but the social danger which his act created."

Whatever opinions one has of *Welsh* however, the scope of its repercussions lay dormant for a number of years. *Selten*[118] emphasised the require-

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111 See n32 above, and accompanying text.
112 (1866) 10 Cox CC 370.
113 (1869) 11 Cox CC 336.
114 Id at 338.
115 Id at 338-339.
116 Emphasis added.
117 Singer, n53 above at 280-281.

ment that the provocation be grave, but otherwise ignored *Welsh*. The jury were once more to be permitted, within general guidelines, to make up their own minds, without the constraints of the reasonable person. Blackburn J in *Rothwell*[119] challenged the absolute prohibition that words could never amount to provocation. His Honour intimated as to the potential of "special circumstances" arising; for example a sudden, unexpected confession of adultery which received an instantaneous lethal retort.[120] This was hardly in keeping with *Welsh*. But then curiously *Welsh* was silently adopted, his Honour focussing on "such a provocation as would in an ordinary man, not in a man of violent or passionate disposition, provoke . . ."[121] Such terms remind one of the *Mawgridge-Oneby* defendant, someone suffering from a "malignant spirit" who deliberately sought provocation so that they could execute their evil intentions.

In 1877, Sir James Fitzjames Stephen published his renowned *Digest of the Criminal Law*. The position of the law prior to *Welsh* was expounded in detailed examples from the cases as to what did, and what did not amount to sufficient provocation. Stephen explained his own analysis by admitting,[122] "[t]he whole law of provocation rests . . . upon an avowed fiction — the fiction of implied malice." One had to focus on the accused's state of mind at the moment of killing to determine whether D had been "deprived of the power of self-control by the provocation . . . received,"[123] being heedful of the surrounding circumstances, such as the mode of killing and the lapse of time. Astonishingly however, the reasonable person was ignored. Also, *Rothwell*[124] was not followed, but *Sherwood*[125] was accepted.

In stark contrast was the integration of the ordinary person into a definition of provocation in the draft Code of the Criminal Code Commission of 1878-79. Their section 176 proposed that: "Any wrongful act or insult of such a nature as to be sufficient to deprive an ordinary person of the power of self-control may be provocation". Not only had *Welsh* been endorsed, but it seemed as though the revolutionary proposal of *Rothwell* had achieved a "ratification". But the recommendation failed to be adopted as Law in England.

At such a climactic point, we find no major statement of law for over thirty years. And then suddenly, came a startling profusion of decisions which wrestled with some of the points of contention — and created others.

The 20th Century — The Erosion of Compassion Begins

Where the accused was provoked into shooting at her tormentor, but mistakenly killed a third party close by, it was held to be manslaughter: *Gross*.[126] D, armed with a revolver, entered a house where her husband was cohabiting with the deceased. On being bashed by her husband, she fired the

118 (1871) 11 Cox CC 674.
119 (1871) 12 Cox CC 145.
120 "Words or gestures may often be infinitely more irritating and provoking than a personal injury of a trivial nature." per the Criminal Law Commissioners, n88 above at XIX.
121 (1871) 12 Cox CC 145 at 147.
122 Stephen, above n18 at 87.
123 *Digest*, Article 225.
124 (1871) 12 Cox CC 145. See n108 above.
125 (1844) 1 Car&K 556; 174 ER 936.
126 (1913) 23 Cox CC 455.

revolver. *Welsh* was indirectly followed, without citation. The Court noted that "the ordinary balance of mind of the accused was so upset."[127]

Rothwell created problems; the ancient marital rights of property, as evidenced in *Maddy's Case*,[128] had endured so as to hopelessly cloud the issue. *Palmer*[129] refused to extend the principle of *Rothwell* — a sudden unexpected confession of adultery — to an engaged couple.[130] So also *Greening*,[131] a case of a de facto couple, where Bray J sermonized that "[a]dultery by a wife is a gross offence against a husband, but [regarding a de facto] there is no offence".[132]

Two celebrated decisions conclusively reaffirmed the stringent requirements of the objective person test. In *Alexander*[133] counsel argued that because D was mentally deficient (although not legally insane), his de facto's wife's threat to abandon him for another man was sufficient provocation. *Greening* was affirmed. D's bout of drinking and subsequent killing two hours after the admission, were seen by the court as negativing the 'suddenly, in the heat of passion' requirement. But remembering *Lynch*,[134] the question there had been whether the interval was "sufficient for the passion of a man proved to be of no very strong intellect to cool". Lynch's peculiarity of low intellect was significant to the decision. The focus was not any man's passion, but Lynch's passion. The court in *Alexander* chose not to apply the same leniency.

Such a rejection was conclusively confirmed in *Lesbini*.[135] A girl in a fairground shooting gallery made a jocular reference about D's race, and was consequently reprimanded by him. Then, when he was offered the revolver to play, he aimed it at the girl and killed her. D was found to be suffering from defective control and want of mental balance. *Alexander* and *Welsh* were given express approval: the provocation must have been sufficient to deprive an ordinary person of their self-control. Coleridge J in *Kirkham* had reassured that "the law . . . considers man to be a rational being, and requires that he should exercise a reasonable control over his passions."[136] One can presume that the accused's mental deficiency in *Alexander* or in *Lesbini* was an 'irrationality' for which the law was not prepared to grant concessions. However, *Alexander* and *Lesbini* could have been merely confirmations of the traditional doctrine that mere words were not sufficient provocation. *Lynch* could be viewed as an altogether different case because the blow involved was held to amount to a provocation in law, and the question of his low intellect was relevant to whether his passions had cooled. In *Alexander* and

127 Id at 456. Troubled, I am reminded a little of *Mason* (1756) Fost 132; 1 East PC 239 (n79 above): the accused deliberately inducing a provocative act so as to exact her revenge with a deadly weapon.

128 (1672) 1 Vent 159; 86 ER 108. See above n51.

129 (1913) 23 Cox CC 377.

130 No doubt the court was intent on upholding the sanctity of marriage, as much as the sanctity of life.

131 (1913) 23 Cox CC 601.

132 Id at 603. See also *Birchall* [1913] LT 478.

133 (1913) 9 Cr App R 139.

134 (1832) 5 Car&P 324; 172 ER 995. See n91 above.

135 [1914] 3 KB 1116.

136 8 Car&P 115 at 117; 173 ER 422 at 423.

Lesbini there was absolutely no need to pronounce general statements of principle as to the relevance of mental deficiency.

In *Smith*[137] a woman seven months pregnant, irritated by some action of a child of two and a half, struck it on the head with a heavy broom. Ridley J rejected the possibility of a child of two and a half offering provocation, and the pregnancy of the accused was seen as being totally irrelevant. On the strength of the older authorities, the provocation was, at most, very slight, and a lethal response amounted to murder: a chastisement so excessive, with an instrument potentially murderous.[138]

The restrictive consequences of the reasonable person test were becoming all too apparent. Cases weak on their facts had generated decisions of alarmingly restrictive principles. Whatever had happened to the benignity of the law for human infirmity? *Simpson*[139] was a tragic case of the soldier-husband home on leave to find his wife admitting to numerous infidelities and totally abandoning their young children, especially a two year old suffering agonizingly from water on the brain. Completely distraught, D resolved to end his child's sufferings. Counsel argued that if the accused had killed his wife, the adultery confession and other circumstances causing his mental distress would have been sufficient provocation; the fact that he had killed not his tormentor but the child should not have disentitled him to the law's leniency. The Court rejected the precedentless argument. Even though the killing was expressly deliberate, the court might have developed *Gross*[140] to hold that the provocation so disturbed the ordinary balance of D's mind, that D could not be held responsible.

