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Introduction

'Domestic and comparative perspectives on loss of self-control and diminished responsibility as partial defences to murder: a 10-year review of the Coroners and Justice Act 2009 reform framework'

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INTRODUCTION

The time is ripe for a review of partial defences to murder within a domestic and comparative contextualisation. For a long time the issues of loss of control (formerly transmogrified as provocation) and diminished responsibility have plagued the legal system of England and Wales,[1] and further jurisdictions beyond. The desire to treat individuals in circumstances at the borders of human endurance or capacity in a compassionate manner conflicted with the high moral threshold against condoning acts of homicide, even if only by reducing the available sentencing framework from the mandatory life sentence for murder. One needs to remember that cases of voluntary manslaughter, because of loss of control and diminished responsibility, are instances where the offence definitional elements of murder are

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1 For discussion see Alan Norrie, 'The Coroners and Justice Act: partial defences to murder: loss of control' [2010] Criminal Law Review 275; Ronnie Mackay, 'The Coroners and Justice Act: partial defences to murder: the new diminished responsibility plea' [2010] Criminal Law Review 290.

established (*actus reus* and *mens rea* comportational ingredients), but the application of the mandatory life sentence appears too draconian in comparison to the blameworthiness of the defendant's act. A partial defence to murder predicated on loss of control or diminished responsibility can be applied in bespoke circumstances as a concession to human frailty, uniquely and transformatively altering the very nature of the crime. The inconsistency in the case law, however, between the subjective and objective interpretation of the prongs of loss of control, and appropriate interpretative standardisation, provoked considerable controversy within prior provocation law.[2] The benign conspiracy, which previously applied under extant law between prosecution, courts and medical experts in diminished responsibility scenarios,[3] and the ensuing high acceptance rate for plea bargains presented substantive and theoretical challenges. In many respects reform was inevitable, but dissonant and often vituperative discourse was presented on the legitimate pathway to follow.

This special issue consequentially focuses upon the reform framework enshrined within sections 52–56 of the Coroners and Justice Act 2009, effective in law from 4 October 2010, which fundamentally altered the landscape applicable to partial defences to murder: provocation was abrogated to be replaced by loss of control;[4] a high threshold standardisation was applied to consideration of loss of control with restrictive qualifying triggers shifting evaluation from compassionate emotional excuse of the actor to imperfect justification of the act; controversially, sexual infidelity killings were apparently excluded in line with revenge/honour killings;[5] and, contrary to explicit Law Commission requirements,[6] a root and branch reform of diminished responsibility occurred.[7] As such, it is apposite to review this new landscape after 10 years of implementation in a domestic and comparative setting. The contributing authors are pre-eminent

2 Law Commission, *Partial Defences to Murder* (Law Com No 290, 2004). See, for example, *R v Duffy* [1949] 1 All ER 932; *R v Ahluwalia* [1992] 4 All ER 889; *R v Doughty* [1986] Crim LR 625 (CA Crim Div); *R v Humphreys* [1995] All ER 100 (CA); *Morgan Smith* [2000] 4 All ER 289, [2001] 1 AV 146 (HL); *AG for Jersey v Holley* [2005] 2 AC 580.

3 Ronnie Mackay, 'The abnormality of mind factor in diminished responsibility' [1999] Crim LR 117. See also *R v Lloyd* [1967] 1 QB 175; *R v Byrne* [1960] 2 QB 296; *R v Dietchmann* [2003] 1 AC 1209; *R v Tandy* [1989] 1 WLR 350 (CA); cf *R v Wood* [2008] EWCA Crim 1305 (CA).

4 Homicide Act 1957, s 3 (repealed).

5 Coroners and Justice Act 2009, s 55(6)(c).

6 Law Commission, *Murder, Manslaughter and Infanticide* (Law Com Report No 304, 2006).

7 Homicide Act 1957, s 2 (repealed).

world-leading criminal justice academics in the United Kingdom, Australia and the United States. The collection, as a whole, addresses whether the reforms to loss of control and diminished responsibility contained in the Coroners and Justice Act 2009 have cathartically and adventitiously cured ills of prior law. Has statutory remediation proved a panacea, or simply a Pandora's Box? An overarching theme is further optimal reforms that need to be made to advance homicide laws that are fair, just and transparent and meet the aims of legitimacy, appropriate culpability gradations and blameworthiness thresholds for inculpation.

