

# Abolishing Provocation and Reframing Self-Defence—the Law Commission’s Options for Reform

**By Susan S. M. Edwards**

*Professor of Law, Buckingham Law School*

**Summary:** *In October 2003, the Law Commission (“LC”) published a detailed Consultation Paper, *Partial Defences to Murder*,<sup>1</sup> reviewing the present law and proposing a series of possible options for reform. In responding to the LC’s invitation, this article recommends that provocation be abolished and self-defence be reframed in order to take into account the inherent “inequality of arms” between the sexes which requires radical rethinking of the immediacy and proportionality requirements so as to allow women, although not exclusively women, the opportunity for an effective self-defence. The reasoning is set out in the body of this article, which reviews the law and practice of provocation and self-defence and the obstacles these defences pose for women, especially battered women who kill.*

## Introduction

The LC (para.4.163) asks “is it morally sustainable for sudden anger to found a partial defence to murder?” It considers the law on provocation “unworkable”, “unjust”, and gendered (para.1.66), providing a partial defence for those who kill in anger but not for those who kill out of despair (paras 4.166, 4.167). Feminist legal criticism has consistently argued that that law’s universal objective rationality, espoused in common law and precedent, is a validation of male experience, transforming men’s experience into an “objective” doctrine which passes for the “normative”.<sup>2</sup> Women and battered women especially are thereby excluded from the framing of provocation’s objective and subjective tests as they are from the objective and subjective pre-requisites of self-defence especially with regard to the application of the requirements of “proportionality” and “immediacy”. The LC impliedly rejects the orthodox view that legal rules are part of a closed autonomous system by conceding that the law on provocation and self-defence is interpretative, and has been shaped historically by the “social circumstances in which [provocation] has operated” (paras 3.10, 3.11) [and that] “prevailing social mores at any particular time have played a vital role in the development of the defence” (para.3.13). In taking the LC’s deconstructionism further I want to respond to the

<sup>1</sup> Law Com. No.173, *Partial Defences to Murder*, Consultation Paper (October 31, 2003).

<sup>2</sup> J. E. Grbich, “The Body in Legal Theory” in M. A. Fineman, and N. S. Thomadsen (eds), *At the Boundaries of Law* (Routledge, London, 1991), p.69.

problem of masculinism in the law of provocation and self-defence in exploring the contextual genesis of exculpatory and excusatory accounts.

### The gendered morphology and ontology of provocation

The Homicide Act 1957, s.3, provides:

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

The burden of proof is on the prosecution to prove beyond reasonable doubt that the case is not one of provocation. In English common law the provocation defence is satisfied only where the killing is founded on moral indignation or outrage,<sup>3</sup> and, in more recent times, the result of an uncontrolled rage<sup>4</sup> following trivial and, more latterly, grave provocation. Over the last two decades counsel and judges in “doing justice”<sup>5</sup> have stretched the requirements of provocation<sup>6</sup> in order to bring women within the ambit of the defence, who out of fear, delay the fatal strike<sup>7</sup> or who deploy what might appear to others a disproportionate force out of necessity for self preservation.<sup>8</sup> Such a development has done nothing whatever to address the defence’s fundamental flaw which is to bestow upon angry men the privilege of immunity from murder when pepper pots are moved<sup>9</sup> or when it has so pleased them.<sup>10</sup>

#### *The subjective test and standard men*

The subjective element demands a loss of self-control which has been the only emotion condoned as relevant to this partial disavowal of responsibility. What has

<sup>3</sup> J. Horder, *Provocation and Responsibility* (Clarendon Press, Oxford, 1992), pp.97, 106, argues that grave provocation took the place of “honour” in deeming what was sufficient for killing under provocation. Honour, however continues to provide an adequate ground where, in some ethnic minority communities, a transgression from a cultural code “permits” family members to “wipe away the shame.” See the killing of Ruhksana Naz in S. Edwards, and M. Welstead, “Death Before Familial Dishonour” (1999) 149 N.L.J. 867.

<sup>4</sup> Loss of self-control and anger based on an over deterministic drive model of man.

<sup>5</sup> Taylor L.C.J. in *Ahluwalia* [1992] 4 All E.R. 889; Lord Steyn in *Luc Thiet Thuan VR* [1996] 2 All E.R. 1033.

<sup>6</sup> Lord Hoffmann said in *Smith* [2000] 1 A.C. 146; 4 All ER 289, that the law on provocation, “has serious logical and moral flaws” (at 159, also cited in Law, Com., see n.1 above, para.1.21). See *R. v Rowland*, *The Times*, January 12, 2004 and the Judicial Studies Board specimen direction.

<sup>7</sup> See n.5 above.

<sup>8</sup> This is not restricted to women killing violent partners but extends to children killing a violent father see *Maw*, Court of Appeal (Criminal Division) No 4795/R/80 (Transcript: Walsh, Cherer) December 3, 1980; *Pearson*, Court of Appeal (Criminal Division) (Transcript: Marten Walsh Cherer) November 11, 1991.

<sup>9</sup> Joseph McGrail, *Guardian* (August 1, 1991). In this case McGrail’s common law wife was said in court to be bullying and an alcoholic. The judge when passing sentence said, “This lady would have tried the patience of a saint.”