The Erosion Takes Hold — Mancini, Holmes *and* Semini

That the reasonable person had become one of the primary tenets of the law of provocation was vindicated in one of the paramount decisions on the doctrine: *Mancini*[141] — a seedy tale of gangland figures, brawls and a stabbing. D had wielded a concealed dagger in anticipatory retaliation for V directing a blow with his fist. Viscount Simon articulated that:

> Provocation ... must be such as temporarily deprives the person provoked of the power of self-control, as the result of which he commits the unlawful act which causes death ...
>
> The test to be applied is that of the effect of the provocation on a reasonable man ... so that an unusually excitable or pugnacious individual is not entitled to rely on provocation which would not have led to an ordinary person to act as he did. In applying the test, it is of particular importance (a) to consider whether a sufficient interval has elapsed since the provocation to allow a reasonable man time to cool, and (b) to take into account the instrument with which the homicide was effected ... In short, the mode of resentment must bear a reasonable relationship to the provocation ...[142]

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137 (1914) 11 Cr App R 36.
138 See *Halloway's Case*, n36 above, and *Grey's Case*, n43 above. Cf *Wigg's Case* (above n83): an instrument at hand with no intention to kill.
139 (1915) 11 Cr App R 218.
140 (1913) 23 Cox CC 455.
141 [1942] AC 1.
142 Id at 9.

The law's toleration for a killing occurring in a fight was fast diminishing. The old defence of chance medley had been raised at trial, which was rather generous given the facts.[143] D was still found guilty of murder. It seemed an eternity since the pulling of a nose warranted a slaying of the impudent perpetrator. The old doctrine that chastisement with a murderous instrument implied malice had been developed and radically extended to apply to most provocation situations. A proportional retaliation was clearly an essential stipulation. *Welsh* and *Lesbini* now ruled the doctrine.

Clear confirmation that the defence of provocation could still operate "in compassion to human infirmity"[144] was the Court of Criminal Appeal decision in *Raney*.[145] After an argument, D, a one-legged man on crutches, had one of his crutches deliberately knocked away. D stabbed his tormentor. Caldecote LCJ said:[146]

> to a one-legged man like [D], who is dependent on his crutches, it is obvious that a blow to a crutch ... is something very different from mere words ... [and] might well be regarded by a jury as an act of provocation.

There was no mention of the reasonable man.

Then in 1946 came the House of Lords ruling in *Holmes*.[147] D was having an affair and arranged to meet his mistress. His wife challenged him, admitted her own adultery and virtually accused him of the same. He struck her on the head with a coal hammer, then strangled her — an unlikely scenario for a killing in the heat of jealous passion.[148] Viscount Simon reaffirmed that if a prima facie case for the defence (as explained in *Mancini*) had not been conceived, then a trial judge was bound not to leave the issue of provocation for the determination of the jury.[149] An extraordinary statement was then presented[150]: "The whole doctrine relating to provocation depends on the fact that . . . the formation of an intention to kill . . . is negatived." All prior understanding of the nature of the doctrine had acknowledged a clear distinction between a premeditated intention to kill (malice aforethought) and a sudden, spontaneous intention to kill (provocation).[151]

Rothwell was strongly disapproved of: "a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter."[152] Extraordinary then, that in the next breath his Lordship teasingly asserted that mere words could never constitute provo-

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143 Lord Simon, in recognising the defence, cited Blackstone — the one writer who had fallen into the error of excluding the connotation of manslaughter upon a sudden quarrel by equating chance medley solely with excusable self-defence.

144 Per Tindal CJ in *Hayward* (1833) 6 Car&P 157 at 159; 172 ER 1188 at 1189.

145 (1942) 29 Cr App R 14.

146 Id at 17.

147 [1946] AC 588.

148 One is reminded of *Shaw*, n107 above, where Patteson J surmised that where D overpowered V, knocked V down and strangled V it was murder, because of the unanswerable implication of wilful deliberation. *Shaw* was not even cited in *Holmes*.

149 Counsel for Holmes (Sandlands KC and Elizabeth Lane) had wisely admonished: "A judge should be very slow to take on himself to decide what a reasonable jury would find a reasonable man would do. The right of the accused to have his case determined by a jury should depend as little as possible on the personal views of a particular judge." [1946] AC 588 at 596.

150 Id at 598.

151 See for example, East PC Vol 1 at 232.

cation: "... *save in circumstances of a most extreme and exceptional character*".[153] One can only imagine that he was referring to threats of an imminent physical assault. His Lordship proffered some searching observations: "[T]he application of common law principles in matters such as this must to some extent be controlled by the evolution of society ... [and] as society advances, it ought to call for a higher measure of self-control in all cases".[154] And with regard to the dilemma of balancing objectives, "the law has to reconcile respect for the sanctity of human life with recognition of the effect of provocation on human frailty".[155]

A mere eight months before *Holmes*, the Judicial Committee of the Privy Council, on appeal from the West African Court of Appeal, delivered its judgment in *Kwaku Mensah*.[156] "The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable."[157] Their Lordships seemed quite ready to accept that they were not the ideal judges of how a reasonable man would act, and certainly not a reasonable man who also happened to be a West African villager. *Mancini* had ruled out an unusually excitable defendant as being a reasonable man. Was *Kwaku Mensah*, like *Raney*, evidence of the law's understanding and compassion?

The doctrine of manslaughter by chance medley, awakened from its deep slumber in *Mancini*, was unceremoniously given its last rites and put to sleep in *Semini*.[158] A group of men uttered obscenities to the female companion of D, a passionate Maltese. D abused them, knocked one to the ground, then drew his knife and stabbed all three, one fatally. Curiously, the defence of chance medley was introduced. The standard definition — by Coke, Foster, Hawkins and Serjeant Stephen — was a mutual fight upon a sudden falling out from which death ensued. Astonishingly, Lord Goddard countered,[159] "In truth, this is not what was ever meant by the expression 'death by chance medley.'" His Lordship allied himself to Blackstone's narrow rendition. Lord Goddard insisted that, "[t]he doctrine has no longer any place in the law of homicide."[160] Chance medley was applicable to an age of drunken brawls and duels, when in the confusion of the moment as the participants grappled with each other, the deadly thrust occurred. But the doctrine had simply faded into oblivion with the law's more rigorous expectations, coupled with the emergence of the doctrine of provocation. In *Semini* itself, the "mere words" doctrine of *Holmes* forbade a provocation defence.

Devlin J (as he then was) in *Duffy*[161] formulated the "classic direction ... to a jury" — or so Lord Goddard extolled[162] — "in a case in which the

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152 [1946] AC 588 at 600. Perhaps Viscount Simon was impressed by the argument of Crown counsel (the Solicitor-General Sir Frank Soskice, at 593) who cautioned: "It would be in the highest degree unfortunate if among returning soldiers, there should be a general impression that on a confession of adultery by a spouse there is something like a licence to kill."

153 Id at 600.

154 Id at 600-601.

155 Id at 601.

156 [1946] AC 83.

157 Id at 93.

158 [1949] 1 KB 405.

159 Id at 407.

160 Id at 409.

161 [1949] 1 All ER 932 note.

sympathy of everyone would be with the accused person and . . . it was essential that the judge should see that the jury had an opportunity of vindicating the law".[163] Crucial were "a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind." Furthermore, "circumstances which induce a desire for revenge are inconsistent with provocation". The standard requirements demanded by *Mancini* and *Holmes* were also stipulated.

Notwithstanding that *Holmes* was not cited, the Privy Council in *Attorney-General for Ceylon v Perera*[164] reaffirmed that only a premeditated intention to kill, as opposed to a sudden spontaneous intention to kill, negatived a provocation defence.

