Loss of Control and Diminished Responsibility

Domestic, Comparative and International Perspectives

Edited by
Alan Reed and
Michael Bohlander

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ALAN REED
Sunderland University, UK

MICHAEL BOHLANDER
Durham University, UK

ASHGATE

Published by
Ashgate Publishing Limited
Wey Court East
Union Road
Farnham
Surrey, GU9 7PT
England

Ashgate Publishing Company
Suite 420
101 Cherry Street
Burlington
VT 05401-4405
USA

www.ashgate.com

British Library Cataloguing in Publication Data
Loss of control and diminished responsibility : domestic,
comparative and international perspectives.
1. Criminal liability of juristic persons. 2. Criminal
liability of juristic persons--Great Britain. 3. Capacity
and disability. 4. Capacity and disability--Great Britain.
5. Provocation (Criminal law) 6. Provocation (Criminal
law)--Great Britain. 7. Defense (Criminal procedure)
8. Defense (Criminal procedure)--Great Britain.
I. Reed, Alan (Matthew Alan) II. Bohlander, Michael, 1962-
345'.04-dc22

Library of Congress Cataloging-in-Publication Data
Loss of control and diminished responsibility : domestic, comparative and international perspectives / by Alan Reed and Michael Bohlander.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4094-3175-6 (hardback) -- ISBN 978-1-4094-3176-3 (ebook) 1. Insanity defense. 2. Homicide--Psychological aspects I. Reed, Alan (Matthew Alan) II. Bohlander, Michael, 1962-
K5077.L67 2011
345.'05044--dc23

2011021124

ISBN 9781409431756 (hbk)
ISBN 9781409431763 (ebk)

Printed and bound in Great Britain by the
MPG Books Group, UK

Notes on Contributors

Michael Bohlander is Professor of Law, Durham University. Before joining Durham Law School in 2004, he had been a member of the German judiciary since 1991. From 1999 until 2001 he served as the Senior Legal Officer of a Trial Chamber at the International Criminal Tribunal for the former Yugoslavia in the Hague. In 2010, Professor Bohlander was appointed to the Visiting Chair in Criminal Law at the Rijksuniversiteit Groningen.

He has published ten books and over 110 articles, essays, chapters, etc. His publications have been cited widely by and before courts in several domestic and international jurisdictions.

Warren Brookbanks (LL.B, LL.M, BD) is Professor of Law at Auckland University Law School where he has taught since 1983. He currently teaches in the areas of criminal law, mental health law and therapeutic jurisprudence. He has co-authored Simester and Brookbanks, *Principles of Criminal Law* (3rd edn, Wellington, Thomson/Brookers, 2007) and Bell and Brookbanks, *Mental Health in New Zealand* (2nd edn, Wellington, Thomson/Brookers, 2005). He has co-edited, *Psychiatry and the Law* (Wellington, LexisNexis, 2007) and *Criminal Justice in New Zealand* (Wellington, LexisNexis, 2007). He is also a contributing author and an update author for *Adams on Criminal Law* and *Brooker's Family Law – Incapacity*. Warren was a founding trustee of the Odyssey House Trust (NZ) and is a former president of the Australia and New Zealand Association of Psychiatry, Psychology and Law (ANZAPPL).

James Chalmers is Senior Lecturer in Law at the University of Edinburgh. He is the author of *The New Law of Sexual Offences in Scotland* (Edinburgh, W. Green/Scottish Universities Law Institute, 2010), *Legal Responses to HIV and AIDS* (Oxford, Hart Publishing, 2008) and *Criminal Defences and Pleas in Bar of Trial* (Edinburgh, W. Green/Scottish Universities Law Institute, 2006, with Fiona Leverick). He is currently Editor of the *Edinburgh Law Review*.

Neil Cobb is Lecturer in Law in the School of Law, Durham University, where he co-convenes the research cluster Gender and Law at Durham (GLAD). His principal research interests are feminist and LGBT/queer legal theory, and criminal law and criminology. Neil has published widely in these and other areas, including articles in *Cambrian Law Review*, *Journal of Law and Society*, *Legal Studies*, *Modern Law Review* and *Social and Legal Studies*. Neil is currently independent legal advisor to the North-East CPS Homophobic/Transphobic Hate Crime Scrutiny Panel.