<sup>10</sup> See n.6 above. Sexual jealousy said Lord Hoffmann should be specifically excluded in a direction to the jury (see n.1 above, para.4.83).

passed for “loss of self-control” has been tightly prescribed for legal purposes. It includes indignation (justification) or anger (excuse), predicated on the belief that free will is compromised either where man is compelled to act because of the need to preserve “honour” or, as is more recently the case, impelled to act because of an inner pathological drive or impulse of anger. In both its guises the litmus test for a loss of control is formulated in accordance with what men do under certain conditions prevail and (as I shall argue later) more pertinently, are allowed to do. Historically, “hot temper” became synonymous with lack of capacity for self-control or, to put it the other way round, lack of self-control became accepted as typically expressed in “hot temper”.<sup>11</sup> Contemporary evidence of “loss of self-control” has depended on outwardly visible signs of outburst, supported by a specific nomenclature, for example, “spin round quickly”,<sup>12</sup> and “went berserk”,<sup>13</sup> both of which have been considered directly reflective of a specific inner mental state. Other linguistic vocabularies have also assisted, such as “snap”,<sup>14</sup> “exploded”,<sup>15</sup> and “black out”.<sup>16</sup> Conversely, a display of despair, terror, hysteria, tears, sobbing, apathy, inertia, inability to act, isolation or exhaustion have not been deemed referable with a state of “loss of self-control” (although clearly the expression of such emotions do not point towards a person in full capacity of self control) and therefore excluded from the prescribed response necessary for provocation.<sup>17</sup> The LC concludes, quite rightly (para.4.163):

“The defence of provocation elevates the emotion of sudden anger above emotions of fear, despair, compassion and empathy.”

The normative standard for self-control since *Camplin*<sup>18</sup> and following *Ahluwalia*,<sup>19</sup> *Dryden*,<sup>20</sup> *Humphreys*,<sup>21</sup> *Thornton*,<sup>22</sup> and *Smith*<sup>23</sup> has expanded,<sup>24</sup> so that it is moderated by the capacity for self-control of the defendant, but only so far as that

<sup>11</sup> *Kirkham* (1837) 8 C. & P. 115; 173 E.R. 422.

<sup>12</sup> *Phillips* [1969] 2 A.C. 130.

<sup>13</sup> *Richens* [1993] 4 All E.R. 877; the trial judge’s direction on provocation included the phrase “going berserk”. In *Campbell* [1997] 1 Cr.App.R. 199, the fact that the defendant had “gone berserk” provided the opportunity for retrial on grounds of provocation (where the defendant had hit a woman hitch hiker with a hockey stick round the throat and strangled her!).

<sup>14</sup> See Warner, *Guardian* (May 1, 1982); *Wyatt*, November 22, 1984, Manchester Crown Court author’s own notes.

<sup>15</sup> *Hinton*, *Daily Telegraph* (March 26, 1988); see Horder, n.3 above, p.109.

<sup>16</sup> *Brown* (1972) 56 Cr.App.R. 564.

<sup>17</sup> D. M. Kahan, and M. C. Nussbaum, “Two Conceptions of Emotion in Criminal Law” (1996) 96 Col. L.R. 269.

<sup>18</sup> *Camplin* [1978] A.C. 705.

<sup>19</sup> See n.5 above.

<sup>20</sup> [1995] 4 All E.R. 987.

<sup>21</sup> [1995] 4 All E.R. 1008.

<sup>22</sup> *Thornton* [1992] 1 All E.R. 306; *Thornton* (No.2) [1996] 2 All E.R. 1023.

<sup>23</sup> See n.6 above.

<sup>24</sup> Over the last three decades Crown Court practice has accepted evidence of “cumulative provocation” see A. Ashworth, “Sentencing in Provocation Cases” [1975] Crim.L.R. 552–563; M. Wasik, “Cumulative Provocation and Domestic Killing” [1982] Crim.L.R. 29–37; J. Dressler, “Rethinking Heat of Passion: a Defense in Search of a Rationale” [1982] 73 *Journal of Criminal Law and Criminology* 421–470; A. McColgan, “In Defence of Battered Women who Kill” (1993) 13 O.J.L.S. 508–529; D. Nicolson, “Telling Tales: Gender Construction and Battered Women who Kill” (1995) 3 *Feminist Legal Studies* 185–206.

capacity falls within an acceptable range, because of the need not to lose sight of the fundamental distinguishing feature of diminished responsibility and provocation. This development has courted considerable controversy and created uncertainty. In *Morhall*<sup>25</sup> Lord Goff in the House of Lords, in an attempt to restrain this unpredictable and unruly development, held that only those characteristics that went to the gravity of the provocation could properly be considered and not those that affected a person's capacity for self-control. Whilst this "rule" was followed in *Luc*<sup>26</sup> and undoubtedly affected the predilection to plead provocation in certain cases, it was not followed in *Smith*.<sup>27</sup> Here, the House of Lords ruled that if the characteristic was deemed relevant it mattered not whether it went to the gravity of the provocation or to the capacity for self-control. The prospect of the distinction between diminished responsibility and provocation disappearing to almost vanishing point prompted the House of Lords to contrive the term "mental affliction" in an effort to retain some vestiges of a distinction.<sup>28</sup> The objection raised in *Morhall*,<sup>29</sup> *Luc*<sup>30</sup> and post-*Smith*<sup>31</sup> is that the capacity for "loss of self-control" is as determined by the defendant's capacity as it is by external factors.<sup>32</sup> However, the combination is important for cases involving battered women subjected to repeated violence (external) where capacity for self-control (volition) is affected by their perception and knowledge of the abuser's behaviour (cognition), which shapes their vigilance and strategy for survival.<sup>33</sup> Entertaining a variable standard of self-control has led to one unwelcome development where spurious argument of differences between ethnic groups in their capacity for self-control has been relied upon.<sup>34</sup>

Following *Stewart*<sup>35</sup> it is for the judge to decide whether there is evidence of loss of self-control and if s/he decides there is no such evidence then provocation may be withdrawn from the jury.<sup>36</sup> Following *Rossiter*<sup>37</sup> "evidence however tenuous" is all that is required.<sup>38</sup> Alternately, in cases where provocation is not part of the defence

<sup>25</sup> [1996] 1 A.C. 90.

<sup>26</sup> See n.5 above.

<sup>27</sup> See n.6 above.

<sup>28</sup> *ibid.* Lord Hobhouse dissenting said "The judgment of Lord Parker and the decision in *Byrne* are strongly contradictory of the respondent's argument in the present case and the thesis that it is necessary and permitted to introduce abnormalities of mind into section 3."

<sup>29</sup> See n.25 above.

<sup>30</sup> See n.5 above.

<sup>31</sup> See n.6 above.