In keeping with the law's increasingly hardened attitude toward human weakness — rightly called "infirmity" by the earlier writers — the Court of Appeal in *McCarthy*[165] determined that no distinctive privileges attached to the drunken accused. D claimed that V had made homosexual advances to him. Infuriated and intoxicated, D repeatedly and savagely beat V to death. The law, it seemed, would be forever guided by Coleridge J's dictum in *Kirkham*[166] that "the law . . . will not indulge human ferocity", and by Parke B in *Thomas*[167] which insisted it would be murder where "the party struck beat the other's head to pieces by continued cruel and repeated blows". In that case, the question of drunkenness had also been considered, and was held to be of relevance: "passion is more easily excitable in a person when in a state of intoxication than when he is sober".[168] But Lord Goddard resolved in *McCarthy*:[169]

> We see no distinction between a person who by temperament is unusually excitable or pugnacious and one who is temporarily made excitable or pugnacious by self-induced intoxication ... [Therefore] drunkenness which may lead a man to attack another in a manner which no reasonable sober man would do cannot be pleaded as an excuse reducing the crime to manslaughter if death results.

McCarthy does not sit easily with *Prince*,[170] where D had hacked his tormentor to death with a fireman's axe. How can one possibly reconcile that pre-*Mancini* decision with *McCarthy* on the question of reasonable retaliation? And why such a restrictive requirement anyway? Devlin J in *Duffy* had emphasised provocation as causing a loss of control which momentarily robbed the accused of the mastery of his mind. Could not a blind berserk rage be excused if there was sufficient provocation to warrant a killing? *McCarthy* had simply witnessed the law's contempt for the voluntary drunk.

Bedder — *The Erosion is Complete*

162 Lord Goddard in the Court of Appeal, id at 933.
163 The deceased had inflicted continued acts of violence on his wife, the accused, so that one night after her husband went to bed, she struck him with a hatchet and a hammer.
164 [1953] AC 200.
165 [1954] 2 All ER 262.
166 8 Car&P 115 at 119; 173 ER 422 at 424. See notes 102-105 above.
167 7 Car&P 817 at 819; 173 ER 356 at 357. See n104 above.
168 7 Car&P 817 at 820; 173 ER 356 at 358.
169 [1954] 2 All ER 262 at 265.
170 (1941) 28 Cr App R 60.

The regressive decision of the House of Lords in *Bedder*[171] was conclusive evidence that the doctrine of provocation no longer operated "in compassion to human infirmity". The sexually impotent D was mocked when attempting to have intercourse with a prostitute. She then slapped him and kicked him in the groin, for which he stabbed her. Counsel had stressed the necessity of locating the reasonable man in the accused's situation at the time of the killing, and investing him with D's particular physical characteristic, his impotence. But Lord Simonds LC countered:[172]

> For that proposition I know of no authority: nor can I see any reason in it ... [To invest the reasonable man] with the peculiar characteristics of the accused ... makes nonsense of the test ... If the reasonable man is then deprived in whole or in part of his reason, or the normal man endowed with abnormal characteristics, the test ceases to have any value.

Lord Simonds' rejection of the notion of a reasonable impotent man reminds one of a remark of the great Oliver Wendell Holmes Jnr: "Judges commonly are elderly men, and are more likely to hate at sight any analysis to which they are not accustomed, and which disturbs repose of mind".[173]

If the jury had been left to their own judgment and not fettered to a reasonable person, their reaction may well have been, "Yes, I might have killed if I had been in his shoes." Then, their decision would have rested on all the natural fears, prejudices and sympathies to which 'reasonable persons' of a jury are accustomed. Since *Welsh*, *Mancini* and *Holmes*, the maxim that "rigid justice is the greatest injustice"[174] had sunk into oblivion.

Raney,[175] surely the decision most directly on the point, was not mentioned. In that case, it was the "one-leggedness" of the accused that was deemed to be the critical factor. To have ignored it would have been not only inconceivable but laughable. There the test would have been "what would a reasonable one-legged man have done?" In *Bedder* itself, the accused had been cruelly taunted and ridiculed for his impotence, and was ultimately kicked in the groin. The assault was not unlike the kick to Raney's crutch. Clearly their Lordships harboured a certain distaste for the whole scenario in *Bedder*.[176] "Suppose the physical peculiarity had been a hideous face resulting from burns suffered as a fighter pilot in the Battle of Britain? One suspects that the decision might have been different."[177]

The Birth of Reforms

In 1957, the Legislature stepped in, enacting section 3 of the *Homicide Act*.[178]

> 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 by things

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171 [1954] 2 All ER 801.
172 Id at 803-804.
173 An address to the New York State Bar Association, 17 January 1899.
174 Thomas Fuller M D, *Gnomologia* (1732) 4055.
175 (1942) 29 Cr App R 14. See above n145.
176 "One may be permitted to wonder how even 25 years ago it was thought possible and right for five Law Lords whose ages ranged from 64 to 79 to pontificate on the reasonableness of the fears and stresses of an immature adolescent." Working Paper No6, Law Reform Commissioner Victoria *Provocation as a Defence to Murder* (1979) 15.
177 See Archbold, *Criminal Pleading, Evidence and Practice* (39th edn 1976) s2479.
178 5&6 Eliz II, c11.

> 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.

The recommendations of the Royal Commissioners[179] were implemented.[180] The 'mere words' restriction reinforced by *Holmes* had gone, but the reasonable man was here to stay. The Commissioners had emphasised the dual prerequisites inherent in the provocation doctrine: that the accused was actually provoked, and that a reasonable person would have been.[181] Of critical importance were cooling time and proportional retaliation. Under the new section, the jury were made sole arbiters in determining how a reasonable person might have responded.[182] Cases immediately appeared[183] in which evidence of provocative words (but not acts) was considered by a jury, recognising the new found freedom granted by section 3.

In *Porritt*,[184] a case of misdirected retaliation,[185] the Court of Criminal Appeal held that a trial judge was beholden to leave an issue such as provocation to a jury if the evidence so warranted, even though the direct evidence of D did not disclose that he had been provoked or had lost control. Viewing the evidence as a whole, it was possible to infer that D had indeed lost control and fired under the provocation of an attack on a relative.[186]

The Complexities Prevail

Lord Devlin in *Lee Chun-Chuen*[187] enunciated the criteria to be satisfied for a successful plea of provocation.

> The defence cannot require the issue to be left to the jury unless there has been produced a credible narrative of events suggesting the presence of ... the act of provocation, the loss of self-control, both actual and reasonable, and the retaliation proportionate to the provocation ... [D's] submission that if there is evidence of an act of provocation, that of itself raises a jury question, is not correct.

It is arguable that what their Lordships saw as a prerequisite was virtually a prima facie case to be established by D, notwithstanding Woolmington,[188] and that then and only then would the issue of provocation be left to the jury: a very strict test indeed.

In *Walker*[189] V was brutally kicked and bashed to death as he lay helpless in a gutter. Counsel argued that section 3 invited the jury to "take into account

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179 Report of the Royal Commission on Capital Punishment (1953) (Cmd 8932) pars 124-153.
180 Hansard, House of Commons Debates, Vol 560, col 1156 (15 November 1956).
181 Report of the Royal Commission on Capital Punishment, at par 126.
182 One early commentator, critical of the clumsy drafting of s3, believed that a judge was still entitled to withhold provocation from the jury: see D W Elliott, "The Homicide Act 1957" [1957] *Crim LR* 282 at 287.
183 See for example, *Simpson* [1957] *Crim LR* 815, and *Fantle* [1959] *Crim LR* 584.
184 [1961] 1 WLR 1372.
185 See *Gross*, n126 above.
186 See the ealier authority of *Harrington*, above n112.
187 [1963] AC 220 at 231-232.
188 [1935] AC 462.
189 [1969] 1 WLR 311.

everything" — that therefore the proportional retaliation doctrine of Mancini was merely one of the factors to be considered. The Court of Appeal agreed with the trial judge's ruling to leave provocation to the jury, and accepted their decision that no reasonable person would have acted as D had done. Fenton Atkinson LJ quoted at length from the judgment of Lord Devlin in *Lee Chun-Chuen*. But surely on that judgment's stringent test, provocation ought not to have even been left to the jury in *Walker* because the credible narrative/prima facie case requirement had failed hopelessly on the proportion test.