John Cubbon is currently Senior Legal Officer in Chambers at the International Criminal Tribunal for the former Yugoslavia. Previous posts include: Legal Officer, Office of the Legal Adviser, UNMIK (2001–2006); Officer in Charge, Prosecution Services and Court Administration Section, UNMIK (1999–2001); Officer in Charge/Tuzla Team Coordinator/Associate Deputy Head, Judicial System Assessment Programme, UNMIBH (1998–1999); Legal Officer, UNMIBH (1996–1998); Legal and Liaison Officer, UN Office of the Special Coordinator for Sarajevo (1995–1996). He was called to the Bar of England and Wales in 1993.

Susan S.M. Edwards is Professor of Law and former Dean of Law of Buckingham Law School. She is currently University Dean of Research and is a practising barrister and a Door Tenant at Clarendon Chambers, London. She has acted as an expert witness in both civil and criminal cases of domestic violence and also acted in a consultancy capacity with regard to domestic violence in Europe and elsewhere. Her work on domestic violence and homicide spans several decades during which time she has advised the police, the CPS and also trained police forces in Denmark, Spain and Germany. Her work explores the interface of gender and culture, ethnicity and identity as these concepts impose themselves on the construction and interpretation of criminal and human rights law.

Catherine Elliott, LL.B, DEA, Barrister, is a Senior Lecturer at City University London. She has written extensively on both English and French criminal law. Her publications include a successful text book entitled *Criminal Law* published by Pearson and now in its eighth edition; a monograph entitled *French Criminal Law* (Cullompton, Willan, 2001) and a chapter on French criminal law in *The Handbook of Comparative Criminal Law* (Stanford, Stanford University Press, 2011).

Jesse Elvin graduated with a PhD in Law from the LSE in 2005. He is a Senior Lecturer in Law at City University London, where criminal law is one of his specialist fields. He has published in a number of leading journals, including the *Modern Law Review*, the *Cambridge Law Journal*, the *Law Quarterly Review*, the *King's Law Journal* (formerly known as the *King's College Law Journal*), and *Feminist Legal Studies*.

Caroline Fournet (LL.M Lund, DEA Strasbourg, PhD Leicester) was a Senior Lecturer at Exeter University until August 2011 and now holds a Rosalind Franklin Fellowship at the University of Groningen in the Netherlands. Her research interests lie in public international law and human rights law as well as international criminal law and criminal justice. She is the author of two monographs: *International Crimes – Theories, Practice and Evolution* (London, Cameron May, 2006) and *The Crime of Destruction and the Law of Genocide: Their Impact on Collective Memory* (Aldershot, Ashgate, 2007).

Rudi Fortson QC, LL.B (Lond), Barrister, has been a criminal law practitioner for over 30 years at 25 Bedford Row, London, and a visiting professor of law at Queen Mary, University of London. He has written and lectured extensively on criminal law issues. He was a member of the 'Police Foundation Independent Inquiry into the Misuse of Drugs Act 1971', and a member of the 'Criminal Justice Forum' for the Institute of Public Policy Research (IPPR). He is a member of the Criminal Bar Association of England and Wales, the Proceeds of Crime Lawyers Association, the Forensic Science Society, and the British Academy of Forensic Science.

Anna Gausden is a Master of Jurisprudence (MJur) candidate in the School of Law, Durham University, and a member of the research cluster Gender & Law at Durham (GLAD). Her research explores the role of gender in domestic violence and intimate partner homicide, with a view to developing a woman-centred approach to the defences to murder for abused women who kill.

Mohammad M. Hedayati-Kakhki graduated from Durham University in 2008 with a PhD in Middle Eastern Politics and Law. He qualified from Shahid Beheshti University in Tehran in 1990 with a law degree, and subsequently completed a Masters in International Law at the University of Shiraz (Iran) in 1999. He practised in both civil and criminal law as a First Class Attorney within the

Islamic legal system of Iran. Alongside teaching LL.M modules including Islamic law at Durham Law School, he continues his involvement in legal practice by acting as an expert in human rights and asylum cases. He is frequently appointed to conduct research and provide commentary into varying aspects Islamic law. He is also a Special Advisor to the Centre for Criminal Law and Criminal Justice at Durham University.

