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The Coroners and Justice Act 2009 - partial defences to murder (1) Loss of control

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Cases: R. v Smith (Morgan James) [2001] 1 A.C. 146 (HL)

Attorney General for Jersey v Holley [2005] UKPC 23; [2005] 2 A.C. 580 (PC (Jer))

***Crim. L.R. 275** Under s.54-56 of the Coroners and Justice Act 2009, the defence of provocation is abolished and in its place comes a new partial defence involving loss of control. This new defence is expanded to cover loss of control arising from both anger or outrage (the old provocation ground) and fear. It is the product of work undertaken by the Law Commission in 2004 and 2006, culminating in a Government consultation paper published in 2008.¹ As regards provocation, the new law may cover much of the old ground, but there is a significant difference of approach and emphasis that emerges from the Law Commission's deliberations, even if it is not fully carried through into the law. The essential difference is that the Law Commission had recommended that new partial defences concerning anger and fear should be enacted, but had cast these in a way that entailed that loss of control be abandoned. The new defence, as its name suggests, does not go that far. The Law Commission's proposal, however, involved a significantly different way of looking at killing through anger and fear to which rejection of loss of control was integral. In this comment, I will focus on the changes made to the law in light of the Law Commission's approach, the problems the Commission identified, and the underlying theoretical changes it sought to introduce.

The New Law

Under the new law, the partial defence to murder of loss of control requires a loss of self-control (s.54) which has a "qualifying trigger" (s.55). The loss of control is monitored by an objective test, which stipulates that it must have been such as would have been experienced by a "person of D's sex and age, with a normal ***Crim. L.R. 276** degree of tolerance and self-restraint and in the circumstances of D" (s.54(1)(c)). The "circumstances of D", it is added (s.54(3)), refers to,

"all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint".

The loss of self-control need not be "sudden" (s.54(2)), but this is connected to the stipulation that D must not have acted from a considered desire for revenge (s.54(4)). The burden of proof that D did not experience a loss of self-control rests with the prosecution once the defence has raised the issue (s.54(5)), but the issue will only have been raised if the trial judge is of the view that the evidence relied upon would satisfy a "properly directed" jury that the defence might reasonably apply (s.54(6)).

As regards the qualifying triggers, s.55 stipulates that these exist where either "D's loss of self-control was attributable to D's fear of serious violence from V against D" or another person (s.55(3))--the fear trigger; or was attributable "to a thing or things done or said (or both)" which "constituted circumstances of an extremely grave character" and "caused D to have a justifiable sense of being seriously wronged" (s.55(4))--the anger trigger. These are the two wings of the new defence --loss of self-control through fear and through anger.² There then follow some ancillary provisions which allow that the qualifying triggers may be combined (s.55(5)), and require that D not have incited the violence he feared, or the provocation which caused him to lose control (s.55 (6)(a) and (b)), before a final stipulation (s.55(6)(c)) that sexual infidelity is to be disregarded in considering loss of control under s.55(4).

As mentioned, the new law is the Government's response to two Law Commission reports, adopting and amending the Commission's argument and recommendations. To understand what is going on in

the law, it will be helpful to state the problems identified by the Commission, and how it sought to deal with them. In the first report, the three main problems with the existing law were identified as being that: provocation had become too loose so that a judge may be obliged to leave the issue to the jury where the conduct or words relied upon are trivial; the concept of loss of self-control had proved to be troublesome, giving rise to serious problems, to complaints of gender bias, and of the law having to be stretched in the “slow burn” type cases; and the objective, reasonable person test under the 1957 Act had become too subjectivised in the interpretation given to it in *Morgan Smith*,³ enabling a D to rely on “personal idiosyncrasies which make him or her more short tempered than other people”.⁴ In response to the first of these problems, the Law Commission proposed that the judge should have control of the issue of provocation, and this has made it into the Act in s.54(6). With regard to the second, the Law Commission proposed that the requirement **Crim. L.R. 277* of a loss of self-control should be abolished to avoid the problem of “slow burn” and the criticism of being overly sympathetic to men and underly so to women. They also proposed that there should be a second limb to the provocation defence which included killing as a response to a fear of serious violence, which would be beneficial to women experiencing domestic violence and not require their defence to be shoehorned into traditional provocation. As already stated, abolition of loss of self-control has not made it into the law, though it no longer requires that the loss of self-control be “sudden”, while the proposal for a new defence ground, through fear, has been enacted. As for the third problem, the Commission maintained the position of the minority in *Morgan Smith* and the majority in *Holley*,⁵ holding that a strong distinction should be maintained between matters which relate only to a D's general capacity for self-control, and those which concern the provocativeness of actions and words directed against him, with the sole exception of age.⁶ Here again, the new law reflects the Law Commission's approach, though it adds “sex” to age as a general characteristic to be taken into account.