The controversy was clarified to some degree by the Privy Council decision of *Phillips*.[190] Lord Devlin's insistence in *Lee* on virtually a prima facie case being established before leaving the defence to the jury was by implication not followed; the emphasis in Lee on the crucial nature of proportional retaliation was also undermined. Lord Diplock insisted[191] that proportional retaliation was "merely a consideration which may or may not commend itself to [the jury]", and that it should no longer be cited as though a rule of law. But he strenuously dismissed counsel's submission "that once a reasonable man had lost his self-control his actions ceased to be those of a reasonable man". His Lordship insisted: "The average man reacts to provocation according to its degree".[192]

At this juncture, one must ask, how could a person who had lost control retaliate in a "reasonable" fashion? As one writer has commented, "[i]f a defendant does genuinely lose control then *ex hypothesi* he may well act out of character, irrationally, or disproportionately.[193] If anything such a test envisaged a studied response, rather than one on a passionate impulse.[194] Put simply, a "reasonable" person would not kill. Thus the "reasonable" person was little more than a figment of the imagination of criminal lawyers.[195]

The doctrine of provocation, as created by the judges and the judicially-inspired legislature had become entangled in a self-spun web of complexity. There had, arguably, been exhibited deplorable inconsistencies, distortions of principle, and unreal semantic wrangling from one case to the next. At times, heartlessness and injustice had pervaded the doctrine.

Brown[196] added to the muddle, approving of *Phillips* and *Walker* and *Lee Chun-Chuen*. How extraordinary when one considers the hugely inconsistent treatment accorded such questions as when to leave provocation to the jury, and what weight to be granted the reasonable relationship "rule". It seems one can say that when evidence exists that the accused was provoked, then the judge, without further preliminary enquiry or finding, must leave the issue to the jury.[197]

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190 [1969] 2 AC 130.

191 Id at 138.

192 Ibid.

193 Samuels, A, "Mental Illness and Criminal Liability" (1975) 15(3) *Medicine, Science and the Law* 198 at 200. See also Brown, B, "The 'Ordinary Man' in Provocation: Anglo-Saxon Attitudes and 'Unreasonable Non-Englishmen'" (1964) 13 *ICLQ* 203 at 230.

194 Lord Diplock's understanding of provocation and retaliation has been subjected to scathing criticisms, for example by Professor Brett, "The Physiology of Provocation" [1970] *Crim LR* 634.

195 See Brett, id at 637-638, and Samuels, A, "Excusable Loss of Self-Control in Homicide" (1971) 34 *MLR* 163 at 167.

196 [1972] 2 QB 229.

197 See similarly, *Whitfield* [1976] *Crim L R* 443, and the discussion in Ashworth, A J,

The Privy Council decision in *Edwards*[198] was simply incredible. What was this new creature, the "reasonable" blackmailer? Lord Pearson, on behalf of the Board, assured us that even a blackmailer could in some instances rely on the defence of provocation where the blackmailed party reacted in an overly hostile manner. What is also amazing is that not even a passing mention was made of proportional retaliation, and yet D flew into a "white hot" rage inflicting twenty-seven stab wounds upon the deceased.

More insight into the operation of section 3 emanated from *Davies*.[199] The Court of Appeal concluded[200] that "the situation since 1957 has been that acts or words . . . are not excluded . . . merely because they emanate from someone other than the victim." The trial judge was reprimanded for his overly generous direction permitting the jury to review the whole conduct of the wife during the course of the year prior to the killing, in determining whether D had been provoked. But surely a single incident, taken in isolation, may not be viewed as especially irritating; but it may be the perfect catalyst for a complete loss of control if that incident was in fact the final straw in a long saga of infuriating conduct.[201]

The New Broom: Camplin

The House of Lords ruling in 1978 in *Director of Public Prosecutions v Camplin*[202] has become the leading case for the seventies and the eighties in the way that *Mancini* and *Holmes* (and *Bedder*) had been for the forties and fifties. It boldly swept away cobwebs, but in so doing inadvertently succeeded in whetting the appetite for far more radical reforms. Those critics whose task it is to fire broadsides at the complexities and inaccuracies of troublesome judicial reasoning were here to find a healthy cache of ammunition.

D was fifteen years old when, against his resistance, he was buggered and then laughed at by the middle-aged deceased. The accused lost control and split his tormentor's skull with a chapati pan. The trial judge asserted the objective test in the strictest possible way: "[The test was whether] the provocation was sufficient to make a reasonable man in like circumstances act as the defendant did . . . Not a reasonable boy . . . or a reasonable lad".[203] The jury convicted him of murder, but the Court of Appeal substituted a verdict of manslaughter, ruling the summing up as a misdirection and distinguishing *Bedder* on the ground that the reasonable person test excluded abnormalities, "but youth, and the immaturity which naturally accompanies youth, are not deviations from the norm".[204] Thus the true test in this case was "whether the provocation was enough to have made a reasonable person of the same age as the defendant in the same circumstances do as he did."[205] On appeal, the House of Lords chose to go further.

"Self-Induced Provocation and the Homicide Act" [1973] *Crim LR* 483.

198 [1973] AC 648.

199 [1975] 1 All ER 890.

200 Id at 896, supporting the judgment of Lawton J in *Twine* [1967] *Crim LR* 710.

201 See for example *Smith* (1866) 4 F&F 1066; 176 ER 910 (n110 above).

202 [1978] AC 705.

203 Id at 712, as quoted by Lord Diplock.

204 [1978] 1 QB 254 at 261, per Bridge LJ.

205 Id at 262.

Lord Diplock reasoned that section 3 "abolishes all previous rules of law as to what can or cannot amount to provocation."[206] The abolition of the restriction as to words was critical.

> To taunt a person because of his race, his physical infirmities or some shameful incident in his past may well be considered by the jury to be more offensive to the person addressed, however equable his temperament, if the facts on which the taunts are founded are true than it would be if they were not. [The abolition of the restriction was pointless] if the jury could not take into consideration all those factors which in their opinion would affect the gravity of taunts or insults ...[207]

Therefore *Bedder* had to be reconsidered. In the present case, the relevant characteristic of D was that he was only fifteen when provoked to kill, and "to require old heads upon young shoulders is inconsistent with the law's compassion to human infirmity"[208]: an indication that this was a characteristic affecting the expected degree of self-control. Attempts to distinguish *Bedder*, as the Court of Appeal had done, merely multiplied the complexities, and thus in his Lordship's opinion it was preferable to disregard *Bedder*, and indeed *Mancini* and *Holmes*, as authorities on the law of provocation.

Lord Diplock then propounded his model direction to a jury, one which gained the express approval of his fellow Law Lords:

> The judge should state what the question is using the very terms of [section 3]. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.[209]

The last section of his Lordship's direction confirmed that the reasonable relationship between the provocation and retaliation, reworded since *Phillips* and *Brown*, was but one factor to be considered.

Although not specifically referred to, Dr Ashworth's acclaimed contribution[210] to the legal literature unquestionably played its part in influencing Lord Diplock's curious distinction between characteristics contributing to self-control and those applicable to the potency of the provocation. For Ashworth, "the law's paramount concern is to ascertain whether the accused showed a reasonable amount of self-restraint",[211] and in determining this question, it was necessary to somehow assess the gravity of the provocation addressed to the defendant. But as the author cautioned, "in general a provocation can only be described as 'grave' in relation to persons of a particular class."[212] The example was provided of someone accidentally finding a couple having sex. This is hardly a provocative incident unless that

206 [1978] AC 705 at 716.
207 Id at 717.
208 Ibid.
209 Id at 718.
210 Ashworth, A J, "The Doctrine of Provocation" (1976) 35 *CLJ* 292.
211 Id at 299.
212 Id at 300.

