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THE RESURGENCE OF MENS REA: I — PROVOCATION, EMOTIONAL DISTURBANCE, AND THE MODEL PENAL CODE[†]

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Prior to the nineteenth century, the criminal law of England and this country took seriously the requirement that a defendant could not be found guilty of an offense unless he had truly acted in a malicious and malevolent way — that he had not only “the” mental state for the crime, but that, more generally, he manifested a full-blown mens rea: an “evil mind.”¹ During the nineteenth century, however, the criminal law began to jettison this focus, edging toward imposing liability based upon objective criteria. These changes included, for example, the acceptance of strict liability crimes,² the increasing emphasis on negligence as a predicate for criminal liability,³ and a growing

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¹ Langbein, *The Criminal Trial Before the Lawyers*, 45 U. CHI. L. REV. 263 (1978).

² The development of strict liability offenses is traced in Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55 (1933), and somewhat rehearsed in *United States v. Morrissette*, 342 U.S. 246, 250–62 (1952). This understanding, however, is somewhat misleading, as I hope to show in a future article. At least in England, many strict liability offenses were primarily legislative attempts to fill the “privity” gap to protect consumers. Indeed, by the early twentieth century, most commonwealth countries had accepted the view that a reasonable mistake of fact, viewed as an affirmative defense, would be a defense to a strict liability crime, a position recently adopted fully in Canada. See Hutchinson, *Sault Ste. Marie, Mens Rea and the Halfway House: Public Welfare Offences Get a Home of Their Own*, 17 OSGOODE HALL L.J. 415 (1979). In this country, on the other hand, strict liability crimes were from the outset “morals” and “liquor” offenses, and were generally applied as such, primarily due to a judicial deference to legislative power in the guise of legal positivism.

³ There has been a continuing debate over the place of negligence as a proper predicate for criminal liability. Jerome Hall has argued that negligence as such was not recognized as a basis for common law crimes, J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* (2d ed. 1960), but cf. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 HASTINGS L.J. 815 (1980). During the nineteenth century the courts both here and in England began to talk about criminal negligence much more approvingly. This development probably tracks the general development of negligence in tort law. Nevertheless it has always been asserted that criminal negligence is “different” from civil negligence, and in most instances is probably actually indistinguishable from recklessness, which has always been accepted as a proper basis for criminal liability. See, e.g., *State v. Weiner*, 41 N.J. 21, 194 A.2d 467 (1964). In many cases, the courts speak of criminal negligence, but the context reflects recklessness. See *Commonwealth v. Welansky*, 316 Mass. 383, 396–97, 55 N.E.2d 902, 910–11 (1944).

reliance on the "presumption of malice and intent."⁴ By the early twentieth century, it was possible to argue that the criminal law was no longer concerned with a general "mens rea,"⁵ but only with a much more specific, constrained question of whether the defendant's conduct reflected the specific mental state required by the statute. Since these mental states were variously defined, some authors argued that the criminal law no longer focused on "mens rea," but on "mentes rea."⁶ This movement toward objectivity in the criminal law was led, if not inspired, in the United States by Justice Holmes,⁷ particularly in his book *The Common Law*. In England it has culminated in this century in the works of Lady Barbara Wootton,⁸ who has urged the total abolition of concern with mens rea prior to a determination of guilt. Lady Wootton's view that courts should focus first on conviction and then examine mental state to determine the need for further utilitarian programming has thus far won few advocates either in the United States or abroad.

This change in the criminal law's focus from the subjective to the objective has occurred in many other areas of the law in the last 100 years. Other examples of this

⁴ The origins of the doctrine that an actor is presumed to intend the natural and probable consequences of his act are very murky. In recent times, the "presumption" has come under much attack, and is now talked of in terms of a "permissive inference." Both Australia and England have abolished the presumption, see 111 C.L.R. 610 (1983); Criminal Justice Act, 1967, ch. 80, 98, respectively. In this country, several cases have questioned the substantive validity of the presumption, particularly in the abstract. See *People v. Jordan*, 51 Mich. App. 710, 714-16, 216 N.W.2d 71, 73-75 (1974). In E. DEVITT & C. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS FORM* 13.06 (3d ed. 1977), for example, the authors say that the propriety of using such an instruction is in "severe doubt." Under the Supreme Court's most recent declarations on presumptions, the presumption's facial validity would have to be tested by a "beyond a reasonable doubt" test, *County Court of Ulster County, New York v. Allen*, 442 U.S. 140, 166-67 (1979), since negligence, as well as strict liability, belies the assertion that one usually *intends* the consequences of his act. Even tested as applied, the standard would be whether the presumed fact (that defendant intended) is more likely than not. *Id.* at 166. Here, the critical question would be how one defines the defendant's "act." While it is certainly true, at least by a preponderance, that most people who propel what they know to be bullets point blank into a victim's head intend serious bodily harm or death (if that is how the "act" is defined), it is probably not true that most people who fire a gun, or stab at a victim, *intend* death. Moreover, one could investigate whether death or serious bodily injury is the "probable" consequence of a shooting or a stabbing. In *Sandstrom v. Montana*, 442 U.S. 510, 523-24 (1979), decided only weeks after *Ulster County*, the Court invalidated a "presumed intent" instruction, not on the substantive grounds that it failed either test, but rather on the ground that the instruction as given might have been perceived by the jury as either establishing a conclusive presumption or as shifting the burden of proof, as opposed to production, to the defendant, both of which the court said violated the due process clause (although putting the burden on the defendant to prove some relevant facts in making an affirmative defense is not unconstitutional). See *Patterson v. New York*, 432 U.S. 197, 206-07 (1977). *Accord* *Francis v. Franklin*, 104 S. Ct. 2677, *cert. granted* (1985). I hope in a later article to explore both the history and the current status of this presumption, or even "inference," in more detail.

⁵ Sayre, *Mens Rea*, 45 HARV. L. REV. 974 (1932).

⁶ Levitt, *Extent and Function of the Doctrine of Mens Rea*, 17 ILL. L. REV. 578 (1923) [hereinafter cited as Levitt, *Extent and Function*]; Levitt, *The Origin of the Doctrine of Mens Rea*, 17 ILL. L. REV. 117 (1922). *Mentes Reae* does not involve a single unitary concept of 'mens rea,' but only specific kinds of mental states, such as intent, wilfulness, maliciousness, etc. The move from mens rea — a general malevolence exemplified by a malicious act — to mentes reae is a move from the dominance of courts to the dominance of legislatures in the criminal law.

⁷ O.W. HOLMES, *THE COMMON LAW* (1881).

⁸ B. WOOTTON, *CRIME AND THE CRIMINAL LAW* (1963). *Accord* K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); W. Gaylin, *Psychiatry and the Law: Partners in Crime*, 8 COLUM. U.F. 23 (1965).

shift include the debate between subjective (old) and objective ("modern") approaches to contract law,⁹ or the introduction into tort law first of the "reasonable person,"¹⁰ and perhaps later of products liability.¹¹ These changes, in turn, can be seen as examples of the broader, generic struggle between law as "rules" or law as "standards."¹² It is at least plausible that these and other movements in the law during the past century can be traced to the increasing ascendance of utilitarianism, in which individuals are regarded primarily as means toward attaining social goals, rather than as ends in themselves. Surely in the area of criminal philosophy, the works of Beccaria, Bentham and Holmes, three leading utilitarians, have dominated the literature in the past two centuries.¹³

While this decline in the importance of moral culpability has been discussed frequently in the literature,¹⁴ very few scholars¹⁵ have recognized that this decline may have

⁹ The debate between Williston, who favored the "objective," rule-bound, approach to contract interpretation, allowing words to have their plain meaning, no matter how awkward that might be, and Corbin, who favored a more subjective approach, focusing primarily on the "intent of the parties" without being bound by the precise words used, is well known. See G. GILMORE, *THE DEATH OF CONTRACT* (1974). See also 3 A. CORBIN, *CONTRACTS* §§ 534-554 (1960); 4 S. WILLISTON, *TREATISE ON THE LAWS OF CONTRACTS* §§ 605-630 (3d ed. 1961); Corbin, *The Interpretation of Words and the Parole Evidence Rule*, 50 CORNELL L.Q. 161 (1965).

¹⁰ It is debatable whether the adoption in tort of the reasonable person standard, generally dated at *Brown v. Kendall*, 60 Mass. (6 Cush.) 292, 296 (1850), was an "objectification" or "subjectivization" of the law as it then stood, since strict liability applied to cases of trespass prior to that decision. Thus, even the introduction of a totally objective test reduced defendant's actual possible liability. On the other hand, the adoption of the reasonable person standard soon infested the criminal law, clearly objectifying it. For a discussion of the reasonable person standard, see *infra* note 193 and accompanying text.

¹¹ RESTATEMENT (SECOND) OF TORTS § 402A (1979). No lengthy citations are needed to demonstrate that strict products liability under § 402A has drastically changed both the law and the market. Increasing calls for the expansion of strict liability to the rest of torts is, whatever else it may be, a clear desire to remove the last vestiges of subjectivity from tort law. See, e.g., Mallor, *Liability Without Fault for Professional Services: Toward a New Standard of Professional Accountability*, 9 SETON HALL L. REV. 474 (1978).

¹² Writers belonging to the "critical legal studies" movement, in particular Duncan Kennedy, have urged the distinction between "rules," which are intended to restrict and even obliterate discretion in an organizational system, and "standards," which are written in such a way as to enhance discretion by making it almost impossible to demonstrate that the standard has not been met. For example, the "standard" that a public agency must decide "in the public interest" is virtually impregnable to analysis. See Kennedy, *Form and Substance in Private Law and Adjudication*, 89 HARV. L. REV. 1685 (1976). But see Shupack, *Rules and Standards in Kennedy's Form and Substance*, 6 CARDOZO L. REV. 947 (1985). In the criminal law, at least ostensibly, this distinction works in favor of the defendant since any statute which merely establishes a "standard" should be invalidated for vagueness, or perhaps overbreadth. On the other hand, defenses are generally seen as "standards" rather than "rules." Part of the purpose of this article, and hopefully of others to follow, is to suggest that at least in some areas during the nineteenth century, when both utilitarianism and jury mistrust were on the rise, the common law appeared to establish legal "rules" which seemed to keep issues from the jury, thereby making conviction more likely. Two factors, however, undercut this analysis from the outset: (1) as this article will show, it was the writers, and not the courts, who first established "the rules" of provocation (and of other "defenses"); (2) the ever-present threat of jury nullification made legal rules less potent (although during this century the law was changing to the point where the jury need not be told of its nullification power, a movement which culminated in *Sparf and Hansen v. United States*, 156 U.S. 51 (1895)).

¹³ But cf. J. STEPHEN, *THE HISTORY OF THE CRIMINAL LAW OF ENGLAND* (1883).

¹⁴ See G. ERENIUS, *CRIMINAL NEGLIGENCE AND INDIVIDUALITY* (1963); Endlick, *The Doctrine of Mens Rea*, 13 CRIM. L. MAG. & REP. 831 (1891); Levitt, *Extent and Function*, *supra* note 6; Sayre,

been brought to a halt, or at least retarded, both in other common law countries and less obviously in this country. In the United States, the primary impetus for this return to a subjective moral culpability as a predicate for criminal liability has been the Model Penal Code (MPC or Code), which, in almost every section of its substantive provisions, moves toward, if it does not totally embrace, a fully subjective concept of mens rea.¹⁶ Moreover, American courts have increasingly interpreted statutes to require the presence of mens rea,¹⁷ even where there is significant doubt that the legislature so intended. The United States Supreme Court, in eclectic fashion, has recently moved along two paths which converge to establish, or at least permit, more subjective inquiries by juries.¹⁸

Mens Rea, supra note 5; Stallybrass, *The Eclipse of Mens Rea*, 52 L.Q. REV. 60 (1936); Thornton, *Intent in Crime*, 9 CRIM. L. MAG. & REP. 139 (1887).

¹⁵ Only George Fletcher, having critiqued both the confusion of the criminal (and civil) courts as to burden of proof and production, and the common law's general reluctance to broaden the very narrow confines of excusing conditions, has in fact provided a blueprint, modeled after the continental approach, for reviving mens rea on a significant scale. G. FLETCHER, *RETHINKING CRIMINAL LAW* (1978); Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269 (1974); Fletcher, *Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases*, 77 YALE L.J. 880 (1968) [hereinafter cited as Fletcher, *Two Kinds*].

¹⁶ MODEL PENAL CODE (PROPOSED OFFICIAL DRAFT 1962). Thus, for example, the Code allows any mistake of fact, reasonable or unreasonable, to act as a defense, *id.* § 2.04, except in certain instances such as that of justification. *Id.* § 3.09. The Code's general predilections against strict liability, § 2.05, and negligence, § 2.02(3), permeate the entire range of substantive provisions. The Code also allows mistake or ignorance of the law, although this mistake must be reasonable, § 2.04(3). Intriguingly, the sentencing provisions of the Code, articles 6 and 7, are almost totally utilitarian.

¹⁷ The trend toward subjectivism is strikingly obvious in the history of narcotics possession offenses. In 1932, the National Conference of Commissioners of Uniform State Laws promulgated the Uniform Narcotics Drug Act, which made possession of any drug a crime, without requiring knowledge that the item possessed was a drug. Most jurisdictions, however, concluded that knowledge was required for conviction. *See, e.g.*, *Carroll v. State*, 90 Ariz. 411, 412, 368 P.2d 649-50 (1962); *Mickens v. People*, 148 Colo. 237, 239, 365 P.2d 679, 680 (1961); *People v. Mack*, 12 Ill. 2d 151, 159, 145 N.E.2d 609, 612-13 (1957); *State v. Nicolosi*, 228 La. 66, 70-71, 81 So.2d 771, 773 (1955); *State v. Young*, 427 S.W.2d 510-13 (Mo. 1968). In 1972, the Commissioners revamped the law, now dubbed the Uniform Controlled Substance Act, and required knowledge both as to possession and as to the nature of the substance. As of 1979, forty-four states had adopted the act, 9 Uniform State Laws 187, and all of the non-adopting jurisdictions required knowledge as a matter of common law. *See, e.g.*, *Davis v. State*, 501 P.2d 1026, 1028 (Alaska 1972); *State v. Colcord*, 109 N.H. 231, 233, 248 A.2d 80, 82 (1968).

Another recent example is the attempt to deal with so-called "head shops." The Model Drug Paraphernalia Act, drafted by the Drug Enforcement Administration, penalized any person selling or delivering items which he knows or reasonably should know will be used with controlled substances. But many states modified that language so as strictly to require that a person know that the buyer will use the paraphernalia for illegal purposes. *See* UTAH CODE ANN. 58-37a-4(3), (4), (5) (1953); N.H. REV. STAT. ANN. §§ 318-B:1(X-a), ch. 318-B:2 § II (Supp. 1981); N.J. STAT. ANN. ch. 24:21-46 (West Supp. 1985); PA. STAT. ANN. tit. 35, §§ 780-102(b), -113(a)(32-34), -113(i), -128(a)(1) (Purdon 1977). This language has been strictly construed as requiring actual knowledge. *See New England Accessories Trade Ass'n v. City of Nashua*, 679 F.2d 1, 7 (1st Cir. 1982); *Town Tobacconist v. Kimmelman*, 94 N.J. 85, 102, 462 A.2d 573, 581 (1983). Some states, however, have used the reasonable knowledge test, and it has apparently been sustained. *See Stojanoff v. Montana*, 695 F.2d 1214, 1220-22 (9th Cir. 1983); *Kansas Retail Trade Co-op v. Stephan*, 695 F.2d 1343, 1346 (10th Cir. 1982). *See, e.g.*, *State v. Rice*, 626 P.2d 104, 110 (Alaska 1981); *State v. Guest*, 583 P.2d 836 (Alaska 1978); *McNutt v. State*, 295 Or. 580, 668 P.2d 1201 (1983).

¹⁸ The *Sandstrom* and *Ulster County* decisions, discussed supra note 4, will unquestionably give the jury greater freedom, at least in legal theory, to investigate the subjective state of the defendant. Similarly, in *Mullaney v. Wilbur*, 421 U.S. 684, 701-02 (1975), the Court appeared to require that

Additionally, new subjective "defenses" — some based upon allegedly new psychological or physiological data — are being proffered almost daily.¹⁹ Finally, "neo-retributivism," most obviously in sentencing reform,²⁰ has added to the push for subjective culpability as a prerequisite for the imposition of the moral stigma²¹ which — at least theoretically

the prosecution negate all "affirmative defenses," once properly raised by the defendant. *See also* State v. Evans, 28 Md. App. 640, 652-54, 349 A.2d 300, 310-12 (1975), *aff'd*, 278 Md. 197, 206, 362 A.2d 629, 634 (1976). Although the Court has cut back severely on *Mullaney* in *Patterson v. New York*, 432 U.S. 197 (1977), the issue has provoked enormous scholarly writing, and is virtually certain to continue as a major question in the next decades. To the extent, of course, that the state must disprove "affirmative defenses," the law's focus becomes more subjective.

¹⁹ The proliferation of proffered new defenses, each of which depends on an increasingly subjective view of the criminal law, has been striking. Thus, for example, women have argued self-defense when they kill their battering husbands, even if the husbands are asleep at the time. E. BUCHNAK, *WOMEN'S SELF DEFENSE CASES* (1981); F. McNULTY, *THE BURNING BED* (1980); Eber, *The Battered Wife's Dilemma: To Kill or To Be Killed*, 32 HASTINGS L.J. 895 (1981); Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705 (1978); Note, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPP. L. REV. 213 (1978); Note, *Limits on the Use of Defensive Force to Prevent Intramarital Assaults*, 10 RUT.-CAM. 643 (1979); Note, *Partially Determined Imperfect Self-Defense: The Battered Wife Kills and Tells Why*, 34 STAN. L. REV. 615 (1982); Comment, *Battered Wives Who Kill*, 2 LAW & HUM. BEH. 133 (1978); Note, *The Battered Spouse Syndrome as a Defense to a Homicide Charge Under the Pennsylvania Crisis Code*, 26 VILL. L. REV. 105 (1980). *See* State v. Kelly, 97 N.J. 178, 478 A.2d 364 (1984) (woman stabbed husband allegedly in self-defense, after being beaten earlier in the day). Commentators have also urged adoption of a "premenstrual syndrome" defense, which has generated a mass of writing. For the first major work, see, WALLACH & RUBIN, *THE PREMENSTRUAL SYNDROME AND CRIMINAL RESPONSIBILITY* 19 UCLA L. REV. 209 (1971). For a recent note summarizing developments, see Note, *Criminal Law: Premenstrual Syndrome in the Courts?*, 24 WASH. L. REV. 54 (1984).

In the early 1960's, a series of articles appeared in medical journals suggesting that a chromosomal variance might be responsible for at least some criminal actions. Although most of the data on which these articles were premised have been thoroughly disproved, the "XXY" defense does appear from time to time. *See generally* Sarbin & Miller, *Demonism Revisited: The XYY Chromosomal Anomaly*, 5 ISSUES IN CRIMINOLOGY 195 (1970); Taylor, *Genetically-Influenced Antisocial Conduct and the Criminal Justice System*, 33 N. IRE. L.Q. 215 (1982).

Still other commentators have focused on a subjective defense of brainwashing. Compare Delgado, *Ascription of Criminal States of Mind: Toward a Defense Theory for the Coercively Persuaded ("Brainwashed") Defendant*, 63 MINN. L. REV. 1 (1978) with Dressler, *Professor Delgado's "Brainwashing" Defense: Courting A Determinist Legal System*, 63 MINN. L. REV. 335 (1979). On an even broader philosophical scale, see Bazelon, *The Morality of the Criminal Law*, 49 S. CAL. L. REV. 385 (1976); Morse, *The Twilight of Welfare Criminology, A Reply to Judge Bazelon*, 49 S. CAL. L. REV. 1247 (1976).

²⁰ E.g., A. VON HIRSCH, *DOING JUSTICE: THE CHOICE OF PUNISHMENTS* (1976); R. SINGER, *JUST DESERTS: SENTENCING BASED ON EQUITY AND DESERT* (1979).

²¹ The glaring exception to this movement toward subjectivity, of course, has been the regression in the area of insanity — both in narrowing the wording of the test to preclude volitional impairment, and in shifting the burden of proof to the defendant. After initial acceptance by the courts of the Model Penal Code test, which broadened the *M'Naughten* "knowledge" criteria and added a volitional prong, the verdict in the *Hinckley* case caused a massive backlash, as did the verdict in the eerily similar *M'Naughten* case 140 years earlier. In the three years since the *Hinckley* acquittal, Congress has revised federal law to eliminate volitional incapacity as a defense, and has shifted the burden of proof to the defendant. 18 U.S.C. § 20 (Supp. 11 1984). At least two states have purported to abolish the insanity defense. *See* IDAHO CODE, § 18-207 (Supp. 1984); MONT. CODE ANN., 46-14-201 (1979). For the most eloquent statement of the position that the defense should be abolished, see N. MORRIS, *MADNESS AND THE CRIMINAL LAW* (1982). *But see* Singer, *Abolition of the Insanity Defense: Madness and the Criminal Law*, 4 CARDOZO L. REV. 683 (1983). Nevertheless, it is possible both that the furor generated by *Hinckley* will abate and that the courts will find methods by which to expand again the reaches of the defense.

— accompanies a guilty verdict.²² The "subjectivist bug"²³ appears to be increasingly vociferous.