<sup>32</sup> Lord Millett in *Smith*, n.6 above, argues that introducing a variable standard of self-control subverts the moral basis of the defence.

<sup>33</sup> S. Edwards [1997] "Battered Women—In Fear of *Luc*'s Shadow," *Denning Law Journal* 75–105; C. Wells, "Provocation: the Case for Abolition" in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law*, (Oxford: Oxford University Press, 2000), p.94.

<sup>34</sup> *Stingel* (1990) 171 C.L.R. 312; see also K. Laster and P. Raman, "Law for One and One for All" in N. Naffine, and Owens (eds), *Sexing the Subject of Law* (London: LBC Information Services, Sweet and Maxwell, 1997), p.206; C. Howard, "What Colour is the Reasonable Man?" [1961] Crim.L.R. 41.

<sup>35</sup> *Walch* [1994] Crim.L.R. 714, citing Lord Reading in *Hopper* [1915] 2 K.B. 431.

<sup>36</sup> Some cases have succeeded on appeal simply because the Court of Appeal took a different view of whether self-control had been lost. See S. Edwards, *Sex and Gender in the Legal Process* (London: Blackstone Press, 1996), p.384.

<sup>37</sup> *Rossiter* (1992) 95 Cr.App.R. 326.

<sup>38</sup> See Lord Steyn in *Acott* [1996] 4 All E.R. 443, "A loss of self-control caused by fear, panic, sheer bad temper or circumstances (*e.g.* slow down of traffic due to snow) would not be enough." It is also worth considering the circumstances of *Lesbini* [1914] 3 K.B. 1116.

case if in the judge's view there is evidence of loss of self-control then provocation must be put to the jury.<sup>39</sup> But this will not assist battered women if their loss of self-control does not conform to the masculinist prescribed formulae outlined above.

In determining the question of loss of self-control judges will also take into account whether the "immediacy requirement" is satisfied. A temporal proximity between the alleged provoking acts and the killing may be required, since a lapse of time between the alleged provocation and the killing is interpreted as time to "cool down" and cooling time has been exclusively regarded as evidence of intention or malice prepened. "Various matters which formed the basis of the old authorities, in particular whether there was a 'cooling-off interval' between the provocation and the killing."<sup>40</sup> To this end, Devlin J. in *Duffy*<sup>41</sup> (a battered wife who had killed the deceased with a hammer and hatchet "not to hand" whilst he lay in bed (behaviour probably considered at that time outrageous and exceptional)) said "we are not concerned with the blame attached to the dead man" and prefixed the phrase "loss of self-control" with the word "sudden" to underscore the contingent requirement of immediacy.<sup>42</sup> The result was that, until *Ahluwalia*,<sup>43</sup> a time lapse was fatal for the success of the battered woman's defence.<sup>44</sup> Lawton L.J. in *Ibrams and Gregory*<sup>45</sup> asserted "Desire for revenge would negative a sudden and temporary loss of self-control."

Yet, a time lapse can sustain and feed anger, just as much as revenge or fear, or the determination to survive and elsewhere in criminal law "time lapse" has alternate privileged meanings.<sup>46</sup> Since *Ahluwalia*, in cases of battered woman who kill, a time lapse of itself is no longer sufficient to negate provocation. Lord Taylor shifts the emphasis of the meaning of "sudden" from an exclusive concern with immediacy to embrace a signification which focuses on the nature and character of the response (LC, para.1.51). This treatment of time lapse has been regarded as problematic because it opens up the possibility for a multiplicity of motives to

<sup>39</sup> In *Thornton* [1992] see n.22, above, provocation was not part of the defence at trial it was the judge who put the matter of provocation to the jury.

<sup>40</sup> Archbold, *Criminal Pleading, Evidence and Practice*, 1996, Vol. 2, 19–62 (Sweet & Maxwell, London). The offender's conduct during the time interval was always an important consideration see Stephen *Digest of the Criminal Law*, art.317, cited in *Mancini v DPP* [1942] A.C. 1, 9.

<sup>41</sup> *Duffy* [1949] 1 All E.R. 932.

<sup>42</sup> Mrs Duffy was sentenced to death (commuted) then released on licence on November 5, 1951.

<sup>43</sup> See n.5 above. Whilst this development is novel for the Court of Appeal, trial judges whose reasoning is less conspicuous had already been developing the law in this direction; see especially the case of Pauline Wyatt, Manchester Crown Court 1982 cited in S. Edwards, "Provoking Her Own Demise: From Common Assault to Homicide" in J. Hanmer, and M. Maynard (eds), *Women, Violence and Social Control* (Basingstoke: Macmillan, 1987), p.166.

<sup>44</sup> Thornton's first appeal was dismissed on just this ground, see n.22, above; see also *Smith* [2002] EWCA Crim 2671 (Transcript: Smith Bernal), where a murder conviction was quashed and a verdict of manslaughter (based on provocation) substituted.

<sup>45</sup> (1982) 74 Cr.App.R. 154.

<sup>46</sup> With regard to the law on duress, the courts have recognised that a threat, although not immediate, might be regarded as imminent in so far as it may be "operative on the mind" such that duress may exist in the continuous present as it is connected to and not interrupted by the threat. Such was the point decided in *Hudson and Taylor* (1971) 56 Cr.App.R. 1, and applied in *Abdul-Hussain* [1999] Crim.L.R. 570.

masquerade under the guise of prolonged or chronic provocation.<sup>47</sup> It is true that one emotion is not hermetically sealed from another in fact or in linguistic analysis.<sup>48</sup>