The Underlying Philosophy

If this is a bare summary of what has happened, consideration of the nature of the reform and the likely issues to which it will give rise depend on understanding the underlying philosophy of the changes proposed. Here a significant change occurred. In their first report, the Law Commission distinguished two approaches to provocation, one with a justificatory, the other with an excusatory basis. While acknowledging that this was problematic, the Commission felt it did produce helpful arguments,⁷ and the distinction between the two operates to identify two different philosophies of provocation. What are these? The first is that of what I shall call *imperfect justification*, and it is this which informs the Law Commission's own thinking. In this view, anger is not a morally impermissible emotion, for it reveals a normal and, at one level, appropriate, even perhaps virtuous, response to certain forms of words or action. How this insight fits with the law is complex and operates at two different levels. Some would argue that “anger cannot ethically afford any ground for mitigating the gravity of deliberately violent action”, but the **Crim. L.R. 278* counter-argument is that it “can be an ethically appropriate emotion and that ... it may be a sign of moral weakness or human coldness not to feel strong anger”.⁸ Even in this view, however, anger cannot justify outright a violent response, certainly not a killing. Nevertheless,

“a killing in anger produced by serious wrongdoing is ethically less wicked, and therefore deserving of a lesser punishment, than, say, killing out of greed, lust, jealousy or for political reasons”.⁹

Where a

“belief that the provoked [person] has been wronged by the provoker ... is justified, it does not justify the provoked person in giving vent to his or her emotions by resorting to unlawful violence, however great the provocation. Two wrongs do not make a right. However, ... there is a distinction in moral blameworthiness between over reaction to grave provocation and unprovoked use of violence.”¹⁰

This idea of responding by way of an action that requires a nuanced and complex judgment of *both* its particular rightfulness *and* its overall wrongness I seek to catch by the term “imperfect justification”.¹¹ Note that in this approach, no reference need be made to a loss of self-control, for on this account, it is the way that anger righteously informs action, albeit in a context of overall wrongness, that provides the element of justification to set against the overall sense of a wrongdoing. On this model, it would be inappropriate to require a loss of self-control as a part of the defence. The defendant need not be out of control, though he or she acted when the “blood was up”. Indeed to be out of control might take the moral edge off what has been done in righteous, but sanctionable, anger. Note also that what is true of anger is also true of fear, for fear too may be an appropriate and justified, if overall wrongful,

emotional response. With both anger and fear, “there is a common element namely a response to unjust conduct”.¹²

If this is the approach of the Law Commission,¹³ how does it compare with the previous law and its underlying theoretical approach? As the Law Commission point out, the approach informing the 1957 Act was not one of justification but one based on excuse.¹⁴ Though they do not elaborate it, I would call it one of **Crim. L.R. 279 compassionate excuse*. This reflects the fact that the person is held to have lost self-control, so that their act is intrinsically marked from the first as wrong. It is (arguably) one thing to act out of morally appropriate anger, remaining in control of one's actions, the new approach. It can never be right at any level to lose one's control, for this entails a defect in one's rationality, the sine qua non of moral action. Loss of self-control, hijacking reason, is a problem from the start. At the same time, it can in appropriate circumstances be understood, sympathised with, and therefore be partially condoned or excused. The law condemns the act both for the wrong done *and* the loss of control, but still extends a compassionate hand to the actor. This is the basis for the idea that provocation is a concession to human frailty, for the loss of self-control and its consequence is condemned, but the weakness it represents is viewed with sympathy. Note in this, by the way, the crucial rider “in appropriate circumstances”, for it is not every loss of self-control that will produce sympathy. Much will depend on the moral quality of the provocation to which there was a reaction,¹⁵ as well as to the particular human circumstances of the defendant. What was it about both the provocation and the provoked defendant that caused her to lose self-control, and is the “ordinary person” sympathetic to their plight? Is their weakness something that can be condoned on a “there but for the grace of God go I” basis? In sum, if the moral mark of the new Law Commission approach is that conduct is imperfectly rightful, and therefore both condemned and partially vindicated, the mark of the old law was that conduct was partially excused, both wrongful and partially condoned on ground of compassion. This, as we shall see, marks out two different territories for the old law of provocation and the new law of loss of control. I now return to the core problems that led to change in the law.

Judge and Jury

As noted, there was a concern at the Law Commission that trivial forms of provocation have to be left to the jury,¹⁶ but was this so serious a problem? Could juries not be relied on to sort out the sheep from the goats? In fact, another issue lay behind this concern, which was not the trivial use of the defence but its use on morally or politically unacceptable grounds (e.g. provocation to a racist,¹⁷ “honour killing”, marital infidelity, the provoked erotomaniac). To combat this, there were two elements to the Law Commission's proposals, one which involved strengthening the law with the requirement that provocation be *legitimately* grounded as an appropriate response to provocation, and therefore be (imperfectly) justified, the other involving the procedural power of the judge, where the case is not legitimately grounded, to remove the issue from the jury. To strengthen the legitimacy of provocation claims, the Law Commission stipulated that provocation should be “gross” and cause a “justifiable sense of being seriously wronged”.¹⁸ The Act omits reference to “gross” provocation, but requires instead that it must be “extremely grave”, and cause the same justifiable sense of being seriously wronged.