I hope to trace in a series of articles the renaissance of mens rea, and its accompanying emphasis on retribution as the primary, if not sole, distinguishing factor of the criminal sanction. I begin that inquiry with the doctrine of provocation for several reasons. First, a core predicate of retribution is that the punishment must be proportionate to the moral blameworthiness of the act, including most obviously the mens rea of the actor. Aside, perhaps, from the much mooted insanity issue,²⁴ the provocation doctrine raises this concern in its clearest form. When it was first introduced to the common law, the function of the provocation doctrine was to turn an otherwise capitally punishable slaying into one which was punished lightly, and certainly not with death. Yet both at its genesis and for the succeeding centuries, the writers and the courts have failed to recognize this function, and have instead used inappropriate metaphors to "explain" the importance of provocation. These metaphors, in turn, have created doctrinal confusion and chaos.²⁵ Rather than continue the charade, it should be acknowledged that the reason we wish to call some slayers manslaughterers is that they are not as morally blameworthy as people who have been found to be murderers, and therefore should not be as severely punished.

A second ground for beginning with provocation is that this doctrine has been seen as based primarily on the common sense assessment of the defendant's²⁶ reaction to particular circumstances. If that inquiry is sufficiently subjectivized, it calls forth, explicitly, the moral judgments of the jury. Yet, intriguingly, just at the moment that the criminal law in this country has moved slowly toward subjectivization of this crucial doctrine, the courts in some instances have removed the inquiry from the jury's grasp by requiring, or at least strongly advising, expert testimony on questions which are preeminently ones of value and judgment.

Third, although the common perception that the law of manslaughter was increasingly objectivized during the nineteenth and twentieth centuries is correct, the common

²² For decades it has been argued that the critical differences between criminal and civil liability rest in two areas: (1) the possible loss of freedom; (2) the moral stigma attached to criminal conviction. See, e.g., Hart, *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401 (1958); H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* (1968). Upon these two prongs rests *In re Winship*, 397 U.S. 358, 364 (1970) which declared that due process required that the state bear the burden of proving all essential facts of a crime beyond a reasonable doubt before these losses could be inflicted upon an individual. Later cases, however, suggest that the real key to requiring greater procedural protections is not potential loss of freedom, but the moral stigma of being labeled a criminal. Thus, in *Addington v. Texas*, 441 U.S. 418, 428-31 (1979), the Court did not require proof beyond a reasonable doubt before permitting civil commitment (loss of freedom) of a mentally ill person. See also *Jones v. United States*, 463 U.S. 354, 368 (1983) (preponderance of the evidence standard sufficient for commitment of insanity acquittees). A compelling argument now can be made that the crucial, and constitutionally significant, distinction between criminal and civil sanctions is that the former connotes moral blameworthiness as perceived by the entire community. Cf. *Robinson v. California*, 370 U.S. 660 (1962) (Court held that a California statute, which called for criminal imprisonment of individuals merely addicted to narcotics, without use or possession within the state, constituted cruel and unusual punishment).

²³ Wells, *Swatting the "Subjectivist Bug,"* 1982 CRIM. L. REV. 209. See also Smith, *Subjective or Objective? Ups and Downs of the Test of Criminal Liability in England*, 27 VILL. L. REV. 1179 (1982).

²⁴ See *supra* note 21.

²⁵ See *infra* note 117 and accompanying text.

²⁶ But see the discussion of the reasonable man test, *infra* note 193 and accompanying text.

perception of how that came to pass is not correct. The article concludes that it was the writers and not the courts who sought continuously to impose objective "rules" upon the doctrine of provocation, resulting in the removal from the jury of the core questions of blameworthiness and proportionate guilt. Only later, and somewhat reluctantly, did the courts follow suit.

The first part of this article explores the genesis and growth of the provocation doctrine in the seventeenth and eighteenth centuries. It concludes that, contrary to the generally received lore, *courts* during this time were quite receptive to any indication that the defendant acted "irrationally"; they did not place the doctrines of provocation into discrete boxes. Any movement toward rules was directed primarily not by the holdings of the courts, but instead by the text and treatise writers. Part II demonstrates that this same dynamic also occurred during the nineteenth century, when the courts, increasingly influenced by the nineteenth century writers, slowly adopted a more rigid approach to the area. This trend greatly accelerated between 1900–1950. Part III explores the reaction in England and the United States to this objectivity and the reception of the Model Penal Code's "extreme emotional and mental disturbance" approach to manslaughter. This section attempts to evaluate whether the Code's goal of broadening the reductive impact of heat of passion — loss of self-control — has been achieved in the courts. It concludes that while some American courts recently have embraced a more subjective viewpoint, others have also unwisely allowed expert testimony to intrude upon what should be a moral judgment made by the jury. This willingness to accept and to rely upon expert testimony should be restricted so as to facilitate the reemergence of the jury verdict as a decision on moral culpability. Finally, Part IV explores the confusion over the rationale of provocation, and suggests that only a totally subjective inquiry into the defendant's actual state of mind is consistent with the primary purpose of the criminal law — to impose sanction and blame commensurate with the defendant's actual malevolence.

I. MANSLAUGHTER AND PROVOCATION AT COMMON LAW — THE EARLY CENTURIES

Prior to the beginning of the sixteenth century, the common law courts had little need to distinguish, as a matter of substantive law, between different kinds of killings. The king's pardon,²⁷ until 1390, and benefit of clergy,²⁸ until the mid-sixteenth century, as well as the ability of the jury to fit the facts to constitute either self-defense or

²⁷ N. HURNARD, *THE KING'S PARDON FOR HOMICIDE BEFORE A.D. 1307* (1969).

²⁸ Benefit of clergy was initially established as a result of the ongoing struggle for supremacy between church and state. The doctrine precluded the secular state from punishing any member of the clergy for a crime against the state. The test for determining who was a member of the clergy was the ability to read which test was soon distorted and manipulated by judges who disliked capital punishment, allowing even the most illiterate to recite a memorized verse (appropriately nicknamed the neck verse) so as to avoid the gallows. Prior to 1389, either benefit of clergy or a king's pardon could be used to avoid the death penalty. In that year, spurred by contempt of the king and a belief that he had often been bribed to issue pardons, Parliament forbade the King to grant pardons for homicides with "malice aforethought." 13 RICH. 2, STAT. 2, ch. 1 (1389). Since benefit of clergy was still available, however, the definition of "malice aforethought" was not critical. In the sixteenth century, however, a number of statutes making killing "malice aforethought" no longer clergyable spurred a legal stampede to define that term. See 23 HEN. 8 ch. 1 (1531) 1 EDW. 6, ch. 12 (1547). See generally Kaye, *The Early History of Murder and Manslaughter* (pts. 1 & 2), 83 L.Q. REV. 365, 571 (1967).

accident,²⁹ allowed the courts to muddle through without paying serious attention to the distinctions among slayings.³⁰ With the abolition of benefit of clergy for all homicides with malice aforethought,³¹ however, a need arose both to narrow malice aforethought, and to deal more directly with non-malice slayings.³²

Yet little evidence exists that the courts readily acted in this direction. Coke, the first major writer after the passage of the clergy-abolishing statutes, speaks of only one type of provoked³³ and culpable but clergyable slaying, that which occurs "upon a sudden occasion, and therefore is called *chance-medley*."³⁴ The envisioned chance medley fact

²⁹ A case cited in Green, *Societal Concepts of Criminal Liability for Homicide in Medieval England*, 47 SPECULUM 669, 679 (1972), demonstrates that medieval juries were willing to recognize insults as mitigating, even if the doctrine of criminal law was not. The jury in this case, to exonerate the defendant who actually killed as a result of insults, turned the facts into self defense. Indeed, Green asserts that "from the outset of the common law period, trial juries persisted in using their role as submitters of evidence to condemn murderers and to acquit or render pardonable those whom a later legal age would term 'manslaughterers.'" *Id.* at 688.

³⁰ Green, *The Jury and the English Law of Homicide, 1200-1600*, 74 MICH. L. REV. 413 (1976).

³¹ See *supra* note 28.

³² Coldiron, *Historical Development of Manslaughter*, 38 KY. L.J. 527 (1950); Kaye, *supra* note 28, at 576-600. Cf. Brown, *The Demise of Chance Medley and the Recognition of Provocation as a Defense To Murder in English Law*, 7 AM. J.L. HIST. 310 (1963).

³³ There are other non-intentional homicides which result in non-capital homicide, also called manslaughter, notably negligent killings. See Robinson, *supra* note 3, at 837-46. This paper is concerned solely with "provoked" killings; whether these are properly characterized as "intentional" is discussed *supra* notes 3 and 22 and accompanying text.

³⁴ E. COKE, INSTITUTES 55 (1628) (emphasis added). This reflects the even earlier distinction noted by N. HURNARD, *supra* note 27, at 9:

The only type of culpable homicide which could still be paid for by wergild and wite in the early years of the Twelfth Century was slaying in a fight or medley and that without any aggravating circumstances. In a war-like society, public opinion tends to condone fighting and slaying in the course of it even if illegal is not regarded as a shameful crime. While such a spirit prevailed, this type of homicide could profitably be atoned for by were with the addition of wite as token of its unlawfulness.

Id.

E. COKE, *supra* note 34, at 57, says that the word "medley" is a corruption of the French word "mesle," which meant "shuffling or contending." M. FOSTER, CROWN LAW 276 (1762), and 4 W. BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 184 (1783), suggest that the word "chance" is actually a corruption of "chaud" (hot), which would belie Coke's view. Cf. W. LAMBARDE, EIRENACHA 243-44 (1599), which gives this explanation: "The former is fitly named chance medley for that in it men are meddled (or committed) together by mere chance, and upon some unlooked for occasion." In any event, it seems clear that chance medley was in fact restricted to killings done "of a sudden" emanating from a "brawl" of some sort.

Whether Coke was correct in limiting manslaughter to sudden quarrels is unclear. There is some support for the proposition in dictum in *Bibithe's Case*, 4 Co. Rep. 43b, 76 Eng. Rep. 991 (1584). The question there was whether *D* could be held as an accessory before the fact to manslaughter. The court held not, since "manslaughter ought to ensue upon a sudden debate or affray." This supports the notion that culpable manslaughter can only occur during a chance medley, but the language is somewhat unclear, and is dictum. Still, at least many of the writers of the sixteenth century support Coke's limitation of manslaughter to chance medley homicides. See, e.g., THE BOKE OF JUSTYCES OF PEAS OF. 4a/b (2d ed. 1510) ("manslaughter is where two men or more meet and by chance medley they fall at affray so that one of them slays the other"); W. STAUNDFORD, PLEAS OF THE CROWN (c. 1580) cited in 3 J. STEPHEN, *supra* note 13, at 47; see also R. CROMPTON, L'OFFICE ET AUTHORITEE DE JUSTICES DE PEACE f.23b (1587) ("Manslaughter is where two fight together on the sudden"); British Library, Lansdown ms. 1972, f.43a (attributed to Richard Eliott); A. FITZHERBERT, NEW BOKE OF JUSTICES OF THE PEACE CXXiiiia (1537). The last three cites are all found in

pattern starts with a verbal argument between A and B, which escalates into use of non-deadly, and then deadly force. It is critical that both parties be equally armed and able to defend themselves. The paradigm is a barroom brawl. This provoked killing slowly obtained the label of "manslaughter." Coke clearly enunciated that the sole distinction between murder and manslaughter is that the latter is not done with malice aforethought. According to Coke,

[s]ome manslaughters be voluntary, and not of malice forethought, upon some sudden falling out There is no difference between murder and manslaughter, but that the one is upon malice forethought, and the other upon a sudden occasion³⁵

Thus, the first articulation of the rationale of manslaughter is that a killing done upon chance medley is by definition not done with malice. Coke further emphasizes that a killing done "on a sudden" or "by chance" is done "without premeditation."³⁶ Strikingly, in light of later developments, Coke does not use the phrase "heat of passion;" his concern focuses more on the objective circumstances, which then reflect a lack of malice.

Green, *The Jury*, *supra* note 30, at 477-87. See also the Statute of 22 HEN. 8, c. 14, § 4, which equates "felony or manslaughter by chance medley." The idea that punishment for killings committed in a brawl should be mitigated is at least as old as Justinian. See JUSTINIAN DIGEST, 48.8.2.

A potentially important case, almost totally ignored by later courts and commentators, is reported by Coke. Because the report is ambiguous, it is quoted here in full:

Divers men playing at bowls in Great Marlow, in the county of Kent, two of them fell out and quarrelled the one with another; and the third man who had not any quarrel, in revenge of his friend, struck the other with a bowl, of which blow he died; this was held manslaughter, for this, that it happened upon a sudden motion in revenge of his friend.

12 Co. Rep. 87, 77 Eng. Rep. 1364 (1612).

At first blush, it appears that this case opens totally new areas for manslaughter; the defendant was not personally involved in a chance medley, and the sole explanation given for the reduction is that he struck out in anger. This *appears* to go beyond the restrictions set up by Coke. But the report is not quite clear; was the argument merely oral, or did it escalate to weapons (perhaps the bowling balls themselves?). The declaration that the defendant wished to "revenge" his friend suggests that the friend was wounded in some way. It also suggests that the first quarrel was ended. Second, the report is unclear whether the victim was engaged in some combat with the defendant or, was struck without warning. If the latter, then the case could have been surely a crucial turning point in chance-medley manslaughter development. If the former, it is a mere repetition of other cases. Perhaps one can infer the latter, since Coke is unlikely to have been totally silent on a case which might have broadened the category of manslaughter crimes beyond that which he had established in his commentaries. It is, of course, hardly impossible that Coke had mistaken the law in his *Institutes*, and that courts were rather constantly rendering manslaughter verdicts in such situations even at the time the *Institutes* were written. This would explain Coke's silence here.

Kaye, *supra* note 28, at 573 also cites numerous authors each of whom supports the thesis that manslaughter was limited to chance medley, although Kaye appears to believe they are all wrong and misleading. See, e.g., W. DE WORDE, *THE BOKE OF JUSTYCES OF PEAS OF*, 4a/b (1510 ed.), cited in Kaye, *supra* note 28, at 573 n.51; Fitzherbert, *supra*, at cxxiiiia, cited in Kaye, *supra* note 28, at 576 n.56. Kaye, however, concludes that notwithstanding these authors, the doctrine was limited to accidental killing in the course of an unlawful act of violence not directed at the party slain, Kaye, *supra* note 28, at 582, until 1573, with *Saunders' Case*, *id.* at 588 & 590, which is then approved by both Crompton and Lambarde in the 1580's. *Id.* at 594. According to Weiner, *The Insanity Defense: Historical Development and Present Status*, 3 BEHAV. SCI. & LAW 3, 6 nn.18-19 (1985), the doctrine of chance medley has an analog in the Justinian Digest, 48.8.2.

³⁵ E. COKE, *supra* note 34; at 55.

³⁶ *Id.*

There is no suggestion from Coke that a lesser penalty is imposed because although there is malice and/or premeditation in the killing, the law will grant a boon to human frailty. At a time when malice actually meant ill will, or an evil disposition,³⁷ it seemed obvious that a killing between two strangers "on a sudden" could not be premeditated, or emanate from "malice." There was no time for the defendant to establish hatred or ill will toward the deceased.

Coke limited the label of manslaughter to this one kind of sudden killing — chance medley. It is unclear whether he did this on principle, or because there appeared to be few precedents. Rather than limiting the manslaughter category to killings done in chance medley, Coke could have suggested that any killing done "on a sudden" was arguably done without malice, and therefore less blameworthy, than those slayings which qualified as murder. Although it is possible to construe some of the language he used in describing chance medley as hinting at such a rationale, it would be overstating the case to say that this was unequivocally the reason he saw for considering chance medley killings as non-capitally punishable.

But if Coke failed to explore the rationale of provocation, the courts for the next two centuries acted as though any killing done in passion, without full self-control, "on a sudden," was at most manslaughter. Yet by the beginning, and certainly by the middle, of the eighteenth century, the rigid requirements ("boxes") of adequate provocation which are associated with the common law had been firmly established, not by the courts, but by the writers. First the cases, and then the works of the writers, will be explored to see how the practice of the courts was initially distorted by, and then came to rely upon, the distortions of the writers.³⁸

³⁷ E.g., Langbein, *supra* note 1.

³⁸ Because it draws almost solely on reported cases, legal writings, and similar matter, and does not concern itself with the social movements of the day, this paper might be accurately termed an "internal" history of the law of provocation. See Gordon, *Introduction: J. Willard Hurst and the Common Law Tradition in American Legal Historiography*, 10 L. & Soc. REV. 9 (1975); Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984). On occasion, reference will be made to materials collected by the Selden Society or to materials in the NEW NEWGATE CALENDER (A. Knapp & W. Baldwin, eds. 1826) [hereinafter cited as NEWGATE], which are anecdotal versions of trials and biographies of criminals tried in London between 1700 and 1825. The limitation is self-imposed. It may well be that closer scrutiny of the "law in action" would disclose that many juries were acting contrary to "the law." Indeed, both the *Newgate* materials, and some unreported cases referred to in reported materials imply exactly that. To the extent that this failure to explore other materials weakens the historical analysis, however, it probably strengthens the court-writer dichotomy suggested later, for it would support the view that courts and juries were taking a much more sympathetic view of manslaughterers than were textwriters.

It is surely possible to speculate that external matters influenced the movements seen in this paper and a number of colleagues have urged me to do so. With great reluctance, I put forth the following tentative, and admittedly superficial, suggestions. Most obviously, the acceptance during the nineteenth century of utilitarianism as the prime purpose of law, including criminal law, would appear to favor restrictions on the role of juries, and restrictions on defenses generally. See Fletcher, *Two Kinds*, *supra* note 15, at 894-907. One might also suggest, at least in some areas, that a mounting concern over violence led to further restrictions on the use of violence, and that, in addition, the increasing availability of the handgun made such restrictions more desirable. I would certainly lean toward believing that the influence of Bentham and Holmes upon the criminal law was immense, and that their endorsement of rigid objective rules and the broadening of the criminal law's net (to include, e.g., the "merely" negligent) demonstrates their influence. But, perhaps because I am not a legal historian, I have difficulties making such assertions. First, although I have perused biographic materials on Wharton, Bishop, Russell, and others, I have yet found nothing to prove, or indeed

A. The Cases

1. "Mere Words"

Although, today, every lawyer knows that "mere words" are insufficient provocation, this doctrine was not clear from the early cases. The first major case dealing with words as provocation is *Watts v. Byrne*.³⁹ In *Watts*, the defendant had been beaten by the victim two days before the slaying. On the third day, the victim passed by defendant's butcher store and "gave him a wry face," whereupon defendant pursued the victim and stabbed him from behind, probably with a butcher knife of some kind. Upon this much, the two reporters of the case, Noy and Croke, agree. But Croke adds two significant facts. First, the jury initially acquitted the defendant of murder, bringing in a verdict of manslaughter; only after being attainted⁴⁰ by the court did the jury return a murder verdict. Second, the court directed the jury to return a murder verdict on the basis that "such a slight provocation was not sufficient ground or pretence for a quarrel."⁴¹

Watts is the premier case cited by later writers for the proposition that insults alone will not suffice for provocation. Croke's report suggests, however, that the court's decision was based solely on its conclusion that the defendant's statement that he was provoked by the wry mouth was not credible. This would seem to be the most reasonable interpretation of the language of the court that there was no defense even if what the defendant "pretended" had been true.⁴² At the very least, there is some question whether *Watts* would be binding precedent if two strangers became involved in an exchange of insulting gestures or words, leading to a death.⁴³

to even indicate that these writers advocated "rules" as a result of growing stress on utilitarianism. Even had I found such evidence, I would think it still necessary to demonstrate that the *judges* who adopted these positions did so from some effect, direct or otherwise, of these writers of legal treatises. I know of little evidence of this; indeed, with regard to both the treatise writers and the judges, the strongest case I can make relies on the general assumption that, being educated persons, and educated persons in the law, they would have read, and would "probably" have been influenced by Bentham, Holmes and others. But I am extremely wary of drawing such a conclusion, for it strikes me as almost parallel, in the absence of direct knowledge about their particular backgrounds, as concluding that conservative judges in the twentieth century read only the works of conservative writers, and were unfamiliar with either the critical legal studies movement or with less radical, but more widespread, writings such as those of John Rawls. If I conclude that judges and treatise writers are familiar with a given legal philosophy (and that might be a large assumption) I know of no *a priori* reason to conclude that they either read only, or were influenced only, by one jurisprudential school. Short of such information, I can only speculate wildly about the reasons for the movements in the criminal law in the nineteenth century.

³⁹ *Watts v. Brynes*, Noy 171, 74 Eng. Rep. 1129, also reported as *Watts v. Brains*, Cro. Eliz. 778, 78 Eng. Rep. 1009. *Watts* is undated, but clearly appears to be decided in or before 1600. Kaye, *supra* note 28, at 591 n.4, puts it at approximately 1580. Kaye also, however, miscites the name of the case, omits the facts recorded by Croke, and omits the fact that the victim had been beaten (not merely insulted) by the defendant two days preceding the fatal attack.

⁴⁰ During this time period, the judiciary had the power to imprison a jury which returned a "wrong" verdict until it returned a "proper" verdict. The process was called "attaint." In *Bushells' Case*, Jones, T. 13, 117 Eng. Rep. 526 (1660), this practice was declared legally impermissible.

⁴¹ *Watts*, 78 Eng. Rep. at 1009 (emphasis added).

⁴² *Id.* (emphasis added).

⁴³ By the time of Russell, the facts of the case had been so reduced as to make the "rule of the case" inevitable. Russell, for example, does not even mention that there had been a pre-existing relationship between victim and defendant. 1 W. RUSSELL, TREATISE ON CRIMES AND MISDEMEANORS 631 (1st ed. 1824).