More specifically, the special issue itself, and the respective article contributions, are set out as follows. The initial articles focus on the contextualisation of pre-Coroners and Justice Act 2009 concerns, the bigger picture of the remedial legislation itself, and how, from both a practitioner and academic perspective, new appellate determinations have uniquely interpreted statutory reform – often in a counter-intuitive and counter-normative fashion. The debate is then extended to analyse and critique the confusion that has been engendered over the last decade on specific partial defences to murder concerns: illustratively encompassing fear of serious violence; coercive control (uniquely and significantly evaluated herein as a 'defence' not an offence); and co-morbidity within diminished responsibility. These significant and important areas of homicide law have received very limited and insufficient academic consideration in the literature, and novel empirical research is presented on the impact of statutory reform(s). In the final part of the special issue, novel alternative pathways are presented via a comparative extirpation of alternative legal systems, notably Australia and the United States where topical developments *vis-à-vis* voluntary manslaughter are appraised and contextualised within the domestic laws, and new contemporary solutions adduced *de novo*. In a novel and innovative manner, the special issue originally and significantly extends debate in this arena. New insights are provided that will help to shape further reforms and present pathways for new initiatives within criminal justice. Commentaries from two recent Court of Appeal cases pertaining to the repealed partial defence of diminished responsibility are also provided, and a book review.

NEW INSIGHTS AND PATHWAYS TO REFORM

In the opening article of the special issue, the reformed partial defences to murder are examined from a unique practitioner's perspective. Rudi Fortson provides the contextualised backdrop of the reformed pleas of loss of control and diminished responsibility enacted by the Coroners and Justice Act 2009 and considers the extent to which the

aims of policy-makers and law-makers have been addressed since the 2009 reforms were enacted.[8] In particular, Fortson addresses the Law Commission's analysis of the pre-existing partial defences, its aims and subsequent recommendations for reform[9] with reference to the Government's response to such as it transpired through the framing of the Coroners and Justice Act 2009. Focusing on the broader implications of the Act, Fortson contends that Parliament's departure from key recommendations of the Law Commission in enacting the Coroners and Justice Act 2009 has resulted in unnecessarily complex homicide law that has created myriad problems in practice, none more so than when experts are called on to give opinion evidence.[10]

Analysis of the 2009 reforms is developed further with regard to the repealed section 3 Homicide Act 1957 defence, 'loss of control', by John J Child, Hans S Crombag and G R Sullivan.[11] The interpretation and application of the partial defence during its first decade in force is examined, with particular focus on the true import and purport of the subjective 'loss of self-control' criterion, its legal and scientific[12] meaning, as well as theoretical purpose. A broad contextualisation of fundamental issues appurtenant to loss of control pre- and post-

8 Rudi Fortson QC expands on his previous contributions in this area which examine the likely impact of the reforms under the Coroners and Justice Act 2009. Through first-hand experience, Fortson comments on the interpretation and application of the new partial defences within the courts over the last decade in order to evaluate the true effect of the reforms.

9 Law Commission (n 2 above); Law Commission (n 6 above); Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law* (Consultation Paper CP 19/08, 2008).

10 See *R v Dowds* [2012] EWCA Crim 281; *R v Golds* [2016] UKSC 61; *R v Foy* [2020] EWCA Crim 270.

11 The authors provide unique interdisciplinary perspectives pertaining to the specific requirement of 'loss of self-control' within the repealed loss of control defence where issues still persist despite calls for its rejection as a defining element during the initial review of provocation.

12 Research in psychology and neuroscience is utilised in order to investigate whether experts in these fields could assist with the interpretation of 'loss of self-control'. See B Libet et al, 'Time of conscious intention to act in relation to onset of cerebral activity (readiness-potential): the unconscious initiation of a freely voluntary act' (1983) 106 Brain 623; C S Soon et al, 'Predicting free choices for abstract intentions' (2013) 110 Proceedings of the National Academy of Sciences 6217; A Roskies, 'Neuroscientific challenges to free will and responsibility' (2006) 10 Trends in Cognitive Sciences 419.

Coroners and Justice Act 2009 reforms are expertly critiqued.[13] Particular weight is afforded to the absence of a statutory definition of 'loss of self-control', the varying levels of control, and the inadequate dealing with questions of self-control at the liability stage, as opposed to the post-conviction (sentencing) stage where they would be more effectively addressed. The authors identify myriad aspirations for reform, including abolishing the mandatory life sentence for murder and the partial defences, before discussing avenues of interpretation, primarily via the courts, in light of the current political stance on mandatory sentences for murder.