Here, the substantive moral issue of what is a rightful or wrongful response to provocation is openly addressed by both the Law Commission and the new law. **Crim. L.R. 280* Under the old law, the matter was either dismissed as irrelevant to provocation, as in the case of *Morhall*,¹⁹ or finessed, more or less successfully, as in the case of *Morgan Smith* (see below). The law essentially declined to commit itself on what were good or bad reasons to be provoked. The issue of moral and political acceptability in being provoked was left to the jury. The law did not provide a standard for assessing acceptability, nor was the judge empowered to rule on the matter. Under the new law, the idea of a *justifiable* sense of being *seriously* wronged directs the jury to consider what is morally or politically acceptable, and, further, the judge has the power to remove cases from the jury's consideration. Interestingly, it should be noted that, with regard to the power of removal, the matter is taken from the “actual” jury's consideration in the name of an “ideal” jury. For example, the Law Commission wrote that the racist killing in response to supposed provocation would be a case where,

“the jury may conclude that the defendant had no sufficient reason to regard it as gross provocation, or indeed that the defendant's attitude... demonstrated an outlook ... offensive to the standards of a civilised society”.²⁰

In such a case, no fair-minded jury, properly directed, could reasonably conclude that there was gross provocation and the proper course “would therefore be for the judge to withdraw provocation from the

jury”.²¹ This formula of the properly directed, reasonable jury makes it into the law in s.54(6).

It is also in this context that the Law Commission raised the issue of killing a spouse revealing her infidelity. Its view was that such cases should not be left by the judge to the jury²²; the Government has taken this one step further with an explicit provision in s.55(6)(c), and this is discussed below. Another case considered by the Law Commission is that of *Stingel*, the Australian case involving killing out of male possessiveness and jealousy by a stalker (erotomania). In *Morgan Smith*, Lord Hoffmann expressed the view that such emotions were not acceptable grounds for being provoked, but in line with the existing law indicated that the matter had to be left to the jury, with an indication that they should use their moral common sense as citizens representing the community to deal with it.²³ Under the new law, a case like *Stingel* would not be left to the jury, on the basis that no fair-minded jury, properly directed, could conclude that there was provocation. But here the emphasis is either on the fair-mindedness of actual juries, in which case such claims could be left to them anyway, or of those idealised juries who have been “properly directed” by judges in particular cases. What the old law entrusted to juries willy nilly, the new law takes out of their hands in cases that are “purely speculative and wholly unmeritorious”,²⁴ empowering judges to make the moral and political call on what is a justifiable expression of provoked anger, albeit in the name of the “ideal jury”.

***Crim. L.R. 281 The Objective Test**

The new law on this follows the Law Commission's recommendations. Whereas the Law Commission stipulated that the standard should be that of a person “of the defendant's age and of ordinary temperament, i.e. ordinary tolerance and self-restraint, in the circumstances of the defendant”,²⁵ the new law speaks of a person of D's sex and age “with a normal degree of tolerance and self-restraint in the circumstances of D” (s.54(1)(c)). Here, “sex” is added to “age” as a general characteristic to be taken into account, but the only other difference in the law from the Law Commission's formula is the exclusion of the word “ordinary”, which now suffers the same fate as “reasonable” in earlier case law, though “normal” is neither more nor less specific than “ordinary”. In any case, the important rider introduced by the Law Commission, that reference to D's circumstances excludes matters whose only relevance is that they bear on D's general capacity for self-control, is retained (though “self-restraint” is substituted for “self-control”, and a reference to a capacity for “tolerance” is also included).

In this approach, it should be noted that only age and sex are general characteristics to be taken into account. This follows the older formula in *Camplin*,²⁶ but it is worth pointing out that it is unclear what role “sex” should play in the new law. Age is included because, as the Law Commission put it, “capacity for self-control is an aspect of maturity, and it would be unjust to expect the same level of a 12-year-old and an adult”.²⁷ Presumably the idea is that sex also generally affects capacity for self-control, but exactly how is left unstated.²⁸

In any case, there is a problem with age. Capacity for self-control is indeed an aspect of maturity, but age is not then the main issue, maturity is. Age is no more than a rough and ready way of marking maturity. One could have twelve year olds with very different levels of maturity, and one could have adults with the maturity of 12-year-olds. The Law Commission recognises both issues. Of the child with developmental immaturity, it notes that taking account of age “allows for the child of normal development (who very seldom kills) but not for the child with significant developmental problems”.²⁹ Such a child, further, may well have difficulties in being included under the defence of diminished responsibility.³⁰ What of the immature adult? The Law Commission notes that “mental age is a complex subject” and that many who kill are emotionally immature. But it argues that probing psychiatric and psychological evidence about an accused's maturity would be complicated and undermine the objective test. It accepts the logic of extending ***Crim. L.R. 282** the rule beyond a single “temporal” account of age, but does not support it “for policy reasons”.³¹ The route here for a defendant should be towards diminished responsibility, but it is doubtful whether that defence, especially in its new form,³² is sufficiently capacious to include all cases of emotional immaturity. In which case, on its own proposal, justice is lost.

