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Uncorrected accepted proof deposited in CURVE January 2015

**Original citation:**

Mitchell, B.J. (2012) 'Years of Provocation, Followed by a Loss of Control' in Lucia Zedner and Julian V. Roberts(Eds). Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth. Oxford: Oxford University Press. ISBN: 9780199696796

<http://dx.doi.org/10.1093/acprof:oso/9780199696796.001.0001>

**Publisher**

Oxford University Press

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## 8

# Years of Provocation, Followed by a Loss of Control

*Barry Mitchell*

On 4 October 2010 the old common law plea of provocation which, if successful, reduced murder to voluntary manslaughter, was abolished and replaced by the partial defence of loss of control.<sup>1</sup> This was the culmination of a crescendo of criticism and frustration over three or four decades of case law, especially (but not exclusively) about (1) the requirement of a loss of self-control, and the apparent bias in favour of male reactions to provocation, and the law's inadequate accommodation of female reactions; and (2) the nature of the normative element in the law and the extent to which personal characteristics of the defendant could be taken into account. In 2003 the Law Commission was asked to review the law, and following a consultation process, proposals for reforming the plea were put forward in 2004.<sup>2</sup> The government then invited the Commission to undertake a wider review of the homicide law and their final report, which reiterated their proposals, was published towards the end of 2006.<sup>3</sup> The new law, which is set out in the Coroners and Justice Act 2009, adopts some of the Law Commission's proposals but there are some important differences between the structure and wording of those proposals and the new plea.

This essay contains a brief review of some of the key elements and concerns about the old common law before turning to explore its statutory replacement. In so doing, it will argue that the decision to base the new law on a loss of control requirement is fundamentally misguided. Whilst the use of ambiguous words and phrases may allow the courts a necessary measure of discretion, it will simultaneously risk injustice to some deserving defendants. The essay will also suggest that the objective requirement in the new plea has not been adequately thought through.

<sup>1</sup> Coroners and Justice Act 2009, s 56, abolishes the old provocation plea, and ss 54 and 55 replace it with loss of control. In Northern Ireland the change in the law took effect from 1 June 2011.

<sup>2</sup> See Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004), especially Part 3.

<sup>3</sup> See Law Commission, *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006), especially paras 5.1–82.

## 1. The Old Law of Provocation

The old common law on provocation had been recognized albeit in slightly different forms since the 17th century.<sup>4</sup> The law which prevailed until its abolition was based on the definition offered by the then Devlin J in *Duffy*, that provocation ‘is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment no longer master of his mind’.<sup>5</sup> Various adjustments were made to this over the years. For example, as Andrew Ashworth has pointed out,<sup>6</sup> although in practice the provocation commonly did originate from the deceased, following section 3 of the Homicide Act 1957 the law was not restricted in this way,<sup>7</sup> nor did the provocation have to be directed at the accused.<sup>8</sup> Nevertheless, the principal features of the old common law were that the defendant had to show that she had been provoked by some form of human action, that that had caused her to lose her self-control (which she had not regained at the time of inflicting the fatal assault), and that a reasonable person would have killed had she been provoked in the same way. Some commentators doubted the law’s restriction of provocation to human conduct:

Mere circumstances, however provocative, do not constitute a defence to murder. Loss of control by a farmer on his crops being destroyed by a flood, or his flocks by foot-and-mouth, a financier ruined by a crash on the stock market or an author on his manuscript being destroyed by lightning, could not, it seems, excuse a resulting killing. An ‘Act of God’ could hardly be regarded as ‘something done’ within s.3. Since, where there is a provocative act, it no longer need be done by the victim, this distinction begins to look a little thin. If D may rely on the defence where the crops or the manuscript were destroyed by an unknown arsonist or the stock exchange crash was engineered by other anonymous financiers, why should it be any different where no human agency was involved? The provocation is no more and no less.<sup>9</sup>

Indeed, the common law’s insistence that the defendant’s reaction be triggered by some form of human conduct was probably rooted in its origins when only a very limited set of circumstances were regarded as sufficient for a successful plea. It was arguably also the result of a failure fully to get to grips with the underlying rationale

<sup>4</sup> Excellent accounts of the emergence and historical development of the provocation plea can be found in J Kaye, ‘The Early History of Murder and Manslaughter’ (1967) 83 LQR 365, 569; AJ Ashworth, ‘The Doctrine of Provocation’ (1976) 35 CLJ 292; and J Horder, *Provocation and Responsibility* (Oxford: Clarendon Press, 1992).

<sup>5</sup> [1949] 1 All ER 932 (CCA).

<sup>6</sup> A Ashworth, *Principles of Criminal Law* (6th edn, Oxford: Oxford University Press, 2009), 251, 252.

<sup>7</sup> See eg *Davies* [1975] QB 691 (CA).

<sup>8</sup> See eg *Pearson* [1992] Crim LR 193 (CA).

<sup>9</sup> See D Ormerod, *Smith and Hogan Criminal Law* (12th edn, Oxford: Oxford University Press, 2008), 491. See also BJ Mitchell, RD Mackay, and WJ Brookbanks, ‘Pleading for Provoked Killers: In Defence of *Morgan Smith*’ (2008) 124 LQR 675, 683.

behind the plea and to pinpoint precisely what it is that warrants a reduction of liability.

Nevertheless, the major criticisms of the law arose from the loss of self-control and normative requirements.

### Loss of self-control

Over the years the courts adopted various epithets in their attempts to explain what they regarded as an appropriate response by the defendant, one of which was a loss of self-control.<sup>10</sup> Although the Court of Appeal in *Richens*<sup>11</sup> stated that it was wrong to say that the defendant must have completely lost his self-control such that he did not know what he was doing—for that would be more indicative of automatism which is a complete defence—there was never any clear definition of this subjective requirement. There was a fundamental ambiguity in the law because it was uncertain whether it required an incapacity to control one's reaction to the provocation, or whether a mere failure to do so would suffice.<sup>12</sup> Given the volume of criticism heaped upon the loss of self-control requirement, it is somewhat ironic that, as both Ashworth and the author discovered, the courts did not necessarily go to any great lengths to see that this theoretical condition was actually fulfilled in the individual case.<sup>13</sup> Nevertheless, regardless of what sometimes happened in practice, whilst this stretching of the law as set out in *Duffy* may have enabled the courts to return what were perceived to be more just verdicts (eg, in cases of battered women who killed their abusive partners), Ashworth observed that it also 'weakened the excusatory force that derives from acting in uncontrolled anger'.<sup>14</sup> Clearly, any excusatory force would have to be founded on some other form of mental or emotional disturbance.

### *The 'suddenness' requirement*

As Ashworth commented, the further requirement that the loss of self-control be 'sudden' was only introduced by Devlin J in *Duffy* and was unsupported by any precedent.<sup>15</sup> The intention behind the suddenness requirement was to distinguish genuine deserving cases from revenge killings.<sup>16</sup> Ashworth rightly criticized the

<sup>10</sup> See the references in n 4 above.