A later case, *Williams*, supports the view that *Watts* can be limited to a case where a defendant, with preconceived malice, unsuccessfully feigns provocation. In *Williams*,⁴⁴ X and D, who were strangers, met on a street. X insulted D's Welsh heritage, whereupon D attempted to kill X by throwing a hammer at him. The hammer missed X, but killed V.⁴⁵ D was indicted upon the statute of stabbing.⁴⁶ The trial court determined that the statute did not apply, but that D was guilty of manslaughter, and entitled to benefit of clergy. *Williams* seems to hold that insults are sufficient to classify a killing as manslaughter if there is no basis for inferring preexisting malice, thus limiting the holding of *Watts* to its specific facts.⁴⁷

These two cases appear to be the only reported instances of bare insults and gestures resolved by the courts between 1600 and 1800. In *Williams* the defendant was convicted of manslaughter, so the case clearly cannot hold that "mere words" are insufficient to reduce the defendant's culpability to manslaughter. In the other case, *Watts*, there is at least a plausible argument that the court, at a time when it had control of the jury's fact-finding, simply refused to find that there had been a gesture. Or, if there had been a gesture, the court found that the previous beatings, and not the gesture, was the reason for the murderous assault.⁴⁸

⁴⁴ Jones, W. 432, 82 Eng. Rep. 227.

⁴⁵ The court in *Williams* does not raise the question of whether D can be convicted of V's murder, even though it is clear that D had no malice toward V, but only toward X. Although this would now be handled under the doctrine of "transferred intent" (a misnomer if there ever was one), that fiction was not very well entrenched in English law at the time. It appears to have been first adopted in *R. v. Saunders and Archer*, 2 Plow. 473, 75 Eng. Rep. 706 (1575) where D gave a poisoned apple to his wife, but it was eaten by his daughter, who died. Although the court ultimately concluded that D could be guilty of the daughter's murder, it wrestled with the issue for many months. The extensive time invested by the court to decide the case demonstrates the subjective nature of malice as it was then understood.

⁴⁶ 2 JAS. 1, c.8 (1604). As in other times and places, Parliament in the early seventeenth century responded to an apparent crime wave (allegedly stemming from Scottish outrage at Englishmen) by statutorily turning homicides which would otherwise be manslaughter into non-clergyable murders, if done with a knife. See W. BLACKSTONE, *supra* note 34, at 193 n.(d). Stephen suggested that the statute was observed more in the breach than in the observance, 3 J. STEPHEN, *supra* note 13, at 48, but the statute still put pressure for a more precise definition of the term "malice aforethought." The obvious meaning of the statute of stabbing is that in 1603 it was considered that a person who killed another 'on the sudden' even without provocation or on any slight provocation, was guilty only of manslaughter.

⁴⁷ For another possible distinction, see *infra* note 73.

⁴⁸ Cf. *Snow's Case*, discussed in 1 E. EAST, PLEAS OF THE CROWN 244 (1803). The case was decided in 1776, and so fits within these time parameters, although there is no report on it prior to East. Defendant and victim were reconciled after having a dispute. Defendant went out to perform some work, which required the use of a knife. The victim returned to the scene, some words (and perhaps a scuffle) ensued, and defendant stabbed the victim. The jury returned a murder verdict, but this was reduced by the court, because there was no evidence that defendant had lain in wait for the victim.

Similarly, *Watts* could be limited to a case where the defendant used a deadly weapon (a butcher knife) with clear intent to kill. The later limitation upon the "rule" as to "mere words" — that the rule does not apply when there is no deadly weapon employed — might have earlier been used to early relegate *Watts* to a special corner of the law. Moreover, even without reviving the "deadly weapon" presumption that any killing with a deadly weapon raises a rebuttable presumption of malice aforethought, see Oberer, *The Deadly Weapon Doctrine — Common Law Origin*, 75 HARV. L. REV. 1565 (1962), it should be clear that one who stabs another in the back intends at least serious bodily harm, without any need for a presumption in that direction. In *Engel v. Koehler*, 707 F.2d

Even if these cases can be distorted to stand for the view that insults will not be sufficient provocation, other reported cases of the same period make clear that words other than insults could be sufficient provocation. *Royley*, the first and leading case regarding "informational" words,⁴⁹ clearly demonstrates that over three hundred years ago, courts recognized that unlike insults, informational words alone may not constitute sufficient provocation.⁵⁰ *Royley* involved a beating of defendant's son by the victim. The son ran to his father and informed him of the beating. The father then ran three-quarters of a mile, found the man who beat his son, and killed him. The court, upon a special verdict of the jury, was unanimously of the opinion that "it was but manslaughter," because the killing was "upon that sudden occasion."⁵¹

Royley appears to be the only reported decision on "informational words" during the period in question.⁵² But in *Maddy's Case*⁵³ there is a reference to an unreported "confession of adultery" case. The *Maddy* court's reference does not indicate what time period elapsed between confession and the killing. Moreover, the defendant expressly told others that he would kill the cuckold.⁵⁴ The Report is not pellucid, but apparently

241, 245 (6th Cir. 1983), the court held unconstitutional an instruction which informed the jury both of a presumption that one intends the natural consequences of his acts, and of a presumption that malice can be implied from "any deliberate and cruel act against another person." The Supreme Court, after granting certiorari, affirmed by an evenly divided vote, 4-4, Justice Marshall not participating. *Koehler v. Engel*, 466 U.S. 901 (1984). The affirmance is ambiguous for two reasons: (1) the major issue might not have been the unconstitutionality of the instruction, but whether the error was harmless; (2) both the Sixth Circuit and the Supreme Court might have been concerned with the "intent" presumption, and not the "deadly weapon" presumption. Since either of these two, if unconstitutional, could have sufficiently tainted the process (if not harmless), *Koehler* is certainly not clear authority that the "deadly weapon" presumption is no longer valid, although most courts have long since ceased using it.

⁴⁹ W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* 577 (1972). "Informational words" are those which tell the hearer that an event which would be considered provocation if actually witnessed by the hearer has occurred. Confessions of adultery are the most obvious case but other events may also be the subject of such communications.

⁵⁰ *Royley's Case*, 2 Cro. Jac. 296, 79 Eng. Rep. 254 (1666).

⁵¹ *Id.* The possibility that *Royley's Case* may be explained by the proportionality doctrine is explored *infra* note 86. *Royley's Case* is also summarized in 12 Co. Rep. 87, 77 Eng. Rep. 1364, which report indicates that the two boys were "combating together," in contrast to Coke, whose report suggests that the deceased was a bully picking on a younger boy. Coke also declares that the younger boy "was scratched in the face, and his nose voided a great quantity of blood," suggesting that there was no "beating," but only a minor injury. *Id.* Most importantly, however, Coke agrees that the rationale of the decision was that "the ire and passion of the father was continued and there was no time that the law can determine that it was so settled that it shall be adjudged in law malice prepense." *Id.* Coke makes no comment on this, but it is clear that *Royley* goes far beyond the "chance medley" definition of manslaughter fact patterns established by Coke. His failure to comment is, in this light, difficult to understand.

⁵² The precise articulation of an "informational words" doctrine will have to wait, see *infra* notes 150-54 and accompanying text, but it does seem clear that it is the "words" about the incident, and not the incident itself, which is the provocation for the defendant since the defendant never sees the actual incident. Thus, *Royley* is best understood as an "informational words" case, although as usual life is not so simple — the court's report indicates that the boy's nose was bloodied, and was still bleeding when he met his father; it is thus at least arguable that the father in *Royley* did see the incident — or at least its results — in a way which a person being informed of adultery, does not. See *infra* note 141 and accompanying text.

⁵³ 1 Vent. 158, 86 Eng. Rep. 108 (1672); Raym. 212, 83 Eng. Rep. 112 (1672) (where defendant's name was reported as Manning).

⁵⁴ There are two reports of *Maddy's Case*. The report by Lord Raymond is preemptory, and

the *Maddy* court believed that the killing would have been manslaughter except that the time interval and the defendant's declaration demonstrated that the killing was one of vengeance and not done in the heat of passion. Thus, the brief reference indicates that absent evidence of premeditation, a confession — informational words — can be adequate provocation. This conclusion is supported by the fact that *Maddy* cites *Royley* approvingly.

In any event, there is no basis in the early precedent for the doctrine that "no words" will reach the level of provocation. Indeed, in two of the three reported "word" cases, *Royley* and *Williams*, the result was a manslaughter verdict. Even if the "words" doctrine is restricted to "insults," in *Williams*, the case involving the heritage insults, there was a manslaughter verdict. Moreover, it should be noted, in anticipation of later doctrinal developments, that the two insults cases, *Williams* and *Watts*, both involved deadly weapons. The doctrine that insults cannot be provocation might, therefore, be limited, as of the eighteenth century, to instances where a deadly weapon was used. Finally, *Williams* arguably involved a racial epithet, and could be construed as allowing, at least in some circumstances, the mitigation of a killing in response to such an insult. The predicate for any statement about the impact of verbal provocation is so tenuous that the attempt to articulate any "rule" was reckless. Yet, as will be shown, virtually every commentator ventured such an articulation.

2. Adultery

No "rule" of adequate provocation was more firmly entrenched, even by the end of the eighteenth century, than that which proclaimed that a spouse (a husband, of course) who found his wife in bed with a lover, and killed one or both of them, was entitled to a reduction to manslaughter.⁵⁵ Equally entrenched were rules that (1) there had to be

does not include the reference here. The reference is included only in the report by Ventris, 1 Vent. 158, 86 Eng. Rep. 108 (1672). Kaye, *supra* note 28, at 577 n.60, cites one excerpt which seems to suggest that killing the adulterer was murder during the sixteenth century, but the excerpt is unclear as to the circumstances.

⁵⁵ The history of mitigation, or even total exoneration, through justification, of killing paramours, is well-known. In Roman law, the father had a right to kill both his married daughter and her lover if she was found in adultery in either the father's house or in her husband's. The husband had no such right as to his wife. If, however, the husband did kill the adulterer, he was punished less severely than in other cases of homicide. 1 J. STEPHEN, *supra* note 13, at 15-16. Kaye, *supra* note 28, at 577, says that English common law did not follow the Roman rule until *Maddy's Case*. Pollack and Maitland suggest that by the thirteenth century, killing the adulterer was no longer justifiable. F. POLLOCK & F. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD*, vol. II, 484 (2d ed. 1923). This seems to be borne out by a case cited by Green, *Societal Concepts*, *supra* note 29, at 679-80, in which the defendant had found his wife and the deceased in flagrante delicto, at least as reflected by the coroner's indictment. The trial jury, however, so changed the facts that the case became one of self-defense. Although Green uses this case to show that juries often misstated facts so as to protect the defendant from capital punishment and even assure exoneration in cases which would later be called manslaughter, this analysis, if accurate, also suggest that killing an adulterer was, as a matter of legal doctrine, dealt with as murder. Two other cases, at least, suggest the same pattern. In a case before the Eyre of Kent in 1313, a priest was killed by defendant when the priest was found in the defendant's house, allegedly attempting to rape the defendant's wife. The jurors determined it to be self-defense, although a slightly suspicious soul might find the allegation of rape less than convincing. See *Eyre of Kent*, 6 & 7 Edw. II, Year Book Series, vol. V (Selden Soc. 1909). In 1221 there is the report of Richard, who was found slain in the churchyard of Walton, killed by Hubert, who "killed him in Hubert's house because of his

adultery; (2) the reduction applied to no other such sudden shock. Again, however, there is little case law to support either of these restrictions.

The only relevant case in this time period is the 1672 *Maddy* decision.⁵⁶ Again, there are two reports — one by Lord Raymond, and one by Ventris. The reports agree upon two basic facts. First, D discovered his wife and the victim in *flagrante delicto*. Second, there is no indication that D expected to find such a rude shock upon his homecoming. Thereafter, however, the reports differ. Ventris says that the defendant “took up a stool and struck” the deceased on the head; Raymond says that the stool was flung.⁵⁷ The court concluded that this was no more than manslaughter.

More importantly, as already stated, Ventris’s report includes reference to another unreported case in which the defendant, being informed of his wife’s adultery, sought out and killed the paramour after swearing he would do so. It seems clear that in the unreported case, the defendant, seeking out the paramour, has had time to, and can be found by the fact-finder to have deliberated.⁵⁸ Finally, Ventris reports that the *Maddy* court discussed and relied upon *Royley’s Case*. Since the court distinguished the other, nonadultery case on the basis that the defendant in that case acted after cooling down, it seems clear that the *Maddy* court did not seek to establish an “adultery” rule, but rather followed a general standard that killings in “heat of passion” or “on a sudden” were less culpable, whatever the source of the passion or otherwise.

Maddy’s Case is the only reported⁵⁹ adultery case prior to the nineteenth century. Neither it, nor any other case of this time, can support the propositions, well accepted

(Hubert’s) wife Eleanor, who loved the said Richard.” If that love was expressed physically in Hubert’s house, we have the situation presented in *Maddy’s Case*, although we do not know the weapon with which Hubert dispatched Richard. The conclusion is that the killing is murder, but Hubert, who died in the meantime, was granted a posthumous pardon by King John. *Select Pleas of the Crown*, A.D. 1200–1225 vol. I, 85–86 (Selden Soc. 1887).

Mitigation in these circumstances is not unique to Anglo-Saxon law. Adultery is a mitigating factor in the Soviet Union, which has changed its earlier (1920–1930) position that such a killing was done from a base motive. V. CHALDIZE, *CRIMINAL RUSSIA* 100 (1977). Article 324 of the French Code provides that “in cases of adultery, the murder of one’s spouse, as well as of the accessory, at the very moment of discovery in the very act in the matrimonial home, is excusable.” It is also well known that juries often nullify the law as it applies to adultery, and acquit the cuckolded spouse in a large percentage of the cases. See Roberts, *The Unwritten Law*, 10 Ky. L.J. 45, 46 (1921). See also R. TRAVER, *ANATOMY OF A MURDER* (1958).

⁵⁶ 1 Vent. 158, 86 Eng. Rep. 108 (1672); Raym. 212, 83 Eng. Rep. 112 (1672).

⁵⁷ Hale, differing from either of these, (mis)states the weapon as a “staff.” M. HALE, *PLEAS OF THE CROWN* 86 (1678).

⁵⁸ 1 Vent. 158, 86 Eng. Rep. 108 (1672). Ventris also reports that *Maddy’s* jury, in a special verdict, *explicitly* found him not to have any precedent malice.

⁵⁹ NEWGATE, *supra* note 38, gives two examples, with conflicting results. In LOWEN, Volume One, at 62 (1706), a suspicious husband invited his putative cuckold to dinner and killed him. He was convicted of murder. A century later, in GRIFFIN, Volume 5, at 235 (1810), the defendant killed his wife who had been notoriously unfaithful; he was convicted of manslaughter and released after paying “a small fine.”

Intriguingly, in discussing *Maddy’s Case*, the reporters of *Newgate Calendar* also include a second case of adultery, in which the jury apparently acquitted, although there the defendant “a silk-mercator of Ludgate hill,” suspected his wife of adultery and informed her that he would be gone on a business trip. He returned that night, hid in the bedroom closet and, when the wife and lover had begun their activity, “plunged his sword through them both.” The reporters stated: “No jury would take cognizance of the cause of their deaths — Let all adulterers thus perish.”

by 1800, that (1) nothing but adultery can be adequate provocation; (2) suspicion of adultery is insufficient.

B. *The Law as Expounded by the Writers*

These few contradictory cases were the full extent of the precedent as to the necessary and sufficient conditions for provocation. Yet, by the beginning of the nineteenth century, there appeared to be unanimity as to the "rules" of provocation. The imposition of these "rules" or limits on the provocation doctrine resulted from the efforts of the writers, not the courts. It was the treatise writers, Coke, Hale, Hawkins, Foster, and Blackstone, as well as Justice Holt's rambling dicta,⁶⁰ whose views came to be accepted doctrine, although the precedent upon which they leaned would not support them. These writers were articulating the law as they thought it should be, not as it was.⁶¹

The impact of these writers cannot be overemphasized. The possible change in common law doctrine which *might* have occurred with *Royley's* and *Maddy's* cases for example, is stunning. Prior to these cases, at least according to Coke,⁶² manslaughter was essentially a category of offense with the single fact pattern of chance medley — a killing during a fight in which both are armed, and where there was no prior malice on either side.⁶³ Neither *Royley* nor *Maddy* fell within that fact pattern. Yet in both cases, the courts focused on the notion of "suddenness" to find a lesser crime than murder, looking to the *rationale* of "chance medley" — suddenness and "heat of passion" — and expanding that rationale far beyond what Coke, and presumably the prior common law,

⁶⁰ Although the case itself dealt with a relatively narrow issue, Judge Holt's sprawling statement in *R. v. Mawgridge* covered not only the "rules" of manslaughter, but the history of the term "murder" and a number of other superfluous matters. Moreover, the "opinion" was written before the trial, and is really a memorandum of the judges' meeting, prior to the trial, to attempt to agree on what the prior case law as to manslaughter was. See, e.g., *R. v. Oneby*, 2 Ld. Raym. 1485, 92 Eng. Rep. 465 (1727); *R. v. Mawgridge*, Kel. 119, 84 Eng. Rep. 1107 (1707).

⁶¹ Moreover, it seems clear that even these cases do not necessarily reflect the actual leniency with which juries — and possibly courts — acted during this time period. In *Watts*, Noy 171, 74 Eng. Rep. 1129, for example, the jury initially returned a verdict of manslaughter, only to be attainted (a practice which was declared impermissible sixty years later in *Bushell's Case*, 6 Howell's State Trials 999 (London 1816)). NEWGATE, *supra* note 38, also indicates that juries were more lenient than the "law on the books." For example, the authorities contrasted chance medley with a specifically set duel in which the two parties had time to reconsider. See E. COKE, *supra* note 34, at 50; W. HAWKINS, PLEAS OF THE CROWN 81–83 (1721). Yet virtually every report of a duelling case in *Newgate* results in acquittal or a manslaughter verdict. See, e.g., THORNHILL (Volume I, at 85 (1711)) (manslaughter conviction); HAMILTON, *id.*, at 91 (1712). See, however, CLARKE, Volume II 309 (1750), in which the defendant was convicted for murder, but was pardoned. Cf. J. COCKBURN, CALENDAR OF ASSIZE RECORDS, SUSSEX INDICTMENTS, ELIZ. I. 742 (1579) (Case of Richard Daniel — case no. 737). There the jury found that defendant had killed the victim "in a place called Harberon Field, but that the victim had dragged himself into a public street." Without further explanation, the jury returned a manslaughter verdict, and defendant was allowed clergy.

⁶² Much of Coke's discussion of criminal law has been challenged. For example, of his establishment of the felony murder doctrine, E. COKE, *supra* note 34, at 56, Thomas Hobbes once said it "was the common law only of Sir Edmund Coke." T. HOBBS, ENGLISH WORKS, DIALOGUE OF THE COMMON LAW 86, 87 (1681). In most of these cases, Coke was *increasing* the severity of the criminal law, which is of course consistent with his position as Chief Justice of the Star Chamber. Similarly, by limiting manslaughter (and hence lesser criminal liability) to a specific type of case, Coke was refusing to broaden a standard of mitigation.

⁶³ It should be noted, however, that in *Watts*, the jury returned a manslaughter verdict. See *supra* notes 39–41 and accompanying text.

would have allowed. Moreover, the distinction drawn by the court in *Maddy's* case between that situation and the "unreported adultery" case demonstrates that the court believed that the difference was not simply one of establishing another "box" of manslaughter ("discovery of adultery"), but rather went to the core of culpability — the mens rea of malice aforethought as negated by the circumstances of the case.

Thus, at the middle of the seventeenth century, the common law as applied in the courts was open to allowing reductions, or even exonerations, based upon any provocation, assuming that the defendant was in fact acting in the heat of passion. The courts carefully examined the facts to distinguish between killings which had been "planned" (the unreported adultery case) or where there had been pre-existing hatred between the parties (*Watts*) and those where there was no such relationship (*Royley*, *Maddy*, *Williams*). As Donovan and Wildman have observed, "[t]he law of provocation as it stood in the mid eighteenth century . . . turned on the individual accused's state of mind as revealed by all relevant facts and circumstances of the individual case."⁶⁴ As a matter of common sense, of course, it was reasonable, where the "provocation" seemed "slight," as in *Watts*, to inquire more deeply into the matter, to determine whether there was some basis for inferring that the "slight" provocation was only a sham used by the defendant to try to find exoneration. But even in cases of "slight" provocation, the courts appeared to be willing to find verdicts of manslaughter, rather than murder.

Moreover, the courts reached this conclusion even when, as in *Royley*, *Maddy*, and *Williams*, there was no meaningful "chance medley." The courts did not require that the victim use force in either *Williams* or *Maddy* and there is no indication of force used by the victim against the defendant. If the *Maddy* and *Royley* courts had adhered strictly to Coke's statements, and restricted the "heat of passion" defense to true chance medley cases, the verdicts would have been murder. Instead, they chose to focus on "heat of passion" as explaining why the killing was not done with malice. The heat of passion made it impossible for the defendant to consider carefully. Because consideration was essential to premeditated malice, there could be no pre-existing malice, hence no murder.