*The objective test and adequate grounds for male indignation/anger*

The LC reviews the external conditions, which have been considered sufficient to reduce the capacity for self-control. Under common law, before 1957, it was a matter for the judge to rule upon. In *Mawgridge* “pulling the nose”, “filling the head” and “if a husband found his wife in the act of adultery” were considered sufficient.<sup>49</sup> With regard to this last ground the LC (para.1.49) states, “. . . by the twentieth century that rule was regarded as an anachronism not to be extended.” Judges certainly withdrew provocation from the jury in some cases where the defendant said he was provoked by his wife’s adultery.<sup>50</sup> But hearing of a wife’s adultery for the first time and where a weapon “was to hand” always provided an exception to this general rule.<sup>51</sup> *Holmes*’s defence of provocation failed on just this ground in that he had known about the adultery of his wife/common law partner for some time. Similarly, Ruth Ellis’s defence of provocation failed in part on the basis that she had known about the adultery of David Blakely.<sup>52</sup>

After 1957, what constituted sufficient provocation was a matter wholly for the jury, but judges nevertheless continued to exert an influence in directing them and in summing up<sup>53</sup> with the result that jurors in finding provocation and judges in passing sentence have regarded the act of adultery, regardless of the marital status of the parties or for how long the adultery has been known, as grave a provocation as it had ever been.<sup>54</sup> Lord Diplock in the House of Lords in *Camplin*<sup>55</sup> said:

<sup>47</sup> *Masciantonio* [1994] 1 V.R. 577. However, the impact of cultural relativism in this expansion has been strongly criticised for presuming that some cultures, usually the dominant culture, can cool down whereas the capacity for certain ethnic groups to cool down is compromised. A similar point is made at n.34 above.

<sup>48</sup> “Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all” (*per* Lord Bingham of Cornhill, in *Reyes v The Queen* [2002] 2 A.C. 235). See also *Burgess* [1995] Crim.L.R. 425, the defendant stated, “everything was hazy. I couldn’t stop myself [and later] I wanted to hurt her the way she hurt everybody else.”

<sup>49</sup> *Mawgridge* [1707] Kel. J. 119; 84 E.R. 1107.

<sup>50</sup> *Holmes* [1946] 1 All E.R. 524.

<sup>51</sup> In *Rothwell*, 12 Cox C.C. at 147 Blackburn, J. said: “As a general rule, no provocation of words will reduce the crime of murder to that of manslaughter, but under special circumstances there may be such a provocation of words as will have that effect; for instance, if a husband suddenly hearing from his wife that she had committed adultery, and he having no idea of such a thing before, were thereupon to kill his wife, it might be manslaughter. In that case the tongs were ready to the accused man’s hand and with them he . . . killed her” (such an exception did not extend to cohabitantes or to those who suspected wives of adultery) followed in *Holmes*, n.47 above, where the husband had for some time suspected the wife’s adultery.

<sup>52</sup> *Ellis* [2003] EWCA Crim 3556; [2003] All E.R. (D) 134 (Dec.), (approved judgment).

<sup>53</sup> See W. Young, “Summing-up to Juries in Criminal Cases—What Jury Research says about Current Rules and Practice” [2003] Crim.L.R. 665.

<sup>54</sup> See LC, n.1 above, para.4.54; *cf.* Lord Hoffman in *Smith*, n.6, who said: “Male jealousy should not today be an acceptable reason for loss of control leading to homicide”, p.289.

<sup>55</sup> See n.18 above.

“ . . . the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused’s characteristics as they think would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.”

In *Ahluwalia*,<sup>56</sup> in an effort to bring battered women within sight of law’s justice reversing *Duffy*’s “no blame is attached to the dead man,” the court conceded that cumulative provocation and a long course of conduct were relevant and that “battered woman syndrome” had “become a characteristic within the meaning of Lord Diplock’s formulation.”<sup>57</sup> In *Dryden*, the court concluded that “the obsessiveness on the part of the appellant and his eccentric character” was also a characteristic<sup>58</sup> and in *Humphreys*, Hirst L.J. considered of relevance, a personality with “immature and explosive and attention seeking traits.”<sup>59</sup> At Thornton’s retrial in 1996 Scott Baker J., accepted as a characteristic of relevance “ . . . being the wife of an alcoholic.”<sup>60</sup> But the absence of any moral or logical rationale to what is sufficient provocation caused Lord Millett in *Smith* to argue that provocation was no longer morally defensible.<sup>61</sup> Lord Taylor in the Court of Appeal in *Morhall* deemed characteristics that were “inherently objectionable” (LC, para.4.48) or “morally repugnant”<sup>62</sup> as suitable for exclusion,<sup>63</sup> whilst Lord Goff<sup>64</sup> curbed further development in laying down his own preference for a schema whereby only characteristics that went to the “gravity of the provocation” and not those that affected the capacity for self-control could be properly considered. This pursuit of legal logic created an overly mechanistic and hermetically sealed approach to considering loss of self-control and to exclude again the battered woman whose capacity for self-control was affected by abuse in the past and fear of abuse in the future such that for her the two requirements were conjoined.

<sup>56</sup> See n.5 above at 898e.

<sup>57</sup> See n.18 above at 897d. Battered woman syndrome evidence (BWSE) is a recognised body of knowledge which has been used in several jurisdictions with a view to assisting the jury in understanding the state of mind of women experiencing or facing violence who kill their abusers and in assessing the reasonableness of her actions. Extensively discussed in Edwards (1996), see n.34 above; C. Dalton and E. M. Schneider, *Battered Women and the Law* (New York: New York Foundation Press, 2001), Ch.10; S. Edwards, *Briefing Paper on Expert Witnesses* (Standing Together Against Domestic Violence, Hammersmith, London, 2003), p.7.

<sup>58</sup> See n.20 above at 998d.

<sup>59</sup> See n.21 above at 1012d.

<sup>60</sup> See n.33 above, p.100; see also S. Edwards and C. Walsh, “The Justice of Retrial?” (1996) 146 N.L.J. 857.

<sup>61</sup> See n.6 above. Horder argued that what passed for provocation developed according to “natural feelings of past times” [and] “emotions can have moral worth, and can hence constitute a structure of ethical considerations within which actions on principles or maxims motivated by such emotions are explained and judged as more or less appropriate in particular circumstances” (see n.3 above, pp.170–171).

<sup>62</sup> *Morhall* [1993] 4 All E.R. 888 at 893; see also Lord Steyn in the dissenting judgment in *Luc*, n.5 above.