<sup>11</sup> [1993] 4 All ER 877 (CA).

<sup>12</sup> Interestingly, the Law Commission referred to a comment made to them by psychiatrists that those who do lose their self-control when provoked can usually afford to do so. 'An angry strong man can afford to lose his self-control with someone who provokes him, if that person is physically smaller and weaker.' See Law Commission, No 290, n 2 above, para 3.28.

<sup>13</sup> Ashworth, n 4 above, 316; B Mitchell and S Cunningham, 'Defences to Murder' in Law Commission, No 304, n 3 above, Appendix C.

<sup>14</sup> Ashworth, n 6 above, 254.

<sup>15</sup> *Ibid*, 252, 253.

<sup>16</sup> Though it was subsequently argued that this is a false distinction because the usual motive for killing whilst out of control is revenge; see R Holton and S Shute, 'Self-Control in the Modern Provocation Defence' (2007) 27 OJLS 49.

suddenness restriction for its bias—‘it favours those with quick tempers over others with a slow-burning temperament (but no less intensity of emotion), and it favours those with the physical strength to act quickly’.<sup>17</sup> This latter form of bias was linked to the perception that the law favoured men over women, although empirical research conducted for the Law Commission did not support such favouritism.<sup>18</sup> Initially at least, the suddenness requirement effectively restricted the scope of the plea to cases where there was little time lapse between the provocation and the defendant’s reaction to it; the fact that the defendant had lost self-control at the time of inflicting the fatal assault was not sufficient per se. Regrettably though, the courts appeared to be inconsistent in this respect. As Ashworth pointed out, in cases such as *Fantle*<sup>19</sup> and *Simpson*<sup>20</sup> the courts admitted evidence of the background leading up to the fatal assault, whereas in *Brown*<sup>21</sup> Bridge J thought that the earlier events were irrelevant.<sup>22</sup> Ashworth’s view was that Bridge J was wrong: ‘[o]ne straw may indeed break a camel’s back’,<sup>23</sup> and ‘the significance of the deceased’s final act and its effect upon the accused—and indeed the relation of the retaliation to that act—can be neither understood nor evaluated without reference to previous dealings between the parties’.<sup>24</sup> His criticism of Bridge J was subsequently underlined when in cases of ‘cumulative provocation’ the courts felt that the time lapse between the provocation and retaliation was merely relevant but not a conclusive factor.<sup>25</sup> Indeed, as Ashworth again pointed out, there were occasions on which the ‘sudden and temporary’ requirement seemed to have been completely overlooked, as in *Pearson* where the defendant struck his abusive father twice with a sledgehammer even though there had apparently been no final act of provocation to which the defendant’s action was a sudden response.<sup>26</sup>

Although the common law provocation plea has been abolished, its replacement is loss of (self-) control, and so the concept is still enormously relevant under the new law.

### The normative element

Whilst the loss of self-control requirement in the old common law often proved a stumbling block for battered women and various other deserving defendants,<sup>27</sup> it

<sup>17</sup> Ashworth, n 6 above, 253.

<sup>18</sup> See RD Mackay, ‘The Provocation Plea in Operation: An Empirical Study’, in Law Commission, No 290, n 2 above, Appendix A.

<sup>19</sup> [1959] Crim LR 585.

<sup>20</sup> [1957] Crim LR 815.

<sup>21</sup> [1972] 2 All ER 1328, 1332 (CA).

<sup>22</sup> AJ Ashworth, ‘Sentencing in Provocation Cases’ [1975] Crim LR 553, 557.

<sup>23</sup> *Ibid.*

<sup>24</sup> *Ibid.*, 559.

<sup>25</sup> See especially Lord Taylor CJ in *Ahluwalia* (1993) 69 Cr App R 133, 139 (CA).

<sup>26</sup> The author’s own research also indicates there are unreported cases which are similar to *Pearson* in this respect; see B Mitchell, ‘Distinguishing between Murder and Manslaughter in Practice’ (2007) 71 JCL 318.

<sup>27</sup> Some of these were able to avoid a murder conviction and mandatory life sentence by pleading diminished responsibility, though that was not necessarily an entirely satisfactory course to adopt.

was the objective requirement which arguably attracted most criticism. Its basic aim was to ensure that the plea would only be available to those who showed a reasonable level of self-control and it thus sought to provide some justification for the loss or angry reaction. The normative requirement was initially articulated in purely objective terms but this was revised by the House of Lords in *Camplin*.<sup>28</sup> In a much quoted speech Lord Diplock stated that when applying the objective test the jury might take some of the defendant's personal characteristics into account. The trial judge 'should . . . explain to [the jury] 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'.<sup>29</sup> In other words, the defendant's sex and age might be taken into account even though they are only relevant to the defendant's capacity to exercise self-control, along with other characteristics which were the object of or relevant to the provocation.

In 1976, shortly before the House of Lords' decision in *Camplin*, an article by Ashworth was published in the Cambridge Law Journal<sup>30</sup> in which he essentially put forward the argument which was used by Lord Diplock. In this seminal article, Ashworth argued that, with the possible exception of serious assaults, the gravity of any provocation can only sensibly be judged in relation to people of a particular class. '[T]he sight of two persons indulging in sexual intercourse cannot properly be described as a grave provocation—for it would hardly provoke the unrelated intruder to anything more than embarrassment—without adding that it would be grave for someone who is married, engaged or related to one of the participants'.<sup>31</sup> In advocating a narrower range of personal characteristics to be taken into account than that which had been proposed by the Criminal Law Revision Committee,<sup>32</sup> he submitted that (with the exception of age and gender) those which bore only on the defendant's powers of self-control should be ignored (unless, of course, they were the object of the provocation). Such a distinction necessarily followed from the purpose of the objective requirement, namely to stipulate and apply a general standard of self-control.

To lay down a test of 'a man with reasonable self-control and with an unusually excitable temperament' would indeed be illogical; but a test of 'an impotent man with reasonable self-

Although some women clearly have developed mental abnormalities through the abuse, others have not. Critics of the law argued that not only is a conviction for diminished manslaughter stigmatizing in itself, but the circumstances leading up to the killing should themselves be sufficient to reduce liability without the need to plead a medical or psychiatric excuse.

<sup>28</sup> [1978] AC 705 (HL).

<sup>29</sup> *Ibid.*, 718.

<sup>30</sup> See Ashworth, n 4 above.

<sup>31</sup> *Ibid.*, 300.