The more general point, however, concerns the limiting of general characteristics, a position which the Law Commission recognised placed itself in the position of the minority in *Morgan Smith* and majority in *Holley* under the old law. This takes us back to what was wrong with *Morgan Smith*, and the problems that it bequeathed to the subsequent law. In that case, Lord Hoffmann's judgement left considerable power in the hands of the jury to decide whether a “reasonable person sharing the characteristics of the accused” under the *Camplin* test was entitled to the defence of provocation. In line with *Camplin* and later case law, no ultimate distinction was drawn between characteristics

affecting the gravity of the provocation and those affecting the general provocability of the defendant,³³ and no distinction was made between morally acceptable and unacceptable characteristics. At the same time, however, Lord Hoffmann made it clear in *Morgan Smith* that there were characteristics such as jealousy and general bad-temper that should not be taken into account, and he encouraged the jury to decide on the moral standards to apply in particular cases.³⁴ Hence, although the law appeared to be value-free in its deployment of the reasonable person test, in that it only required that a characteristic had affected the accused's ability to retain self-control, this was accompanied by circumlocutionary advice to the jury. The jury was encouraged to deploy the objective reasonableness test not just in terms of whether a reasonable person sharing the accused's characteristics would have done what the accused did, but also to apply community moral standards in making that assessment. There was an undercover appeal to values³⁵ through the reasonable person test even if, on its surface, moral values were not part of it.

Nonetheless, despite Lord Hoffmann's exhortations, juries in subsequent cases did not necessarily get the point. Some judges reported to the Law Commission that juries had no problem in applying *Morgan Smith*. Others, however, did, such as in *Weller*,³⁶ which concerned the question whether the jury should be able to take into account an obsessive and jealous character--a character which *Morgan Smith* had suggested should not be taken into account, while recognising that the judge had no power to direct the jury explicitly on the matter. Juries just had to take the hint that this should not be taken into account as part of a general consideration of what standards should be applied; judges could not officially direct them on the matter.

In light of this, did the minority position in *Morgan Smith*, which became the law in *Holley*, have the answer? Certainly, adopting that position narrows the scope ***Crim. L.R. 283** of the defence, for it requires that where the provocation relies on a characteristic of the defendant, it must be directed at the characteristic if it is to be taken into account. Anything else that affects the defendant's general propensity to be provoked, apart from age and sex, is ignored. Thus if a person suffers from alcoholism, this is irrelevant to the loss of self-control unless a taunt was levelled at the fact that the defendant was an alcoholic. If there is not that link, then the defendant must look to the defence of diminished responsibility, even though the characteristic in fact caused them to lose their self-control and to be provoked. This is a significantly narrower test, but an irrational one because it does not address the nub of the problem under the old law. The real problem under the partially excusable wrongdoing approach adopted in that law was that there was no morally or politically substantive standpoint from which to evaluate the factor that caused the provocation. That was explicitly held to be the case in *Morhall*, where it was held that the moral and political colour of the condition relied on, addiction to glue-sniffing, did not matter. The question remained open to the jury to decide whether or not it affected the loss of self-control, regardless of its (dis)credibility. It was therefore impossible to distinguish in law those conditions that ought ethically to be permitted to excuse from those which ought not. That was the problem under the old law. Arguing for the need for a direct link between a provoking factor and provoked conduct narrowed the scope of the defence, but it did not get to the nub of the problem.

Thus after *Holley*, being addicted to glue-sniffing still provided the basis for an excusable provocation, provided the taunt was directed at the addiction, but not if it was not. At the same time, otherwise sympathetic psychological conditions such as the stress and pressure of caring for a new-born baby (*Doughty*),³⁷ or suffering from emotional immaturity (*Humphreys*),³⁸ or being of low intelligence (*Acott*)³⁹ would not. Yet, these were cases that were, or could in principle have been, admitted under the compassionate excuse approach of the old law. For these defendants to have a defence to murder after *Holley*, they would need to find refuge in diminished responsibility. In all three cases this might have been possible under the existing law, though it would have involved very sympathetic psychiatric testimony, especially in *Doughty*.⁴⁰ In any case, despite the fact that all three could claim to fall within the loss of self-control model, and to have experienced a reason for loss of self-control that was worthy of compassion, none of them would be entitled to a claim under the provocation defence on the basis of the position of the minority in *Morgan Smith* or the majority in *Holley*. Thus post-*Holley*, under the old law, the law's irrationality is seen in that morally unworthy characteristics are still admissible provided that they are directly related to the provocation, while morally sympathetic characteristics are not, unless there is the direct link. The old law was based upon a concession to human frailty, recognising that people could not always ***Crim. L.R. 284** reach the standard of the reasonable person, yet be worthy of compassion in their personal situation. That law developed in a way that lost sight of the need to judge which characteristics were worthy of compassion, and hit upon the need for a direct connection between provocation and loss of self-control to narrow its application, but without ever recognising the underlying problem.

Contrast this failure in the old law with the standpoint of the new law. Here, the issue is not a wrongful loss of self-control for which a sympathetic partial excuse acts as a concession. Under the new ethical approach, this sympathy for human frailty is rejected in favour of a recognition of imperfectly justified anger. Anger is partially rightful in the new understanding, while loss of self-control fails to qualify one for the defence. The person who loses self-control falls short of a standard to which he or she has to conform, which cannot be “capped according to the capacities ... of the person to whom the excuse is supposed to apply”. To the contrary, any failure to reach the standard is “a mode of unfitness in its own right”,⁴¹ and is relegated to a separate category such as diminished responsibility.