Jonathan Herring is a Fellow in Law at Exeter College, Oxford University and University Lecturer in Law at the Law Faculty, Oxford University. He has written on family law, medical law, criminal law and legal issues surrounding old age. His books include: *Older People in Law and Society* (Oxford, Oxford University Press, 2009); *European Human Rights and Family Law* (Oxford, Hart, 2010) (with Shazia Choudhry); *Medical Law and Ethics* (Oxford, Oxford University Press, 2010); *Criminal Law* (4th edn, Oxford, Oxford University Press 2010); *Family Law* (4th edn, Harlow, Pearson, 2009); and *The Woman Who Tickled Too Much* (Harlow, Pearson, 2009).

Ronnie Mackay is Professor of Criminal Policy and Mental Health at Leicester De Montfort Law School and has written and researched on mentally abnormal offenders for many years. He is the author of *Mental Condition Defences in the Criminal Law* published by Oxford University Press together with numerous other scholarly publications. He was a member of the Parole Board of England and Wales from 1995 to 2001. He has acted as a consultant to the Law Commission for England and Wales for whom he has conducted empirical studies on unfitness to plead, the insanity defence, diminished responsibility, provocation and infanticide.

Manuel Cancio Meliá: Licenciado en Derecho, 1991; Doctor en Derecho, 1997; Alexander-von-Humboldt Research Fellow, 2002–2009; Doctor *honoris causa*, 2008; Professor of Criminal Law at the Universidad Autónoma de Madrid (since 2008). His publications, regarding criminal law principles, criminal law legal dogmatics, comparative criminal law studies, European criminal law and several single offences, have been published in Spain, most countries of Latin America, Germany, the United States, Italy, Portugal, Great Britain, Turkey, Taiwan and China. He is a member of the advisory boards of several Spanish, Latin American and German journals on criminal law.

Barry Mitchell is Professor of Criminal Law and Criminal Justice at Coventry University. One of his principal research interests is homicide law on which he has published widely. Barry's research has been both theoretical and empirical, and he has worked with various government departments including the Law Commission, the Ministry of Justice, the Home Office and the Crown Prosecution Service. He has conducted public opinion surveys on homicide and the law and recently, in collaboration with Julian Roberts (Professor of Criminology at Oxford University) carried out the first survey of attitudes towards the mandatory life sentence for murder.

Alan Reed graduated from Trinity College, Cambridge University with a First Class Honours Degree in Law, and was awarded the Herbert Smith Prize for Conflict of Laws and the Dr Lancey Prize. Cambridge University awarded him a full Holland Scholarship to facilitate study in the United States and he obtained an LL.M Masters of Law (Comparative Law) at the University of Virginia. After completion of the Law Society Finals Examinations he spent three years in practice in London at Addleshaw Goddard, and also acted as a tutor in Criminal Law at Trinity College, Cambridge. He spent seven years as a lecturer in law at Leeds University, and from

September 2001 has been engaged as Professor of Criminal and Private International Law at Sunderland University.

Alan has published significant monographs, textbooks and articles in the substantive arena in leading journals in England, Australia, New York, Florida and Los Angeles. For the last ten years he has been editor of the *Journal of Criminal Law*.

Paul H. Robinson is one of the world's leading criminal law scholars as well as a former federal prosecutor and counsel for the US Senate Subcommittee on Criminal Laws and Procedures. Among his books are the standard lawyer's reference on criminal law defences, two monographs on criminal law theory, a highly regarded criminal law treatise, and an innovative case studies course book. He was the lead editor of *Criminal Law Conversations* (Oxford, Oxford University Press, 2009), and is author of *Distributive Principles of Criminal Law* (Oxford, Oxford University Press, 2008; also appearing in Spanish and Chinese). Robinson recently completed two criminal code reform projects in the United States and the first modern Islamic penal code under the auspices of the UN Development Programme.

John E. Stannard is a graduate of Oxford University, and has been on the staff of the Queen's University of Belfast since 1977. He has written widely on criminal law topics in a variety of journals including the *Irish Jurist*, *Legal Studies* and the *Law Quarterly Review*, and is the author of a textbook on Northern Ireland Criminal Procedure. He is a member of the Society of Legal Scholars, of the Irish Legal History Society and a fellow of the Institute of Teaching and Learning. He is also a past president of the Irish Association of Law Teachers.

Richard Taylor is Professor of English Law at the University of Central Lancashire. A member of the Law Panel for the 1996 and 2001 Research Assessment Exercises, he has written widely on criminal law and justice. He is a founding author of *Blackstone's Criminal Practice* (published annually since 1991) contributing, inter alia, the 'Homicide' chapter. Recent publications include 'The Nature of Partial Excuses and the Coherence of Second Degree Murder' (2007 Crim LR 345); 'Procuring, Causation, Innocent Agency and the Law Commission' (2008 Crim LR 32–49) and 'Complicity, Legal Scholarship and the Law of Unintended Consequences' (2009 (29) *Legal Studies*, 1–18).