<sup>32</sup> See Criminal Law Revision Committee, *Working Paper on Offences against the Person* (London: HMSO, 1976), para 54, where it was proposed that 'any physical characteristics of the accused' could be taken into account when applying the objective test, but the Committee went on to say that 'any disability, physical or mental, from which he suffered' should also be included.

control' contains no logical contradiction, for these two characteristics can co-exist and the reference to impotence assists in interpreting the gravity of the provocation.<sup>33</sup>

It is fair to say that the use of the reasonable man/person as the benchmark against which the defendant's reaction should be compared probably caused much confusion and misunderstanding. It was surely not intended to be used in the same way as it is in other areas of the law such as the tort of negligence. In the civil law the reasonable person test is used as setting a minimum standard of acceptable conduct, and the defendant either meets that standard (and incurs no legal liability) or does not. In *Morhall* Lord Goff explained that in provocation the test's function was to induce the court to compare the defendant's reaction with that of an ordinary person with a normal capacity for self-control.<sup>34</sup> In effect, it was a means whereby the courts could distinguish the deserving from the undeserving cases. As a consequence of section 3 of the Homicide Act 1957, once there was evidence that the defendant had been provoked to lose self-control the matter then had to be passed to the jury who would decide whether a reasonable person would have reacted as the defendant had.

Ashworth also used causal reasoning as a means of understanding the rationale behind provocation, and he linked it to the issue of relevant characteristics. Where there is some significant or grave provocation, the defendant's loss of self-control could be attributed to it, whereas in cases of trivial provocation the loss of self-control is due more to a weakness in the defendant's make-up than the provocation.<sup>35</sup> It is, of course, in cases of trivial provocation that the defence are more likely to want personal characteristics to be taken into account; these are cases where the characteristic, such as some form of mental abnormality or personality deficiency (which are discussed below), provides an explanation or excuse for the loss of self-control.

The case law which emerged after *Camplin* was confusing and inconsistent. It was not simply that the courts sometimes ignored the distinction which Ashworth and Lord Diplock had advocated, nor that the hypothetical reasonable man became increasingly (and impractically) anthropomorphized; ultimately the confusion and disagreement reached its height on whether undesirable or discreditable characteristics, or mental abnormalities could be taken into account. In *Morhall* the House of Lords held that in the light of section 3 of the Homicide Act 1957 juries should be directed to take account of anything they thought was relevant to the assessment of the strength of the provocation. This seemed to include discreditable characteristics such as irascibility or racial prejudice. From a purely pragmatic perspective it might be suggested that it was enough to leave it to the jury's good sense to decide whether a characteristic was so discreditable that it should not be used to enable the defendant to reduce his liability. But in principle there was arguably no good explanation for such an approach. *Morhall* was an addicted glue-sniffer who was

<sup>33</sup> Ashworth, n 4 above, 301. The reference to the defendant's impotence is clearly a reference to the case of *Bedder v DPP* (1954) 38 Cr App R 133 (HL) which was overruled on this point by *Camplin*.

<sup>34</sup> *Morhall* [1995] 3 All ER 659, 665 (HL).

<sup>35</sup> Ashworth, n 4 above, 308.

taunted about his addiction. How, one might wonder, would a jury take this into account when applying the objective test?<sup>36</sup>

More fundamentally, Ashworth argued that this is unsatisfactory on the ground that the objective test should exclude attitudes and reactions which are inconsistent with the aims and values which the law seeks to uphold.<sup>37</sup> He also demonstrated his desire to be guided by principle when considering the merits of other characteristics such as culture. If the law was trying to ensure that deserving defendants have shown a reasonable level of self-control, then youth should be regarded as relevant because 'there is good reason to maintain that a lower standard may be accepted'. Conversely, cultural background may well be relevant to assessing the seriousness of the provocation but there is no clear reason why it should justify the reduction of the expected standard of self-control unless greater weight is attached to the desire for 'cultural pluralism'.<sup>38</sup> Two simple observations can be made here. First, the law should not expect a person to exercise a level of self-control that he was incapable of exercising, and secondly, a decision had to be made—and still has to be made under the new law—about whether provocation was the appropriate plea where there was an incapacity or reduced capacity.

The other major controversial issue relating to characteristics that are relevant to the objective test concerned mental disorders and personality disorders, and here the conflict in the case law was ultimately between the Privy Council and the House of Lords. In *Luc Thiet Thuan*<sup>39</sup> the majority of the Privy Council declined to take account of the defendant's brain damage when applying the reasonable man standard. Lord Goff took the same view as that taken by Ashworth,<sup>40</sup> that the provocation plea was designed for ordinary 'normal' people, not for those suffering from some form of mental abnormality. This, of course, follows the distinction advocated by Lord Diplock and Ashworth in that only characteristics relevant to the provocation should be taken into account. However, in *Smith (Morgan)*<sup>41</sup> the majority of the House of Lords decided that in the light of section 3 of the Homicide Act 1957 juries should be able to determine which characteristics to take into account, including mental abnormalities. Two of their lordships (Lords Hobhouse and Millet) took the same view as Ashworth that those who seek to rely on mental abnormality to reduce their liability should base their defence on diminished responsibility. But the majority thought that the distinction between characteristics relevant to the provocation and those relevant to the power of self-control is unrealistic. Moreover, although certain characteristics such as pugnacity, undue excitability, short temper, or morbid jealousy should always be excluded,

<sup>36</sup> Similarly, one might wonder how the jury would take account of the defendant's immaturity and attention-seeking in *Humphreys* [1995] 4 All ER 1008 (CA), and 'obsessive and eccentric' personality in *Dryden* [1995] 4 All ER 987 (CA).

<sup>37</sup> Ashworth, n 6 above, 256.

<sup>38</sup> *Ibid.* In *Ali* [1989] Crim LR 736 the Court of Appeal explained that age is not always relevant. There the fact that the defendant was 20 years old at the time was immaterial; it mattered not whether he was 20 or, say, 35; one would expect the same general level of self-control in either case.

<sup>39</sup> [1997] AC 131 (PC).

<sup>40</sup> Ashworth, n 4 above, 312.

<sup>41</sup> [2001] 1 AC 146 (HL).

they felt that the primary concern was to do justice in the circumstances of the case even if that might cause some uncertainty or lack of clarity as to the law. One particular dimension of this was that the law should not expect people to exercise self-control when, though no fault of their own, they were incapable of doing so.<sup>42</sup>

But the Privy Council had the last word on the issue. In *A-G for Jersey v Holley*<sup>43</sup> a majority (six to three) of the court effectively overruled *Smith (Morgan)* and held that unless they are relevant to the provocation, mental abnormalities should be excluded when applying the reasonable person standard. Thus the principle expressed by Ashworth and adopted by Lord Diplock in *Camplin* prevailed; the law of provocation required a reasonable level of self-control from provoked defendants regardless of any mental abnormalities. The Court of Appeal subsequently accepted this interpretation of the law.<sup>44</sup> Those who had been provoked but sought to rely on a mental abnormality as the explanation for loss of self-control should plead diminished responsibility instead.