Notwithstanding this general willingness on the part of the courts to allow mitigation for killings done in passion, the writers constantly restricted the impact of the cases, either because of genuine disagreements with the law, or because of a desire to "classify" the cases. Thus, for example, the "doctrine" that "mere words" will never rise to the level of sufficient provocation is first enunciated by Hale,⁶⁵ who discusses *Watts*, the case involving the murder of the victim after he "gave [the defendant] a wry face."⁶⁶ Hale, however, cites only the Noy version of the opinion, which does not give the extra facts regarding the jury's original verdict or the judge's instruction to the jury.⁶⁷ Perhaps because of this omission, Hale states that "it was no such provocation as would abate the presumption of malice in the party killing."⁶⁸ Yet Hale is more cautious in his other statements as to the "rule." He notes that in at least one case⁶⁹ the judges "agreed" that

⁶⁴ Donovan & Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A.L. REV. 435, 447 (1981). This may be somewhat overstated, but clearly suggests that the major ingredient of provocation was subjective, rather than objective.

⁶⁵ M. HALE, *supra* note 57, at 456.

⁶⁶ Noy 171, 74 Eng. Rep. 1129. See *supra* notes 39–47 and accompanying text.

⁶⁷ See *supra* notes 39–43 and accompanying text.

⁶⁸ M. Hale, *supra* note 57, at 455.

⁶⁹ Bromwich's Case, 1 Lev. 180, 85 Eng. Rep. 358 (1666). Morely and Hastings got into a quarrel, and Morely said, "If we fight at this time, I shall have the disadvantage from the height of

"such words, that is, insults, are not in law such a provocation."⁷⁰ He neither cites nor discusses either *Royley* or *Maddy* with respect to words as provocation.⁷¹

The misstatement as to "mere words," however, really begins with Chief Justice Holt's dictum in *Mawgridge*, where he stated without limitation, that "no words are a provocation [and] no affronting gestures are sufficient . . ."⁷² Making the same mistake that Hale does about *Watts*, Holt fails to discuss *Royley*, the "informational words" case, and then proceeds to "distinguish" *Williams*, involving the racial slur, on dubious grounds.⁷³ However weak Holt's precedent, his view that words could "never" be adequate provocation was later accepted by Hawkins⁷⁴ and Foster,⁷⁵ although both attempt to restrict it to situations where defendant acts without affording the "insulter" time to defend. Neither Hawkins nor Foster cites *Williams* or *Royley*⁷⁶ and by the end of the

the heels of my shoes." So Morely went home, got new shoes, conducted the duel and killed Hastings. Morely was convicted of manslaughter. The better report is the trial of Bromwich, who was Morely's second. 1 Lev. 180, 83 Eng. Rep. 358 (1666). The court in *Bromwich* said that this is murder (i.e., Morely should have no mitigation), because there were mere words that passed at the tavern, and Morely, by taking into account his disadvantage, showed that he was not in the heat of passion. The court so directed the jury. But the jury (as in *Watts*) returned a manslaughter verdict. Since *Bromwich* followed *Bushell's Case*, no attain was possible.

⁷⁰ *Id.*

⁷¹ M. HALE, *supra* note 57, at 456. Hale does discuss one other unreported case, but again the report supports the view that, in fact and possibly in theory as well, the law viewed any provocation as possible grounds for reduction, if not total exoneration. In the unreported case, *V* called *D* a "son of a whore," whereupon *D*, at a distance from *V*, threw a broomstick at her, killing her. The judges were uncertain whether this would constitute murder. They apparently agreed that it would be murder if a deadly weapon had been used, but were so divided that they asked the king to pardon the defendant. This may reflect the requirement of proportionality, discussed *infra* note 86 and accompanying text. But it surely recognizes that words, and even insults, may in fact be sufficient "provocation." The fact pattern, not referred to as a "case," is discussed by the judges of England in a pre-trial session before Morley's Case, Kelyng 54-56, 84 Eng. Rep. 1079, 1080 (1666). There, the judges said that a phrase such as "son of a whore" would not be "such a provocation" as to mitigate to manslaughter — but this is not consistent with Hale's report of the case.

⁷² *R. v. Mawgridge*, Kel. 119, 84 Eng. Rep. 1107, 1112 (1707).

⁷³ In *Williams*, the defendant had been found guilty of manslaughter after throwing a hammer at an insulter. Holt, with a lawyer's eye, notes that the defendant had not been indicted for murder, but only (1) for manslaughter and (2) upon the Statute of Stabbing. He concluded that since there was no possibility of a murder verdict, the case could not stand for the proposition that *Williams* would "only" be guilty of manslaughter even if he had been properly charged. *Id.* Holt's distinction is not necessarily correct, however, because Foster tells us that the typical procedure was to indict for both common law murder and manslaughter covered by the statute. M. FOSTER, *supra* note 34, at 299.

There is one other possibility — that the indictment in such a case would read for "murder," that the defendant be convicted of murder and that, after conviction, the defendant would seek his benefit of clergy, which would be denied pursuant to the statute. But if that were so, Holt's ground of distinction — that the indictment was "only" for manslaughter — would be eliminated. Instead, it would seem that the defendant was indicted for murder, plead manslaughter, was found guilty of manslaughter, and then the prosecution sought to elevate the finding, by denying benefit of clergy. This would then rebut Holt on both grounds — his proffered distinction would be irrelevant, and the case would stand for the proposition that such a killing was indeed manslaughter even though the only provocation was "gestures" because "on the sudden."

⁷⁴ W. HAWKINS, *supra* note 61, at 82 states: "[N]o . . . bare words or gestures, however false or malicious it may be, and aggravated with the most provoking circumstances, will excuse him from being guilty of murder."

⁷⁵ M. FOSTER, *supra* note 34, at 295.

⁷⁶ *Williams* is probably not discussed due to Chief Justice Holt's distinction. See *supra* note 73.

1700's, the courts had uncritically accepted the rule.⁷⁷ Meanwhile, the holding of *Maddy*, that the sight of adultery can reduce the homicide to manslaughter, became a fixed rule that the act must be seen *and* that it is only adultery that will so excite the passions as to allow a reduction.⁷⁸

Finally, the doctrine of chance medley suffered mid-course alteration. Judge Holt, in the *Mawgridge* decision, having narrowed the other bases for provocation, also announced the view that any battery, no matter how minor, would be adequate provocation. He stated: "[i]f one man upon angry words shall make an assault upon another, either by pulling him by the nose, or filliping upon the forehead . . . the peace is broken by the person killed, and with an *indignity* to him that received the assault."⁷⁹ This rule that any battery could be adequate provocation is supported in part by Hale, who declares that any jostling is sufficient to reduce the crime to manslaughter.⁸⁰ Once again, the subsequent writers follow this dictum without exploration.⁸¹

Thus, the courts, deciding cases on an ad hoc basis, without any articulated theory, indicated that any killing done "on a sudden" or without full control, would be at least eligible for a manslaughter reduction. The writers, on the other hand, refused to recognize the nuances of these decisions. They imposed such rules as words alone could never be sufficient provocation and adultery could be sufficient provocation only if seen. As the nineteenth century approached, the writers almost unilaterally imposed upon the criminal law the view that rigid categories characterized the manslaughter verdict.

II. 1800-1950: APATHY AND OBJECTIFICATION

A. A Quick Review

For the next century and a half, with two major exceptions,⁸² there were no significant changes in the basic doctrines of the law of manslaughter and provocation. Some

Foster is the first writer to note the paradox, or limitation, upon the doctrine of "insult." Thus, he says, the rule "will not hold in cases where from words or actions of reproach or contempt, or indeed upon any other sudden provocation, the parties come to blows, *no undue advantage being sought or taken on either side.*" *M. Foster, supra* note 34, at 295. In short, insults are provocation, even where a deadly weapon is involved, so long as there is no evidence of pre-existing malice (as demonstrated by one party taking "undue advantage" such as by using a deadly weapon before the other party has drawn). Although Hale had suggested this distinction, Foster puts it most plainly.

⁷⁷ See, e.g., *Pennsylvania v. Bell*, Addison 156, 162, 1 Am. Dec. 298, 304 (1793). "[T]he law will not suffer, with impunity, a man to become so angry, for mere words or gestures of contumely, as, in his rage, to kill a man." *Id.* Of course, a defendant pleading provocation is not seeking total exculpation, but merely mitigation, a point lost on the *Bell* court and many other jurists and writers.

⁷⁸ See 4 W. BLACKSTONE, *supra* note 34, at 192. Blackstone summarizes the view: "Manslaughter therefore on a sudden provocation differs from excusable *homicide se defendo* in this: that in one case there is an apparent necessity . . . in the other no necessity at all being only a sudden act of revenge." *Id.*

⁷⁹ *R. v. Mawgridge*, Kel. 119, 84 Eng. Rep. 1107, 1114 (1707) (emphasis added).

⁸⁰ Hale, however, cites only one authority, Lanure's Case, 17 Car. 1, cited in M. HALE, *supra* note 57, at 456. This authority is at least arguably off point, since the "battery" there actually threatened *D's* life.

⁸¹ W. HAWKINS, *supra* note 61, at 98; 4 W. BLACKSTONE, *supra* note 34, at 191. NEWGATE Vol. II, *supra* note 38, at 269, reports the case of Seymour, in 1749, who was convicted of murder although the victim struck him on the face.

⁸² The development of the reasonable man test is discussed *infra* note 193 and accompanying text, and the notion of proportionality, is discussed *infra* note 86 and accompanying text.

courts continued to allow broader mitigations than would have been anticipated simply by reading the treatises. These treatises, while usually accurate in summarizing the *language* of the courts, (1) failed to critique seriously the conflicting decisions, contenting themselves with simply listing them, or (2) relied on dictum to perpetuate the earlier announced rules, or (3) certainly did not seriously scrutinize the writings of Blackstone, Hale, and others to determine the accuracy of their statements and citations.

This failure by the writers to critique the previous doctrines, and their apparent eagerness to explain the law by simplifying it, led to a willingness to ignore the subtleties of the cases and to pigeonhole them into narrow categories. This continuous objectification of the rules of provocation pushed the criminal law's previous focus on the subjective mental state of the actor further into the background. Indeed, by the end of the century a number of courts had sent the actual defendant off-stage and instructed the jury that they were to consider not merely, or even primarily, whether the defendant had in fact "killed in a heat of passion," but whether the reasonable person, the average man, would have been similarly outraged. Although the courts and writers had a symbiotic effect upon each other, it is the writers, rather than the judiciary, which is primarily to blame for this occurrence.

Two writers — East and Russell — are primarily responsible for the "proportionality" doctrine, which refused even to consider whether the defendant was in fact "out of control" unless the "provoking" act somehow "required" the use of deadly force. Similarly, while the courts in both this country and England were in fact allowing juries to return manslaughter verdicts when the defendant had been provoked by words, either insults or informational, the writers continued to echo the doctrine that words never could be legal provocation. To support this, they either ignored or, in some cases grossly distorted, the contrary cases. Similar distortions occurred in the areas of the "reasonable person" doctrine, and the view that the issue of "cooling off" time was exclusively one of law, rather than of fact for the jury.⁸³

Singly, these lapses, or misreadings, might have been relatively harmless. But in combination they induced many courts to believe that the doctrine of provocation was indeed only objective in nature, and that the actual mental state of the actor was essentially irrelevant to the proper inquiry. In the long run, these simplifications and misstatements of the law became the law. By the middle of the twentieth century, it was widely accepted that the actual defendant was a *persona non grata* at a criminal trial where provocation was raised as a mitigation.

B. *Proportionality*

The first of the two new doctrines regarding provocation that developed during this time was the notion of proportionality. This doctrine, which was added to existing "rules," required that the force used by the defendant be "proportionate" to the provocation generated by the victim.

The doctrine is highly objective. It declares that regardless of the defendant's actual mental state, and regardless whether he could have entertained malice aforethought,⁸⁴ he will be precluded from arguing that he lacked such malice aforethought — and will

⁸³ This was supported by Bishop until his eighth edition, where he suddenly reversed his position without explanation.

⁸⁴ Even malice aforethought in its more modern meaning.

therefore be found guilty of murder — unless, in anger, he used a weapon which in some metaphysical sense is “proportionate” to the provocation. This first step toward ignoring the defendant’s actual mental state arrives early in the nineteenth century and is essentially the product of two writers — East and Russell.

At the outset of the nineteenth century there was mild acceptance of Lord Holt’s dictum in *Mawgridge* that any offensive battery, including even a tweaking on the nose, would be sufficient provocation. For example, the North Carolina court in the 1820 case of *State v. Tackett* observed:

If it amounts to a breach of the peace, and offer an indignity to the person receiving it, it is generally conceded, that it will extenuate the homicide to manslaughter, although a deadly weapon be used.⁸⁵

East, the first writer to question the “any assault” doctrine, argued that not “any trivial provocation . . . will of course reduce the crime . . . to manslaughter”⁸⁶ Twenty years later, Russell repeated this restrictive view, never acknowledging its dissonance with the cases:

It seems therefore that it may be laid down that, in all cases of slight provocation, if it may be reasonably collected from the weapon made use of, or from any other circumstance, the party intended to kill, or to do some great bodily harm such homicide will be murder.

Even a blow will not be considered as sufficient provocation to extenuate where the revenge is disproportioned to the injury⁸⁷

⁸⁵ 8 N.C. 171, 179 (1820). In Foster’s report of the case of Sir John Strange, where *V* hit *D* on the nose with a cane, whereupon *D* stabbed *V* nine times. The court held that this constituted manslaughter. M. FOSTER, *supra* note 38, at 293. Accord *State v. Johnson*, 23 N.C. 279, 281 (1840) (use of gun by defendant after, according to defense witnesses’ testimony, deceased dragged him downstairs would not preclude verdict of manslaughter had that testimony been believed); *State v. Yarbrough*, 1 N.C. 67, 72–73 (1820) (use of knife after victim struck defendant with fist would have been manslaughter and not murder had victim died). See also *R. v. Snow*, 1 Leach 15 (1776); *R. v. Rankin*, R & R 43 (1803); *R. v. Smith*, 8 C & P. 160 (1837). In *Ayes R & R* 166, (1810), defendant stomped to death a stranger who had only hit him with his fist. The jury returned a murder verdict, but the conviction was reduced by the court to manslaughter. On the other hand, in *Steadman’s case*, reported by M. FOSTER, *supra* note 34, at 292, and 1 E. EAST, *supra* note 48, at 234, the court, in dictum, said that the use of a deadly weapon after a mere box on the ears might be murder, but facts proved at trial suggested that the victim had used much more force than a mere box on the ears.

⁸⁶ E. EAST, *supra* note 48, at 234, 239. Note also that M. FOSTER, *supra* note 34, at 294, explained *Royley’s case*, as essentially one of unhappy consequences of a proportionate, but illegal, response. The views of East and others are carefully reviewed in Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, who concludes that the proportionality doctrine was concocted by East, and never reflected the law.

⁸⁷ W. RUSSELL, *supra* note 43, at 639, 702. By the 1950 edition, the view seems to have been tempered. In that edition, the view is proffered that the proportionality of the response may give real indication of the mental state of the defendant, although it is difficult to understand the proposition.

The mode or weapon adopted in response to the provocation are mentioned for the assistance which they can give for reaching the critical decision on the fundamental question as to the impulse which prompted the particular response; was it (a) a sudden surge of ungovernable fury which the frailty of human nature could not be expected to withstand or was it (b) a voluntary satisfaction of a wicked desire?

W. RUSSELL, *supra* note 43, at 566 (J. W. Cecil Turner, 10th ed. 1958).

Neither the court nor the writers appeared to realize that a requirement of proportionality can only be rationally applied where the provocation is physical force: chance medleys. The proportionality requirement is inconsistent with the notion that discovery of adultery can be a sufficient provocation, and clearly determines that words, whether insulting or informational, can never as a matter of law be sufficient provocation, no matter how angered or outraged the defendant has become.⁸⁸ On the other hand, the refusal to allow the provocation reduction where the defendant uses a deadly weapon is easily reconciled with the general "presumption of intent" generated by the use of a deadly weapon.⁸⁹

For example, Russell cites, as an instance of the proportionality rule, *Hazel's case*,⁹⁰ in which the defendant, upset with the speed and manner in which her ten-year-old stepdaughter was doing her chores, threw a stool at her, which killed her. The court quickly found that there was no intent to kill; nevertheless, the matter was considered of such great difficulty, that the court simply never entered an opinion.⁹¹ The judges were perplexed because, as a general matter, the victim's conduct could not be considered provocation, while the defendant's acts, under the notion of malice which had emerged in the late eighteenth century, clearly qualified as murder.⁹² Yet unless only physical

⁸⁸ *But see* *Rex v. Conner*, 7 Car. & P 438, 173 Eng. Rep. 194 (1835). In those jurisdictions where words can be adequate provocation, the use of deadly force does not automatically preclude a manslaughter verdict. *See, e.g., Rex v. McLean*, 1 D.C.R. 844 (1947). *But see* the discussion in *Pennsylvania v. Bell*, Add. 138, 145, 1 Amer. Dec. 298, 304 (Pa. 1793), where the court, distinguishing between allowing mere words as a provocation and even the most "trivial" assault, said:

[t]here would be no freedom of censure or irony, if you must, at the peril of your life, first measure the degree of another's patience. The law then says, while you touch not the person of another, death shall avenge the taking away of your life. When you assault the person of another, you shall risk your own. Abstain from violence, and the law guards you. If you employ violence, you must hazard its being employed against you.

Id.

⁸⁹ *See Oberer, supra* note 48.

⁹⁰ 1 Leach 368, 168 Eng. Rep. 287 (1785) cited in W. RUSSELL, *supra* note 43, at 637. The case, however, stands for no real proposition at all, except the ingenuity of defendant's lawyer. The jury returned a special verdict, finding the facts. Essentially, the facts were that the defendant had thrown a four-legged stool toward the deceased, her ten-year-old stepdaughter, after the latter had improperly reeled some yarn. The stepdaughter was hurt, but apparently not seriously. Half an hour later, however, she fell to the ground. She later died. The charge was murder, but defense counsel clearly argued that the wording of the special verdict was so ambiguous that no conclusion could be reached as to the defendant's liability. First, he argued that the stool was so light as not to be likely to cause serious injury or death. He also argued that finding that the stool was thrown "at" the girl might mean solely that it was thrown "toward" her, which could be consistent with the notion that the defendant was not aiming at the girl, but merely "gave" her the stool to sit on while she re-reeled the yarn. Moreover, said counsel, the jury's finding that the defendant died from the "blow" could refer to the blow from the stool or the blow from hitting the ground. The verdict was ambiguous. If that interpretation was correct, said counsel, then there was no felony at all, much less murder. The court, finding that "great matter of doubt having arisen from the wording of the special verdict," adjourned the matter, and the report is that no decision was ever reached, the defendant receiving the king's pardon in the interim. Aside from being a marvelous instance of advocacy, *Hazel* can really stand for no proposition.

⁹¹ W. RUSSELL, *supra* note 43, at 637-38.

⁹² By the beginning of the nineteenth century, "malice aforethought" had ceased to require either malice (spite) or aforethought, and could be met by a high degree of recklessness ("depraved

blows could be provocation, it would appear that the defendant in *Hazel* was in fact outraged and used nondeadly force. The difficulties encountered by the *Hazel* court suggest both that it was willing to consider some conduct other than fights or adultery as engendering heat of passion and that it was reluctant to so hold. East's and Russell's explanations of *Hazel*, while establishing the notion of proportionality, entirely omitted the fact that the court could reach no conclusion.

While unnoticed by courts and writers, the most insidious aspect of the proportionality doctrine was that it shifted the jury's focus from the mental state of the defendant to the act of the victim. The law's concern with mens rea was replaced by some inarticulate notion of quasi-justification.⁹³ This objectification may have made it easier for the courts to accept other aspects of objectification of the law of manslaughter.

The striking aspect of this discussion is the failure of any of the writers to examine the proportionality doctrine or to question its compatibility with any underlying theory of heat of passion killings. In fact, commentators and jurists who searched for authority for the doctrine were hard pressed to find any. For example, Glanville Williams has argued⁹⁴ that there was no proportionality doctrine under either the early or late common law. In addition, Lord Diplock, who ultimately jettisoned most objective restrictions on provocation, had to cite a 1942 case as an authoritative decision accepting the doctrine.⁹⁵ Nevertheless, the nineteenth century writers, who had established the doctrine whole cloth, treated the doctrine as having been long established.⁹⁶

C. "Mere Words"

The doctrine that "mere words" could not be adequate provocation was based on a tenuous reading of a few early cases.⁹⁷ Yet, well-founded or not, the notion was carelessly repeated first by the nineteenth century commentators and later by the courts without much concern for the niceties of distinctions and precedents.

Typical of the comments of the courts during this time, a South Carolina court in 1890 stated: "[i]t was in this connection that the jury were instructed, correctly as we think, that provocation by words only, no matter how opprobrious, would not be sufficient."⁹⁸ Similarly, a California court declared: "[n]o words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide with a deadly weapon from murder to manslaughter."⁹⁹ Consequently, insults such as "damned

mind"). The defendant in *Hazel* could be said to have a disregard of the victim's life, but not to have borne her any spite or malice.

⁹³ See *infra* note 317 and accompanying text.

⁹⁴ Williams, *supra* note 86, at 744-45.

⁹⁵ 2 W.L.R. 269, 285 (1978). See *infra* note 239 and accompanying text.

⁹⁶ For representative cites, see W. RUSSELL, *supra* note 43, 1st ed., at 635-39; 702-06; 2d ed., at 514-18; 4th ed. (1845) at 583, 591; 7th ed. (1877) at 713-15; F. WHARTON, CRIMINAL LAW 368, 372 (2d ed. 1852). American courts never formally adopted the doctrine, Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIM. 421, 430 (1982), although it sometimes appears in the cases.