<sup>63</sup> As Lord Diplock had similarly done in *Camplin*, see n.18 above.

<sup>64</sup> See n.25 above.

*Socially mediated approbation for provocation*

The rationale for this legal construction of “loss of self-control” relies on the relationship between the external factors and the internal capacity for self-control. The general “theory” informing the jurisprudence is that certain conduct acts as a disinhibitor to self-control and the loss of self-control mirrors an inner pathology.<sup>65</sup> I want to argue instead that when the law authorises a loss of self-control it is in effect giving way not to physiology but to the “mirror of nature.”<sup>66</sup> In this sense, the law permits and gives its exculpation to anger and rage and also prescribes the external conditions which allow the weakening of the moral bind. What is being encapsulated here is not a physiological model of man at all, nor a referential description of human response or emotions, but bears testimony to the social construction of the human response in so far as social conventions excuse conduct. The idea that motives are the reasons for action not the causes of actions has an established philosophical heritage.<sup>67</sup> So then, the law provides permission enabling and facilitating indignation, anger, passion, and rage authorising these emotions as valid self-expression and at times as required obligations, so that, “The criminal law invites the defendant to neutralise his normative attachment to it.”<sup>68</sup> As Blum and McHugh argue:

“To say his motive in murdering his wife was his jealousy is to explicate the circumstances which make him the type of jealous person who would (could) murder his wife—that murdering his wife is one possible method available to him for doing jealousy. In this way, the event is formulated as the agent’s possible method for doing whatever the formulation of the motive requires as a course of action.”<sup>69</sup>

**Self-defence and mens’ “equality of arms”**

The construction of self-defence whilst a restrictive defence for both genders has nevertheless been skewed to the detriment of women<sup>70</sup> since a defendant’s action is only considered “reasonable” when the killing is a proportionate response to an immediate threat of deadly force. This requires the person to show that the force used to repel an immediate attack is based on honest belief and is of reasonable amount.<sup>71</sup> The law has been interpreted strictly. With regard to the battered woman who kills she frequently expresses her predicament in everyday language as one of the necessity to take self-defensive action. The effect of repeat violence on her perception and anticipation of further violence is relevant to her reasonableness and justification in mounting a defence of self-defence. Efforts to assimilate the “effect” of violence on her knowledge of his behaviour and her perception of likely harm or

<sup>65</sup> The notion of an inner pathology is explored by Kant in his discussion of “pathological feelings”, see T. N. Pelegrinis, *Kant’s Conceptions of the Categorical Imperative and the Will* (Zeno, London, 1980), p.25.

<sup>66</sup> See R. Rorty, *Philosophy and The Mirror of Nature* (Blackwell, Oxford, 1980).

<sup>67</sup> See for example D. Hume, *A Treatise of Human Nature* (Clarendon Press, Oxford, 1929); A. Schutz, *The Phenomenology of the Social World* (Heinemann, London, 1972).

<sup>68</sup> D. Matza, *Delinquency and Drift* (John Wiley and Sons, Chichester, 1964).

<sup>69</sup> A. F. Blum, and P. McHugh, “The Social Ascription of Motives” (1971) XXXVI *American Sociological Review* 107.

<sup>70</sup> A. McColgan, “In Defence of Battered Women who Kill” (1993) 13 O.J.L.S. 508.

<sup>71</sup> *Owino* [1996] 2 Cr.App.R. 128.

death and hence legal argument that self-defence is “reasonable in the circumstances” (Criminal Law Act 1967) have been thus far unsuccessful.<sup>72</sup> The question of whether the force used is reasonable in the circumstances is a question for the jury. The harshness of the rule has been somewhat mitigated by the guidance given to juries following *Palmer*.<sup>73</sup> Nevertheless, the defence remains exorbitantly generated largely situated in the particular ontology of the proportionality requirements.

*Proportionality—an incommensurability crisis*

Under the common law the “mode of resentment” was a rule of law. For provocation the retaliation had to be proportionate as it did in self-defence.<sup>74</sup> Thus, in *Oneby’s Case*<sup>75</sup> the fact that “the father had only used a little club to beat a boy” and in *Turner’s Case*<sup>76</sup> “the clog was so small, [so] there could be no design to do any great harm to the boy, much less kill him,” the type of object used was relevant. Similarly, though the use of weapons was generally deplored<sup>77</sup> a less serious view was taken of weapons “already in the hand.”<sup>78</sup> In *Mancini v DPP*,<sup>79</sup> Lord Simon, elaborating on the “proportionality” rule said that it was important “to take into account the instrument with which the homicide was effected, for to retort . . . by a simple blow, is a very different thing from making use of a deadly instrument . . .” Whilst proportionate force is no longer a legal rule in provocation, it remains pivotal in self-defence. The rule developed at a time when the archetypal killing involved two adult men, not a child killing an adult, nor a woman killing her male partner. Men killing men and men killing women continues to present as the more typical relationship of victim to suspect,<sup>80</sup> but children do on occasion kill adults and women on occasion do kill men.<sup>81</sup> However, the law continues to treat women homicide defendants, as if they were indeed men in respect of size, strength, ability to box, spar, and land a punch. So when women defend themselves against male

<sup>72</sup> See n.37 above; *Janet Gardiner, Independent*, October 30, 1992; *Oatridge* (1992) 94 Cr.App.R. 367; *Elizabeth Line, Daily Telegraph*, February 4, 1992.

<sup>73</sup> *Palmer* [1971] A.C. 814, 832.

<sup>74</sup> In *Steadman* (1704) C.C. 292, children and women were not considered equal; similarly, Holt C.J., in *Mawgridge* (see n.49 above) said that “excessive retaliation” was to “throw down a child and stamp on it”.

<sup>75</sup> In *Oneby* (1727) 2 Ld Raym. 1485, 1498; 92 E.R. 465.

<sup>76</sup> See *Comberbatch* 407, 8.