#### *A further dimension to the objective requirement—proportionality*

There was another, perhaps less obvious, objective dimension to the old common law which concerned the relationship between the provocation and the defendant's reaction to it. This was once known as the 'reasonable relationship rule',<sup>45</sup> but it ceased to be a rule of substantive law and became instead one of evidential significance.<sup>46</sup> Section 3 of the Homicide Act 1957 required the court to be satisfied that the provocation 'was enough to make the reasonable man *do as he did*' (emphasis added).<sup>47</sup> The obvious ambiguity here was whether those last four words mean that the reasonable man would have killed in precisely the same way as the defendant did or whether it merely means that the reasonable man would have lost control and killed in some way. In *Phillips*<sup>48</sup> Lord Diplock said that common sense dictated that loss of self-control is a matter of degree and that the nature of a person's reaction to provocation will depend on its gravity. In other words, the nature and gravity of the provocation should be reflected in the nature of the defendant's reaction to it. The implication behind this was that the reasonable person would carry on behaving reasonably even after losing his self-control.

<sup>42</sup> For contrasting views about *Smith (Morgan)* see eg J Gardner and T Macklem, 'Compassion without Respect? Nine Fallacies in *R v Smith*' [2001] Crim LR 623; T Macklem and J Gardner, 'Provocation and Pluralism' (2001) 64 MLR 815; RD Mackay and BJ Mitchell, 'Provoking Diminished Responsibility: Two Pleas Merging into One?' [2003] Crim LR 745; J Chalmers, 'Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism' [2004] Crim LR 198; J Gardner and T Macklem, 'No Provocation without Responsibility: A Reply to Mackay and Mitchell' [2004] Crim LR 213; RD Mackay and BJ Mitchell, 'Replacing Provocation: More on a Combined Plea' [2004] Crim LR 219.

<sup>43</sup> [2005] UKPC 23.

<sup>44</sup> See *Mohammed* [2005] EWCA Crim 1880; *James* [2006] EWCA Crim 14, [2006] QB 588.

<sup>45</sup> Following the decision in *Mancini v DPP* [1942] AC 1 (HL).

<sup>46</sup> After the decision in *Brown* [1972] 2 QB 229 (CA).

<sup>47</sup> In *Camplin* Lord Diplock included a similar condition in his model direction.

<sup>48</sup> [1969] 2 AC 130, 137 (PC).

Ashworth has persuasively argued, however, that the ‘reaction’ in this context has not always been properly understood. It should refer to the degree of loss of self-control, rather than the extent of the violence in D’s reaction, as being in proportion to the gravity of the provocation.<sup>49</sup> Thus, since the defendant must necessarily have been provoked so as to lose his self-control it makes no sense to stipulate that the reasonable person would have done exactly what the defendant did.<sup>50</sup> Our desire for proportionality is surely satisfied if the provocation was sufficiently grave to justify the angry loss of self-control which resulted in the use of fatal force.

## 2. The Review of the Old Law

At the end of its review the Law Commission identified three principal problems with the old law—(1) there was a lack of judicial control over pleas so that even where there was only very trivial provocation the judge had to allow the matter to be determined by the jury; (2) the sudden and temporary loss of self-control requirement was problematic—there was a tension between it and slow-burn cases, and there was also some difficulty applying the law (which was clearly based on anger) to situations where the predominant emotion was fear; and (3) the inconsistencies in the case law regarding the defendant’s characteristics which may be relevant to the reasonable person standard.<sup>51</sup>

The Commission recommended a reformed partial defence of provocation<sup>52</sup> based on two limbs, namely (i) a fear of serious violence, and (ii) gross provocation in the sense of words and/or conduct which caused the defendant to have a justifiable sense of being seriously wronged.<sup>53</sup> The first of these was meant to fill a gap in the law where defendants fear serious violence and overreact by killing the aggressor in order to thwart an attack. The government doubted whether many such cases actually arose but accepted the Commission’s wider point that shoe-horning these cases into a plea based on anger is difficult.<sup>54</sup> As to the second limb of the Commission’s proposal, the government felt that as a general rule people should be able to control their reactions when they think they have been wronged but accepted that there is a small number of situations in which the provocation is so strong that some allowance should be given to them.<sup>55</sup> The government therefore

<sup>49</sup> Ashworth, n 4 above, 305.

<sup>50</sup> Ashworth, n 6 above, 259.

<sup>51</sup> Law Com No 304, n 3 above, paras 5.15–46.

<sup>52</sup> The Law Commission recommended a restructuring of the substantive law, so that (if successful) provocation would effectively reduce murder in the first degree to murder in the second degree; n 3 above, para 9.6. The previous New Labour government was not persuaded to implement the proposed restructuring, and the Coalition government concluded ‘that the time is not right to take forward such a substantial reform of our criminal law’; see Ministry of Justice, *Report on the Implementation of Law Commission Proposals* (London: TSO, 2011), para 54.

<sup>53</sup> Law Com No 304, n 3 above, para 9.17.

<sup>54</sup> Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law: Consultation Paper CP19/08* (London: Ministry of Justice, 2008), paras 26 and 27.

<sup>55</sup> *Ibid.*, paras 31–4. The government cited an example from the Law Commission’s report of a rape victim who kills his attacker after being taunted about what happened.

decided to abolish the old common plea<sup>56</sup> and replace it with words and/or conduct which constituted circumstances of an extremely grave character and which caused the defendant to have a justifiable sense of being seriously wronged.

Whereas the Law Commission considered that the loss of self-control concept had been so troublesome that it should be abandoned, and that undeserving cases would nonetheless be excluded by the safeguards they incorporated elsewhere in their recommendations, the then government took a more pessimistic and cautious approach. The Ministry of Justice remained ‘concerned that there is a risk of the partial defence being used inappropriately, for example, in cold-blooded, gang-related or “honour” killings. Even in cases which are less obviously less unsympathetic, there is still a fundamental problem about providing a partial defence in situations where a defendant has killed while basically in full possession of his or her senses, even if he or she is frightened, other than in a situation which is complete self-defence.’<sup>57</sup> At the same time, the government decided to remove the ‘suddenness’ requirement ‘to make plain that situations where the defendant’s reaction has been delayed or builds gradually are not excluded’.<sup>58</sup>

As to the third of the principal problems with the old law, both the Law Commission and the government favoured the majority view in *Holley* and that of Ashworth and Lord Diplock, that there should be a general standard of self-control.<sup>59</sup> Concessions to the defendant’s capacity to exercise self-control should be made only by taking account of her age and gender. The difficulty here is that there are no clear objective or scientific data about consistency in levels of self-control. We do not know how much consistency there is in people’s *views* about when self-control should or should not be exercised, nor do we know the degree of similarity in people’s *ability* to exercise self-control in any given set of circumstances. The Law Commission and the government also rightly felt that judges ought not to have to direct juries on provocation (now loss of control) where the evidence is very poor.<sup>60</sup> Otherwise, there is a greater risk of inconsistencies and verdicts which fly in the face of the law.