⁹⁷ See *supra* notes 39-54 and accompanying text.

⁹⁸ *State v. Levelle*, 34 S.C. 120, 129, 13 S.E. 319, 320 (1890).

⁹⁹ *People v. Murback*, 64 Cal. 369, 370 (1883). *Accord* *Bird v. State*, 55 Ga. 317, 318 (1875) (victim scoffed at defendant). See also *People v. Turley*, 50 Cal. 469, 471 (1875); *State v. Carter*, 76 N.C. 20, 21 (1877).

liar,"¹⁰⁰ "son of a bitch,"¹⁰¹ or even "black sons of bitches,"¹⁰² were held to be legally insufficient provocation. A number of jurisdictions even codified the rule. Georgia's statute, for example, declared, "provocation by words, threats, menaces or contemptuous gestures shall in no case be sufficient to free the person killing from the guilt and crime of murder."¹⁰³

Cemented to the phraseology, rather than to the purpose, of the doctrine, the courts followed it even in extreme fact patterns. A classic example is the 1912 Tennessee case of *Freddo v. State*,¹⁰⁴ which involved an appeal from a murder conviction. The defendant in *Freddo* was described as a "quiet, peaceable, high-minded young man" who had been raised to abhor profanity. A co-worker, knowing of the defendant's sensitivity to profanity, taunted him daily and deliberately called him a "son of a bitch" to provoke him. This provocation resulted in the defendant's killing of the co-worker. Although concluding that the defendant actually killed in the heat of passion, the Tennessee Supreme Court affirmed the verdict of the lower court, stating that:

The rule in this State is, as it was at common law, that the law regards no mere epithet or language, however violent or offensive, as sufficient provocation for taking life While the testimony indicates that the plaintiff in error was particularly sensitive in respect of the use by another, as applied to him, of the opprobrious epithet used by deceased, yet we believe the rule to be firmly fixed . . . that the law proceeds in testing the adequacy of the provocation upon the based of a mind ordinarily constituted¹⁰⁵

Some courts, however, adhered to a subjective approach. For example, in *Wilson v. People*, the court declared that "[i]t is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and it matters not whether this state is produced by acts or words."¹⁰⁶ Similarly, in *Regina v. Smith*,¹⁰⁷ defendant killed his wife

¹⁰⁰ *Taylor v. State*, 48 Ala. 180, 185 (1872) ("damned liar"); *Turner v. State*, 89 Tenn. 547, 551, 15 S.W. 838, 842 (1891) (same).

¹⁰¹ *State v. Williams*, 46 La. Ann. 709, 710, 15 So. 82, 83 (1894).

¹⁰² *State v. Martin*, 124 Mo. 514, 519, 28 S.W. 12, 13 (1894).

¹⁰³ *Jackson v. State*, 45 Ga. 198, 200 (1872) (quoting LA. REV. CIV. CODE § 4259). See also *Ross v. State*, 59 Ga. 248 (1877). On the other hand, Texas legislated that insulting words about a female relative were sufficient provocation. In *Levy v. State*, 28 Tex. Crim. 203, 209 (1889), the court faced the delicate determination of whether an insult that the defendant was a "son of a bitch" implicitly carried an insult about his mother, so that the statute applied. The court concluded that the term would not qualify under the statute. *Id.* at 210-11. Presumably the statute would apply had the victim said the defendant's mother was a whore, rather than leaving the defendant to infer that meaning from the victim's words.

¹⁰⁴ 127 Tenn. 376, 155 S.W. 170 (1912).

¹⁰⁵ *Id.* at 382-83, 155 S.W. at 172 (citations omitted).

¹⁰⁶ 4 Parker Cr. Rep. 619, 641-48 (N.Y. 1859).

¹⁰⁷ 4 Fost & F 1066 (1866), 176 Eng. Rep. 910. *Accord* *Preston v. State*, 225 Miss. 383 (1853); *Miller v. State*, 37 Ind. 432 (1871). See also *Seals v. State*, 62 Tenn. 459, 466 (1874), where the Supreme Court of Tennessee reversed a second degree murder conviction on the ground that the trial court erred in declaring that words, no matter how obscene, could never amount to adequate provocation. A strange amalgam is *Reeves v. State*, 186 Ala. 14, 18-20, 65 So. 160, 161-62 (1914). Reeves had gone to a dance with his wife. While there, he was informed that the deceased had said, earlier in the day, that he would either have intercourse with D's wife, or kill D. Ten minutes later, V gave D's wife a note, which she refused to hand over to D. At that point, V said, "I don't care. Show it to him. If he raises up, I will kill him." V then put his hand on his back pocket. D stabbed V. It was held that the court erroneously precluded the jury from considering manslaughter based on sudden passion.

after she repeatedly taunted him by repeating her preference for her lover. The jury was charged that if they found the wife had assaulted the defendant, an assault not amounting to a battery attended by words may become sufficient provocation.

There is no way, of course, to know the general practice in trial courts during this time period. Yet it is surely interesting that in virtually every reported case where the "words" doctrine was raised, it appears the trial court admitted the evidence as to the insults, resulting in clear contradiction of the doctrine that the evidence was legally insufficient and therefore inadmissible. For example, in *Willis v. State*,¹⁰⁸ the defendant's sister had been married to the victim. When the sister died, defendant read her diary, which said that her husband had given her venereal disease and attempted to kill her by making her swallow rat poison. Some time thereafter the defendant met and killed her husband, the victim. The trial court excluded evidence of the diary. The appellate court overruled the lower court's decision because the defendant had killed the victim on their first meeting after his reading of the diary. Moreover, there was some evidence that the brother-in-law had said that he knew what was in the diary, and dared the defendant to act on it. Indeed, in *Freddo* itself, the insults, and evidence relating to the defendant's sensitivity to profanity, were admitted in contravention of the rule that words were legally insufficient provocation and therefore inadmissible.

A more careful analysis would have revealed the "rule," even when applied in its pristine form, actually was that *insulting* words would not have a reductive effect *where a deadly weapon was used*.¹⁰⁹ This of course, would have required a metaphysical leap to the proposition that the use of nondeadly force could be "proportionate" to a provocative set of words, but it would also have recognized that some people, otherwise quite rational and law abiding, become uncontrollably outraged when subjected to certain kinds of insults.

The commentators, however, were tepid. Bishop, for example, blandly declared in his second edition that "no words, however provoking or insulting, will so far justify a blow returned, though in actual passion, as to reduce the killing to the lower degree."¹¹⁰

¹⁰⁸ *Willis v. State*, 75 S.W. 790 (1903). See also *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929) (rape of wife); *Toler v. State*, 152 Tenn. 1, 260 S.W. 134 (1924) (rape of daughter).

¹⁰⁹ See, e.g., *State v. Judge*, 208 S.C. 497, 504, 38 S.E.2d 715, 719 (1946); *State v. Gilliam*, 66 S.C. 419, 421, 45 S.E. 6, 7 (1903); *State v. Davis*, 50 S.C. 405, 424, 27 S.E. 905, 912 (1897); *State v. Levelle*, 34 S.C. 120, 129, 13 S.E. 319, 320 (1890). An annotation in 2 A.L.R.3d 1278 (1962), collecting some of the cases, also fails to make this distinction. Yet analysis of the cases cited there reveals that a deadly weapon was used, and that in the one case where the defendant used his fists, the court refused to apply the "mere insults" doctrine. *Collum v. State*, 65 Ga. App. 740, 742, 16 S.E.2d 483, 484 (1941). Not infrequently, the courts strained to find other methods to alleviate the harsh rules of manslaughter rather than change the rules themselves. A classic case is *Short v. State*, 15 Tenn. 510 (1835). Defendant, obviously irate over being called a "God damned liar," struck the deceased. After researching the rule that words alone would not be adequate provocation, at least where a deadly weapon was used, the court looked to the special verdict of the jury, which declared that at the time of the insult, the defendant had a "heavy rifle in his hands." After the insults, the defendant according to the special verdict, "walked to the deceased slowly" and then "instantly struck the deceased two violent blows." *Id.* at 511. The court declared that the special verdict was "unclear" as to whether the two violent blows had been struck with the rifle, or some other "non-deadly" weapon. Therefore, in light of the newly created ambiguity, the "no words" rule did not apply, and the murder conviction set aside. Moreover, to avoid the possibility of a retrial with a more clearly worded verdict that would preclude semantic machinations, the court simply announced a manslaughter verdict.

¹¹⁰ II J. BISHOP, COMMENTARIES ON CRIMINAL LAW § 636 (2d ed. 1852).

In a later passage, almost as an afterthought, he suggests that "the books" (unspecified) maintain two qualifications of this "general doctrine." The relevant qualification here is that the rule does not apply when one seeks to "chastise" the victim with a nondeadly weapon. This phrasing surely reflects that Bishop did not support the "exception." Moreover, it suggests that "chastisement," rather than mere anger or vengeance, was the goal of the defendant — perhaps in a master-servant or teacher-student relationship. Bishop's eighth edition finally recognizes that slaying by use of a nondeadly weapon in response to verbal insults may constitute manslaughter rather than murder.¹¹¹

Wharton is similarly noncommittal. Thus, in his second edition, while recognizing "the rule that words of reproach or indecent provoking actions, or gestures of contempt will not free the party killing from the guilt of murder, without an assault upon the person," he suggests a narrow exception that the rule is inapplicable "in cases, where from such words or gestures, . . . the parties come to blows, no undue advantage being sought or taken on either side."¹¹² By the seventh edition in 1874, the rule is restated as: "Words of reproach, how grievous so ever, are not provocation sufficient to free the party killing from the guilt of murder; nor are indecent provoking actions or gestures expressive of contempt or reproach without an assault upon the person."¹¹³

This tension between the courts, which were split on the words doctrine, and the writers, who did not acknowledge this split, but opted instead for the more simplistic and "rule-bound" approach, is more readily observed in "informational words" cases. As already seen,¹¹⁴ in two cases prior to 1800 — *Royley* and the unreported adultery case mentioned in *Maddy* — the courts were willing to recognize informational words as potentially sufficient provocation. This trend accelerated in the 1800's, although there was no uniformity of development. Again, however, the writers effectively ignored the entire issue.

The most intriguing early decision was an 1837 English case, *Regina v. Fisher*.¹¹⁵ In *Fisher*, defendant was informed by his fifteen-year-old son that the victim, Randall, had sodomized him. The next day, the defendant actively sought out Randall and, within two minutes of finding him, stabbed him to death. Although the case might have been decided on the basis of "cooling off,"¹¹⁶ Justice Park instead determined, "in the hearing of two very learned persons," that there was inadequate provocation as a matter of law, and so instructed the jury.

Fisher is both easier and more difficult than *Royley*. The victim's act against the son was worse in *Fisher*, and almost certainly would have been sufficient provocation, by analogy to *Maddy's* case, had the defendant actually seen the crime being committed.¹¹⁷ On the other hand, the father acted immediately in *Royley*, while *Fisher* waited until the

¹¹¹ *Id.* § 704 (9th ed. 1892).

¹¹² F. WHARTON, *supra* note 96, at 373.

¹¹³ *Id.* at 38 (7th ed. 1874).

¹¹⁴ See *supra* notes 49–54 and accompanying text.

¹¹⁵ 8 Car. & P 182, 173 Eng. Rep. 452 (1837). This similarity between *Fisher* and *Royley*, 2 Cro. 296, 79 Eng. Rep. 254 (1666), decided almost two centuries earlier, is striking.

¹¹⁶ See *infra* notes 153–92 and accompanying text.

¹¹⁷ Indeed, Judge Park himself so suggests, saying that he would have reserved such a case for the entire court. Oddly, Lord Diplock in the recent case of *R. v. Camplin*, 2 W.L.R. 269, 285 (1978), described *Fisher* as a case of a father killing someone "discovered" committing sodomy on his son. While it is possible that Diplock meant to suggest that "discovery" meant "learning" this seems to stretch the point too much.

next day so that the defendant might have been found — even as a matter of law — to have cooled off. Justice Park, however, did not take that tack, but instead precluded the jury from even considering the issue of sufficient provocation.

It is at this point that *Fisher* becomes weak precedent. Having been instructed by Justice Park that there was insufficient legal provocation, the jury is reported to have ignored these instructions and returned a verdict "of manslaughter, and recommended him to mercy . . ." ¹¹⁸ Because the jury returned this manslaughter verdict, the case cannot stand for the proposition that informational words are insufficient provocation. Technically, then, the instructions by Justice Park are dicta. Still, they reflect the view held by some courts in the middle of the nineteenth century that informational words concerning an act which, if actually witnessed, would qualify as adequate provocation, were insufficient to qualify as adequate provocation if not witnessed. ¹¹⁹

Other cases of informational words had mixed results. In an 1898 case before the Missouri Supreme Court, the defendant father, informed that the victim had had sexual relations with the defendant's minor daughter, explicitly sought the victim out. ¹²⁰ When the victim taunted "I'll do as I damn well please about it," defendant killed him. Of the doctrine that words could never be provocation, Judge Sherwood acknowledged that "I have often uttered this platitude myself," but then opined that "the statement is subject to many qualifications," ¹²¹ and reversed a second degree murder conviction, holding that the defendant should have been allowed to proffer the evidence of words.

¹¹⁸ 8 Car. & P. at 186, 173 Eng. Rep. at 454.

¹¹⁹ Very similar to these two cases is *M'Whirt's Case* 44 Va. (3 Gratt.) 594, 597-600 (1846). Defendant was told by his son that *V* had beaten him. The next day, *D* went about his normal business, but accidentally ran into *V*. He did not attack *V*, but pursued him, somewhat casually, for a while; then there was a challenge and finally *D* beat *V* to death using his fists and feet. The court stated:

Admitting the full force the provocation gave to the father by the beating of the son, had there been no cooling time during the repose of the night? Was there no opportunity during the labors and occupations of the following day, for reason to resume her sway in allaying his paternal resentment? If the law could protect its indulgence for the frailties of human temper, notwithstanding these intervening opportunities of cooling, it would seem impossible to say when that state of the feelings, amounting to revenge or other malevolence, which is indicative of express malice, shall begin.

Id. at 609. Even so, the court was not quite persuaded. Only because the father bided his time after spying the assaulter was the court sure that this case was one of murder and not manslaughter. *Id.* at 610. Even then, the court was content to leave this as a jury issue, rather than a question of law.

¹²⁰ *State v. Grugin*, 147 Mo. 39, 57, 47 S.W. 1058, 1064 (1898).

¹²¹ *Id.* The Florida Supreme Court also found adequate provocation in informational words suggesting improper sexual contact. In *Whidden v. State*, 64 Fla. 165, 167-68, 59 So. 561-62 (1912), *D*'s wife informed him that two days earlier *V* had sexually assaulted her. The court held that the question of manslaughter was proper for the jury. In *Haddock v. State*, 129 Fla. 701, 176 So. 782 (1937), defendant was informed by a third party that his younger daughter had been having consensual relationships with the deceased. *D* went to his own home, then to *V*'s house, and killed *V*. Again the court held that the question of manslaughter was for the jury. In *Haddock* the court said:

It is not so much a question of whether or not the chastity of the daughter . . . had been actually violated . . . but whether the knowledge, information and belief of this fact or facts was in the mind of the defendant . . . [w]e are required to stand in the shoes of this defendant some few minutes prior to firing the fatal shot, and have all information then known to him and his daughter and her relation to the deceased,

Although many courts continued to say that words could never constitute adequate provocation, the "informational words" exception was so well established that a 1913 student comment in the *Harvard Law Review* could declare that "[w]ords which . . . are a mere vehicle to convey intelligence of the fact which actuates the crime were not included in the original rule [of *Mawgridge*, that no words could be adequate provocation]."¹²² An English court in that same year declared that "[i]t would, perhaps, have been more accurate, in view of modern decisions, if [the trial court] had said that words cannot constitute provocation except in very special circumstances."¹²³ The informational words exception has continued to this day,¹²⁴ and has been particularly eclectic where the words confess adultery.¹²⁵

and let the jury determine from the evidence if the defendant was at the time overwhelmed with anger and did or did not possess such mental capacity to be legally responsible for the act committed.

Id. at 785. *Accord* *People v. Rice*, 351 Ill. 604, 184 N.E. 894 (1933) (defendant was informed that *V* had hit *D*'s eight-year-old girl); *Green v. Commonwealth*, 17 Ky. 943, 33 S.W. 100 (1895) (evidence that defendant, shortly before killing *W*, was informed that she was an adulteress held admissible); *Cheek v. State*, 35 Ind. 492, 494 (1871) (evidence that defendant recently learned that victim and another had conspired to convince *D*'s wife to elope was admissible); *Fisher v. People*, 23 Ill. 218 (1860) (jury instructions regarding defendant's state of mind admissible). *Contra* *People v. Hurtado*, 63 Cal. 288 (1883); *State v. Rash*, 34 N.C. (12 Ired.) 357 (1851).

¹²² Note, *Homicide — Defenses — Provocation — Illicit Intercourse of Betrothed*, 27 HARV. L. REV. 89, 90 (1913).

¹²³ *R v. Palmer*, 2 K.B. 29, 30–31 (1913).

¹²⁴ *Haley v. State*, 123 Miss. 87, 103–04, 85 So. 129, 131 (1900) (confession of adultery can arouse passion and bring homicide within statute); *Elsmore v. State*, 132 Tex. Crim. App. 261, 104 S.W.2d 493 (1937) (relying on statutory interpretation); *H.M. Advoc. v. Delaney*, 1945 J.C. 138 (both involving confessions of adultery); *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958) (confessions of infidelity and goading by victim); *Commonwealth v. Berry*, 461 Pa. 233, 336 A.2d 262 (1975) (mother informed *D* that *V* had just struck her to ground); *People v. Berry*, 18 Cal. 3d 509, 515, 556 P.2d 777, 780, 134 Cal. Rptr. 415, 418 (1976) (verbal provocation sufficient to require instruction on manslaughter). In *Campbell v. Commonwealth*, 88 Ky. 402, 406–07, 11 S.W. 290, 291–92 (1889), a father was informed that his daughter was beaten and abused by her husband. He seized a pistol and went three miles distant to his daughter's home, and found her and her children in the street, driven from the home. After some words had passed between him and his son-in-law, the father killed his son-in-law. These informational words were held sufficient to reduce the charge of murder to manslaughter, and the case was properly given to the jury. *Id.* at 407–08, 11 S.W. at 292; *see also* *Campbell v. State*, 204 Ga. 399, 49 S.E.2d 867 (1948); *People v. Rice*, 351 Ill. 604, 184 N.E. 894 (1933); *People v. Curwick*, 33 Ill. App. 3d 757, 338 N.E.2d 468 (1975); *Commonwealth v. Bermudez*, 370 Mass. 438, 348 N.E.2d 802 (1978); *State v. Martin*, 216 S.C. 129, 57 S.E.2d 55 (1949); *see generally* Annot., 10 A.L.R. 470 (1921).

¹²⁵ The courts also seemed to carve out an exception to the general rule when there was a confession of adultery. *See, e.g., R v. Rothwell*, 12 Cox. C.C. 145 (1871); *R v. Jones*, 72 J.P. 215 (1908). *Cf. In re Smith*, 4 F&F 1066, 176 Eng. Rep. 910 (1866). The court in *King v. Palmer*, 2 K.B. 29 (1913), held that where the parties were only engaged, there could not, as a matter of law, be provocation. But the court gave no real reason, saying only "[b]ut here the relation between the parties were not that of husband and wife, nor was it a case of unmarried persons living together as husband and wife." *Id.* at 31 (emphasis added). But in that same year, under those hypothetical facts, the confession doctrine was still held inapplicable. *R v. Greening*, K.B. 846 (1913). However, in 1946, the House of Lords clearly rejected those precedents, holding that a confession of adultery could never be adequate legal provocation. *Holmes v. Dir. of Pub. Pros.*, 1946 A.C. 588. *Holmes* is even more surprising because in the five years before that decision two Scottish cases had decided that confessions of adultery would be sufficient provocation. *H.M. Advocate v. Hill*, 1941 J.C. 59

The writers generally failed to reflect the flux in the situation. Wharton, for example, does not cite *Fisher* at all,¹²⁶ and cites *Rothwell*, an English decision allowing reduction on the basis of a confession of adultery, only with a note that the case establishes a "qualification" on the general doctrine that words are insufficient. He does not even articulate what the "qualification" is.¹²⁷ There is no recognition of informational words as a potential categorical exception to the generally received dogma, much less as reflecting an even greater concern with the defendant's subjective mental state. Moreover, at least half of the cases cited by Wharton for the ironclad rule that words cannot be adequate provocation recited the rule in dictum, or were so completely off point as to be irrelevant.¹²⁸ Both Russell and Wharton cite numerous cases of purported self-defense, where the words were threats, and not insults.¹²⁹

Of all the writers, only Bishop cites, without comment,¹³⁰ state statutes allowing words, informational or otherwise, to be provocation, and further restricts the statutes by noting that the insult must be to a female relative.¹³¹ Bishop is also the only writer

and H.M. Advocate v. Delaney, 1945 J.C. 138. *Holmes* may have been the decision which shocked Parliament into changing the actual law of provocation.