Claire de Than, BA (Hons) LL.B, LL.M is a Senior Lecturer in Law at City University London, having previously held appointments at two London University colleges. A graduate of Queen Mary, University of London, she is the author or co-author of more than 15 books, including Heaton and de Than, *Criminal Law* (Oxford, Oxford University Press, 2010), and de Than and Shorts, *International Criminal Law and Human Rights* (London, Sweet & Maxwell, 2004). She has also published articles in a variety of national and international journals, including the *Modern Law Review*. Her research fields include human rights law, media law and criminal law. She has advised several governments and many organisations on human rights and law reform issues, with a specialism in the law of British Overseas Territories and Crown Dependencies.

Nicola Wake is a Lecturer in Law at the University of Sunderland. Nicola's research interests lie in the complex inter-relationship between intoxication and the partial defences to murder. She is a regular contributor to the *Journal of Criminal Law* in this particular arena, and she co-chaired the first UK conference on the 2009 governmental reforms to the concessionary defences; 'Coroners and Justice Act 2009 – Panacea or Pandora's Box for Partial Defences?'

Hein D. Wolswijk is a Senior Lecturer in criminal law at the University of Groningen. He studied law at the University of Utrecht and graduated in 1991, with special focus on criminal law and legal theory. He obtained his doctorate in 1998 cum laude with a thesis on 'Locus Delicti and Criminal Jurisdiction'. From 1996 until 2000 he was a lecturer in environmental law and criminal law at the University of Amsterdam. Since 2001 he has worked at the Department of Criminal Law and Criminology at the University of Groningen.

Preface

The genesis for the monograph was a conference held on 4th October 2010 at Durham University, jointly hosted by the Centre for Criminal Law and Criminal Justice at Durham and the Criminal Law and Justice Research Cluster at Sunderland University. The conference title was: 'The Coroners and Justice Act 2009 – Panacea or Pandora's Box for Partial Defences', with introductory remarks kindly provided by His Honour Judge Prince, Honorary Recorder of Durham, and Mr Chris Enzor of the Crown Prosecution Service acting as a panel convenor. Serendipitously, the event was held on the very day that the reform provisions in England and Wales, *vis-à-vis* loss of control and diminished responsibility as partial defences for murder, became effective in law. The conference, with world-class presentations in the substantive arena, from academia and practice, engendered stimulating and enervating debates centred around the controversial reform agenda. As such, it operated as a catalyst to extend consideration of this important subject, and to provide an overview and analysis from the UK perspective and beyond on the new law, its relation to previous practice, and potential problems that lie ahead.

Individual chapters within the monograph concentrate on particularised concerns: subjective and objective characterisations; revenge and mixed motive killings; sexual infidelity; conceptualisation of loss of self-control and diminished responsibility aligned with other defences; mistaken beliefs and self-defence; theoretical underpinnings of the reform as excusatory or justificatory in nature; partial defences and legal feminism; and the Law Commission reformulations. The comparative and international chapters provide a wider framework in relation to how other legal systems treat issues of human frailty short of full insanity (loss of control and diminished responsibility) in the context of the criminal law. The aim is production of an edited collection monograph which serves as a leading point of reference in the field of partial defences to murder and with respect to the mental condition defences of loss of control and diminished responsibility in general. In order to operate effectively, domestic laws depend on information about foreign legal systems and at least sometimes, also on comparative interpretation of their roles. It is submitted that this allows a refined application or reconsideration of home law via comparative interpretation and promotes an evaluation and perhaps improvement of our domestic regimes through learning from other countries' approaches. It will aid impacted parties applying their rules in a refined fashion through a comparative interpretation of key terms and optimal policy solutions. It is important, as Yntema highlights, that the focus is not simply on domestic issues and to treat international problems as an exotic sideshow:

> While legal science in each country will and should continue to cultivate first its peculiar institutions and traditions, these can no longer be accepted as the horizon of legal knowledge. The practical, specialized study of indigenous techniques, legislative, judicial and administrative, must be complemented by scientific comparison with other legal systems – to ascertain their manifold bearings on domestic interests; to prepare the reforms that may be desired from time to time to bring the municipal laws into harmony with advancing conceptions of justice and the requirements of the international community; to share in efforts to provide appropriate uniform legislation for the commerce of the world; in fine, to establish a more objective scientific basis