Now, according to this approach, the minority position in *Morgan Smith* is absolutely right, for it is the imperfectly valid moral connection between the provocation and the response that is relevant. Provocation causally links the anger felt to the deed done or words said. This still leads to problems: how to identify appropriate grounds for anger looms large here too, hence the need to strengthen the objective basis for the defence (s.55(4)), to empower the judge against the jury (s.54(6)), to stipulate that sexual infidelity is not a valid basis (s.55(6)(c)), and that provoked outrage is different from revenge (s.54(4)). But the key point is that under the Law Commission approach, loss of self-control falls from the picture and with it, the sympathetic, excuse-based approach of the old law, and with that, the possibility of giving the defence to defendants such as Doughty, Humphreys and Acott. In these cases, there may have been elements relating to justification in what they did, though especially in *Doughty*, it is hard to see this. That case in particular requires us to have compassion for the weakness of one who in sad or tragic circumstances did what was wrong without justifiable sense of being seriously wronged. No jury, properly directed or otherwise, could find that the defendant had such a sense. Under the old law, his loss of self-control was condemnable, but having lost it in the context of a sympathetic or tragic plight could lead a jury to grant him a partial concession based on human frailty.⁴² Under the old provocation law, someone like Doughty may be shown compassion and become a manslaughterer; under the new law, he will not get the defence. One might wonder if moral progress has been made here.

***Crim. L.R. 285 The Abused Woman**

What of the abused woman who kills her partner, instrumental under the old law in opening up the capacity for self-control to a variety of circumstances?⁴³ In *Morgan Smith*, Lord Hoffmann was of the view that this was just the kind of person who ought to be able to benefit from the provocation defence regardless of a direct link between provocation and characteristic.⁴⁴ Such a person should not be pressed into the law of diminished responsibility. Under the new law, two avenues are open to the abused woman. One is through the new fear trigger, the loss of self-control attributable to fear of serious violence. The other is through a different reading of how domestic violence impacts on loss of control through anger.

The fear trigger was introduced by the Law Commission as a way of dealing with cases which did not fall within the law of self defence. Where an abused woman kills her partner out of fear of violence, such conduct often does not bring the defendant within self defence, either because she reacted disproportionately or because it would be hard to claim that she acted in response to a fear of imminent violence.⁴⁵ (This form of the defence may cover, it should be noted, other cases, for example of the householder killing an intruder, or the policeman shooting dead an unarmed suspect,⁴⁶ but I focus here on the abused woman killing her partner.) The new defence covers both the case of overreaction and that of improper pre-emption. Under the old law, the abused woman was rather shoe-horned into the defence of provocation, and this led to difficulties in defending her. Where, for example, a woman wished to claim she acted in self defence, which involves acting reasonably, it is not easy to run as an alternative defence that she was acting under provocation, involving a sudden loss of self-control.⁴⁷ Under the Law Commission's proposals, such a woman could still plead self defence, with the new partial defence of killing out of fear of serious violence operating as a more compatible alternative. In both situations, the claim is that she acted in a morally appropriate and reasonable way. Note, however, that under the Law Commission's proposals this would be easier than under the new law itself, for the latter reinstates a loss of self-control requirement. The Law Commission sensed a problem here, as we shall see, but its overall approach may be undermined by the final form of the new law.

The second route would involve the use of anger as the trigger condition under the new defence. Here, the argument is provided by the Law Commission, drawing on dicta in *Morgan Smith*⁴⁸ and *Holley*,⁴⁹ which sought to bring the abused woman within the narrower version of the old defence. Under that version, the abused ***Crim. L.R. 286** woman has some difficulty, provided that the

provocation does not target her weakness or vulnerability but, say, focuses on her cooking or general uselessness as a spouse. Notionally, in such a case, the changes in her personality brought about by systematic abuse (“battered woman syndrome”) lead to a condition of learned helplessness which *generally* affects how she reacts, and this points her under *Holley* to the diminished responsibility defence. Within this approach, however, there is an argument for keeping her within provocation. It is that evidence of systematic abuse does not affect her general capacity for self-control but the quality, grossness or gravity of the abuse she has suffered. Cumulative abuse therefore affects the gravity of the provocation to her, not her general capacity. Accordingly, under the new law, evidence of systematic abuse could go to establish the gravity of the wrongdoing and the justifiable sense of being seriously wronged which would have been experienced by any person of normal tolerance and self-restraint. It would not be used to explain her general psychological condition.

This is a clever argument, though it does involve rethinking how one understands the abused woman in this situation. Under the old law, defendants were encouraged to provide evidence of a characteristic that could be taken into account with regard to the reasonableness of their conduct. This led to the pursuit of a medico-legal category, battered woman syndrome, which could legitimate the existence of the characteristic for legal practice. Unfortunately, the more this characteristic was medicalised, the more it fell prey to the criticism that this was a condition worthy not of the provocation but of the diminished responsibility defence. Under the new law, defendants and their lawyers will be encouraged to portray themselves as ordinary people grievously harmed and acting out of a legitimate sense of anger at what has been done to them. This may be a benefit of the new approach.