American courts also recognized the exception. See, e.g., *People v. Hurtado*, 63 Cal. 288 (1883); *Fisher v. People*, 23 Ill. 283 (1860); *Sells v. State*, 98 N.M. 786, 653 P.2d 162 (1982). *Contra* *Sheppard v. State*, 243 Ala. 498, 10 So. 2d 822 (1942); *Stevens v. State*, 137 Ga. 520, 73 S.E. 737 (1912); *People v. Arnold*, 17 Ill. App. 3d 1043, 309 N.E.2d 89 (1974); *State v. Kelly*, 131 Kan. 357, 291 P. 945 (1930); *State v. Rash*, 34 N.C. (12 Ired.) 357 (1851). See generally Annot., 10 A.L.R. 462 (1920). The mixed case law led one commentator to observe wryly that in California, Georgia, or Iowa, the reasonable man does not become sufficiently provoked when his wife "tells him she has been unfaithful, but the provocation becomes unbearable when the scene is shifted to Kentucky, Mississippi, or South Carolina." Note, *Manslaughter and the Adequacy of Provocation: The Reasonableness of the Reasonable Man*, 106 U. PA. L. REV. 1021, 1037 (1958) (citations omitted). This leads to the intriguing question of whether a California resident whose spouse confesses while they are vacationing in Kentucky should be deemed provoked.

¹²⁶ F. WHARTON, *supra* note 96, at 746 (11th ed. 1912).

¹²⁷ *Id.* at 748 n.2.

¹²⁸ Cases of pure dictum cited by Wharton include *Ray v. State*, 15 Ga. 244 (1854); *State v. Shippy*, 10 Minn. 178 (1865); *State v. Anderson*, 314 Nev. 226 (1867) and *State v. O'Neal*, 1 Houst. (Del.) Crim. Reports 58 (1958). F. WHARTON, *supra* note 96, at 749. Additionally, in *Rapp v. Commonwealth*, 53 Ky. (1 B. Mon.) 614 (1854), also cited by W. RUSSELL, *supra* note 43, at 712 n.1 (5th ed. 1977), the charge was not even homicide. In *State v. Martin*, 30 Wis. 216, (1877), the issue was one of double jeopardy, not of provocation. *Id.* at 218-19. *Hanvey v. State*, 68 Ga. 612 (1882), involved the issue of the effect of intoxication on culpability.

¹²⁹ F. WHARTON, *supra* note 96. See, e.g., *Jackson v. State*, 45 Ga. 198 (1871); *Hawkins v. State*, 25 Ga. 207 (1855); *People v. Lombard*, 17 Cal. 316 (1861); *Edwards v. State*, 47 Miss. 581 (1872); *Evans v. State*, 44 Miss. 762 (1870); *State v. Evans*, 65 Mo. 574 (1877); *State v. Crozier*, 12 Nev. 300 (1877); *State v. Barfield*, 30 N.C. (8 Ired.) 344 (1848); *Green v. Commonwealth*, 83 Pa. 75 (1876); *Meyers v. State*, 33 Tex. 525 (1870); *Johnson v. State*, 27 Tex. 758 (1865).

¹³⁰ See J. BISHOP, *supra* note 110, § 704 (8th ed. 1892). Bishop notes that there are states with such statutes. *Id.* But Bishop cites not a single statute. Instead, he cites several Texas cases. *Id.* He never indicates the precise parameters of the statutes, nor does he comment on the desirability, or even the importance, of these statutes.

¹³¹ See F. WHARTON, *supra* note 96, at 748 n.2 (11th ed. 1912). The cases are much more interesting than Wharton's peremptory citation would suggest. In *Ex Parte Jones*, 31 Tex. Crim. 422, 20 S.W. 983 (1893), the court held that an insult made to D's wife prior to their marriage would not suffice under the statute. *Id.* at 446-47, 20 S.W. at 984. In *Hallingburton v. State*, 32 Tex. Crim. 51, 22 S.W. 48 (1893), the defendant killed his father after the father insulted defen-

even to cite *Fisher* as an "informational words" case,¹³² yet fails to compare *Royley* or other cases. He also fails to note the informational words cases decided between 1852 and 1882.¹³³ Beginning with the sixth edition, however, he does attempt to explain those cases which, like *Fisher*, preclude reliance on the proposition that informational words are insufficient provocation. Bishop attempted to place limits on this informational words exception to the words doctrine. He tried to distinguish between simply being informed of an event and knowing that an event was transpiring at the very moment. According to Bishop, the first was insufficient provocation, while the latter was sufficient to reduce murder to manslaughter.¹³⁴

In short, in this area, as in others of the provocation doctrine, the writers failed to alert the bar, and the judiciary, of the courts' continued refusal to adopt the narrow boxes into which other writers had previously placed defendants seeking to reduce their liability on the basis of heat of passion. But this refusal of writers accurately to document the trend occurring in the courts merely indicates why "the law" remained stagnant for so many years. At a time when the courts were eloquently articulating difficulties with the rigid categories of provocation,¹³⁵ the silence of the commentators is distressing.

D. The Adultery Rule

All courts followed the "holding" of *Maddy's* case, that where a cuckold found his wife and her lover in bed, the killing of either the wife or paramour could be reduced to manslaughter.¹³⁶ Several states went beyond this holding and found such a killing to be justifiable,¹³⁷ thereby codifying the so-called "unwritten" law.¹³⁸

dant's mother (victim's wife). The evidence demonstrated that defendant had carefully and deliberately planned the father's death. *Id.* at 56-57, 22 S.W. at 48-49. Nevertheless, the court reversed a conviction of second degree murder, and strongly suggested that manslaughter was the proper verdict. *Id.* at 57, 22 S.W. at 49. Wharton also miscites some cases, e.g., *Moore v. State*, 31 Tex. Crim. 234, 20 S.W. 563 (1892), where it was the defendant, and not the victim, who uttered the insulting words. The court held that the words were properly admitted to show the state of mind of the accused. *Id.* at 236, 20 S.W. at 563. There was no suggestion that the words provoked the defendant, only, perhaps, that they demonstrated that he had been provoked.

¹³² II J. BISHOP, *supra* note 110, at 415 (2d ed. 1852).

¹³³ *Id.* § 731 (3d ed. 1858 & 4th ed. 1868); *id.* § 708 (6th ed. 1877 & 7th ed. 1882).

¹³⁴ *Id.* § 708, at 394 (6th ed. 1877).

¹³⁵ See the especially thoughtful opinion in *State v. Grugin*, 147 Mo. 39, 47 S.W. 1058 (1898).

¹³⁶ See, e.g., *Commonwealth v. Whitler*, 2 Brewster (Philadelphia Cty, Pa.) 388 (1868); *Rowland v. State*, 83 Miss. 494, 85 So. 826 (1904); *Hooks v. State*, 99 Ala. 166, 13 So. 767 (1893). *But see State v. Senegal*, 107 La. 474, 31 So. 867 (1902) (it is always a question of fact for jury). *Accord McNeal v. State*, 102 Ala. 121, 15 So. 352 (1893). All agreed, "of course," that if the defendant was not surprised at the discovery, because he had either known or suspected the illicit relationship for a long time, there was no reduction. *State v. Herrell*, 97 Mo. 105, 10 S.W. 387 (1889); *State v. Chiles*, 58 S.C. 47, 36 S.E. 496 (1900); *State v. Avery*, 64 N.C. 608 (1870) (defendant husband followed his wife to the place of assignation and then slew the lover with a deadly weapon). This raises the issue of why the killing had to be "on a sudden," or, more precisely, why cooling off was an objective question. See *infra* notes 153-92 and accompanying text.

¹³⁷ TEX. PENAL CODE ANN. § 1220 (Vernon 1936). The courts, however, limited the justification to the killing of the paramour. Killing the wife was not justifiable. *Billings v. State*, 102 Tex. Crim. 338, 227 S.W. 687 (1925).

¹³⁸ The term "unwritten law" refers to the view that one has the "right" to kill an adulterous spouse and that the jury should therefore acquit a defendant by nullifying the written law. Reports of acquittals on the basis of the unwritten law are, of course, rare. See, however, *Whitler*, 2 Brewster

A few courts, however, restricted *Maddy* to its precise facts, requiring that the defendant actually see the couple in the act of adultery. Even the highest suspicion, raised by the most dubious circumstances, would not qualify for a mitigation, thus ossifying *Maddy* into a rigid and unyielding rule, ostensibly removing all discretion from the fact finder. For example, in the 1848 North Carolina case of *State v. John*,¹³⁹ the defendant sought to introduce evidence that his wife and the victim had been having an affair for some period of time. The court excluded the evidence on the grounds that the defendant had to find the two in bed:

Hale, Foster, East and Russell all agree in stating that, to extenuate the offense, the husband must find the deceased in the very act of adultery A belief — nay a knowledge . . . that the deceased had been carrying on an adulterous intercourse with his wife, cannot change the character of the homicide.¹⁴⁰

Similarly, in the 1913 case of *State v. Saxon*, a Connecticut court required "ocular evidence of actual adultery or of facts justifying a reasonable belief that it is actually being committed"¹⁴¹

Other courts, however, held that if the defendant *believed* that his wife was committing adultery, this would be sufficient to fall within the *Maddy* rationale. Thus, in *People v. Ryan*,¹⁴² defendant knew that his wife and the victim had previously had an affair, and suspected that it had been renewed. On the evening of the killing, he found his wife and the former paramour together on the floor of the latter's apartment, arm in arm. Three hours later, he discovered the two together again in the victim's room, and killed him, although at the time of the killing, the two were in different beds, and were fully clothed. The court allowed a verdict of manslaughter.¹⁴³

Even those courts which allowed the mitigation when the husband merely suspected that there was adultery required that the suspicion be reasonable,¹⁴⁴ despite the fact that

(Philadelphia Cty. Pa.) 388, where the court instructed the jury that the killing was manslaughter, but the jury nevertheless acquitted.

¹³⁹ 30 N.C. (8 Ired.) 330 (1848).

¹⁴⁰ *Id.* at 335. None of the writers cited in this quote support this proposition. At the very most, they declare that finding a paramour in bed will be sufficient and that waiting too long after discovery will possibly lead to a finding that the killing was done in cold blood.

¹⁴¹ *State v. Saxon*, 87 Conn. 5, 86 A. 590 (1913). *Accord* *R. v. Birchall*, 29 T.L.R. 711 (1913); *State v. Pratt*, 6 Del. (1 Houst.) 249 (1867); *R v. Kelly*, 175 Eng. Rep. 342 (1848). The *Kelly* court instructed the jury:

But I state it to you without the least fear or doubt, that to take away the life of a woman, even your own wife, because you suspect that she has been engaged in some illicit intrigue, would be murder; however strongly you may suspect it, it would most unquestionably be murder, and if I were to direct you, or you were to find otherwise, I am bound to tell you, either I or you, would be grievously swerving from our duty.

Id. The jury later returned a murder verdict. The French Code requires not merely ocular viewing, but also that the defendant discover "the two at the very moment of discovery in the very act in the matrimonial home" in order to obtain mitigation. C. PÉN. art. 324 (Fr. 1976).

¹⁴² 2 Wheeler (N.Y.) 47, 50-53 (1823).

¹⁴³ *Id.* at 54. In allowing the possible reduction the court effectively ignored two cases which had been decided only two years previously. *People v. Goodwin*, 1 Wheeler 253 (1821); *People v. Randall*, 1 Wheeler 258 (1820). *But see* D. STROUD, MENS REA 299 (1914) ("there can never be provocation by mere suspicion, e.g., as to a wife's unfaithfulness . . .").

¹⁴⁴ *State v. Yanz*, 74 Conn. 177, 50 A. 37 (1901); *Stott v. Commonwealth*, 17 Ky. 308, 29 S.W.

the defendant was "in the heat of passion" and "out of control." In *Davis v. State*,¹⁴⁵ for example, the defendant was "insanely jealous." On his wedding day, he went into the store where his fiance was a clerk, and imagined that he saw her hiding a piece of lingerie which he imagined she had just been showing another man. He became so irate that, while he married the woman later that day, he never consummated the marriage and, several months later, killed his supposed adversary. It was against such husbands, of course, that the courts were seeking to draw a line.¹⁴⁶ Yet the very attempt to "draw a line" at a "reasonable suspicion" showed a growing concern for the victim, and less concern for the immediate mental state of the defendant. Had the focus been the defendant's lack of malice, the courts might more readily have expanded the doctrine to allow mitigation at least where the suspicion, however wrong-headed, was vigorous and overpowering.

Once again, the writers are of little assistance. Bishop, for example, accepts in his first edition that the adultery must be seen.¹⁴⁷ Only with the sixth edition does he even attempt to explain the difference between seeing the event and being informed of it:

The distinction rests on the greater tendency of seeing the passing fact than of hearing of it when accomplished, to stir the passions; and if a husband is not actually witnessing the wife's adultery, but knows it is transpiring; and

141 (1895); *State v. Harman*, 78 N.C. 515 (1875); *Whitsett v. State*, 201 Tenn. 317, 299 S.W.2d 2 (1957); *Price v. State*, 18 Tex. Crim. 474, (1885).

In a subsequent case, *State v. Saxon*, 87 Conn. 5, 86 A. 590 (1913), *Yanz* appears to be improperly applied. *D* testified that he heard *W* and *X* talking about adultery, believed that they were about to commit adultery, and killed *W*. The citation to *Yanz* is clearly inapposite; the court here concludes that no reasonable jury could find that the defendant reasonably believed that adultery was about to be committed.

¹⁴⁵ 161 Tenn. 23, 28 S.W.2d 993 (1930). The court stated:

It cannot be doubted on this record that Dr. Davis truly and absolutely believed that his wife had misbehaved herself. It is equally plain on the record that there was no basis whatever for this belief. It is also clear that the . . . [defendant] entertained this belief as a settled conviction.

Id. at 27, 28 S.W.2d at 994.

¹⁴⁶ *See, e.g.*, the language in *State v. Neville*, 51 N.C. 423, 434 (1850):

Let it be considered how it would be if the law were otherwise. How remote or recent must the offense be? How long or how far may the husband pursue the offender? If it happen that he be the deluded victim of an Iago, and after all, that he has a chaste wife, how is it to be then? These enquiries suggest the impossibility of acting on any rule but that of the common law, without danger of imbruing men's hands in innocent blood, and the certainty of encouraging proud-heads to slay others for vengeance instead of bringing them to trial and punishment by the law.

Id.

¹⁴⁷ *See, e.g.*, II J. BISHOP, *supra* note 110, § 638 (2d ed. 1852); *id.* § 731 (3d ed. 1858 & 4th ed. 1868); *id.* § 708 (5th ed. 1872). In the first two cited volumes, Bishop cites no authority other than *Fisher*, in which, he acknowledges, the jury returned a manslaughter verdict, even though the offending act was not seen. In the fourth edition, he cites *Maher v. People*, 10 Mich. 212 (1863), which again relaxed the rule stated in the text, but which he again casts off as stating the rule "less strictly and severely against defendants than it is here stated in the text." No cases directly supporting the rule are cited. Only in the fifth edition does he cite cases supporting this view, for example, *Neville*, 51 N.C. 423, 434 (1850) and *Avery*, 64 N.C. 608 (1870). Wharton, on the other hand, recognizes that "hearing of" the adultery may be sufficient, but only if "the time of hearing is brought so close to the homicide (not the event — ed.) as not to allow space for cooling." F. WHARTON, *supra* note 96, § 983 (2d ed. 1868).

in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer, the offense is reduced to manslaughter.¹⁴⁸

Although Bishop thus draws the line between being informed and "knowing," neither he, nor any other writer, explores the question why the doctrine applies only to husbands, and not to paramours,¹⁴⁹ or relatives of those engaging in illicit sex,¹⁵⁰ since at least the first, and probably the second, would in fact be as provoked by the scene as the husband.¹⁵¹ Perhaps it is because the doctrine originally had at least overtones of protection of property;¹⁵² neither a lover nor a brother would have a claim of property infringement. In any event, no one, including the courts, seemed to wish to explore the issue very carefully. Indeed, a striking characteristic of virtually all the sources at this period is a complete absence of discussion of the basis of this — or any other — doctrine of provocation.

E. "Cooling Off"

If killing in "heat of passion" or "upon a sudden" is manslaughter, then, almost tautologically, killing in "cool blood," and not suddenly, is not manslaughter. As Coke put it: "[i]f two fall out upon a sudden occasion . . . [the killing is manslaughter because] the blood was never cooled . . . [T]he heat of blood kindled by fire was never cooled, till blow was given."¹⁵³

Yet Coke gives only one example: *A* and *B*, having a sudden falling out, agree to fight not in the street, but to get weapons and fight in a nearby field. The interval between the agreement to fight and the actual killing, according to Coke, is not sufficient for the blood to cool. The presumption appears to be that if the two events follow closely in time, the killing was still in heat of passion. If, on the other hand, the fight occurs the next day, it is not manslaughter but murder, presumably because the blood had time to cool.¹⁵⁴

The first reported case to put the "cooling period" to any serious test was *Royley's* case.¹⁵⁵ In that case the defendant, immediately after receiving a sufficient provocation¹⁵⁶ involving informational words about a beating of the defendant's son, ran three-quarters of a mile before killing the victim who had given the provocation. The court was not bothered with the time it took to run the distance, but unanimously found that the killing was

but manslaughter, for the going upon the complaint of his, not having any malice before, and in that anger beating [the victim] . . . *the law shall adjudge it to be upon that sudden occasion* And although the distance of the place

¹⁴⁸ 11 J. BISHOP, *supra* note 110, § 708, at 34 (6th ed. 1877).

¹⁴⁹ *State v. Parker*, 31 Tex. 132 (1868).

¹⁵⁰ *Lynch v. Commonwealth*, 77 Pa. 205 (1874).

¹⁵¹ Indeed, Roman law gave the woman's father greater rights than the husband. See *supra* note 56.

¹⁵² Chief Justice Holt, in *Mawgridge*, explained the *Maddy* case by noting that "adultery is the highest invasion of property." 84 Eng. Rep. 1107, 1115.

¹⁵³ 3 E. COKE, *supra* note 34, at 51, 55.

¹⁵⁴ See *supra* notes 153-92 and accompanying text. Hale simply copies Coke. M. HALE, *supra* note 57, at 453.

¹⁵⁵ 2 Cro. 296, 79 Eng. Rep. 254 (1666).

¹⁵⁶ See discussion *supra* notes 39-81 and accompanying text.

where his son complained was a mile, it is not material, being all upon one passion.¹⁵⁷

In view of the perplexity that arose in the nineteenth century about cooling time, and about the characteristics of the defendant,¹⁵⁸ *Royley's* case is disappointingly opaque as to whether the court "merely" asked whether the defendant was still in a sudden heat of passion, or "also" asked — and decided — whether a reasonable person in defendant's position would have been "cooled off" after the run. Coke himself implies that the test is at least somewhat objective, since the example of the "next day duel" appears to presume as a matter of law that one day is long enough for the blood to cool. Needless to say, Coke cites no authority for that view.¹⁵⁹

All the seventeenth and eighteenth century cases appear to agree not only that the question of whether the defendant has cooled off is objective, but, also that it is a question to be decided by the court, rather than by the jury.¹⁶⁰ This latter point, however, may not be very probative since, as Fletcher¹⁶¹ has pointed out, in most criminal trials of this era juries returned special verdicts, upon which the court was to decide every "legal" question. It is therefore not surprising that the courts at this time declared the issue to be one of law, not of fact.

The next reported case on the issue, *Regina v. Fisher*,¹⁶² occurred nearly two centuries later. This case involved a father who, the morning after an assault on his son, killed the assailant. The trial court, citing no authority, declared: "[w]hether the blood had time to cool or not is rather a question of law. But the jury may find the length of time which elapsed."¹⁶³ At approximately the same time, however, two distinguished jurists concluded differently. In *R. v. Hayward*,¹⁶⁴ Tindall, C.J., instructed the jury that the cooling off question was an issue that it should decide. Similarly, in *Reg. v. Kirkham*,¹⁶⁵ Judge Coleridge made clear that "the time which elapses" was merely one circumstance which the jury must consider, in determining whether the killing was manslaughter or murder. For the next century, the courts were severely divided on this issue, some holding that whether the time period in question was sufficient for a "cooling off" was a matter of law, while other courts held that it was a matter of fact for the jury.¹⁶⁶

¹⁵⁷ 2 Cro. 296, 79 Eng. Rep. 254 (1666) (emphasis added).

¹⁵⁸ See *infra* note 193 and accompanying text for a discussion of the reasonable man standard in provocation.

¹⁵⁹ See Coldiron, *supra* note 32, at 535.

¹⁶⁰ In *Watts*, Noy 171, 74 Eng. Rep. 1129, for example, the court directed the jury to return a verdict of murder, essentially on the grounds that the judges found that the defendant had cooled off, and was merely using an insulting gesture as a pretext for murder. In *Oneby*, 2 Ld. Raymond 1485, 92 Eng. Rep. 465 (1727) and *Mawgridge*, Kel. 119, 84 Eng. Rep. 1107 (1707) the court in dictum indicated that the issue was one for the court.

¹⁶¹ Fletcher, *supra* note 15, at 396.

¹⁶² 8 Car. & P. 182, 173 Eng. Rep. 452 (1837).

¹⁶³ 8 Car. & P. 186, 173 Eng. Rep. at 454 (1837).

¹⁶⁴ 8 Car. & P. 115, 173 Eng. Rep. 422 (1837).

¹⁶⁵ *E.g.*, held that cooling time is a jury issue. 9 Crim. App. 158 (1913). In *State v. Sizemore*, 52 N.C. (7 Jones) 206 (1859), the court held that sending the issue to the jury was reversible error, although the jury concluded that there was sufficient cooling time. The court therefore held that as a matter of law, there was not sufficient time, and that, if the evidence of defendant was believed, he was not guilty of murder. See also *Coston v. People*, 633 P.2d 470 (Colo. 1981).