<sup>77</sup> Manslaughter by stabbing was made a capital offence under the Stabbing Act, 1 Jac.1.c.8 1603. Eden, deploring this Act, said that it “proved fatal to many unfortunate persons, who have suffered, not merely because they killed, but because they had adopted a mode of killing.” The stab or thrust must be made with a weapon or instrument, the use of which was likely to be dangerous. Although it did not apply to self-defence, misfortune or to, for example, a husband who killed an adulterer in the act of adultery, his offence was held to be manslaughter at common law. *Maddy’s Case*, 1672 1 Vent. 158 in L. Radzinowicz, *History of the Criminal Law*, vol.1 (London: Stevens, 1948), p.695.

<sup>78</sup> See n.41, and Devlin J. in *Duffy*.

<sup>79</sup> See n.40 above.

<sup>80</sup> S. Edwards, “The Real Risk of Violence behind Closed Doors” (1986) 136 N.L.J. 1191. Here, Edwards notes that for 1982, 1983 and 1984 men were homicide suspects in 458, 381 and 428 cases respectively, compared to 52, 57, and 65 women for the respective years. Whilst for the same years 314, 255 and 303 males were killed compared to 262, 227, and 240 females. See also K. Soothill, B. Francis, E. Ackerley, S. Collett, *Homicide in Britain* (Central Research Unit, Scottish Executive, 1999) especially Table E9, p.112.

<sup>81</sup> See *Criminal Statistics* (Home Office, London, 2001), Ch.4, p.74.

violence with an instrument as they are inclined to do (see Table 1) and as a result kill, their "mode of resentment" is treated for all legal purposes as "excessive." The terminology "excessive" is misplaced and the LC will further compound this apocryphal fallacy if this wording is used in any subsequent proposals for reform. It is this cognitive intransigence that I refer to as the "incommensurability crisis" in legal method and reasoning. The "proportionate" requirement embodies a mathematical and physical abstraction, which disavows the qualitative and quantitative difference of gender, *inter alia*, physical attributes, and unequal access to inherent body force. Women who use weapons in self-defence, do so in order to arm themselves against the *apriori* disproportionate force of men in order to achieve a notional equality between unequals. Women use such force as they consider necessary to repel the real possibility of a disproportionate and life threatening male force, which in their mind is in the continuous present.<sup>82</sup> The LC recognises:

"If a person, confronted with violence or threatened violence to himself or herself or another, responds with force and does no more than he or she believes to be necessary in the circumstances, it is harsh that he or she should be convicted of murder and sentenced to life imprisonment because on an objective view the degree of force used is judged to have been excessive" (para.1.61).

The US courts, in two celebrated rulings have recognised the incommensurability problem inherent in the legal rule. In *Easterling*, the appellate court reversed the decision of the trial judge who had instructed the jury that, "no person has the right to use a dangerous weapon merely to repel a simple assault without weapons" and said, "There may be such a difference in the size of the parties involved or disparity in their ages or physical condition which would give the person assaulted by fists reasonable grounds to apprehend danger of great bodily harm and thus legally justified in repelling the assault by the use of a deadly weapon . . ." <sup>83</sup> Similarly, in *the State of Washington v Yvonne L. Wanrow*, a retrial was ordered and the Supreme Court said: ". . . in our society women suffer from a conspicuous lack of access to training in and the means of developing those skills necessary to effectively repel a male assailant without resorting to the use of deadly weapons" [the court continued] ". . . [the] objective standard . . . through the persistent use of the masculine gender leaves the jury with the impression that the objective standard to be applied is that applicable to an altercation between two men."<sup>84</sup> There has been no such interrogation of proportionality in UK law.

The other side of the same coin is that the law has ignored the physical disparity between the sexes so that when men kill women, using body force such as strangulation, instead of this force being regarded as excessive when used against a person of smaller frame and when that person is also disabled from using physical force through social conditioning, the law construes body force as a mitigating factor. Again the law reifies context such that body force *per se* is rendered less

<sup>82</sup> As Weiss notes "Fear sears the expectations of many, often making them suffer in anticipation . . ." P. Weiss, *Emphatics* (Vanderbilt University Press, 2000), p.214.

<sup>83</sup> *Easterling v State* 267 P.2d 185, 188 (1954).

<sup>84</sup> See n.36 above, Edwards, p.234; see also C. Dalton and E. M. Schneider, *Battered Women and the Law* (New York Foundation Press, New York, 2001), Ch.10.

serious and sometimes even rendered benign.<sup>85</sup> Weapons and body force have different consequences for the construction of intention.<sup>86</sup> Table 2 suggests that when men kill spouses they are less likely to be convicted of murder if they use body force than if they use weapons 47 per cent to 56 per cent. Table 3 suggests that when women kill, they almost exclusively use weapons. Of course, that is not to say that weapons are the only determining factor in homicide outcomes, the use of a weapon or body force is part of the circumstances to which the court must have regard in assessing murder, manslaughter/provocation and self-defence. Before anyone is misled by the statistical fallacy (as indeed was the wont of the Home Office in 1992 when similar figures were produced in response to a Parliamentary question<sup>87</sup>) that really there is nothing biased about provocation since women are more likely to receive a conviction for manslaughter than murder as compared to men, it is always to be remembered that women kill almost always in an effort to survive the beatings and threats of beating from violent men. Men kill in anger because they can: “the reasons [men] have for acting in [this] particular way implies the applicability of a law like proposition to this particular action.”<sup>88</sup> And further, when women are the victims whether men use body force or weapons, both methods are disproportionate and excessive.