"someone" happened to be married or closely attached to one of the lovers. Ashworth concluded that:

> The proper distinction ... is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not.[213]

Lord Diplock departed from Ashworth by including the sex and age of the defendant as characteristics bearing on the level of self-control. His Lordship's reasoning with respect to age seems sound and the more appealing as it is the more generous. But his inclusion of the gender of the accused as influencing self-control appeared without explanation. If the implication was that women have a lower level of self-control, then the suggestion was unfortunate if not sexist, and certainly debatable. The gender of the accused would certainly be relevant where, as raised by Lord Simon, the provocation was in calling the accused a filthy slut and a whore, but that surely goes to gravity rather than self-control (adopting the distinction drawn and accepted by their Lordships).

Lord Morris offered his own example of the crucial question for the jury, namely:

> whether they considered that the accused, placed as he was, and having regard to all the things that they found were said, and all the things that they found were done, only acted as a reasonable young man might have acted, so that, in compassion, and having regard to human frailty, he could to some extent be excused even though he had caused a death.[214]

Because of what Lord Morris had said earlier, "placed as he was" clearly meant "with all his characteristics" and was thus a very generous rendition of the reasonable person test. Incredibly however, in the very next breath, he expressly agreed with Lord Diplock's model direction which is readily distinguishable from the one just quoted.

Lord Simon's judgment is one of almost maddening contrasts — some would say inconsistencies. Having detailed the decision in *Bedder*, he drew on Dr Turner's[215] example in subjecting that case to criticism. Thus a blow to the face of a healthy man would be very different if the recipient was suffering from a severe abscess, even though the ailment was of a temporary nature. Lord Simon noted the relevance of the sex of the defendant, giving his example of an accusation "whore" to a reasonable man/woman, and then lamented that *Bedder*, in an affront to common sense, would of necessity forbid a jury taking into account the pregnancy of the accused, or indeed menstruation or menopause.[216] It is unclear what he had in mind. The point about "whore", as stated earlier, goes to gravity not self-control, but he seemed to have self-control in mind when listing the other factors. If so, that would have broadened Lord Diplock's classification quite dramatically.

Lord Simon finally emphasised the irreconcilable confrontation between *Bedder* and section 3:

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213 Ibid.

214 [1978] AC 705 at 722.

215 *Russell on Crime*, Vol 1 (12th edn 1964) 544-545.

216 [1978] AC 705 at 724. It will be remembered that the pregnancy of the accused was ignored in *Smith* (1914) 11 Cr App R 36 (n137 above) which Lord Simon cited without comment.

> But if the jury cannot take into account the characteristic which particularly points the insult, I cannot see that they are taking 'into account everything ... according to the effect ... it would have on a reasonable man'.[217]

In considering various hypothetical situations, he determined that "evidence of the pregnancy or the age or the malformation would be admissible".[218] That problem once again: even though malformation may be a characteristic which 'points the insult', surely pregnancy, like age, affects self-control.

Towards the end of Lord Simon's judgment, he acknowledged that section 169(2) of the New Zealand *Crimes Act* had mirrored section 3 (of the English *Homicide Act*), and that *McGregor*[219] held the key. The decidedly convoluted wording of the New Zealand section came under the immediate scrutiny of the New Zealand Court of Appeal in *McGregor*. There North J offered quite lengthy observations, which have had a profound effect on recent English law. He noted that the section necessitated "the fusion of . . . two discordant notions"[220] and then continued:

> the offender must be presumed to possess in general the power of self- control of the ordinary man, save insofar as his power of self-control is weakened because of some particular characteristic possesed by him ... The characteristic must be something definite and of sufficient significance to make the offender a different person from the ordinary run of mankind, and have also a sufficient degree of permanence to warrant its being regarded as something constituting part of the individual's character or personality. A disposition to ... lose one's temper readily will not suffice, nor will a temporary or transitory state of mind such as ... excitability or irascibility ... Still less can a self-induced transitory state be relied upon, as where it arises from the consumption of liquor ...
>
> Moreover ... there must be some real connection between the nature of the provocation and the particular characteristic of the offender ... The words or conduct must have been exclusively or particularly provocative to the individual because and only because of the characteristic ... [so too] if the colour, race or creed of the offender be relied on as constituting a characteristic ... Special difficulties however arise [regarding] what purely mental peculiarities may be allowed as characteristics ... It is not enough ... that the offender should merely in some general way be mentally deficient or weak-minded ... There must be something more, such as provocative words or acts directed to a particular phobia ...[221]

So many points raised and where to begin? Firstly the notion of permanence: what of the blow to the cheek abscess instanced by Lord Simon in *Camplin*? Although such an ailment was of a temporary nature, it would have been laughable to ignore it in measuring the passion arising from the provocation. But *McGregor* insisted on permanence and Lord Simon insisted that English law corresponded to New Zealand law as declared in *McGregor*. Secondly, the real connection: clearly, their Lordships in *Camplin* were concerned with characteristics which particularly pointed the insult. But age, like sex, was a characteristic which was universal, going to self-control. In *Camplin*, no direct connection existed between the provocative act of buggery

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217 Id at 726.
218 Id at 727.
219 [1962] NZLR 1069.
220 Id at 1081.
221 Id at 1081-1082.

and the defendant's age. Age, like sex was not a characteristic which pointed the insult; it did not exclusively affect the gravity of the provocation, at least not in that particular causal sense. *McGregor* was silent as to age and sex; but that insistence on a direct connection was of paramount importance. And what of Lord Simon's mention of pregnancy, menstruation and menopause: into which category were they to be slotted? And what of race? It appears as fundamental and as universal as age and sex. *Kwaku Mensah*[222] would apparently support such a proposition. But North J in *McGregor* obviously thought otherwise. He charged that "it would not be sufficient . . . for the offender to claim merely that he belongs to an excitable race, or that members of his nationality are accustomed to resort readily to the use of some lethal weapon".[223] Attempts by writers to draw distinctions between *universal* characteristics such as age and sex, and *peculiar* characteristics demanding a connection between the provocation and the characteristic,[224] exaggerate rather than resolve the dilemma.

One can imagine juries becoming hopelessly confused when faced with North J's distinctions. Amazingly, Lord Simon confessed that he had "heard nothing to suggest juries in New Zealand find the task beyond them."[225] In fact the New Zealand Criminal Law Reform Committee in 1976 had bemoaned that "it is doubtful whether juries comprehend the substance let alone the nuances of section 169(2)(a)".[226] As one commentator expressed it, "[i]t seems similar to endeavouring to isolate black and white from a spectrum consisting entirely of differing shades of grey."[227] Certainly the most authoritative text writer in New Zealand, Sir Francis Adams,[228] interpreted the section in a way which emerged as the exact prototype of Dr Ashworth's formulation[229] of the relevant distinctions.