> for the consideration of legal problems. To attain these ends, indeed even to appreciate the special genius of each legal system, the comparative method, necessarily supposing intensive historical and functional investigation of particular institutions, is indicated. Without this perspective, as Ihering pointed out long ago, there is no legal science worthy of the name. Blind without history, jurisprudence without comparative understanding can scarcely rise above the level of provincial casuistry and empirical craft.[1]

The debate in the UK is not over in this controversial arena, and the Coroners and Justice Act 2009 has arguably raised more interpretive questions than answers. Moreover, the wider context of overall reform of homicide offences still prevails and may in fact reach towards a more general approach to mental condition defences. Expert descriptions of the wider issues surrounding potential defences and of other legal systems' approaches will serve to stimulate and inform future developments.

We should like to acknowledge the help we have received from many people in the preparation of this book. Our work has been supported by a team of consummate professionals at Ashgate. They have displayed tolerance beyond the call of duty and have shepherded the text to production. A huge debt of gratitude is owed to our colleague Nicola Wake for her marvellous help in all aspects of the editorial process.

1 Hessel E. Yntema, 'Foreword' in Ernst Rabel, *The Conflict of Laws: A Comparative Study* (2nd edition, University of Michigan Press, 1958).

Contents

Introduction

Alan Reed and Michael Bohlander

For a long time, the issues of provocation and diminished responsibility have plagued the legal system of England and Wales. The desire to treat people 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 manslaughter because of loss of control and diminished responsibility are in fact nothing but instances of murder where the application of the mandatory life sentence appears too draconic in comparison to the blameworthiness of the defendant's act. Add to that the scintillation in the case law between the subjective and objective interpretation of the prongs of provocation, as well as the 'benign conspiracy' between prosecution, courts and medical experts in diminished responsibility scenarios and the ensuing high acceptance rate for plea bargains. Reform was thus eagerly awaited.

This volume is mainly concerned with the question of whether the Coroners and Justice Act 2009 delivers that reform. Assuming that the discussion will go on, and this collection is indeed testimony to the correctness of that assumption, we also thought it would be beneficial for the UK debate to have some input from foreign and international jurisdictions, which is the second focus of the book. The first part thus deals with the question from a (wider) domestic point of view which already includes some comparative aspects. The second part then proceeds to outline the major issues of some foreign jurisdictions.

In Chapter 1 entitled *The New Diminished Responsibility Plea: More than Mere Modernisation?*, Ronnie Mackay starts off by exploring the new diminished responsibility plea contained in s. 52 of the Coroners and Justice Act 2009. He questions whether the new plea, in the words of the then Minister, 'is really just a clarification of the way in which that defence works'. By exploring the reasons which prompted the reform of s. 2 of the Homicide Act 1957, he draws on the work of the Law Commission whose original reformulation was developed from a definition proposed by the Law Reform Commission of New South Wales, later implemented in the Crimes Amendment (Diminished Responsibility) Act 1997. The reasons which led to reform in New South Wales are compared together with the way in which the new plea has been implemented in that jurisdiction leading to a reduction in its use. The chapter asks the question whether that is also likely to be the result of s. 52.

Rudi Fortson, in Chapter 2, *The Modern Partial Defence of Diminished Responsibility*, suggests that, contrary to the government's view that revised s. 2 of the Homicide Act 1957 merely 'clarifies' the way in which the partial defence of diminished responsibility works, substantial changes have actually been made to the structure of the partial defence and this chapter considers the practical and theoretical implications of those changes. The revised rules of diminished responsibility are explained in the context of Parliament's decisions not to modify the structure of homicide offences nor to abolish the mandatory sentence of life imprisonment for murder. Whether and to what extent there is incoherence between revised diminished responsibility, the new partial defence of 'loss of self-control', insanity, and 'unfitness to plead', is also discussed.

In Chapter 3, *Loss of Self-Control under the Coroners and Justice Act 2009: Oh No!*, Barry Mitchell recalls that the concept of loss of self-control which is replacing the partial defence of provocation has been heavily criticised for its uncertainty of meaning and its propensity to lead to undesirable convictions for murder. The previous government retained it in order to exclude considered revenge homicides and cases where the killer was 'in full possession of his or her senses'. This chapter argues that these aims are misguided. There are mixed-motive cases in which considered revenge is at least understandable and possibly beneficial. The desire to exclude those 'in possession of their full senses' reveals a failure to understand the rationale of a provocation plea. The overt nature of the killer's physical reaction may give a significantly misleading picture of his state of mind. The loss of self-control defence should be abandoned and replaced by a plea which focuses on the killer's mental state.