### 3. The New Law of Loss of Control

By virtue of ss 54 and 55 of the Coroners and Justice Act 2009 the court must now be satisfied that the defendant’s participation in the killing resulted from a loss of self-control which was triggered in one of two ways. Either it must have been

<sup>56</sup> The government took the view that the term ‘provocation’ had acquired such ‘negative connotations’ that it should be abandoned (*ibid*, para 34), though Andrew Ashworth suggests that the term will continue to be used in practice; see n 6 above, 261.

<sup>57</sup> *Ibid*, para 36. The Ministry confirmed this view after the consultation process was completed (para 62).

<sup>58</sup> *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law: Summary of Responses and Government Position: Response to Consultation CP(R)19/08* (London: Ministry of Justice, 2008), para 66.

<sup>59</sup> *Ibid*, para 78.

<sup>60</sup> *Ibid*, para 80.

triggered by the defendant's fear of serious violence from the victim against the defendant or someone else, or it must have been prompted by something done and/or said which was of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged. Whichever trigger is appropriate, the court must also be satisfied that (a) the trigger was something other than sexual infidelity;<sup>61</sup> (b) the trigger was not self-induced; (c) the defendant must not have acted 'in a considered desire for revenge'; and (d) 'a person of D's sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or a similar way to D'.<sup>62</sup> Thus, the reasonable person test at common law has been replaced by a person of normal tolerance and self-restraint etc, and instead of referring to the defendant's characteristics when applying the objective test we should henceforth refer to the defendant's circumstances.

At the time of writing this essay there has been just one reported case, *Clinton*,<sup>63</sup> in which the new partial defence has been raised, and it is obviously impossible to know at this stage how far that case reflects the way in which the courts will interpret the new law. That said, the Lord Chief Justice, Lord Judge, warned that some aspects of the new legislation 'are likely to produce surprising results'.<sup>64</sup>

### The triggers

The first of the two possible triggers of the defendant's fatal assault is a fear of serious violence from the victim against the defendant or another identified person. In broad terms this is surely a welcome development. The precise boundary between serious and non-serious violence may sometimes not be immediately apparent, but the government required that the fear must be of 'serious' violence in order to exclude unmeritorious cases.<sup>65</sup> The law does not expressly stipulate that the fear must be of *imminent* violence, but the government is relying on the loss of self-control condition, the need to fulfil the person of normal tolerance test, and evidence (for example) whether the defendant had sought other protection as being sufficient safeguards to ensure that only deserving cases benefit from the new plea.<sup>66</sup>

The alternative form of the plea arises where the loss of self-control was triggered by words and/or conduct which constituted circumstances of an extremely grave character and caused the defendant to have a justifiable sense of being seriously wronged. One of the central aims of the new law is to reduce the number of cases in which defendants reduce their liability from murder to manslaughter and to limit the application of the new pleas to 'exceptional circumstances'<sup>67</sup>—hence the 'extremely grave character' requirement. There is also a desire to stipulate general standards of reaction to provocation, and the 'justifiable sense of being seriously

<sup>61</sup> Coroners and Justice Act 2009, s 55(6)(c).

<sup>62</sup> *Ibid*, s 54(1)(c).

<sup>63</sup> [2012] EWCA Crim 2.

<sup>64</sup> *Ibid*, at [2].

<sup>65</sup> *Response to Consultation CP(R)19/08*, n 58 above, para 28.

<sup>66</sup> *Ibid*, paras 29 and 30.

<sup>67</sup> *Ibid*, para 36.

wronged' requirement is one element of this. An obvious concern here is the ambiguity and uncertainty of the language—'extremely grave' and 'seriously wronged'. Some of the wording in section 55(4) is based on the Law Commission's recommendation, and the Commission thought that the word 'justifiable' should be construed objectively.<sup>68</sup> The government took the same view, believing it is unnecessary to 'spell that out',<sup>69</sup> but the statute does not make this clear and as Simester et al commented, there must surely be a risk that it will be confused with 'excusable' or 'understandable'.<sup>70</sup>

Sexual infidelity by the victim was regarded by the previous New Labour government as an inadequate ground, and if it is one aspect of a wider set of circumstances then it should be disregarded when deciding whether those circumstances should suffice to reduce murder to manslaughter. But it is not easy to appreciate why the previous administration felt it was necessary expressly to exclude sexual infidelity from the words or conduct trigger, and indeed there may well be good reason to suspect that a potential conflict has been created within the new law. On the face of it, it seems that the New Labour government was heavily influenced by the support it received for the exclusion from various organizations. In contrast it also felt that perpetrators of 'honour killings' should not benefit from the new plea, but instead of expressly excluding this category as well it was content that 'the high threshold for the words and conduct limb of the partial defence will have the effect of excluding "honour killings" because such cases will not satisfy the requirements that the circumstances were of an extremely grave character and caused a justifiable sense of being seriously wronged'<sup>71</sup>—together with the exemption of cases where the killing resulted from a considered desire for revenge. Why should not the same be true of sexual infidelity?<sup>72</sup> Moreover, as Simester et al argue, if having been properly directed by the judge a jury concludes that a person with normal tolerance and self-restraint would also have reacted with fatal violence, it is difficult to see why the plea should be denied.<sup>73</sup>

The prohibition of sexual infidelity as a qualifying trigger is especially problematic.<sup>74</sup> What, for example, does 'sexual infidelity' mean? It is not defined in the 2009 Act. Should it be confined to the words and acts of sexual intercourse, so that the effects of it are not excluded? Must there be some form of relationship between the parties and, if so, what?

<sup>68</sup> Law Com No 290, n 2 above, para 3.70.

<sup>69</sup> *Response to Consultation CP(R)19/08*, n 58 above, para 45.

<sup>70</sup> See AP Simester, JR Spencer, GR Sullivan, and GJ Virgo, *Simester and Sullivan's Criminal Law: Theory and Doctrine* (4th edn, Oxford: Hart, 2010), 399 and 400.

<sup>71</sup> *Response to Consultation CP(R)19/08*, n 58 above, para 56.

<sup>72</sup> The government went out of its way to exclude any trace of sexual infidelity from the new law. 'We believe that where sexual infidelity is one part in a set of circumstances which led to the defendant losing self-control, the partial defence should succeed or fail on the basis of those circumstances *disregarding the element of sexual infidelity*' (emphasis added); *ibid*, para 55.

<sup>73</sup> Simester et al, n 68 above, 399.

<sup>74</sup> For a fuller discussion of these problems, see Professor David Ormerod's comments in *Smith and Hogan's Criminal Law* (13th edn, Oxford: Oxford University Press, 2011), 520–22.