Loss of Control

The story of the law's reform away from and then back to loss of control is slightly complex. It begins with a concern of the Law Commission to exclude unmeritorious cases while admitting others.⁵⁰ The problem was to permit the inclusion of, say, the abused woman who kills, but who acts with some apparent degree of premeditation, and to exclude other cases such as those of “honour killing” or a case like *Baillie*,⁵¹ in both of which there is a strong motive of revenge. In light of this worry about the unworthy case of revenge creeping in under cover of the moral approach, the Law Commission proposed what became s.54(4) on “considered desire for revenge”, but also considered alternatives to strengthen the position, including that the defendant should have acted out of “extreme emotional disturbance” or “immediately” following the provocation.⁵²

The problem was that a person should be able to claim the defence who has acted out of a justifiable sense of being seriously wronged, in response to a grave provocation, but not in a situation where they have converted their justifiable anger into a cold calculation for revenge. What is required is that the person act out of anger “in the moment”. The example of honour killing is slightly beside the point here, because it would be excluded on the basis that there was no justifiable **Crim. L.R. 287* sense of being seriously wronged. *Baillie* is perhaps nearer the mark, where the defendant drove to a drug dealer's house and killed him, acting as “self-appointed judge, jury and executioner”.⁵³ The Law Commission accordingly, in addition to the no “considered desire for revenge” requirement, sought a marker for the “in the moment” nature of the anger. This could be indicated either by a defendant's “extreme emotional disturbance”, or by immediacy in point of time between the provocation and response. The former would, however, add a different, jarring, element to the new moral basis for the defence. As well as acting out of justified anger, one would need to be emotionally disturbed. This involved bringing loss of self-control back into the picture, and was therefore inconsistent with the new rationale of the defence as stated by the Commission. The latter was perhaps more promising, since it linked the reaction to the time when “the blood was up”. However, the problem with this approach was that it was thought that it could not apply equally to the fear trigger--why is not stated, but it may be that there was a worry that in the case of the abused woman, bringing in an immediacy requirement would undermine the core idea that the partial defence could be used in cases of non-imminence or improper pre-emption. Still, one might have thought that the clear stipulation that the person not have acted out of considered revenge would have been enough to indicate the moral scope of the new law in relation to either the anger or fear triggers, and this was in fact where the Law Commission left the matter.

Not so with the Government. When we come to the new law, we find that it is concerned that there is a risk of the partial defence being used inappropriately, in honour killing and also gang-related cases, and even in appropriate cases such as those of the abused woman who kills. Even there, there,

“is still a fundamental problem... where a defendant has killed while basically in full possession of his

or her senses, even if he or she is frightened ...”⁵⁴

At this point, the Government jumps tracks on the Law Commission's approach, for under it, the angry or fearful defendant *is* in control of their senses, albeit acting out of anger or fear. The Law Commission relied on judges and juries (in terms of ss.54(4) and (6)) to distinguish acting out of justified anger or serious fear from killing in cold-blooded revenge, but it opened the door to this departure from its proposals by acknowledging that the stipulation against revenge might be insufficient. If it is right that the immediacy requirement was rejected because it would counteract the fear trigger in cases of pre-emptive violence, that only left “extreme emotional disturbance” as a means of checking revengeful violence. That however, as I have said, is only a hop and a skip away from loss of self-control. Hence, the Government, picking up the Law Commission's hesitancy, reintroduced loss of self-control into the defence, and, indeed, even called it that.

What will be the practical effect of this change? We need to consider its impact on the two modes of provocation under the new and old law. The first is imperfect justification. Here, the defendant acts out of fear of serious violence or where something that has been said or done is extremely grave and causes a justifiable sense of being seriously wronged. These are the qualifying triggers which permit, under the new law, a loss of self-control. That loss, however, must not be in **Crim. L.R. 288* conditions where the defendant acted from a considered desire for revenge. In addition, that person must have lost their self-control, though this need not be “sudden”. What does this add to the law? On the one hand, it may make no substantial difference to an actual case, since it might be thought that any person who kills out of anger *must*, at some level, have lost their self-control--why else would they have killed? That the killing could not take place out of revenge already means that that problem is covered. A loss of self-control may just become another way for the jury to test that the person did not act in revenge. On the other hand, however, the idea of loss of self-control must have some substance, and though the removal of the “sudden” requirement may help where the defendant's provoked reaction is delayed or gradual, there can now still be an argument as to whether there was a loss of self-control. In the case of the abused woman who acts after a time delay, will this not take the law back into disputes about whether there was a loss of self-control, and from there, into questions of suddenness, for, it might be thought, a test for and constitutive feature of any loss of self control in anger is that it have an element of suddenness? How else does one identify a loss of control, except as a moment of departure from being in control? The concern may be that, with both the anger and the fear triggers, the reintroduced requirement for loss of control will work against the new understanding that killing out of anger or fear represents a form of imperfectly justified action. Now, as well as a legitimately grounded sense of anger or fear, the defendant must also show a loss of self-control. Will that not work against the core logic of the new defence? Will it return defendants to the difficulty in pleading both reasonable self defence and a mitigatory defence based on loss of control?