Chapter 4, *The Model of Tolerance and Self-Restraint*, by Richard Taylor, looks at s. 54(1)(c) of the 2009 Act which addresses the question usually characterised in the common law as the objective question, although it is in truth a mixture of subjective and objective considerations. It is similarly subjective to the former *Camplin/Holley* test in that it concerns how a person of the age and sex of the accused would react and is similarly objective in so far as it assumes the 'normal degree of tolerance and restraint' of a person of that age and sex. Like the *Camplin/Holley* test it also recognises a further limited subjective aspect but it is formulated quite differently. Instead of asking whether the accused's characteristics would affect the gravity of the trigger for the loss of self-control (formerly the gravity of the provocation question), the statute now directs attention specifically to how a person (of normal tolerance and self-restraint) 'in the circumstances of D' might have reacted. This may open up a broader range of subjective considerations than under the *Camplin/Holley* test, notwithstanding that, rather like the old law, s. 54(3) effectively excludes circumstances 'whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint'. The difference is, however, that, whilst roughly the same sorts of things are excluded, there is now no positive requirement that, to be included, D's individual circumstances have to affect the gravity of the triggering conduct. Instead, all D's circumstances are included, provided only that they do not bear on his capacity for tolerance and self-restraint and they can be considered directly in terms of how he might have reacted rather than in relation to what was effectively the subsidiary question of whether they affected the gravity of the provocation/ triggering conduct. The chapter asks the important questions to what extent does the tolerance and self-restraint test as enacted represent the best response to the lessons learned from the *Camplin/ Smith/Holley* saga and whether the nature of the resultant defence will facilitate or hinder legitimate aims sought to be achieved by the abolition of provocation or by any coherent project of homicide reform, with or without degrees.

Jonathan Herring in Chapter 5, *The Serious Wrong of Domestic Abuse and the Loss of Control Defence*, considers the role played by domestic violence when considering whether conduct will be a 'qualifying trigger' for the purposes of the new loss of control defence. This involves an analysis of the literature on the meaning of domestic violence and identifying the wrong of domestic violence. This will assist in determining when a domestic violence background can render an apparently minor act something 'extremely grave' and generate a 'justifiable sense of being seriously wronged'. Moreover, other acts that might appear to be serious should not be regarded as a qualifying trigger, bearing in mind the domestic violence background of the relationship.

Chapter 6, *Loss of Self-Control: When His Anger is Worth More than Her Fear*, by Susan Edwards, points out that the Coroners and Justice Act 2009, s. 56, abolishes the common law defence of provocation, which relied on a sudden and temporary loss of self-control, and was criticised for privileging male violence but excluding from its ambit battered women who killed

out of self-defence and fear. In its place is substituted a statutory defence of loss of self-control. For the first time fear qualifies as a new ground for loss of self-control (s. 55(3)) which will then potentially bring women who kill violent husbands within its ambit and so correct a historical injustice. However, the qualifying trigger to this loss of self-control must be based on a 'justifiable sense of being seriously wronged'. This will undoubtedly leave the question of what is justifiable to the jury, whose sense of justifiable may still be founded on masculinist notions of what is and what is not a justifiable cause of lethal anger. The chapter explores the new legislation and some of the inequities it resolves and some of the habituated thinking it may still perpetuate. The evaluation of the new legislation explores efforts by other jurisdictions to deal with the masculinism within the law and draws on a study of Ministry of Justice cases in provocation/loss of self-control in considering these questions.