Why then such unqualified support for *McGregor*? As has been so poignantly stated of *Camplin*:

> Surely, once a fifteen year old youth, or indeed, a male or female of any age is raped or buggered, he or she ceases to be ordinary in any real sense at all? A jury must look at *that* person with all his susceptibilities and weaknesses. It is impossible to draw lines as was attempted in *McGregor*.[230]

If one accepts that the reasonable person test must stay, then Lord Morris' direction[231] is preferable. It suggested the significance of regarding the defendant "as he was", and the need to consider everything said and done. Furthermore, the crucial historical purpose of the doctrine was stressed, to ensure that because of the law's compassion for human frailty, the killing,

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222 [1946] AC 83.
223 [1962] NZLR 1069 at 1082.
224 See Clarkson, C M V and Keating, H M, *Criminal Law: Text and Materials* (1984) 548, and Elliott, D W and Wells, C, *Elliott and Wood's Casebook on Criminal Law*, (4th edn, 1982) 397 and 399.
225 [1978] AC 705 at 727.
226 *Report on Culpable Homicide*, par 15.
227 Milligan, J R, "Provocation and the Subjective Test" [1967] *New Zealand LJ* 19 at 24.
228 *Criminal Law and Practice in New Zealand*, (2nd edn, 1971) 342 ff.
229 Ashworth, above n210.
230 Report of the Sub-Committee on Provocation of the Victorian Criminal Bar Association, quoted in Law Reform Commission of Victoria Report No 12, *Provocation and Diminished Responsibility as Defences to Murder* (1982) 16.
231 [1978] AC 705 at 722 (above n214).

although wrong, should be to some extent excused. It was a pity his Lordship ultimately adopted Lord Diplock's direction.

The Dilemma Intensifies: Newell

An even greater pity was that Lord Simon had cited *McGregor*. With the advent of the Court of Appeal's judgment in *R v Newell*,[232] it was obvious that *McGregor* was indeed firmly entrenched in English law. D, a chronic alcoholic of ten years standing, was deserted by his girl-friend. His distress overwhelmed him and he attempted suicide in spectacular fashion.[233] Over drinks with a fellow alcoholic, the latter made very offensive remarks about the girlfriend and then made sexual overtures to D. Incensed, D struck his friend twenty two times with a heavy ash-tray. Medical evidence revealed that D was an unstable drunkard, in a highly emotional and distressed state, and suffering from toxic confusion, causing him to overreact and lose control.

According to the trial judge, the appropriate test was whether a sober man would have similarly reacted in the circumstances. The Court of Appeal thought the direction perfectly proper. They quoted from *Camplin*, and *McGregor* at length, especially the passage from North J's judgment. With regard to that they found:

> That passage, and the reasoning therein contained, seem to us to be impeccable. It is not only expressed in plain, easily comprehended language; it represents ... the law of this country as well as that of New Zealand.[234]

Reasoning impeccable, language plain — a truly extraordinary conclusion! The Court of Appeal refrained from deciding whether or not chronic alcoholism was a "characteristic" because there was no direct connection between the alleged characteristic and the provocative remarks and suggestions. D's drunkenness and grief were transitory in nature. The necessity of permanence was adopted from *McGregor* without further discussion. But how does the fact that they were transitory detract from their pertinence to the accused at the moment of the provocation? The deceased well knew of D's extreme depression, his drunkenness, and his devotion to the girl-friend. To say to him, under those circumstances,and putting his finger on the girlfriend's photograph, "Why don't you forget that fucking bitch; she's no fucking good for you. Why don't you come to bed with me?", would have been inflammatory in the extreme, and exclusively so to the accused.

If the Court of Appeal had simply chosen to decide that, as a matter of policy, the defence could not be relied upon by someone like Newell, a hopeless drunkard who was suffering from a self-induced state of toxic confusion, then so be it. But the Court's overly-simplistic endorsement of *McGregor* and the consequent non-existent discussion of the interrelationship between *Camplin*, the case at hand, and of necessity, *McGregor*, was a source of frustration for concerned commentators. Why for example, have courts not exposed the glaring inconsistency at the very beginning of the oft-quoted passage from *McGregor*? North J commenced by referring to a characteristic

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232 (1980) 71 Cr App R 331.

233 50 Valiums, a large number of sleeping pills, a bottle of surgical spirits, 3 bottles of after-shave lotion, and half a bottle of vodka — bottoms up!

234 (1980) 71 Cr App R 331 at 340.

as something weakening self-control. But of course later the emphasis is on the relevance of the characteristic to the susceptibility of the defendant to the provocation — thus going to gravity, not self-control. It makes a mockery of these artificial distinctions in that case, and those in *Camplin* and *Newell*. The Court of Appeal in *Newell* raised a point of law of general importance, namely whether a jury could take account of a characteristic "which was (1) temporary or transient or (2) not directly connected to the provocative words or conduct", but the Appellate Committee refused leave to appeal.

Since *Camplin*, what would happen if an underprivileged accused was twenty two years of age but with the mental age of nine? In *Raven*[235] the Recorder of London directed the jury "to consider the reasonable man as having lived the same type of life as the accused for 22 years but with the retarded development and mental age of the accused". This surely is an outrageously difficult task for a jury, but how much more taxing than putting themselves in the shoes of a 15-year-old boy or an impotent youth is impossible to tell. At long last, contrary to the principle in *Alexander*,[236] the reasonable person could be mentally deficient. Professor Glanville Williams[237] thought the decision "may perhaps be justified as an extension to 'mental age' of the *Camplin* rule for ordinary age"; nevertheless, it "was a merciful concession to people who are very mentally retarded". And surely a merciful concession should be the primary stimulus of the defence of provocation. All the complex distinctions and definitions are made to look absurd in such a case as this. *Raven may* have been permitted by *Camplin*, but *McGregor* would certainly not countenance it. *Raven* must be applauded.

Two recent cases, although not on the troublesome "characteristics" discourse, warrant noting. In *Doughty*,[238] D, overly fatigued, had killed his seventeen day old baby by placing cushions over its head and kneeling on it to silence its persistent crying so as to prevent it waking his convalescing wife. The trial judge, notwithstanding section 3, insisted that "civilised society dictates that the natural episodes occurring in the life of a baby only days old have to be endured and cannot be utilised as the foundation of subjective provocation to enable his killer to escape a conviction for murder."[239] But the Court of Appeal, remembering Lord Diplock's pronouncement in *Camplin*[240] that section 3 "abolishes all previous rules of law as to what can or cannot amount to provocation" and noting Glanville Williams' acknowledgement that "there is no longer any reason why the defence should not be available (if the jury uphold it) to . . . the man who kills a constantly crying baby",[241] thought otherwise. In the words of Stocker LJ, "there was here evidence upon which [D] was — I use the word loosely 'provoked' to lose his self-control."[242] To counter the "floodgates proposition", the Court stressed that:

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235 [1982] *Crim LR* 51.
236 (1913) 9 Cr App R 139 (n133 above).
237 *Textbook of Criminal Law* (2nd edn 1983) 540.
238 (1986) 83 Cr App R 319.
239 Quoted, id at 324. For a not dissimilar approach, see *Smith* (1914) 11 Cr App R 36 (n137 above).
240 [1978] AC 705 at 716.
241 Williams, G, above n237 at 534.
242 (1986) 83 Cr App R 319 at 326.

> the common sense of juries ... will ensure that only in cases where the facts fully justified it would their verdict be likely to be ... that a defendant's act in killing a crying child would be the response of a reasonable man within the section.[243]

And in *Johnson*,[244] the Privy Council ruling in *Edwards*[245] was taken to its logical post-*Camplin* conclusion:

> In view of the express wording of section 3, as interpreted in *DPP v Camplin*, which was decided after *Edwards v R* we find it impossible to accept that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his self-control, should result in the issue of provocation being kept outside a jury's consideration ... [W]hether or not [D's conduct] had started the trouble and induced others, including [V] to react in the way they did, .. the defence of provocation should have been left to the jury.[246]

The Inevitable Reform Demands

Numerous commentators and law reform bodies have proposed a valuable selection of reformulations in lieu of the reasonable person test as it exists at present. Brown[247] submitted one of the most drastic specifications. The jury had to be satisfied that D had lost control and killed under provocation. To assist the jury to make a determination, a set of evidentiary safeguards had to be recognised, including the nature of the retaliation and D's conduct and state of mind during any interval between the provocation and the response, to be gleaned from surrounding circumstances. In truth, Brown's test was a not so revolutionary rewording of Sir James Fitzjames Stephen's Article 225 from his *Digest*.[248] Brown was apparently inspired by one of the criminal law's most respected authorities.