¹⁶⁶ *Hooks v. State*, 99 Ala. 166, 13 So. 767 (1893); *Ferguson v. State*, 49 Ind. 33 (1874); *State v. Yarborough*, 39 Kan. 581, 18 Pac. 474 (1888); *Shorter v. Commonwealth*, 252 Ky. 472, 67 S.W.2d

On the matter of substance, some courts held that new, insulting words, may be sufficient to reduce a killing to manslaughter, even though the words occur long after the triggering "event."¹⁶⁷ A striking example of this view is *Pauline v. State*.¹⁶⁸ In an initial opinion the court had held that the jury verdict of murder was proper because defendant had received a letter on January 5, informing him of the adulterous relationship between the victim and defendant's wife, but he had not killed the victim until February 7, thereby making the time between the triggering event and the murder too long as a matter of law. On rehearing, however, the court was informed that the letter had actually been dated February 5. That new fact, said the court, made all the difference:

Such being the case, the evidence establishes the killing on the first meeting after appellant had been informed of the adultery One of the adequate causes expressly enumerated in the statute as sufficient to reduce a homicide from murder to manslaughter is the adultery of the person killed . . . provided the killing occurred as soon as the fact of an illicit connection is discovered. Penal Code, art. 597, subd. 3. In such case, the provocation is not required to arise at the time of the commission of the offense, because the adultery may have occurred before the killing¹⁶⁹

This "rekindling" exception, of course, is in complete accord with the "confession of adultery" cases,¹⁷⁰ but is in direct conflict with the views both that the act must be seen¹⁷¹ and that words will never be sufficient provocation.¹⁷² On the other hand, taken to its extreme, the exception would, as Professor Gobert has recognized, "virtually abrogate the cooling-off period requirement."¹⁷³ Indeed, taken to its logical end, the doctrine seriously challenges every aspect of the objectification of provocation.¹⁷⁴

If the commentators were weak in failing to analyze the adultery rule, their lack of analysis on the issue of cooling time is stunning. Russell, for example, in his first edition in 1824 indirectly suggests that cooling time is a question of law,¹⁷⁵ and then, by the second edition in 1845, determines that this is indeed the case.¹⁷⁶ He cites *Fisher* and *Hayward* as authority for this conclusion, but makes no attempt either to reconcile the conflicting views of this issue or to suggest the better approach. Indeed, it is only in the fourth edition, in 1877, that Russell appears to notice the conflict, and only then to the

695 (1934); *Maher v. People*, 10 Mich. 212 (1863); *Haley v. State*, 123 Miss. 87, 85 So. 129 (1920); *State v. Hill*, 20 N.C. 629 (1839); *Small v. Commonwealth*, 91 Pa. (10 Norris) 304 (1879); *State v. McCants*, 1 Spears (S.C.) 384 (1842); *State v. Beatty*, 51 W. Va. 232, 41 S.E. 434 (1902).

¹⁶⁷ See e.g., *State v. Flory*, 40 Wyo. 184, 276 P. 458 (1929). *Accord Toler v. State*, 152 Tenn. 1, 260 S.W. 134 (1924). See also *People v. Rice*, 351 Ill. 604, 184 N.E. 894 (1933); *State v. Whitsett*, 201 Tenn. 317, 299 S.W.2d 2 (1957).

¹⁶⁸ 21 Tex. Crim. 436, 1 S.W. 453 (1886).

¹⁶⁹ *Id.* at 447-48, 1 S.W. at 453-54.

¹⁷⁰ See *supra* note 125 and accompanying text.

¹⁷¹ See *supra* note 140 and accompanying text.

¹⁷² See *supra* notes 96-134 and accompanying text. Although, as to the former, as with confessions, the likelihood that the defendant is wrong about the event having occurred is substantially reduced.

¹⁷³ Gobert, *Victim Precipitation*, 77 COLUM. L. REV. 511, 534 n.119 (1977).

¹⁷⁴ See *infra* notes 193-216 and accompanying text.

¹⁷⁵ 1 W. RUSSELL, *supra* note 43, at 642 (1st ed. 1824).

¹⁷⁶ *Id.* at 424 (2d ed. 1826).

extent of citing *Fisher* and then adding: "Sed quaere"¹⁷⁷ [But query] with a citation to *Hayward* and *Lynch*.¹⁷⁸

Bishop is similarly unhelpful. The first four editions declare unequivocally that the cooling off issue is one of law for the court.¹⁷⁹ With the fifth edition, Bishop tentatively suggests that that view may be less than firmly established:

The length of time necessary for cooling has never been made absolute by rule; it must, in the nature of things, depend much on the special circumstances of the particular case. In general terms, the time in which an ordinary man, under the like circumstances, would cool, is a reasonable time.¹⁸⁰

While this language does not directly undercut the notion that it is question of law, by using the "reasonableness" standard, Bishop moves the issue toward the jury box. By the eighth edition, however, his statement of the doctrine has changed:

Ordinarily the sufficiency of the cooling time, and the sufficiency of provocation are respectively deemed questions of law, not of fact *But the time required to cool, for example, is sometimes, it is believed with great propriety, submitted to the jury.*¹⁸¹

This change of perception would be explicable if the case law had in fact changed during the relevant interval. While it is certainly true that some opinions to this effect had been handed down in the intervening twenty years, Bishop himself relies primarily upon *Hale*, *Hawkins* and *Foster*, and a number of much earlier cases. More disturbing, perhaps, he does not tell us why sending the issue to the jury is to be preferred, why there was ever a question about it, or the importance of the question. Additionally, there is no suggestion as to why the courts went so wrong in holding as they did for over two centuries that it was a question of law, or why *Fisher* was incorrectly decided on this point.

Wharton's treatment of the law-fact issue on cooling time is even less satisfactory. In the second edition, Wharton declares that the cooling off issue is one for the court and not the jury,¹⁸² citing *Haywood*, which held to the contrary, and failing to cite *Fisher*. Three pages later he declares that "[e]very case must depend on its own circumstances, but the time in which an ordinary man, in like circumstances, would have cooled, may be said to be the reasonable time."¹⁸³ This continues to be his position in the fifth¹⁸⁴ and sixth editions.¹⁸⁵ In the eighth edition, published in 1880, a complete reversal occurs when he declares that "[w]hether there has been cooling time is *eminently a question of fact*, varying with the particular case"¹⁸⁶ This position is maintained through the

¹⁷⁷ *Id.* at 711 n.132 (4th ed. 1885).

¹⁷⁸ *R v. Lynch*, 5 Cap. & P. 324, 172 Eng. Rep. 995 (1832).

¹⁷⁹ II J. BISHOP, *supra* note 110, § 638 at 415; *id.* at 416 (2d ed.1852); *id.* § 733-734 (3d ed. 1858); *id.* § 733 (4th ed. 1868).

¹⁸⁰ *Id.* § 712, at 393. (5th ed. 1872). The underlined portion is new material in this edition.

¹⁸¹ *Id.* § 713 (8th ed. 1892).

¹⁸² F. WHARTON, *supra* note 96, at 372.

¹⁸³ *Id.* at 378.

¹⁸⁴ *Id.* at 53. The only cited support is *State v. Sizemore*, 52 N.C. 206 (1859).

¹⁸⁵ See *supra* F. WHARTON, *supra* note 96, at 375.

¹⁸⁶ *Id.* at 435 (8th ed. 1880) (emphasis added). *Sizemore*, 52 N.C. 206 (1859), is now cited as "differing from the text," and a string of cases is cited to support the revised view. Among these is *Fisher*, as well as *Hayward*.

eleventh edition in 1912.¹⁸⁷ In none of these editions is there any recognition that the law has changed or that the author's view has changed.

These failings of the writers, and their awkward reversals, would be of little interest were it not for the larger questions which they also ignored. For, as with the adultery rule and the mere words doctrine, the question of whether the defendant had sufficient time to cool off objectifies the law by unfairly penalizing the defendant who was, in fact, still acting "in passion," even after some lengthy period. The objectification is even more pronounced when the courts assume authority to decide the question rather than leave it to the jury. If left to the jury, they could effectively nullify the law by finding a lengthy period of time still insufficient to cool off. The writers address neither these questions, nor the larger trend, to which they contribute, of turning the mens rea inquiry into an objective one.¹⁸⁸

The commentators also fail to acknowledge, much less analyze, the significant effect that the "cooling" doctrine has upon the liability of "brooders," those who, having been provoked, do not react immediately but brood over the injury for days, weeks, or even months. Aside from the obvious case of Hamlet, perhaps the best known instance of brooder liability is *State v. Gounagias*.¹⁸⁹ The defendant, a Greek immigrant, had purposely killed the deceased. He sought to introduce evidence that he had been sodomized by the deceased and that for the next three weeks, the defendant's friends, who had learned about the incident from the deceased, taunted him. The Washington Supreme Court held that this evidence had been properly excluded from the trial because, while the defendant might in fact have killed in passion, it was not "of a sudden." The court stated,

[t]his theory of the cumulative effect of reminders of former wrongs . . . is contrary to the idea of sudden anger as understood in the doctrine of mitigation. In the nature of the thing, *sudden* anger cannot be cumulative. A provocation which does not cause instant resentment, but which is only resented after being thought upon and brooded over, is not a provocation sufficient in law to reduce intentional killing from murder to manslaughter¹⁹⁰

The *Gounagias* court at least focused, as the writers had never done, on the tension inherent in the doctrines of provocation: why a killing actually done in rage had to be "of a sudden." Other courts, in fact, had reached somewhat different results, primarily on a notion of "rekindling" the earlier passion. Thus, in *People v. Barberi*,¹⁹¹ defendant

¹⁸⁷ F. WHARTON, *supra* note 96, at 766 (11th ed. 1912).

¹⁸⁸ Nagel, *Psychology and the Reform of the Substantive Criminal Law*, in 3 *ADVANCES IN APPLIED SOCIAL PSYCHOLOGY* —(M. Saks & L. Saxe eds.) (forthcoming), suggests an intriguing connection between proportionality and cooling time: "[The assumption that the retaliation will be a controlled response] is grounded in the belief that a disproportionate response is not caused by the provocation but is indicative of the accused's wickedness and prior criminal intent. This belief about the behavior of the provoked [implies that] . . . a specific provocative event of sufficient gravity [causes] the defendant's reaction." *Id.* at 21. This assumption, however, is subject to severe attack on the basis of psychological and other studies which show that "excessive-impulsive aggression [is] a typical response to provocation . . ." *Id.* at 25.

¹⁸⁹ 88 Wash. 304, 153 P. 9 (1915).

¹⁹⁰ *Id.* at 318, 153 P.2d at 14 (emphasis in original). *Gounagias* is one of the very few cases where evidence was actually excluded by the trial court.

¹⁹¹ 149 N.Y. 256 (1896).

had been seduced by the victim, who had promised to marry her. After repeated entreaties to him to fulfill the promise of marriage, the defendant became so enraged that, in a public bar, she pulled a concealed razor and slit his throat. She appealed from the first degree murder conviction. Although the appellate court did not state explicitly that the proper conviction was manslaughter, its language so indicated:

If the defendant inflicted the wound in a sudden transport of passion, excited by what the deceased then said and by the preceding events which, for the time, disturbed her reasoning faculties and deprived her of the capacity to reflect, or while under the influence of some sudden and uncontrollable emotion excited by the final culmination of her misfortunes . . . the act did not constitute murder in the first degree

The words that the deceased then uttered may have extinguished the last ground of a lingering hope, and suddenly revealed to her mind her real situation. What was then said, taken in connection with the preceding events, were causes which are sometimes known and may reasonably be supposed to operate powerfully upon the human mind, and the statement that they could not, coming as it did from the [trial] court, amounted to something more than a mere expression of opinion, even if that were permissible upon such a vital question.¹⁹²

Thus, on all three aspects of the "cooling off" doctrine — its rationale, the possibility of "rekindling," and whether it was a factual or legal question — the nineteenth century commentators were apathetic, passive, and in some cases seriously misleading about the case law and its implications. Although they ultimately took a position on the law-fact question, their reluctance to analyze, much less comment, on the general objectification of this cooling off inquiry only strengthened the movement, both on this narrow question and in provocation cases generally, to use a set of objective rules rather than judge the defendant by a subjective standard of blameworthiness.

F. *The Final Objectification: The "Ordinary" Man Who Kills*

A system which precludes evidence of words which actually enraged the defendant to the point of loss of self-control, which precludes evidence of his victim's adultery unless the defendant saw the physical act itself, which focuses on the force used by the defendant in proportion to the battery inflicted by the victim, and which views the question of cooling off as one of law rather than of fact has, for all practical purposes, relegated the defendant to the sidelines. The issue of his culpability has, thus, been transformed into one to be measured by rules, rather than by his actual mental state. It is not surprising, therefore, that in the mid-nineteenth century, having taken tentative steps in this direction, assisted by the silence of the commentators, a number of American and English courts almost simultaneously introduced into the law of provocation that quintessential "rule" of objectivity — the "reasonable" or "ordinary" man.¹⁹³ The arrival

¹⁹² *Id.* at 267, 274. G. WILLIAMS, TEXTBOOK OF CRIMINAL LAW 482 (1978), characterizes these cases as the "last affront" doctrine, and recognizes that the "last" affront may be rather trivial.

¹⁹³ The court in *Maher* used the terms "ordinary" and "average" and carefully avoided the term "reasonable man," see *infra* notes 196-97 and accompanying text, perhaps because, as Glandville Williams so rightly observed a century later, the reasonable man never kills. Williams, *supra* note 94 at 742. Cf. A.P. HERBERT, MISLEADING CASES ON THE COMMON LAW 12-16 (1930).

"He is an ideal, a standard, the embodiment of all those qualities which we demand

of this test culminated the criminal law's movement in this area toward considering not the moral culpability of the defendant, but the social danger which his act created.

of the good citizen . . . he is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; he neither stargazes nor is lost in meditation when approaching trap doors or the margin of a dock; who never mounts a moving omnibus and does not alight from any car while the train is in motion and will inform himself of the history and habits of a dog before administering a caress; who never drives his ball until those in front of him have definitely vacated the putting green, which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, upon his neighbors, his servants, his ox, or his ass; who never swears, gambles, or loses his temper; who uses nothing except in moderation, and even while he flogs his child, is meditating only on the golden mean."

Id.

Only a few years after *Maher*, the court in *R. v. Welsh*, 11 Cox Crim. Law Cases 336 (1869) used the term "reasonable" man in establishing the objective test in England. Justice Keating instructed the jury that they would have to determine whether the provocation was such that they would attribute the killing to such passion "naturally arising therefrom, and likely to be aroused thereby in the breast of a reasonable man." *Id.* at 338. Twice more in the same instruction, Justice Keating used the term "reasonable," rather than "average" or "ordinary" man, and it would appear at first glance that he was indeed erecting a difficult objective test for the defendant to meet. In his last statement, however, Keating referred to a blow "which might naturally cause an ordinary and reasonably minded man to lose his self-control . . ." *Id.* at 339. It thus appears that Keating was not necessarily drawing a distinction between the "reasonable" man and the "ordinary" man. Indeed, the major issue appears to have been, not the standard to be used, but whether there had been any blow from the deceased at all. Still, the case has been followed as the generator of the "reasonable" man test, at least in England. *Id.*

Courts and legislatures have used the terms interchangeably. Favoring the term "ordinary": *State v. Williford*, 103 Wis. 2d 98, 307 N.W.2d 277 (1981) (ordinarily constituted person); 3 J. STEPHEN, *supra* note 13, at 81 ("ordinary person"); N.M. STAT. ANN. § 2.22 (1982) ("ordinary person of average disposition"); *State v. Watkins*, 147 Iowa 566, 569, 126 N.W. 691, 692 (1910) ("the average of men of fair, average mind and disposition is the standard"). Using the term "reasonable": CAL. GEN. LAWS ANN. § 1427 as quoted in *People v. Bruggy*, 93 Cal. 476, 481, 29 P. 26, 28 (1892) (defining provocation as conduct which "may be sufficient to excite an irresistible passion in a reasonable person"); ILL. CRIM. CODE 9-2 (1961) cited in *People v. Arnold*, 17 Ill. App. 3d 1043, 1047, 309 N.E.2d 89, 92 (1974); *Golden v. State*, 25 Ga. 527 (1858).

For a full discussion of the cases, showing that the same courts sometimes used the terms interchangeably, see Dressler, *supra* note 96, at 432-33.

The use of an objective standard becomes very tricky when one culture attempts to impose a "reasonableness" standard upon a conquered culture. See, e.g., O'Regan, *Provocation and Homicide in Papua and New Guinea*, 10 U. WEST AUST. L. REV. 1 (1971); Niekerk, *Witch's Brew from Natal — Some Thoughts on Provocation*, 89 SO. AFR. L.J. 169 (1972). Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 300 n.41 (1975), cites a case reported in the London Times, 14 September 1929, involving a Moslem who killed another Moslem after the latter had thrown a pigskin shoe at him. Evidence of the religious significance of the shoe throwing was admitted in a trial in England.

It is probably true, at least in theory, that the term "reasonable" establishes a "more" objective "rule," whereas "ordinary" leans toward a slightly more flexible "standard." Nevertheless, both terms look toward a fictional being, rather than at the defendant himself, and ignore the very human characteristics which led defendant, and not another, to commit the crime in question.

The semantic dispute was rather more quickly settled in tort. In *Vaughn v. Menlove*, 3 Bing (N.C.) 468, 132 Eng. Rep. 490 (1837), the case generally touted as introducing that standard to tort law, the phrase is "man of ordinary prudence." The court in *Brown v. Kendall*, 60 Mass. (6 Cush.) 292 (1850), used the term "man of ordinary care and prudence." The phrase "prudent and reasonable man" is used, possibly for the first time, in *Blyth v. Birmingham Waterworks Co.*, 11 Exch. 781, 156 Eng. Rep. 1047, 1049 (1856).

One of the first cases adopting the objectivist position that some assaults could not be provocation as a matter of law was *Rex v. Lynch*, decided in 1832.¹⁹⁴ Yet in this opinion, Justice Tenterden left to the jury the question of whether there "was not time and interval sufficient for the passion of a man proved to be of no very strong intellect,"¹⁹⁵ clearly adopting the subjectivist position as to the defendant. Thus, although there was a slight movement toward objectification as early as 1832, that movement was equivocal, and remained so for 30 years.

While some courts had in fact hinted at the use of the reasonable man before,¹⁹⁶ the case generally credited, and almost always cited, as introducing this concept into the law of provocation is the 1863 decision of *Maher v. People*.¹⁹⁷ Because it directly addressed the issue, *Maher* was the forerunner of the ordinary man standard. Defendant Maher had seen his wife and the victim, Hunt, going into the woods together, and had followed them when they left the woods. Maher then was stopped by a friend, who informed him that his wife and Hunt had committed adultery the day before. After leaving Maher's wife, Hunt had gone straight into a saloon, where he was standing when Maher, pistol loaded, came in, went straight up to Hunt, and fired. Maher then turned and left. No words were exchanged between them.

Although seriously injured, Hunt was not killed, and the charge was therefore not murder, but assault with intent to murder. The trial judge excluded all evidence of Maher's observations of Hunt and Maher's wife and of the friend's statement to Maher. This evidence was excluded apparently on the grounds that because Maher did not actually catch the two in adultery, the evidence of his suspicion was irrelevant.¹⁹⁸ The trial court excluded this evidence on the theory, which the Michigan Supreme Court assumed to be correct, that the proper question was whether, had Hunt died, the homicide would have been murder or manslaughter.¹⁹⁹

The Michigan court first discussed the general principles of murder and the effect of heat of passion upon the mental state required for murder:

[for murder] the homicide must . . . have been committed with some degree of coolness and deliberation, or, at least, under circumstances in which *ordinary men or the average of men*, recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion . . . [and which] indicate that it sprung from, a wicked, depraved, or malignant mind — a

¹⁹⁴ 5 Car. & P. 324, 172 Eng. Rep. 995 (1832). See also *Commonwealth v. Dougherty*, Brown App. 17 (Court of Oyer & Terminer, Philadelphia Cty., Pa. Nov. 16, 1807).

¹⁹⁵ 5 Car. & P. 324, 325, 172 Eng. Rep. 995, 996 (emphasis added).

¹⁹⁶ See, e.g., *People v. Butler*, 8 Cal. 435 (1853). In *State v. McCants*, 1 Speers (S.C.) 384, 386-87 (1842), the court upheld an instruction that the reasonable time for cooling off "is the time in which an *ordinary reasonable man* under like circumstances would cool . . ." (emphasis added). See also *id.* at 391.

¹⁹⁷ 10 Mich. 212 (1863).

¹⁹⁸ See *supra* note 140 and accompanying text. Counsel for Maher did not let the issue drop, however. He cited *Royley's Case*, 2 Cro. 296, 79 Eng. Rep. 254 (1666), although he reportedly cited it as "*Boyley's*" case, 10 Mich. at 214, and *McWhirt's Case*, 3 Gratt. (44 Va.) 566 (1846), discussed *supra* note 119. Moreover, counsel attacked the requirement that there actually be adultery by pointing out that in self-defense cases, the law required not actual necessity, but only a reasonable belief based upon information given to the defendant. See 10 Mich. at 214, citing *Pond's Case*, 8 Mich. 150. It is one of the first attempts to compare the law of manslaughter and self-defense. See Donovan and Wildman, *supra* note 64, at 442-46.

¹⁹⁹ 10 Mich. at 217.

mind which, even in its habitual condition and when excited by no provocation which would be liable to give undue control to passion in *ordinary* men, is cruel, wanton or malignant, reckless of human life, or regardless of social duty.