Shifting focus towards the reforms to diminished responsibility under section 52 of the Coroners and Justice Act 2009, the third article provides a new perspective on the operational constituents of mental condition defences. Here, Ronnie Mackay re-evaluates the persistent 'official line' that the changes to the plea were merely ones of 'clarification' and 'modernisation'.[14] The requirements of section 2 of the Homicide Act 1957, as repealed by the Coroners and Justice Act 2009,[15] are examined in the context of an original empirical study into the operation of the new plea, undertaken by Mackay and Barry Mitchell,[16] which comparatively analyses new plea cases and cases

13 For further discussion of the issues pre-reform, see G R Sullivan, 'Anger and excuse: reassessing provocation' (1993) 13(3) Oxford Journal of Legal Studies 380; Donald J Nicolson and Rohit Sanghvi, 'Battered women and provocation: the implications of *R v Ahluwalia*' [1993] Crim LR 78; Law Commission (n 2 above). For discussion of issues post-reform see Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011).

14 Ronnie Mackay has been at the academic forefront of a wider academic debate as to whether the reforms to diminished responsibility as a partial defence to murder contained within s 52 of the Coroners and Justice Act 2009 were needed at all. A benevolent conspiracy pragmatically applied between prosecution and defence to accept a lesser plea of manslaughter, and consequentially avoid inculpation for murder, arguably where justice demanded. An important consequential question is whether reform has been adventitious in this arena in terms of culpability standardisations and plea arrangements.

15 For further discussion, see Mackay (n 1 above); Ronnie Mackay and Barry Mitchell, 'The new diminished responsibility plea in operation: some initial findings' [2017] Criminal Law Review 18; Rudi Fortson, 'The modern partial defence of diminished responsibility' in Reed and Bohlander (n 13 above); Louise Kennefick, 'Introducing a new diminished responsibility defence for England and Wales' (2011) 74 Modern Law Review 750; Matthew Gibson, 'Diminished responsibility in Golds and beyond: insights and implications' [2017] Criminal Law Review 543; Ronnie Mackay, 'The impairment factors in the new diminished responsibility plea' [2018] Criminal Law Review 462; and, for a comparative perspective and critique, see Nicola Wake, 'Recognising acute intoxication as diminished responsibility: a comparative analysis' (2012) 76 Journal of Criminal Law 71.

16 See Mackay and Mitchell (n 15 above).

dealt with under the former plea. The data produced by the study highlights the operational changes which have taken place over the last decade which challenge the validity of the 'official line' and suggest that the reformed section 2 plea has resulted in regrettable unintended consequences, including an increase in convictions for murder.

Additional novel empirical research is presented by Susan Edwards, pertaining to the inclusion of 'fear of serious violence' as a qualifying trigger for 'loss of self-control' voluntary manslaughter in section 55(3) of the Coroners and Justice Act 2009.[17] This important specific issue has received very limited prior academic consideration,[18] and the author provides unique empirical analysis. Edwards reviews the impact of the reforms introduced under sections 54–56, including their limitations and expansions, and explores the statutory interpretation of these provisions,[19] before offering a provisional assessment of the impact of section 55(3) via the analysis of Home Office data sets over a five-year period. It was anticipated that the development under section 55(3) would be an important step in recognising the situation of a woman who, in fearing a partner's violence, control and abuse, kills to preserve her own life.[20] However, as Edwards discusses, masculinist

17 This inclusion is of particular significance as it was the first time the emotion of fear, which has received little to no recognition within the criminal law defence framework, was acknowledged in statute. Despite obfuscated transparency on the operation of homicide defences and the impact of s 55(3) over the last decade, the author presents unique empirical analysis of several data sets which provides an invaluable insight into the use of the defence in practice. See discussion in Caroline Criado Perez, *Invisible Women: Exposing Data Bias in a World Designed for Men* (Vintage 2020).

18 Susan Edwards herself has provided much of the broader academic commentary in this area: S S M Edwards, 'Recognising the role of the emotion of fear in offences and defences' (2019) 83(6) Journal of Criminal Law 450–472; S S M Edwards, 'Loss of self-control: when his anger is worth more than her fear' in Reed and Bohlander (n 13 above) 79–96; S S M Edwards, 'Anger and fear as justifiable preludes for loss of self-control' (2010) 74(3) Journal of Criminal Law 223–241.