By a combination of analysis of the structure and wording of sections 54 and 55 of the 2009 Act together with careful scrutiny of comments by government ministers about the purpose and intended effect of the new law, the Court of Appeal in *Clinton*<sup>75</sup> concluded that (i) sexual infidelity could not *by itself* constitute a qualifying trigger, but (ii) evidence of sexual infidelity may be admissible because of its relevance to the circumstances in which the defendant reacted to a (legally acceptable) qualifying trigger.<sup>76</sup> The Court stressed the need to consider the context in which the loss of control occurred. Lord Judge CJ illustrated this by reference to a situation in which the defendant returned home unexpectedly to find her spouse having consensual sexual intercourse with her sister. When the defendant complained about what she discovered, her unfaithful spouse justified what he had done, shouting and taunting the defendant in hurtful language that it is she (the defendant) who was really responsible for the infidelity. The taunts and distressing words, that do not constitute sexual infidelity, may be treated as a qualifying trigger (under section 55(4)). ‘The idea that, in the search for a qualifying trigger, the context in which such words are used should be ignored represents an artificiality which the administration of criminal justice should do without.’<sup>77</sup>

### The loss of self-control requirement

At the heart of the new law there remains the need for a loss of self-control, and it is difficult to avoid the conclusion that this will necessarily prevent much of the reform and improvement in the law which had been sought. The Law Commission was worried that a loss of self-control requirement would inevitably favour men over women and thought that there was no overriding need to replace it with some other form of subjective requirement;<sup>78</sup> rather it would be sufficient to stipulate that the provocation had not been triggered by a considered desire for revenge, that the defendant should not have ‘engineered’ or incited it, and that either judges could exclude undeserving cases or that juries could be trusted to do so.<sup>79</sup> Ashworth, though, criticized the Commission’s approach on theoretical rather than practical grounds—it ‘seeks to detach the provocation defence from one of its true rationales, which is that a good reason for partially excusing such defendants is that they acted during a distinct emotional disturbance resulting from what was done to

<sup>75</sup> [2012] EWCA Crim 2.

<sup>76</sup> *Ibid.*, at [34]–[44].

<sup>77</sup> *Ibid.*, at [23].

<sup>78</sup> The Law Commission did consider the alternative concept in the American Model Penal Code, ‘extreme mental or emotional disturbance’, but consultation with academics and judges yielded much criticism of vagueness and indiscriminability; and the Commission also feared it would produce considerable case law; see Law Com No 304, n 3 above, para 5.22. The Commission did, though, acknowledge that EMED ‘has formed the basis for a provocation defence in at least some American jurisdictions, and cannot therefore be dismissed as unworkable’. Other commentators have argued that EMED is a more accurate and more defensible concept than loss of self-control; see eg Mitchell et al, n 9 above.

<sup>79</sup> Law Com No 304, n 3 above, paras 5.17–27.

them'.<sup>80</sup> Ashworth's concern is not with the proposal to abolish the loss of self-control requirement but with the suggestion that there should be nothing put in its place. Interestingly, Horder had earlier floated the idea of what he called 'provoked extreme emotional disturbance' as a substitute subjective requirement.<sup>81</sup> Indeed, various alternatives to the loss of self-control requirement have been offered, some of which also seek to put emotional disturbance at the core of the subjective test. Such suggestions have been criticized essentially for their uncertainty. Regrettably though, the government's preferred condition, that there must be a loss of self-control, remains undefined and vague, and there is no apparent reason to assume that the case law on it will be any more consistent than it was under the old common law.

Prima facie, the only apparent difference between the old and the new law is that the loss of self-control need no longer be 'sudden and temporary'. Quite how a loss of self-control could be anything other than temporary is hard to envisage, and the more significant questions surround the suddenness requirement. Its removal under the new law appears to indicate a wish to formally accommodate slow-burn cases. Yet one obvious category of such cases—battered women who kill their abusers—would still have to surmount the loss of self-control hurdle, and previous experience clearly indicates that many of these women would not be able to rely on the new plea.<sup>82</sup> Welcoming the Law Commission's proposal to include the fear of serious violence trigger, the government stated that it should be available even though the violence is not imminent.<sup>83</sup> It is, however, not easy to imagine a situation in which the defendant was fearful of non-imminent serious violence and still lost his or (perhaps more likely) her self-control. Although concern about this was expressed by consultees, the government asserted that a loss of self-control is not always 'inconsistent with situations where a person reacts to an *imminent* fear of serious violence'.<sup>84</sup> Unfortunately, there was no comment on cases where the fear is not imminent.

The paradigmatic provocation case under the old common law was based on the idea that the defendant 'exploded' with anger (and lashed out with fatal violence), and the anger then subsided. But whether the new law will be noticeably different in this respect from the common law is open to doubt. It has already been suggested that this distinction between the old and the new law ought not in fact make much difference. A loss of self-control can only occur 'as a moment of departure from

<sup>80</sup> Ashworth, n 6 above, 254.

<sup>81</sup> See J Horder, 'Reshaping the Subjective Element in the Provocation Defence' (2005) 25 OJLS 123, 134–9. 'Where, on a charge of murder, the judge considers there to be evidence that D was provoked to play his or her part in the killing in a state of extreme emotional disturbance, he or she should direct the jury that the offence may for that reason be found to be manslaughter. Further, "extreme emotional disturbance" is confined to circumstances in which it is produced by a combination of gravely provoked anger and D's fear for his or her own safety (or the safety of another), being no mere pretext for the taking of premeditated revenge.'

<sup>82</sup> See eg *Abluwalia* (1993) 96 Cr App R 133 (CA); and *Thornton (No 2)* [1996] 2 Cr App R 108 (CA).

<sup>83</sup> *Consultation Paper CP19/08*, n 54 above, paras 26 and 29.

<sup>84</sup> *Ibid*, para 63, emphasis added.

being in control'.<sup>85</sup> Moreover, the decision to admit evidence of cumulative provocation over a lengthy period, so as to provide the context in which the final incident (which may have been relatively trivial) occurred, effectively undermined the element of suddenness. Conversely, as has already been indicated, the new plea will automatically fail if the defendant acted in a considered desire for revenge, and the longer the time gap between the trigger and the fatal assault, the greater is the risk that the court will infer that the killing was vengeful.<sup>86</sup>

Thus, it has elsewhere been suggested that rather than focus on the physical nature of the defendant's reaction the law should concentrate on the impact of the trigger (provocation) on his mind<sup>87</sup>—after all, the defendant receives and processes the trigger in his mind; the physical response follows from that and is merely (ambiguous) evidence of the impact of the trigger. Arguably therefore, the law should instead put some form of mental or emotional disturbance at the heart of the plea.<sup>88</sup> One consequence of that would be the avoidance of the problem in both the old and the new law of satisfactorily reconciling the loss of self-control requirement with acceptance of a time lapse before the fatal assault.