The second kind of case is the old, theoretically excluded, one of compassionate excuse. This approach will presumably be permitted a limited re-entry into the law, simply by virtue of the loss of control formula. This will, however, be restricted in its use both by the requirement that any provocation involve a justifiable sense of being seriously wronged, and by the requirement that any characteristic to be taken into account on the reasonableness test not go to general capacity. In this approach, neither the kinds of cases mentioned previously relating to the general stress (*Doughty*), immaturity (*Humphreys*) or lack of intelligence of the defendant (*Acott*), nor those which concern discreditable characteristics, such as being addicted to glue-sniffing (*Morhall*) or experiencing erotomania (*Stingel*) will fall within the defence. Loss of control may be back, but the compassionate excusing approach, in both its appropriate and inappropriate forms, is not.

Finally, there is the control on the defence in requiring that sexual infidelity is never to be considered as a valid basis for killing in anger. Here, the Government is clear that infidelity should not be a relevant factor. Even if other exceptional factors are present, the defence “should stand or fall on these ...rather than on the sexual infidelity”.⁵⁵ As a general rule, one can see exactly why the Government should take this position, especially on an approach to angry killing that seeks to identify those forms of killing that are imperfectly justified. The Government does not want to say conduct was “rightful but wrongful” in such cases; rather that it was doubly wrongful, in both taking offence initially and killing. The difficult cases, however, will presumably not be those in which the bare fact of infidelity **Crim. L.R. 289* is relied upon as causing anger, but where one partner habitually taunts another with the example of their infidelity, either by itself, or as part of a range of taunts. According to the new law, infidelity can never be taken into account, but where a taunt of infidelity is part of a range of taunts and the taunting is systematic, should it be the case that one somehow excludes the one

taunt and admits the others? In such cases, it is surely the campaign of taunting that is significant and not the substance of individual taunts. In light of how the old defence was used by some male defendants to blacken the character of those they had killed, this may be thought not to be a real worry. Yet, there are cases where sexual infidelity has been used as a taunt, and this was recognised by the Law Commission as being a situation where judge and jury should be able to come to a decision.⁵⁶

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Crim. L.R. 2010, 4, 275-289

1. Law Commission, *Partial Defences to Murder* (2004), Law Com. No.290; Law Commission, *Murder, Manslaughter and Infanticide* (2006), Law Com. No.304; Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (2008), Consultation Paper CP No.19/08. While the Law Commission proposed a reform of the defence of provocation to include both gross provocation and fear as triggers, the new law based on the Government paper abolishes provocation as a defence while including the substance of the Law Commission's dual trigger approach, in a new defence called "loss of control". When considering the new law with regard to loss of control from "justifiable sense of being seriously wronged", I have tended to talk still of provocation. Though this is no longer the name of the defence invoked, its substance remains in the law.
2. As s.55(4) makes clear, this is not anger plain and simple, but arising out of a sense of being justifiably wronged. The Law Commission's pivotal theoretical discussion of the grounds of provocation (*Partial Defences to Murder*, 2004, Law Com. No.290, para3.38) refers to "anger" and "fear", and I have followed this usage. Unlike "fear", "anger" is not mentioned in the new law, as indeed it was not under the old law either. Yet anger or something like it--lost temper, outrage--has always been the link between the provoking conduct and the loss of control.
3. *Morgan Smith* [2000] 4 All E.R. 289; [2001] 1 A.C. 146 HL.
4. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.21.
5. *AG for Jersey v Holley* [2005] UKPC 23; [2005] 2 A.C. 580.
6. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.110.
7. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.24. The terms are notoriously difficult to use, though there is a common distinction made in terms of justified conduct being in its essence not wrong, while excused conduct is wrong but condoned. With regard to provocation, this distinction does not work because the conduct is condemned as wrong, whichever approach one takes to the defence. In the approach favoured by the Law Commission, the conduct is wrong, but, in that overall setting, invokes an element of *justification*. Hence the Commission writes, appropriately in terms of its argument, that "It is the *justification* of the sense of outrage which provides a partial *excuse* for their responsive conduct" (*Partial Defences to Murder*, 2004, Law Com. No.290, para 3.59, emphasis added). Provoked conduct is partially excused because it is, at one level, *justified*. This is important because the previous law operated on the basis that provocation was partially excused where the defendant had an *excuse* (she had lost self-control). This was complicated, however, by a vague justificatory element, concerning whether the loss of self-control was acceptable (discussed below). From this confusing admixing of justificatory and excusatory elements, one can broadly pick out two approaches: the new one, based on "imperfect justification"; the old one based on "compassionate excuse". These are my terms, though I argue they are implicit in the Law Commission's deliberations.
8. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.38.
9. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.38.
10. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.39.
11. This designation may itself be "imperfect". What I seek to describe is the layering of the moral argument so that the killing has an element of "rightfulness in an overall context of wrongfulness". Anger may be an "ethically appropriate emotion" which makes killing "ethically less wicked"--the overall wrong is balanced against the rightful emotion in bringing it about. One might talk here of a "misappropriated justification" or an "improperly justified" wrongdoing, to indicate that the action may be rightly felt but wrongly done.
12. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.101.
13. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304 is set differently from *Partial Defences to Murder*, 2004, Law Com. No.290, in that it is concerned with the overall reform of the law of murder. In that context, it states that the *raison d'etre* of provocation is mitigation, given the mandatory life sentence for murder (*Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.8). *Partial Defences to Murder*, 2004, Law Com. No.290 (paras 3.41-3.44) took a different, less pragmatic, view.
14. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.21