19 See, generally, Susan S M Edwards, 'Abolishing provocation and reframing self-defence – the Law Commission's options for reform' [2004] Criminal Law Review 181; Jeremy Horder, *Provocation and Responsibility* (Clarendon Press 1992); Carol Smart, *Feminism, and the Power of Law* (Routledge 1989); Jeremy Horder and Kate Fitzgibbon, 'Where sexual infidelity triggers murder: examining the impact of homicide law reform on judicial attitudes in sentencing' (2015) 74(2) Cambridge Law Review 307.

20 Nicola Wake, 'Battered women, startled householders and psychological self-defence: Anglo-Australian perspectives' (2013) 77(5) Journal of Criminal Law 433; Janet Loveless, 'Domestic violence, coercion and duress' [2010] Criminal Law Review 93; Susan S M Edwards 'Descent into murder – provocation's stricture – the prognosis for women who kill men who abuse them' (2007) 71(4) Journal of Criminal Law 342.

legal concepts prevail and fear remains a contested emotion; further reform of the legal framework is needed in order to achieve a just law by incorporating women's experience of and defensive response to violence and control in their many forms.

Moving away from the exclusively domestic perspectives of the 2009 reform framework, Heather Douglas and Alan Reed, in their comparative article, analyse the operation of the loss of control defence through an Anglo-Australian lens.[21] The authors review the legislative reform of provocation in both England and Wales and Australia over the past 10 years, focusing on the defence in the context of an abused woman who kills her abuser.[22] Notably, one of the key challenges for law reform has been how to ensure homicide defences are not overly restrictive for abused women who kill their abuser, while at the same time ensuring that homicide defences are not overly expansive for domestic abusers who kill their partner.[23] The operation of the loss of control defence in England and Wales is critically examined alongside the most recent reforms to provocation in Queensland and New South Wales. The article concludes with optimal reformulation proposals to reflect a new comparative pathway for abusive partner and sexual infidelity killings.

The second Anglo-Australian comparative article in the special issue focuses on the issues that have arisen since the implementation of changes to the diminished responsibility defence under section 52 of the Coroners and Justice Act 2009. Through an Anglo-Australian framework, Thomas Crofts and Nicola Wake review each issue in turn and consider the impact on the operation of the partial defence in theory

21 In Australia, the provocation defence has been abolished in some states and significantly reformed in others.

22 See, generally, Aileen McColgan, 'In defence of battered women who kill' (1991) 18 Journal of Law and Society 219; Carol Withey, 'Loss of control: loss of opportunity' [2011] Criminal Law Review 263; Norrie (n 1 above); Vanessa Bettinson, 'Criminalising coercive control in domestic violence cases: should Scotland follow the path of England and Wales' [2016] Criminal Law Review 165; Susan S M Edwards, 'The strangulation of female partners' [2015] Criminal Law Review 12; Susan S M Edwards, 'Coercion and compulsion: re-imagining crimes and defences' [2016] Criminal Law Review 876; and Wake (n 20 above).

23 A significant further issue, discussed herein, is how dissonant criminal justice legal systems have responded to the dilemmatic choice where the coercee and abusee responds with fatal violence against their provoker. Where should the contours of criminalisation sit in terms of inculpation for homicide (or otherwise), and are further reforms needed in terms of culpability threshold gradations?

and in practice.[24] The medicalisation of the reformed defence in England and Wales is scrutinised with key criticisms outlined.[25] Crofts and Wake submit that the reformed defence stands in stark contrast to the approach under section 23A of the Crimes Act 1900 (New South Wales), where the legislation explicitly outlines the respective role of the medical expert and jurors and prohibits experts from commenting on whether murder ought to be reduced to manslaughter in such cases. Original insights are presented on co-morbidity and diminished responsibility, and novel Anglo-Australian reform pathways are presented.

A final important comparative perspective is provided by Vera Bergelson in her article which parses through the contours of the partial defence of provocation via an Anglo-American lens.[26] Bergelson compares the reformed version of provocation propagated by the Model Penal Code (MPC) with that suggested by the Law Commission for England and Wales. These versions of the defence are then compared with the new 'loss of self-control' defence under the Coroners and Justice Act 2009 in order to determine the governing rationales for

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24 Thomas Crofts and Nicola Wake address significant concerns on inculpation and blameworthiness standardisations when co-morbidity coheres, within a contextualisation of diminished responsibility interwoven with other individual conditions. New insights are provided on Anglo-Australian reform optimality in this arena and particularised issues of concern created by the Coroners and Justice Act 2009 reforms.