Samuels[249] similarly favoured a subjective test:

> In any given situation each man has a threshold of loss of self-control ... What the jury should be required to do is to fix upon the proper norm of behaviour to be expected from that man in that situation and then to judge whether or not he acted in conformity with it ... Did he fail to observe the self-control properly to be expected of him in the light of all that is known about him?

It provides an interesting contrast to Brown, for whom all that mattered was whether or not D really lost control from provocation. Samuels focused on the 'individual morality' of D, and whether or not it had been breached. Those concerned with upholding some form of 'moral standard' would presumably prefer the reformulation of Samuels if the reasonable person was expunged from the defence.

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243 Ibid. For a detailed criticism of the decision, see Horder, J, "The Problem of Provocative Children" [1987] *Crim LR* 655.

244 (1989) 89 Cr App R 148. See Alldridge, P, "Self-Induced Provocation in the Court of Appeal" (1991) 55 *J of Crim L* 94.

245 [1973] AC 648 (above n198).

246 (1989) 89 Cr App R 148 at 152. See note at [1989] *Crim LR* 738.

247 Brown, above n193 at 234-235.

248 Stephen, above n123.

249 Samuels, above n195 at 169, 168. And see his proposed statutory offence, at 171.

Even before *Camplin*, the Criminal Law Revision Committee had recommended the demise of the reasonable person test:[250] of paramount concern were "the facts as they appeared to the accused." In 1980, the Committee produced their Report which concluded that:

> provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground[251] for the loss of self-control leading the defendant to react against the victim with a murderous intent. [Instead of the reasonable person] this formulation [directs] the jury's attention ... to what they themselves consider reasonable — which has always been the real question ... the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental ...[252]

The proposed test was a glorified embellishment of *Camplin*. Although the reasonable person had gone, the test remained an objective one. But the subjective element was now more prominent with the accused's actual perception of the provocation being stressed. Nonetheless, the ultimate consideration was what the jury believed was reasonable. The vagueness of the wording was regrettable. Some of the problems in the dicta of Camplin were not addressed, but it is uncertain whether the new formulation rendered them irrelevant. And what of the restrictions imposed by Newell, and thus the reasoning in McGregor? The causal connection impliedly remained, but the permanence requirement does not appear to have been incorporated. The fact that the Report pre-dated Newell highlights the injustice of that particular decision.[253] It was refreshing to see the Raven compassion to retardation anticipated in the proposed test. But does "any disability, physical or mental" include the (always excluded) states of unusual excitability or pugnacity or intoxication? Presumably, racial characteristics of the defendant were permitted under the all-embracing "all the circumstances". If that phrase was truly all-embracing then the test would be a considerable advance from Camplin. But those advocating a purely subjective test would not have been satisfied.[254]

Of the recent American commentators, Donovan and Wildman[255] — with a formulation definitely reminiscent of Samuels' — have drawn upon the theories of Hart and of Fletcher[256] in establishing their ideal jury instruction. It asks whether D "was honestly and understandably aroused to the heat of passion". In determining that question, the jury have to ponder whether D "could have been fairly expected to avoid" the killing.[257] Thus the critical inquiry is into the moral culpability of the individual defendant.

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250 Working Paper on Offences against the Person (1976) par 54.

251 "[I]t can reasonably be regarded as a sufficient ground" replaced the far simpler wording of the 1976 Working Paper: "[I]t constitutes a reasonable excuse."

252 14th Report, *Offences against the Person*, Cmnd 7844, pars 81 and 83.

253 See comments of Editor in "Provocation — The Need for Radical Reform" (1980) 130 *New LJ* 618.

254 See also Spencer, M, "Provocation and the Reasonable Man" (1978) 128 *New LJ* 615.

255 Donovan and Wildman, above n1.

256 See Hart, H L A, *Punishment and Responsibility* (1968) and Fletcher, G, *Rethinking the Criminal Law* (1978).

257 Above n1 at 467. Wilkie J in *State v Hoyt* (128 NW 2d 645, 21 Wis 2d 284 (1964)) provided an interesting formulation:
"The basic question is whether [D] ... is as culpable as [a wilful murderer]. To answer this question, we must place ourselves emphatically in the actual situation in which the defendant was placed, a situation which may be relatively unique ... The trier-of-fact must

An even more dramatic pronouncement may be found in the musings of Weber.[258] He asserts that if a killing occurred through heat of passion — D lost control and was not master of his/her mind — then *that* should be sufficient; queries as to provocation are simply not at issue. But if provocative conduct is required, then the only matter for consideration is the actual mental state of D. In a case of virtual causeless rage, D may be congenitally incapable of exercising 'proper' control (for example, *Alexander*). For Weber, this fact alone would be a sufficient mitigating factor. Dr Turner had also condemned a law which inflicted the strictest punishment on defendants who basically could not help themselves.[259] Weber rejected Dr Ashworth's counter- argument that "the defence of provocation is for those who are in a broad sense mentally normal",[260] and that the appropriate defence in other cases was diminished responsibility. Such a proposal had in Weber's view, completely failed to recognise the restrictions inherent in that defence. It is arguable that Weber has taken his heat of passion hypothesis too far, and that the proposals — of Samuels, Donovan and Brown amongst them — demanding certain standards to be upheld offer the more universally appealing and thus pragmatic reforms.

Ultimately, in seeking to comprehend the numerous motions for reform, the fundamental question has to be faced: Why do we have a defence of provocation reducing the crime of murder to one of manslaughter? Without daring to enter into a complex jurisprudential debate, it is surely imperative to determine the true rationale of the defence. It will be remembered that manslaughter upon chance medley, or killing in the heat of passion, had first emerged as a category of excusable homicide. No doubt as an expression of the law's benevolence, it was introduced to mitigate the absolute severity of the death penalty. Its modern day incarnation, the defence of provocation, is no longer possessed of such a design.

Confusion has existed as to whether the defence is properly a partial "excuse" or partial "justification": a dichotomy between the injustice of the provoker's conduct [justification], and the 'understandableness' of the defendant's retaliatory outburst [excuse]. As Dressler explains,[261] it is misguided to focus on the conduct of the provoker. Although it may be reprehensible, the conduct itself (usually) endangers no one's life. Therefore the life of the

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be able to say: although I would have acted differently, and I believe most people would have acted differently, I can understand why this person gave way to an impulse to kill."

258 Weber, J L, "Some Provoking Aspects of Voluntary Manslaughter Law" (1981) 10 *Anglo-American LR* 159.

259 *Russell on Crime* above n215 at 535.

260 Ashworth, above n210 at 312.

261 Dressler, J, "Rethinking Heat of Passion: A Defense in Search of a Rationale" (1982) 73 *J of Crim L and Criminology* 421 at 457. For those interested in a champion of the justification argument, see McAuley, F, "Anticipating the Past: the Defence of Provocation in Irish Law" (1987) 50 *MLR* 133. For a persuasive rejoinder, see Dressler, J, "Partial Justification Or Partial Excuse?" (1988) 51 *MLR* 467; and for its counter see McAuley, F, "Provocation: Partial Justification, Not Partial Excuse" in Yeo, S (ed) *Partial Excuses to Murder* (1991). Alldridge has gone so far as to contemplate two distinct provocation defences: "A partial justification is required to give vent to the feelings of the jury that [the victim] was 'served right' ... A partial excuse is required for the defendant who really does lose self-control." — But this seems merely to exacerbate the problem. See Alldridge, P, "The Coherence of Defences" [1983] *Crim LR* 665 at 671, and see above n244. Horder, above n243, expressly adopts Alldridge's definitions.

provoker is no less deserving of the law's protection and the killing can in no way be said to be justifiable. Instead one must properly focus on D, and her or his anger aroused by the provocation:

> Thus, his choice-capabilities were partially undermined by severe and understandable, non-blameworthy anger, but he was not sufficiently in control of his actions so as to merit total acquittal ... We are saying that the actor's moral blameworthiness is found not in his violent response, but in his *homicidal* violent response.[262]

If we accept that provocation is an excuse-based defence,[263] with the focus being on the actions of the defendant — as a concession to human frailty — then the application of the doctrine may be more expansive than is sometimes conceded. Thus the defence should be available where the provocation is indirect: where A who has provoked B, is killed by C; or where the retaliation is misdirected: where A provokes B who kills C, either accidentally or mistakenly. And in theory the marital status restrictions attached to killings in a love triangle should not apply.