15. This is the basis for claiming that there was a justificatory dimension to the old law, though, as I discuss below, this was vague and enfeebled in the case law.
16. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.65.
17. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.70.
18. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.68.
19. *Morhall* [1995] 3 All E.R. 659; [1996] A.C. 90 HL.
20. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.70.
21. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.71.
22. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.145.
23. *Morgan Smith* [2000] 4 All E.R. 289, 309, 312.
24. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.16.
25. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.15.
26. *DPP v Camplin* [1978] 2 All E.R. 168; [1978] A.C. 705 HL.
27. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.110.
28. cf. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.78, arguing that the law should be gender neutral unless absolutely necessary not to be. Given the fear trigger, this could be a way of indicating women are more vulnerable in their relations with men who tend to be physically bigger and stronger.
29. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.134.
30. Under the Law Commission's proposals, developmental immaturity in a person under 18 was included as a condition which could bring the person under the law of diminished responsibility. This was rejected by the Government, though it indicates that some medical conditions that are particularly relevant to juveniles are covered by the new law (*Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, 2008, Consultation Paper CP No.19/08, para.55).
31. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.130.
32. See below, fn.40.
33. Such a distinction would be of "too great nicety" (*Camplin* [1978] 2 All E.R. 168 at 174, per Lord Diplock).
34. *Morgan Smith* [2000] 4 All E.R. 289 at 309-312.
35. See A. Norrie, "The Structure of Provocation" (2001) *Current Legal Problems* 54, 307, especially 338-339, for discussion.
36. *Weller* [2003] EWCA Crim 815; [2004] 1 Cr. App. R. 1; *Partial Defences to Murder*, 2004, Law Com. No.290, paras 3.116-3.124.
37. *Doughty* (1986) 83 Cr. App. R. 319; [1986] Crim. L.R. 625 CA (Crim Div); cf. *Partial Defences to Murder*, 2004, Law Com. No.290, para 3.64.
38. *Humphreys* [1995] 4 All E.R. 1008; [1996] Crim. L.R. 431 CA (Crim Div).
39. *Acott* [1997] 1 W.L.R. 306; [1997] 2 Cr. App. R. 94 HL.
40. Under the new law of diminished responsibility, this avenue is likely to be closed off by the requirement of a "recognised medical condition", which will reduce the room for manoeuvre with psychiatric testimony, and thus the "compassionate pragmatism" for which the law has been known, for example in mercy killing cases. See R.D. Mackay, "The New Diminished Responsibility Plea" [2010] Crim. L.R. 290, 295.
41. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para 5.42. The quoted words are taken by the Law Commission from J.Gardner, "The Gist of Excuses" (1998) 1 *Buffalo Criminal Law Review* 575, 579-587.
42. Doughty's appeal against murder was successful because the trial judge had excluded consideration of the baby's crying from the jury. The Court of Appeal held this was incorrect, but in allowing the appeal dwelt on the caring and committed parenting of the accused and the tragedy of his case. The court indicated that this would not open the floodgates to every battered baby case. Reliance could be placed on the "common sense" of the jury (the informal role of moral judgment advertised by Lord Hoffmann in *Morgan Smith*). Doughty's case was one where the court was impliedly satisfied that the jury would have found in his favour.

43. *Thornton (No.1)* [1992] 1 All E.R. 306; (1993) 96 Cr. App. R. 112 CA (Crim Div); *Thornton (No.2)* [1996] 1W.L.R. 1174; [1996] 2 Cr. App. R. 108 CA (Crim Div); *Ahluwalia* [1992] 4 All E.R. 889; (1993) 96 Cr. App. R. 133 CA (Crim Div).
44. *Morgan Smith* [2000] 4 All E.R. 289, 305-307.
45. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.91
46. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.89; *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.50.
47. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.88; *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.52-4
48. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.111; *Morgan Smith* [2000] 4 All E.R. 289, per Lord Millett at 351.
49. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.45; *Holley* [2005] UKPC 23, per Lord Nicholls at [25].
50. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, paras 5.27-5.32.
51. *Baillie* [1995] 2 Cr. App. R. 31; [1995] Crim L.R. 739 CA (Crim Div).
52. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.32.
53. *Murder, Manslaughter and Infanticide*, 2006, Law Com. No.304, para.5.31.
54. *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, 2008, Consultation Paper CP No.19/08, para.36.
55. *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law*, 2008, Consultation Paper CP No.19/08, para.33.
56. *Partial Defences to Murder*, 2004, Law Com. No.290, para.3.147.