Chapter 7 by Neil Cobb and Anna Gausden, *Feminism, 'Typical' Women, and Losing Control*, posits that the new partial defence to murder of 'loss of control' was created in response to compelling feminist concerns that its antecedent – provocation – was profoundly gender biased. The injustice that provocation created for women was demonstrated most clearly by its applicability to intimate partner homicide and domestic violence. The new defence is designed specifically to better protect abused women who kill, and those women killed by their partners. This chapter evaluates the requirement under the new defence that a person of normal tolerance and self-restraint would have reacted in the same or a similar way as the defendant. When judge and jury appraise normal tolerance and self-restraint, the defence directs them to consider the reaction of a person of D's sex (and inevitably, in turn, D's gender). It is argued that neither the Law Commission nor the Ministry of Justice considered carefully enough whether incorporation of sex into the evaluative standard will help or hinder women, and specifically abused women who kill. This chapter draws on a wealth of feminist scholarship which engages with this very question and explores why, while a sexed standard has the potential to ameliorate the structural impact of gender disadvantage, it also creates its own pitfalls for women. It concludes that the legislative schema overstates the role of sex and gender in explaining D's reaction, advocating instead that a reformed defence should abandon explicit reference to sex, so that sex and gender are only considered by judge and jury as part of the wider 'circumstances' of D.

Chapter 8, *Sexual Infidelity Killings: Contemporary Standardisations and Comparative Stereotypes*, by Alan Reed and Nicola Wake, addresses whether the controversial exclusion of sexual infidelity as a qualifying trigger for loss of self-control, contained now in s. 55(6)(c) of the Coroners and Justice Act 2009, fully accords with appropriate contemporary standards and societal mores of the day. The authors evaluate the interpretational difficulties created by the new wording, and focus on the tautological and imprecise nature of this final stage legislative amendment. The discussion embraces the putative search for a rationale to the heat of passion defence, with consequential iteration of the theoretical underpinnings to allow loss of self-control to operate in partially exculpatory fashion. In this regard the US experience in traditional and reform Model Penal Code (hereinafter MPC) states and extant Scottish law provide an important source of comparative extirpation, towards legitimate identification of the defence as grounded in either excusatory or justificatory concepts, or a combination of the two. It is submitted that there needs to be a more compartmentalised and prioritised approach to this sensitive area than simply a blanket exclusion of things said or done which constitute sexual infidelity. Different gradations of culpability may be demarcated, and illustrations are provided, that reflect more directly attitudinal behaviours to loss of self-control and societal concerns *vis-à-vis* appropriate levels of mitigation. Killings prompted by male proprietorialness, sexual jealousy, envy, and premeditation by a cuckolded partner should be excluded from the ambit of this concessionary defence, but in equal measure cases of 'gross

provocation' regarding sexual infidelity embracing excessive taunting, sexual humiliation, and extreme breaches of trust ought in appropriate cases to be allowed for consideration by fact-finders. The tension between these parameters may be satisfied through invocation of the power of the trial judge to withdraw the matter of loss of self-control in sexual infidelity killings when there is no predicate on which a reasonable jury properly directed could conclude that it might apply. This is considered in terms of pre- and post-Coroners and Justice Act 2009 reforms, and a *via media* perspective is articulated as an optimal counterpoise.

Jesse Elvin in Chapter 9, *Killing in Response to 'Circumstances of an Extremely Grave Character': Improving the Law on Homicide?*, critically analyses ss. 55(4) and 55(6) of the Coroners and Justice Act 2009. Section 55(4) stipulates that the loss of self-control had a qualifying trigger if 'D's loss of self-control was attributable to a thing or things done or said (or both) which – (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged'. Section 55(6) explicitly limits the scope of the loss of control defence, providing restrictions in relation to sexual fidelity and preventing it from applying where 'D incited the thing to be done or said for the purpose of providing an excuse to use violence'. The author critically explores four important issues raised by s. 55(4) and s. 55(6). First, the chapter considers precisely what factors the jury can and should take into account in applying s. 55(4). Secondly, it examines whether the thing or things said or done have to be directed against D. Thirdly, it considers to what extent, if at all, D should be judged on the facts as he or she believed them to be where he or she made a mistake about them. Fourthly, it considers the extent of the restriction regarding sexual infidelity and whether this restriction improves the law. The chapter also considers relevant law from other common law jurisdictions, including Australia and Canada.

Chapter 10 by John Stannard gives *The View from Ireland* by explaining, for those readers who are not familiar with Irish law, the constitutional position regarding criminal law both in the north and the south, including the status of the English common law in Ireland following independence, and the way legislative powers in Northern Ireland in relation to criminal law were transferred to the Northern Ireland Parliament in 1921, removed in 1972, and restored in 2011. The chapter sets out the law relating to diminished responsibility, provocation and other partial defences as it has evolved both north and south of the border and also covers insanity, as the content of this defence differs substantially in both parts of Ireland from that seen in England and Wales, thus impacting on the scope of the diminished responsibility defence in both jurisdictions. Finally, it assesses what lessons can be learned from the Irish experience.