### Recommendations for reform

The LC makes a number of recommendations for abolition and revision of the present constitution of partial defences and self-defence. The LC’s case (para.3a) for the abolition of the mandatory sentence is one with which I agree. I also concur with the LC that the problems of the partial defence of provocation go beyond moral, theoretical and practical problems (para.12.2), that the defects are not curable by judicial development (para.12.4). Horder argues, and I am in agreement, that provocation should be abolished altogether.<sup>89</sup> Moral indignation or temper can only properly be considered in mitigation of sentence.<sup>90</sup> However, if the killing of another were committed in circumstances where there is a loss of self-control the definition of which requires expansion, then I believe that the capacity for “loss” should be a matter for diminished responsibility. However, it is acknowledged that such a development would lead to an expansion of diminished responsibility and a medicalisation of loss of self-control in a far wider range of cases (LC, para.12.26). With regard to the proposal that there should be a partial defence of self-defence this I support although limited to personal protection with two objections. First, whilst I fully support an expansion to include “excessive” force I do not support the

<sup>85</sup> See, *e.g.* *Grundy* where the seven-year sentence was reduced to four years, the judge explained his reasons “first no weapon was used as a boot or worse. Fisticuffs alone cause death.” See for further discussion S. Edwards, “Ascribing Intention—the Neglected Role of *Modus Operandi*—Implications for Gender” (1999/2000) 4 *Contemporary Issues in Law* 235–256.

<sup>86</sup> Edwards, *ibid.*

<sup>87</sup> See S. Bandalli, “Provocation from the Home Office” [1992] *Crim.L.R.* 716.

<sup>88</sup> See Pelegrinis, n.65 above, p.24 summarising Ryle’s argument.

<sup>89</sup> See n.3 above, p.197.

<sup>90</sup> Although the degree to which such facts would mitigate a sentence would rest with the judiciary. The recent Attorney General’s reference in *Suraton Humes and Wilkinson*, EWCA Crim 2982, where the Court of Appeal did not consider that the sentences of three and a half years for *Suraton* and four years for *Wilkinson* unduly lenient or the sentence in *Humes* of seven years as lenient, is none too encouraging.

**Table 1: Method of killing by gender in spousal homicide 1987–1996, England & Wales**

| Method of killing    | Male spouse killed by | %           | Female spouse killed by | %           |
|----------------------|-----------------------|-------------|-------------------------|-------------|
| <b>Weapons</b>       |                       |             |                         |             |
| Sharp inst.          | 207                   | 72.0        | 303                     | 30.1        |
| Blunt inst.          | 13                    | 4.5         | 137                     | 13.6        |
| Shooting             | 19                    | 6.6         | 88                      | 8.7         |
| <b>Sub total</b>     | <b>239</b>            | <b>83.1</b> | <b>528</b>              | <b>52.4</b> |
| <b>Body force</b>    |                       |             |                         |             |
| Hit/kicking          | 8                     | 3.0         | 78                      | 7.7         |
| Strangulation        | 21                    | 7.3         | 325                     | 32.3        |
| Drowning             | 2                     | 0.6         | 13                      | 1.3         |
| <b>Sub total</b>     | <b>31</b>             | <b>10.9</b> | <b>416</b>              | <b>41.3</b> |
| <b>Other methods</b> |                       |             |                         |             |
| Explosion            | 1                     | 0.3         | 7                       | 0.6         |
| Burning              | 9                     | 3.1         | 24                      | 2.3         |
| Poison/drugs         | 4                     | 1.3         | 9                       | 0.8         |
| Motor vehicle        | 1                     | 0.3         | 4                       | 0.3         |
| Other                | 1                     | 0.3         | 9                       | 0.8         |
| Unknown              | 0                     | 0           | 7                       | 0.6         |
| <b>Total</b>         | <b>286</b>            | <b>100</b>  | <b>1,004</b>            | <b>100</b>  |

Source: Statistics by kind permission of the Research and Statistics Directorate—Home Office

Table 2: Method of killing by males in spousal\* homicide and legal outcome 1995-2000, England & Wales

| METHOD            | Murder    | Manslaughter DR | Manslaughter | Homicide/ Lesser Offence | Sub Total  | % Murder   | Acquitted | No Proceedings Advice of DPP | Court Proceedings Pending | Suspect Committed Suicide | Other    | Grand Total |
|-------------------|-----------|-----------------|--------------|--------------------------|------------|------------|-----------|------------------------------|---------------------------|---------------------------|----------|-------------|
| <b>Weapons</b>    |           |                 |              |                          |            |            |           |                              |                           |                           |          |             |
| Sharp ins.        | 58        | 28              | 21           |                          | 107        | 54%        | 1         |                              | 5                         | 9                         | 1        | 123         |
| Blunt ins.        | 23        | 8               | 7            |                          | 38         | 61%        |           |                              | 1                         | 7                         | 2        | 48          |
| Shooting          | 4         |                 | 2            |                          | 6          | 67%        |           |                              |                           | 11                        |          | 17          |
| <b>Sub total</b>  | <b>85</b> | <b>36</b>       | <b>30</b>    |                          | <b>151</b> | <b>56%</b> | <b>1</b>  |                              | <b>6</b>                  | <b>27</b>                 | <b>3</b> | <b>188</b>  |
| <b>Body force</b> |           |                 |              |                          |            |            |           |                              |                           |                           |          |             |
| Hit/kicking       | 8         | 1               | 12           |                          | 21         | 38%        |           |                              |                           | 2                         |          | 23          |
| Strangulation     | 32        | 8               | 26           |                          | 66         | 48%        |           |                              | 2                         | 18                        | 2        | 88          |
| Drowning          | 2         |                 | 1            |                          | 3          | 67%        |           |                              |                           |                           |          | 3           |
| <b>Sub total</b>  | <b>42</b> | <b>8</b>        | <b>39</b>    |                          | <b>89</b>  | <b>47%</b> | <b>1</b>  | <b>1</b>                     | <b>3</b>                  | <b>25</b>                 | <b>3</b> | <b>135</b>  |