### The objective requirements

As well as losing self-control through one of the two triggers the defendant will only succeed under the new law if a 'person of D's age and sex, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D'. As under the old law the assumption behind this is that there is a generally recognized and recognizable standard of tolerance and self-restraint that most people could and would exercise when provoked or fearful. But no evidence to support this has ever been produced, so the government's aim of setting a general normative standard is based more on hope and assumption than on reliable data. Moreover, even if the assumption is well-founded, it is almost inevitable that juries will vary in their precise location of the maximum level of self-restraint, and there is thus a real risk that the cases will result in inconsistent decisions in the interpretation of this requirement.

The phrase 'circumstances of D' specifically excludes 'those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance and self-restraint'.<sup>89</sup> In essence, this reproduces the law after the decision in *Holley* so that, apart from age and gender, individual characteristics of the defendant will only be attributable to the 'person with normal tolerance and self-restraint' if they are relevant to the triggering event. As under the old common law, trial judges will

<sup>85</sup> A Norrie, 'The Coroners and Justice Act 2009—Partial Defences to Murder (1) Loss of Control' [2010] Crim LR 275, 288.

<sup>86</sup> Simester et al, n 70 above, 397.

<sup>87</sup> See Mitchell et al, n 9 above.

<sup>88</sup> As indicated above, Ashworth criticized the Law Commission for not recommending something such as an 'element of emotional disturbance' to put in place of the loss of control requirement; n 6 above, 260.

<sup>89</sup> Coroners and Justice Act 2009, s 54 (3).

have to direct juries very carefully about this distinction and which characteristics they can and cannot take into account, in what circumstances and for what purpose. One of the main criticisms of the old law before *Holley* was that those courts which took the same approach as in *Smith* effectively subjectivized (and, in so doing, diluted) the normative elements in a way which was morally repugnant (eg, by taking account of the defendant's discreditable characteristics) and this predictably led to calls for 'purer' objective requirements. At the same time though, Ashworth pointed out that if the principle of autonomy is to be maintained an objective test should be subject to capacity-based exceptions.<sup>90</sup> The principle of autonomy, that each person should be treated as responsible for his own conduct, implies that each individual has sufficient free will to choose how to behave in any situation and thus should be regarded as an independent agent. If the conduct breaches the law the individual can rightly be held liable and punished. The danger in adopting objective requirements is that any individual may, through no fault of his own, be incapable of acting in a way which would have avoided contravening the law. This, of course, echoes the concern of Lords Hoffmann and Clyde in *Smith* that the law would be unjustified in expecting a person to conform to a standard of which he is, through no fault on his part, incapable of achieving.

Given the New Labour government's desire to 'toughen up' this part of the law it is not surprising to find that the new plea is littered with objective requirements—apart from the obvious 'person with a normal degree of tolerance and self-restraint...' test, those who rely on the fear trigger must fear *serious* violence, which will surely be construed according to what the court treats as serious; those who rely on the words and/or conduct trigger will only succeed if the court thinks they are of an *extremely grave* character and that they caused the defendant to have a *justifiable* sense of being *seriously* wronged. In some cases the facts are likely to be such that it is clear whether these tests are or are not fulfilled, but there will be many where there is no such certainty.<sup>91</sup> Thus, any benefits which may be derived by adopting a stricter normative requirement are, at least in the early years before any line of authority or clarity is established, likely to be at the cost of maximum certainty.

### Judicial directions to the jury

At this relatively early stage in the life of the new law it is obviously difficult to predict with confidence how it will work in practice, but it is impossible not to be concerned that juries will find it perplexing. In addition to the ambiguities in some of the words and phrases in ss 54 and 55 of the 2009 Act, the structure and wording of it is complicated, and judges are likely to be hard-pressed to explain it in clear and simple terms. The jury needs to be told that the burden is on the prosecution to

<sup>90</sup> Ashworth, n 6 above, 189.

<sup>91</sup> Moreover, there is the danger that a purely objective interpretation of these words will lead to injustice by denying the plea to deserving defendants such as battered women or very young defendants.

satisfy them that the plea fails.<sup>92</sup> They should be advised to consider evidence of one of the two recognized triggers. For the fear trigger, was it of *serious* violence; did the defendant fear the violence would emanate from the victim; was the feared violence directed at the defendant or another? For the words or conduct trigger, did this constitute something of an *extremely grave character*; and did it cause the defendant to justifiably feel she had been seriously wronged? In relation to either trigger, was it self-induced? If the killing was prompted solely through sexual infidelity or in considered desire for revenge, the plea must fail. Whichever trigger is appropriate, the defendant must have lost her self-control and not regained it at the time of the assault, and the jury must be made aware of what constitutes such a loss. Then they have to consider the objective test, whether a person of the defendant's age and sex, 'with a normal degree of tolerance and self-restraint, and in the defendant's circumstances, might have reacted in the same or in a similar way'. The judge will have to identify which of the defendant's circumstances might be applicable. He will have to tell the jury to ignore any morally repugnant or discreditable characteristics, and only take account of any mental abnormalities if they were relevant to the trigger. The new law thus surely makes very heavy demands both of judges and juries.

### **The relationship between loss of self-control and diminished responsibility**

Evidence of both loss of self-control and diminished responsibility might arise in the course of any individual case, even though following the Privy Council's decision in *Holley*, and certainly under the Coroners and Justice Act 2009, the two pleas should now be regarded as mutually exclusive: if pleaded in the same case they ought to be considered in the alternative.<sup>93</sup> Where a person was suffering from an 'abnormality of mental functioning' (as defined in section 52 of the Coroners and Justice Act 2009) which caused him to lose his self-control and strike out with fatal violence, then he may plead diminished responsibility, regardless of any provocation to which he may have been subjected. Evidence of such abnormality may also be relevant where the defendant pleads loss of self-control (under the words and/or conduct trigger) if it is the object of the provocation. To that extent therefore, the defendant can raise both pleas, but this presents a potential problem. Where diminished responsibility is relied on, the burden of proof lies with the defendant and the burden must be discharged on a balance of probabilities;<sup>94</sup> whereas it is for the prosecution to disprove beyond reasonable doubt a loss of self-control.<sup>95</sup> Clearly, there is a real likelihood that these differences in the burdens and standards of proof will cause considerable difficulties for juries.

<sup>92</sup> Coroners and Justice Act 2009, s 54(5).

<sup>93</sup> The author has begun to monitor the operation of the new law and has already encountered cases in which both pleas are being raised, but the basis on which they are raised is unknown.

<sup>94</sup> Homicide Act 1957, s 2(2), and *Dunbar* [1958] 1 QB 1 (CCA).

<sup>95</sup> Coroners and Justice Act 2009, s 54(5) and (6).