25 See generally, Edward Griew, 'The future of diminished responsibility' [1998] Criminal Law Review 75; Matthew Gibson, 'Pragmatism preserved? The challenges of accommodating mercy killers in the reformed diminished responsibility plea' (2017) 81 Journal of Criminal Law 177; Oliver Quick and Celia Wells, 'Getting tough with defences' [2006] Criminal Law Review 117; and Andrew Hemming, 'It's time to abolish diminished responsibility: the coach and horses' defence through criminal liability for murder' (2008) 10 University of Notre Dame Australia Law Review 1–35.

26 Vera Bergelson's article extends the debate further in terms of the moral basis (or otherwise) for the defence of provocation, or, put differently, what makes intentional killing under provocation less reprehensible than murder? Is it a justificatory or excuse-based partial defence, and does this distinction matter in Anglo-American criminal law? The rationale for loss of control as a defence is deconstructed through an important comparative lens, and in terms of novel developments over the course of the last decade.

each version.[27] Bergelson stipulates that the comparative analysis serves three main goals: it helps to reveal the moral, logical and structural strengths and weaknesses of the different versions of the defence; it highlights the strong intrinsic presence of the justificatory component in the defence; and it contributes to the critical assessment of the attempts to reform the defence of provocation in Anglo-American jurisprudence. Bergelson concludes that the largely justificatory defence of provocation developed by the Law Commission (and to a lesser degree the 'loss of self-control' defence) is legally and morally preferable to the largely excusatory defence proposed by the MPC.

In addition to the special issue articles, two case commentaries provide insight into the interpretation and application of section 3 of the Homicide Act 1957 (repealed) at the stages of liability and sentencing. Bethany Simpson, in her commentary on the Court of Appeal judgment in *R v Foy (Nicholas)*,[28] considers the co-morbidity between substance-use disorders and psychiatric conditions and examines the legal ambiguities that arise in the context of voluntary intoxication, mental health and diminished responsibility. Sean Mennim provides a commentary on the Court of Appeal judgment in *R v Westwood (Thomas)*,[29] which reviews the range of possible disposals available to a sentencing judge under the Mental Health Act 1983 and earlier authorities on the correct approach to the exercise of application where an individual is found guilty of manslaughter by reason of diminished responsibility. The special issue culminates with a book review on the topic of criminal law pedagogy and the teaching of substantive criminal offences. Daniel Pascoe, in his appraisal of Kris Gledhill and Ben Livings' edited collection on *The Teaching of Criminal Law: The Pedagogical Imperatives*, questions whether typical pedagogical methods for teaching law are fit for purpose and emphasises the importance of pedagogical innovation.

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27 For further evaluation and critique, see Vera Bergelson, 'Victims and perpetrators: an argument for comparative liability in criminal law' (2005) Buffalo Criminal Law Review 385; Victoria Nourse, 'Passion's progress: model law reform and the provocation defence' (1997) 106 Yale Law Journal 1331; Joshua Dressler, 'Rethinking heat of passion: a defence in search of a rationale' (1982) 73 Journal of Criminal Law and Criminology 442; Reed Griffith Fontaine, 'Adequate (non) provocation and heat of passion as an excuse not justification' (2009) University of Michigan Journal of Law Reform 27; and Carolyn B Ramsey, 'Provoking change-comparative insights on feminist homicide law reform' (2010) 100 Journal of Criminal Law and Criminology 55.

28 [2020] EWCA Crim 270.

29 [2020] EWCA Crim 598.

CONCLUSION

The Coroners and Justice Act 2009, sections 52–56 were prescribed as a legislative response to cure ills in extant law(s) over the ambit and parameters of partial defences to murder.[30] Unfortunately, rather than a panacea, the statutory reforms have opened a new Pandora's Box in terms of the opaque and uncertain operation of loss of control and diminished responsibility defences. This special issue, as well as deconstructing current issues from practitioner, academic and empirical perspectives, has striven to provide novel reform optionality, drawing lessons from international and comparative perspectives as to the most adventitious future pathways to follow. The work serves as a clarion call for change, in an arena that is still ripe for reform, and further reflection.

30 See Coroners and Justice Act 2009, Explanatory Notes [14], which states the overriding aims of the 2009 reforms were to 'establish more effective, transparent and responsive justice … by … updating parts of the criminal law to improve its clarity, fairness and effectiveness'. This alludes to the goals outlined by the Law Commission: 'to bring greater order, fairness and clarity to the law of homicide'. See Law Commission (n 6 above) [2.4].