*continued*

| METHOD                   | Murder | Manslaughter<br>DR | Manslaughter | Homicide/<br>Lesser<br>Offence | Sub Total | % Murder | Acquitted | No<br>Proceedings<br>Advice of<br>DPP | Court<br>Proceedings<br>Pending | Suspect<br>Committed<br>Suicide | Other | Grand<br>Total |
|--------------------------|--------|--------------------|--------------|--------------------------------|-----------|----------|-----------|---------------------------------------|---------------------------------|---------------------------------|-------|----------------|
| <b>Other<br/>methods</b> |        |                    |              |                                |           |          |           |                                       |                                 |                                 |       |                |
| Gasping                  |        |                    |              |                                |           |          | 1         |                                       |                                 |                                 |       | 1              |
| Burning/<br>scalding     | 6      |                    | 1            |                                | 7         |          |           |                                       |                                 | 1                               |       | 8              |
| Poison/drugs             |        |                    | 1            |                                | 1         |          |           |                                       |                                 | 1                               |       | 2              |
| Negl/neglect             |        |                    |              |                                |           |          |           | 1                                     | 6                               |                                 |       | 7              |
| Hard surface             | 2      | 1                  | 1            |                                | 4         |          |           | 2                                     | 1                               |                                 |       | 7              |
| Suffocation              | 9      | 1                  | 2            |                                | 12        |          | 1         | 1                                     | 1                               | 5                               | 1     | 21             |
| Arson                    | 3      |                    | 1            | 1                              | 5         |          | 1         |                                       | 1                               |                                 | 1     | 8              |
| Other                    | 2      |                    | 1            |                                | 3         |          |           |                                       |                                 | 2                               |       | 5              |
| Unknown                  | 4      |                    |              |                                | 4         |          | 1         | 1                                     | 1                               | 1                               | 3     | 11             |
| <b>Grand total</b>       | 153    | 47                 | 76           | 1                              | 277       |          | 5         | 5                                     | 18                              | 57                              | 10    | 372            |

*Source: Statistics provided by the Research and Statistics Directorate*

\*includes spouses and ex-spouses, partners and ex-partners

Table 3: Method of killing by females in spousal\* homicide and legal outcome 1995-2000, England & Wales

| METHOD            | Murder    | Manslaughter DR | Manslaughter | Homicide/ Lesser Offence | Sub Total | % Murder   | Acquitted | No Proceedings Advice of DPP | Court Proceedings Pending | Suspect Committed Suicide | Other | Grand Total |
|-------------------|-----------|-----------------|--------------|--------------------------|-----------|------------|-----------|------------------------------|---------------------------|---------------------------|-------|-------------|
| <b>Weapons</b>    |           |                 |              |                          |           |            |           |                              |                           |                           |       |             |
| Sharp ins.        | 15        | 11              | 50           | -                        | 76        | 20%        | -         | 1                            | 3                         | 2                         | -     | 82          |
| Blunt ins.        | -         | -               | -            | -                        | -         | -          | -         | -                            | -                         | -                         | -     | -           |
| Shooting          | 2         | -               | -            | 2                        | 4         | 50%        | -         | -                            | -                         | 1                         | -     | 5           |
| <b>Sub total</b>  | <b>17</b> | <b>11</b>       | <b>50</b>    | <b>2</b>                 | <b>80</b> | <b>21%</b> |           |                              |                           |                           |       |             |
| <b>Body force</b> |           |                 |              |                          |           |            |           |                              |                           |                           |       |             |
| Hit/kicking       | -         | -               | -            | -                        | -         | -          | -         | -                            | -                         | -                         | -     | -           |
| Strangulation     | -         | -               | -            | -                        | -         | -          | -         | -                            | -                         | -                         | -     | -           |
| Drowning          |           |                 |              |                          |           |            |           |                              |                           |                           |       |             |
| <b>Sub total</b>  |           |                 |              |                          |           |            |           |                              |                           |                           |       |             |

continued

| METHOD                   | Murder | Manslaughter<br>DR | Manslaughter | Homicide/<br>Lesser<br>Offence | Sub Total | % | Acquitted | No<br>Proceedings<br>Advice of<br>DPP | Court<br>Proceedings<br>Pending | Suspect<br>Committed<br>Suicide | Other | Grand<br>Total |
|--------------------------|--------|--------------------|--------------|--------------------------------|-----------|---|-----------|---------------------------------------|---------------------------------|---------------------------------|-------|----------------|
| <b>Other<br/>methods</b> |        |                    |              |                                |           |   |           |                                       |                                 |                                 |       |                |
| Gassing                  | -      | -                  | -            | -                              | -         | - | -         | -                                     | -                               | 2                               | -     | 2              |
| Burning/<br>scalding     | -      | -                  | 1            | -                              | 1         |   | 1         | -                                     | -                               | -                               | -     | 2              |
| Poison/drugs             | 1      | -                  | -            | -                              | 1         |   | -         | -                                     | 1                               | 1                               | 1     | 4              |
| Negl/neglect             |        |                    |              |                                |           |   |           |                                       |                                 |                                 |       |                |
| Hard surface             |        |                    |              |                                |           |   |           |                                       |                                 |                                 |       |                |
| Suffocation              |        |                    | 1            |                                | 1         |   |           |                                       |                                 |                                 |       | 1              |
| Arson                    | -      | 1                  | -            | -                              | 1         |   | 1         | -                                     | -                               | -                               | -     | 2              |
| Other                    |        |                    |              |                                |           |   |           |                                       |                                 |                                 |       |                |
| Unknown                  |        |                    |              |                                |           |   |           |                                       |                                 |                                 |       |                |
| <b>Grand total</b>       | 18     | 12                 | 52           | 2                              | 84        |   | 2         | 1                                     | 4                               | 6                               | 1     | 98             |

Source: Statistics provided by the Research and Statistics Directorate

\*includes spouses and ex-spouses, partners and ex-partners

nomenclature for the reasons already outlined. Secondly, whilst I support the development of a partial defence of self-defence to include a pre-emptive use of force (para.12.88) this only expands the law to include threats that are imminent rather than immediate. Again, the language of “pre-emptive” is inappropriate to articulate battered women’s predicament with the consequence that women’s necessity will continue to be misframed and their reasons inarticulate and silenced. To reform self-defence with the language proposed is merely to add an appendix to a systemic masculinist law. But the arguments expressed and the options for reform in the Consultation Paper are bold and well considered.