## Sentencing

It is worth making some brief comments about sentencing in provocation manslaughter cases as well as on the substantive law. The guidelines drafted by the then Sentencing Guidelines Council in 2005 indicate that, as Ashworth had suggested many years earlier,<sup>96</sup> the dominant consideration when determining the appropriate sentence in provocation manslaughter should be the objective seriousness of the provocation itself.<sup>97</sup> Other factors include the extent and timing of the retaliation, post-offence behaviour, and the use of a weapon. Judges need to have clear lines of direction. For example, where there is a short time between the provocation and the loss of self-control the defendant's culpability is likely to be less, but longer gaps between the two should not necessarily imply greater culpability in cases of cumulative provocation. The use of a weapon *prima facie* suggests greater culpability, but only if it was carried to the scene by the defendant—if it was used simply because it was conveniently at hand, no real increase in seriousness is implied. In addition, there may be an important difference between a man and a woman—who may be significantly weaker than her victim—using a weapon.

The SGC guidelines state that where there is a high degree of provocation over a short period, the starting point should be three years' custody, up to a maximum of four years. In cases of substantial provocation (over a short period) the starting point should be eight years, within a range of four to nine years; and if the provocation was at a low level over a short time, the starting point should be twelve years, and the range ten years to life imprisonment. Bearing in mind that offenders serving a year or more in prison can expect to be released at the half-way stage,<sup>98</sup> Ashworth indicated that some of these sentences—where the provocation is high—seem very low.<sup>99</sup> Provocation (now loss of control) manslaughter is a form of mitigated murder, and on average murderers can expect to spend at least 15 or 16 years in prison before being able to apply for release on licence.<sup>100</sup> As Ashworth explained, the justification for the low sentences must be based on the offender's reduced culpability arising out of the loss of self-control and partial justification for that loss. But, not surprisingly perhaps, the political tide appears to have turned in favour of tougher sentences where the harm is so serious, and as Ashworth rightly suggests, the current guidelines may have to be revised. It has recently been suggested that one consequence of the enactment of Sch 21 to the Criminal Justice Act 2003 will be a general ratcheting up of sentences for all serious crimes, including manslaughter by provocation/loss of control.<sup>101</sup> Indeed, dealing with

<sup>96</sup> AJ Ashworth, 'Sentencing in Provocation Cases' [1975] Crim LR 553, 560.

<sup>97</sup> Sentencing Guidelines Council, *Manslaughter by Reason of Provocation* (London: SGC, 2005), paras 3.2 and 4.2.

<sup>98</sup> Criminal Justice Act 2003, s 244.

<sup>99</sup> A Ashworth, *Sentencing and Criminal Justice* (5th edn, Cambridge: Cambridge University Press, 2010), 122.

<sup>100</sup> Statistics kindly provided to the author by the National Offender Management Service. The shortest minimum term which a convicted murderer is likely to serve is about 6 years.

<sup>101</sup> D Jeremy, 'Sentencing Policy or Short-term Expediency?' [2010] Crim LR 593.

an appeal against sentence in an unlawful and dangerous act manslaughter case the Lord Chief Justice commented that following the 2003 Act ‘crimes which result in death should be treated more seriously and dealt with more severely than before’.<sup>102</sup>

#### 4. Provocation and Principles

It was not surprising to find such a strong desire to be rid of the old provocation plea, though one of the underlying problems was the struggle to identify a clear rationale behind it. Some commentators have categorized it as essentially excusatory, on the basis that the defendant was acting out of control (as a consequence of the provocation) and was thus less culpable.<sup>103</sup> Others, such as Ashworth, acknowledged this but also recognized an element of justification in the loss of self-control.<sup>104</sup> Yet a third school of opinion preferred to regard the rationale as one of partial responsibility because of the disturbed mental or emotional state of mind of the defendant.<sup>105</sup> But much of the criticism of the provocation plea must surely be attributed to a failure to consistently follow or apply legal principles and policies. An obvious concern with both the old and almost certainly the new law is the failure to comply with the principle of maximum certainty.<sup>106</sup> There was uncertainty about how far the courts would look closely at the evidence of a loss of self-control, about which characteristics would be treated as relevant to the objective test (especially whether they would adopt the *Smith* or *Holley* approach), and thus about the relationship between provocation and diminished responsibility.

The latter two issues appear to have been settled under the new law, but it remains to be seen how the courts construe the central concept of loss of self-control. If they regard it in the same light as under the old law, then much of the potential benefit to battered women from the introduction of the fear of serious violence trigger will effectively be frustrated (as under the old law). In addition, much of the terminology of the new law—especially in the words and/or conduct trigger (extremely grave character, justifiable sense of being seriously wronged)—is ambiguous, so that certainty will depend on the emergence of a clear and consistent body of case law. It is perhaps too early to be really critical, and as Ashworth reminds us, the principle is of *maximum* not *absolute* certainty,<sup>107</sup> so that some uncertainty is inescapable in order to avoid undue rigidity.<sup>108</sup>

Concerns have also been raised about the extent to which the old law complied with the principle of proportionality. One of the central criticisms of the old law

<sup>102</sup> *Appleby* [2009] EWCA Crim 2693, [2010] 2 Cr App R (S) 46.

<sup>103</sup> See eg J Dressler, ‘Provocation, Partial Justification or Partial Excuse?’ (1998) 51 MLR 467.

<sup>104</sup> Ashworth, n 6 above, 254.

<sup>105</sup> Mitchell et al, n 9 above.

<sup>106</sup> Referring to the obvious potential ambiguity of the wording in s 55(3) and (4), Lord Judge CJ warned in *Clinton* [2012] EWCA Crim 2 at [11]: ‘[T]here is no point in pretending that the practical application of this provision will not create considerable difficulties. . . . The statutory language is not bland.’

<sup>107</sup> Ashworth, n 6 above, 66.

<sup>108</sup> Ashworth refers to this as part of a policy of social defence, n 6 above, 66, 67.

was that it accommodated undeserving defendants, inter alia because the courts did not always insist on a loss of self-control, and because they sometimes took account of inappropriate characteristics of the defendant instead of adopting a tougher normative approach. In other words, there was a lack of proportion between the real mitigation and the verdict. The courts were encouraged to look at the relationship between the gravity of the provocation and the defendant's retaliation to it, whereas Ashworth argued that it should have been between the provocation and the defendant's loss of self-control (rather than the nature of the violence he used against the victim). Ashworth's worry that some cases resulted in disproportionately short prison sentences being imposed, when compared to the minimum terms imposed in murder cases, is a further obvious example of his concern to maintain a principled approach. It remains to be seen how the principle of proportionality will be addressed under the new law. The government clearly hopes that fewer pleas under the 2009 Act will succeed, and judges can now exclude consideration of loss of control in what are viewed as weak cases. Nevertheless, there must be a real fear that the retention of the loss of self-control requirement will continue to thwart many deserving cases.