But I fail to understand why, when Dressler produces his model defence in terms which broaden the concept, he ultimately restricts the doctrine by saddling it with an objective test:[264]

> Homicide ... is manslaughter, if at the moment of killing of the victim:
> (a) The actor suffered from extreme emotional upset which caused him to wholly or partially lose his self-control; and
> (b) Such upset was caused by a real or reasonably apparent [unlawful] situation ... which would render the ordinarily reasonable and law-abiding person in the same situation liable to become so emotionally upset that he would attempt to inflict non-lethal force upon the person whom the actor attempted to kill.

If the doctrine is truly excuse-based, then surely a formulation along the lines of Samuels'[265] would be more apposite. Whether some hypothetical person, or indeed a member of the jury would/might have lost control in similar circumstances still seems to overlook the principal issue. But the advocates for both points of view are numerous and persuasive, so it remains a moot point.

The question of why we have a defence of provocation must again be posed when faced with the vexed challenge of cumulative provocation. One writer has explained:

> Cumulative provocation ... typically ... involves a course of cruel or violent conduct by the deceased, often in a domestic setting, lasting over a substantial period of time, which culminates in the victim of that conduct ... killing the tormentor. Reliance is then placed on the whole course of conduct rather than on a single, really serious provoking event occurring immediately before the killing ... In such cases there may be no apparent final provoking event.[266]

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262 Id at 467.
263 Section 210.3 of the Model Penal Code (US), and even s3 of the *Homicide Act*, accept as much.
264 Id at 468.
265 Samuels, n195 above.
266 Wasik, M, "Cumulative Provocation and Domestic Killing" [1982] *Crim LR* 29.

In the classic scenario, a brutish husband/father creates an existence of domestic hell-on-earth, and the wife/children envisage no escape from their intolerable lives, until ultimately they effect the destruction of their tormentor. To paraphrase Dressler, their choice-capabilities have been not simply undermined but annihilated. In such a case, the defendant's solution is totally understandable. It is absurd that *in law* the facts cannot amount to a defence of provocation. Evidence of "no apparent final provoking event" and/or deliberation, as in the horrendous case of *Ibrams*,[267] will invariably bar a successful defence.[268]

Wasik notes[269] that the Criminal Law Revision Committee opted for a reaffirmation of the traditional *Duffy* requirement of a reasonably immediate retaliation from loss of control.[270] The delicate issue of public perceptions regarding the stigma of a murder conviction was of crucial significance; but as Wasik confirms:

> all the evidence there is points to the public's opposition to stigmatising killing under cumulative provocation as murder. It must be that the Committee simply overlooked the complexities of this issue.[271]

Amongst the possible reforms Wasik canvasses is the extension of the present doctrine of provocation: to de-emphasize the *Duffy* requirement and concentrate on the injustice of the victim's conduct. Such an approach is supported by Wolfgang's theory that cases of cumulative provocation are "classic illustrations of victim-precipitated homicides."[272]

Recently, the case of *Sara Thornton*[273] has highlighted the absolute injustice of a rigid application of the provocation defence in a domestic violence setting. There was a history of drunken violence towards the wife during the course of their marriage. After repeated threats from the husband that he would kill her, she sharpened a knife in the kitchen before stabbing him to death as he lay in an alcohol-induced stupor. The Court of Appeal reaffirmed the trial judge's rejection of a defence of provocation on the grounds that she had not been beaten on the night of the killing; that she had not acted 'suddenly, in the heat of passion'; that she could have opted to leave; that it was, in short, a deliberate killing of a defenceless man. A public furore erupted. It escalated when in a matter of days a husband who had kicked his drunken and abusive wife to death received a mere suspended sentence, the trial judge lamenting that the wife "would have tried the patience of a saint".[274] Understandably, there have been calls both to amend s3 of the *Homicide Act*, and/or to abolish the mandatory life sentence for murder. Studies have revealed the inappropriateness of the legal notions of

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267 (1982) 74 Cr App R 154.

268 For an enlightening appraisal of this whole area, see Horder, J, "Sex, Violence, and Sentencing in Domestic Provocation Cases" [1989] *Crim LR* 546.

269 Wasik, above n266 at 34.

270 Above n252 at par 15.

271 Wasik, above n266 at 35.

272 See Wolfgang, M E, "Victim-Precipitated Criminal Homicide" in Wolfgang, Savitz and Johnson, *The Sociology of Crime and Delinquency* (1970).

273 Unreported, Court of Appeal, 22 July 1991. See Lonsdale, S and Ghazi, P, "Women beaten by the law" *Observer* 4 August 1991 at 19.

274 The case of *Joseph McGrail*, discussed ibid.

cooling time and proportionality to "battered women".[275] These recent rulings have inspired fresh accusations, from not only writers but a concerned public, of a disturbing pattern of judicial gender-discrimination in cases of domestic homicides. Although at the time of writing the Home Secretary continues to reject these claims, it is to be hoped that the long respected — by male judges and male lawyers — *Duffy* definition may, in the not too distant future, be replaced.

Conclusion

Our analysis of the courts' attempts to struggle with the doctrine has unearthed striking inconsistencies. Irregularities in terminology abound. The "reasonable" person has also materialised as ordinary, prudent, average — indeed any combination of expressions. Such a person would/might/is liable to/is likely to kill. As to loss of control, reason may have been dethroned, but sometimes rather than a blind fury, only a partial loss of control seems required. Either way it somehow must produce a reasonable retaliation, if that is possible. Although each description has a subtly different connotation, the courts have appeared oblivious to the distinctions. And as we have seen, the problems are in no way limited to terminology. The developments on the whole leave one feeling hugely dissatisfied. As Dressler has charged:[276] "Put bluntly, courts have dealt sloppily, disinterestedly, or, worst of all, incompetently with the doctrine."

All those advocating reform of the defence of provocation — whichever feature generates the most concern — must come to terms with the traditionalist approach championed by Ashworth;[277] it may well determine the direction of the debate in England for some time to come:

> It is one of the fundamental postulates of English criminal law that individuals ought at all times to control their actions and to conduct themselves in accordance with rational judgment.

And perhaps, as Fletcher has stated, there is a fundamental issue which cannot be ignored:

> The primary source of difficulty in the analysis of provocation derives from the failure of the courts and commentators to face the underlying normative issue whether the accused may be fairly expected to control an impulse to kill under the circumstances ... The basic moral question ... is distinguishing between those impulses to kill as to which we as a society demand self-control, and those as to which we relax our inhibitions.[278]

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275 See, for example, Walker, L, *The Battered Woman* (1979). For a useful analysis of the whole debate, see O'Donovan, K, "Defences for Battered Women Who Kill" (1991) 18 *J of Law and Society* 219.

276 Dressler, above n261 at 432.

277 Ashworth, above n210 at 317.

278 Fletcher, above n256 at 246-247.