Chapter 11, *Partial Defences to Murder in Scotland: An Unlikely Tranquillity*, by James Chalmers, emphasises the striking fact that partial defences to murder in Scots law have been surprisingly uncontroversial compared to the experience of other jurisdictions, something which is perhaps the result of the inevitable lack of case law in a small jurisdiction combined with the benign exercise of prosecutorial discretion. However, both provocation and diminished responsibility have been reformulated significantly by the courts within the last decade (with the latter's formulation being put on a statutory footing earlier this year), while the Scottish Law Commission is about to embark on a major review of the law of homicide. This provides a timely opportunity to consider whether, and to what extent, these defences can survive in their present form.

Alan Reed and Nicola Wake in Chapter 12, *Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed, and Something New*, address the treatment of the severely intoxicated and mentally abnormal killer in the context of the partial defences to murder. The chapter focuses on extant law prior to the Coroners and Justice Act 2009 legislative reforms, and reflects on the novel classificatory system adopted therein as applied to this discrete category of offenders. How should we reconcile or align conditions of depression with alcohol dependency

syndrome in terms of potentially explanatory behavioural patterns towards partial exculpation? Can appropriate delineations be made between chronic/harmful/acute intoxication as relevant factors in the context of diminished responsibility? In respect of individual loss of self-control, how relevant are voluntary intoxication or mental frailties to 'personification' or 'characterisation' of a societal expectation standard of 'reasonable' conduct? A comparative extirpation is briefly provided in this regard by reviewing the position adopted in traditional states in the US, set against the liberalised regime prevailing in the few states that have adopted a version of the MPC. The latter iteration focuses on the standard template of 'extreme mental or emotional disturbance'. It is submitted that extant law ought to reflect contemporary standardisations of attitudinal behaviour. There needs to be an appraisal, in effect as a moral and social barometer, of legitimate and appropriate rectitude and culpability of the chronic alcoholic or mentally abnormal killer.

Chapter 13, *Provoking a Range of Responses: The Provocation Defence in British Overseas Territories and Crown Dependencies*, by Claire de Than, is a comparative examination of the scope and interrelationship of defences to homicide offences, with a particular focus on the relevant laws of Crown Dependencies and British Overseas Territories. There is great variance in the relevant law of these British jurisdictions; some have fully modern written constitutions, some are based on early English common law principles, some have been influenced heavily by civil law principles, and some are yet to incorporate any human rights standards. No such review of this field of law has yet been conducted, and this a particularly opportune time since England and Wales are not the only British jurisdictions undergoing fundamental legal change; human rights, codification and constitutional reform are having an impact on criminal law across many British jurisdictions.

The second part of the collection starts with Chapter 14 by Catherine Elliott, *A Comparative Analysis of English and French Defences to Demonstrate the Limitations of the Concept of Loss of Control*. This chapter looks at the new branch of the loss of control defence: that the defendant killed due to a fear of serious violence. It considers the overlap between this form of the defence and self-defence. The assumption must be that Parliament intended the partial defence of loss of control to be available where the full defence of self-defence would fail. This chapter identifies where the differences lie between the two defences, noting the importance of timing and proportionality for the full defence, and evaluating the relevance of these issues for the partial defence in the light of both the wording of the 2009 Act and accompanying explanatory notes on the timing issue and how the objective test in the Act might be interpreted. The Conservative Party favours an extension of the availability of the defence of self-defence and the implications of this will be considered for the future role of the 'fear of serious violence' branch of the loss of control defence. A comparison is drawn with the availability of these two defences in English criminal law and the absence of a provocation/ loss of control defence in France. Where the defendant feared serious violence the only defence available in France is self-defence and the benefits and weaknesses of this approach will be considered.

Chapter 15, When the Bough Breaks – *Defences and Sentencing Options Available in Battered Women and Similar Scenarios under German Criminal Law*, by Michael Bohlander, takes the discussion to another continental jurisdiction: German criminal law does not know of a separate partial defence of provocation or loss of control, and the general defence of diminished responsibility under §21 of the Criminal Code has application across the board. Depending on the degree of loss of control, the two concepts can actually overlap. There are other instances in German law that allow for human frailty and uncontrollable emotion to be taken into account. The underlying law of the General Part of the Criminal Code and of the individual relevant homicide offences is first outlined and then applied to several Battered Women Scenarios.