But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed . . . then the law, out of indulgence to the frailty of human nature . . . very properly regards the offense as of a less heinous character than murder . . .²⁰⁰

The *Maher* decision presents several critical developments in the law of provocation. First, the court referred to the need for the provocation to be "adequate or reasonable." "Adequate" provocation refers to those legal categories — adultery, battery, chance medley — which the common law had established. It is at least arguable that the sources cited by the court (East, Russell, Bishop) had used the term "reasonable" interchangeably with "adequate." In this case, however, the court was really contrasting the two terms, saying that even some provocation which had not yet been classified as "legally adequate" would, if "reasonable," that is, sufficient to provoke the ordinary or average man, be allowed to reduce the homicide to manslaughter.

This use of the term "reasonable" was new. Previously, "reasonable" had been used to describe either of two issues: the reasonable use of a deadly weapon in proportionality cases or the determination of whether the time elapsed was reasonable to permit cooling off. In *Maher*, the court shifted the inquiry to a totally different level, holding that "as a general rule . . . anything the natural tendency of which would be to produce such a state of mind in ordinary men . . ." is sufficient to reduce the murder to manslaughter.²⁰¹

Having announced a potentially sweeping new doctrine, however, the court sought to limit it, lest, "by habitual and long continued indulgence of evil passions, a bad man might acquire a claim to mitigation which would not be available to better men."²⁰² This fear that people with low thresholds would be the beneficiaries of a subjective test has persisted to this day.

The court then answered the precise question raised in this case. Given both the court's new standard, and its new procedural view that *all* questions of provocation were jury questions, both the evidence of the defendant's observations and the "friend's" information, should have been admitted. The jury should decide whether this was reasonable, not adequate, provocation. The *Maher* court stated, "[i]f the alleged provocation be such as to admit of any reasonable doubt, whether it might not have had such tendency, it is much safer . . . and more in accordance with principle, to let the evidence go to the jury under proper instructions."²⁰³

²⁰⁰ *Id.* at 219 (emphasis added). The two paragraphs quoted above are internally inconsistent, as are most other explanations of why heat of passion killings are only manslaughter. In the first paragraph, the court essentially declared that where there is heat of passion there is no malice, in the basic sense in which that term was used in the sixteenth-eighteenth centuries. In short, heat of passion negates the possibility of malice aforethought, an essential element of murder. The second paragraph, however, suggests that "provoked" killing is murder, but that from considerations of "human frailty", and *not* because an element of the crime of murder is missing, the law reduces the punishment. This inability to decide upon the rationale of provocation will be more fully explored later, see *infra* notes 316-84 and accompanying text, but it is at least worth noting here.

²⁰¹ 10 Mich. at 221.

²⁰² *Id.*

²⁰³ *Id.* at 222.

By allowing the issue to go to the jury, a process which many courts were not anxious to allow, the *Maher* court undercut all the previous objectifications which the past half century had established. Although the objective test of the "ordinary man" may be seen as replacing these several objective tests, the use of the term pales in significance when compared with the open advocacy of the view that these were *all* jury issues. Secretive jury nullification was no longer necessary. The *Maher* court determined that the trier of fact should have not only the ultimate issue, but the subsidiary ones as well.²⁰⁴

Given the revolutionary nature of the decision as well as the less radical, but certainly new, use of the "average man," one might have expected the commentators, if not the courts, to have subjected the opinion to probing analysis, or at the very least, to have noted the deviation of this one court from what, according to the writers, was the general rule. The writers, however, are silent. Wharton, for example, does not cite *Maher* in his sixth edition, published in 1868, and cites it in his 1874 edition only for the proposition that if the defendant meets the adulterer before the cooling off time has elapsed, it will be manslaughter.²⁰⁵ Similarly, the cite to *Maher* in the eighth edition, published in 1880,²⁰⁶ while at least technically accurate, by no means conveys the importance of the decision. This cursory treatment of *Maher* is even more striking since it is in this edition that Wharton embraces a subjectivist position by recognizing that the issue of cooling off time is a jury, and not a judge, question. Indeed, the failure to analyze and criticize *Maher* is very difficult to understand since Wharton seems, in his discussion of cooling off, to champion the subjective approach to culpability. He stated that "it must be remembered that we must determine the question of malice in each case, not by the standard of an ideal 'reasonable man,' but by that of the party to whom the malice is imputed."²⁰⁷

Bishop's sole mention of *Maher* begins in 1868, in the fourth edition where he relegates the case to a footnote dealing with informational words. Even then he merely declares, "[i]n *Maher* . . . the rule appears to be held less strictly and severely against

²⁰⁴ It might be suggested that the development of the reasonable man test portended, and could have led to, the removal of the narrow restrictions on what could be adequate provocation — adultery, chance medley, battery. But there is little case law which suggests that this occurred. On the other hand, it might equally well be argued that because the "boxes" of provocation remained the same, the establishment of the reasonable man test did no harm. It was effectively neutralized. This is not necessarily true, however. A jury that is first instructed that it must find that adultery occurred and, then, that the defendant reacted as a reasonable person, might conclude that the reasonable person does not always kill upon finding his spouse in bed with another and that, therefore, the defendant should not receive the reduction. This would be a narrowing of the *Maddy* doctrine. Donovan and Wildman, *supra* note 64, at 448, make this mistake, arguing that the introduction of the reasonable man test allowed the jury to act as "the conscience of the community" and deliver "the normative or value judgment as to the degree of moral culpability to be assigned to the particular offender." However, they cite only R. PERKINS, *CRIMINAL LAW* (2d ed. 1969) and Ashworth, *supra* note 193, for this proposition, and do not discuss any cases.

²⁰⁵ See I F. WHARTON, *supra* note 96, at 46 (1874 ed.). Wharton miscites *Maher* as "*McWhirt*," but it is clear that he means *Maher*. Intriguingly, but not surprisingly, Wharton fails to note that the "adequate" provocation — the adultery — occurred at least 24 hours prior to the shooting unless, of course, "mere suspicion" of adultery is adequate provocation, a position which Wharton had elsewhere suggested.

²⁰⁶ *Id.* at 424 n.2 (1880 ed.).

²⁰⁷ I F. WHARTON, *supra* note 96, at 435 (1880 ed.). This is repeated in the 10th edition without change. See *id.* at 446 (1896 ed.).

defendants than it is here stated in the text."²⁰⁸ Neither the case, nor the doctrine it raises, are discussed in any detail at any point.

The leading writer in England, similarly ignored the growing objectification of provocation doctrine on both sides of the Atlantic. Speaking of the *Welsh* case,²⁰⁹ decided in 1869, which introduced the doctrine of the reasonable person into English provocation law, Lord Diplock recently observed that even Stephen missed the point:

[The reasonable person test] had not been so previously and did not at once become the orthodox view. In his Digest of the Criminal Law published in 1877 and his History of the Criminal Law of England published in 1883 Sir James Fitzjames Stephen makes no reference to the reasonable man as providing a standard of self-control He classifies and defines the kinds of conduct of the deceased that alone are capable in law of amounting to provocation . . . as being limited to (1) whether the evidence established conduct by the deceased that falls within one of the defined classes; and, if so, (2) whether the accused was thereby actually deprived of his self-control.²¹⁰

Indeed, while *Maher* seemed to move toward subjectifying the law of provocation by concluding that all issues were questions of fact for the jury, this advance was overshadowed by its use of the "average" or "ordinary man" test. The impact of the "reasonable person" test need not be overemphasized here, since it seems obvious that, as in torts,²¹¹ it will preclude the mentally ill or mentally deficient²¹² (short of insanity), as well as the physically different²¹³ from claiming the reduction. It will also preclude

²⁰⁸ II J. BISHOP, *supra* note 110, at 399 n.4 (4th ed.). The same language, all in footnotes, is found in the 5th edition, *id.* at 391 n.3 (1872 ed.), the 6th edition, *id.* at 394 n.3 (1877 ed.) and the 7th edition, *id.* at 400 n.3 (1882 ed.).

²⁰⁹ *R. v. Welsh*, 11 Cox Crim. Law Cases 336 (1869).

²¹⁰ *R. v. Camplin*, [1978] 2 W.L.R. 679, 682.

²¹¹ *Cf. Vaughan v. Menlove*, 3 Bing (N.C.) 468, 132 Eng. Rep. 490 (1837).

²¹² *R. v. Lesbini*, 3 K.B. 1116 (1914) (reasonable man standard applied to defendant acknowledged to be mentally defective); *R. v. Alexander*, 9 Crim. App. 139 (1913). *State v. Nevares*, 36 N.M. 41, 7 P.2d 933 (1932) (evidence of defendant's head injury two years earlier which allegedly made him more irritable properly excluded).

²¹³ Through the early twentieth century, the cases generally found that specific physical characteristics of the defendant were irrelevant. *See, e.g.*, *People v. Golsh*, 63 Cal. App. 609, 219 P. 456 (1923) (stroke); *Bishop v. United States*, 107 F.2d 297 (D.C. Cir. 1939) (intoxication); *People v. Washington*, 58 Cal. App. 3d 620, 130 Cal. Rptr. 36 (1976) (homosexuality); *State v. Jackson*, 226 Kan. 302, 597 P.2d 255 (1979) (low intelligence and mental disturbance); *State v. Madden*, 61 N.J. 377, 294 A.2d 609 (1972) (race); *In re Smith*, 11 Crim. App. 36 (1914) (pregnancy). The rationale did not change. The objective test was used "to reduce the incidence of fatal violence by preventing a person relying upon his own exceptional pugnacity or excitability as an excuse for loss of self-control." *Camplin*, 2 W.L.R. 679, 684 (1978). J.C. SMITH AND B. HOGAN, *CRIMINAL LAW* 215 (3d ed. 1973); Ashworth, *supra* note 193, at 300-01; Donovan and Wildman, *supra* note 64, at 448-49; Milligan, *Provocation and the Subjective Test*, 1967 N.Z.L.J. 19.

The cases which caused the most consternation were those in which, because of a physical handicap of some sort, the defendant argued that either (1) he should not be judged by the ordinary man standard, or (2) the ordinary man should be endowed with the defendant's physical characteristics. As Ashworth, *supra* note 193, has argued, the proposition was hardly implausible; nevertheless, ambiguity prevailed. Often cited for the proposition that English law considered at least some physical handicaps of defendants is *R. v. Raney*, 29 Crim. App. 14 (1942). In fact, however, *Raney* is very suspect support for that proposition. *Raney*, a one-legged man who depended on crutches, had had a dispute with the deceased. As the two were going out a door, there was a

the person with a peculiar fixation, for example, fear — or irritation — at being touched, or having one's car touched, from even invoking the reduction. Indeed, the primary concern raised by the "ordinary man" standard was its applicability to the "overly irritable" defendant. As a Pennsylvania court put it in the 1888 case of *Jacobs v. Commonwealth*, where psychiatric evidence concerning the excitability of the defendant was excluded,

[w]hy should one man be excused for the results of passion and not another? The phlegmatic man may be moved to anger as well as the most nervous. The only difference is that it requires more to affect the one than the other; but when passion is aroused in either, it is the same unreasoning and unreasonable power. Why, then, should it not excuse crime in the one as well as in the other?²¹⁴

Maher itself, however, distinguished between those defendants with low tolerance thresholds and the ordinary man. Concern about this problem, which permeated the courts for nearly another century, was undue. The courts easily could have adopted the "ordinary man" standard with the qualification that they have adopted in recent years — that the question of self-control be an objective one. As Professor Ashworth has stated: "[t]he proper distinction . . . is that individual peculiarities which bear on the gravity of the provocation should be taken into account, whereas individual peculiarities bearing on the accused's level of self-control should not."²¹⁵ The climactic case here was *Director of Public Prosecutions v. Bedder*,²¹⁶ where the court imposed an objective standard on an

scuffle, and Raney stabbed the victim. Raney testified that the victim had "knocked my crutch and knocked me off balance" and that he feared that he would be "back-handed" by the victim. *Id.* at 15 (emphasis added). The defendant complained that during the instructions to the jury, the judge did not refer to this testimony. The complaint, therefore, appears to have been to the judge's "summation," rather than to the instructions given the jury. Indeed, the instructions are not reported. Still, the court declared that "[t]o a one-legged man . . . it is obvious that a blow to a crutch . . . is something very different from mere words . . .," and held that the court should have referred to this evidence in its summation. *Id.* at 17. It replaced the murder verdict with a manslaughter verdict.

Raney is a tenuous case. Surely a battery to a two-legged man was sufficient provocation, even in England in 1942. Furthermore, as a matter of general tort law, a blow to any object to which a person is clinging is considered a battery. W. PROSSER & W. KEETON, *TORTS* 39-40 (5th ed. 1984). Thus, even if a two-legged man had been, for some strange reason, holding onto a crutch, and it had been "hit" or "hit away," this would have been a battery, and adequate provocation. It is therefore unclear why the court stressed that this battery had occurred to a "one-legged" man. Ostensibly, that would be irrelevant, unless the court was establishing the proposition that not every battery would suffice to be provocation. If so, the discussion is sorely wanting indeed.

Also ambiguous is *R. v. Hopkins*, 10 Cox Crim. Law Cases 229 (1866). *D* killed his wife after she grabbed him around the neck. The defendant sought to introduce evidence that he was particularly sensitive there. The trial judge held that the evidence could be admitted only to show the character of the assault which the defendant had reason to fear. On that understanding, the evidence was admitted. But the jury, instructed that it could find manslaughter if it found that there was a "serious attack" on the defendant, returned a manslaughter verdict. Thus, the question raised by the court as to the limits on the use of the evidence never clearly arose.

²¹⁴ 121 Pa. 586, 592-93, 15 A. 465, 466 (1888). See also *People v. Golsh*, 63 Cal. App. 609, 219 P. 456 (1923) (evidence that defendant, because of a sunstroke, was more easily excited than an ordinary man properly excluded).

²¹⁵ Ashworth, *supra* note 193, at 300.

²¹⁶ *Director of Pub. Pros. v. Bedder* [1954] 1 W.L.R. 1119. An intriguing aspect of *Bedder* is that the House of Lords never actually considered the "reasonable person" issue at all. *Bedder* appeared to argue that it was the taunts of the prostitute which "provoked" him to kill; yet the law

impotent defendant, and held that the reasonable person was not impotent and, therefore, would not become provoked at comments about his impotency.

G. 1950: The Objective Doctrines Solidified

By the mid-twentieth century, the majority of courts had adopted the rather rigid categories imposed on the provocation doctrine by the writers. Examples of these rigid provocation doctrines included: mere words, unless informational, were insufficient provocation; a battery or chance medley probably was sufficient provocation; and the defendant must not have had a "reasonable time" to cool down. There were, of course, exceptions; some courts did allow words, even insults, to be adequate provocation.²¹⁷ A few jurisdictions defined "passion" to include "rage or anger,"²¹⁸ or "violent, intense, highwrought or enthusiastic emotion,"²¹⁹ and some even included "uncontrollable fear."²²⁰ The Texas Penal Code defined "adequate cause" as: "[c]ause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection."²²¹ And some states gave brooders such as Gounagias²²² a reduction, finding that a small spark, insufficient to activate "passion" as a general matter, might be the final straw on the camel's back.²²³

seemed crystalline that no taunts or jests could be sufficient provocation. Therefore, *Bedder* might have been seen as tacitly accepting the idea that words alone could be provocation, a position taken by other Commonwealth countries prior to *Bedder*, and enacted into law in England three years after *Bedder*, see *infra* note 230 and accompanying text.

²¹⁷ *E.g.*, *People v. Valentine*, 28 Cal. 2d 121, 169 P.2d 1 (1946). Some commonwealth countries had legislatively adopted this position. The first recognition that words alone, even insulting words alone, might be adequate provocation, seems to have been section 370 of the Criminal Law Amendment Act in New South Wales (1883), cited in Snelling, *Manslaughter Upon Provocation*, 31 *Austr. L.J.* 790, 795 (1958). Canada has enacted the Criminal Code, § 261, which provides that "any" wrongful act or insult could be provocation, and that this was a question for the jury. In *Taylor v. the King*, S.C.R. 462 (1947), the court held that this statute changed the common law, as exemplified by the very recent House of Lords decision in *Holmes v. Director of Pub. Pros.* 1946 A.C. 588, that a confession of adultery could not be sufficient provocation. Other commonwealth countries had also enacted similar statutes.

Perhaps the height of irony is that as early as 1878, Judge Stephen, in his Draft Code, had proposed a broadening of the rules of provocation, explicitly stating that "cases may be imagined where language would give a provocation greater than any ordinary blow." CRIMINAL CODE COMMISSION, DRAFT PENAL CODE (1879), at 165, as quoted in *Taylor v. the King*, S.C.R. 462 (1947).

²¹⁸ *Dunn v. State*, 439 N.E.2d 165 (Ind. 1982).

²¹⁹ *People v. Borchers*, 50 Cal. 2d 321, 325 P.2d 97 (1958).

²²⁰ *Commonwealth v. Colandro*, 231 Pa. 343, 80 A. 571 (1911). See *Schoelman v. State*, 644 S.W.2d 727 (Tex. Crim. 1983) ("upset" or "mad" is sufficient). In California, this is true even if the fear is unreasonable. *People v. Wickershap*, 124 Cal. App. 3d 835, 177 Cal. Rptr. 559 (1981) (citing *People v. Lewis*, 186 Cal. App. 2d 585, 9 Cal. Rptr. 263 (1960), and *People v. Flannel*, 25 Cal. 3d 668, 681-82, 160 Cal. Rptr. 84, 603 P.2d 1 (1979) (superceded by statute as stated in *People v. Spurlin*, 156 Cal. App. 3d 119, 202 Cal. Rptr. 663 (1984)). See also *State v. Melendez*, 97 N.M. 738, 643 P.2d 607 (1982).

²²¹ TEX. PENAL CODE ANN. § 19.04 (Vernon 1974).

When Defendant's estranged wife got him mad by constantly taunting him about her new boyfriends and he shot her, this was, in the words of the court allegedly applying the statute, a "classic example" of voluntary manslaughter. *Sercoat v. State*, 644 S.W.2d 710 (Tex. Crim. 1983).

²²² See *supra* note 189.

²²³ *E.g.*, *People v. Berry*, 18 Cal. 3d 509, 556 P.2d 777, 134 Cal. Rptr. 415 (1976) (superceded by statute as stated in *People v. Spurlin*, 156 Cal. App. 3d 119, 202 Cal. Rptr. 663 (1984)) (deceased,

On the whole, however, the common law courts seemed content to follow the objective restrictions which had been placed on provocation by the nineteenth century commentators. It is difficult to know whether this reflected agreement with these limitations, or simple inertia. But it is clear that between 1950 and 1963 both in this country and in England, a revolution in provocation doctrine occurred. To that story I now turn.

III. THE LAST THIRTY YEARS: RETURN TO SUBJECTIVITY

Just as American and English doctrine in the 1860's moved in tandem toward adoption of the "ordinary" or "reasonable" man approach in provocation, a century later, the two countries simultaneously rejected that objective standard, or at least parts of it. This section explores how that occurred. The last section will, among other things, speculate as to why this sudden change occurred when it did, and as to the possible implications for other areas of the criminal law.

A. *The Commonwealth Experience*

In England, the change can be clearly and unequivocally traced to two ill-fated decisions: *Director of Public Prosecutions v. Holmes*²²⁴ and *Director of Public Prosecutions v. Bedder*.²²⁵ *Holmes*, which was decided in 1946, held that a confession of adultery to a returning war veteran was not adequate provocation to reduce the husband's killing from murder. Moreover, Lord Simon's opinion, summarily rejecting two century-old lower court cases,²²⁶ failed to explain or explore the rationale of the manslaughter reduction. It seemed relatively clear that the decision was intended primarily as a deterrent to other irate cuckolded veterans. Yet the opinion went far beyond a mere recitation

defendant's wife, constantly taunted him about her lover, and then sexually aroused him. After a particularly bitter argument, he killed her). See also *State v. Guido*, 40 N.J. 191, 210-11, 191 A.2d 45, 55-56 (1963):

Here defendant did not point to any specific event as the provocative one. Rather she claimed a course of ill treatment and oppression which closed in upon her so completely that her own death appeared for a while to be the only way out. Within that course of conduct were incidents which could have constituted provocation but none in fact had evoked a homicidal response when it occurred. As indicated above, the conventional statement would exclude a claim of manslaughter if the elapsed time were sufficient for a reasonable man to cool off. Thus, assuming defendant did experience a burst of emotion which overwhelmed her reason, the question is whether a course of conduct such as we have described can legally suffice as provocation . . . the factual pattern comes fairly within the concept of manslaughter . . . a course of ill treatment which can induce a homicidal response in a person of ordinary firmness and which the accused reasonably believes is likely to continue, should permit a finding of provocation. In taking this view, we merely acknowledge the undoubted capacity of events to accumulate a detonating force, no different from that of a single blow or injury. The question is simply one of fact, whether the accused did, because of such prolonged oppression and the prospect of its continuance, experience a sudden episode of emotional distress which overwhelmed her reason, and whether, if she did, she killed because of it and before there had passed time reasonably sufficient for her emotions to yield to reason.

Id.

But see *Martin v. State*, 664 P.2d 612, 620 (Alaska App. 1983).

²²⁴ *Holmes v. Director of Pub. Pros.*, [1946] A.C. 588, 598.

²²⁵ *Director of Pub. Pros. v. Bedder*, [1954] 1 W.L.R. 1119.

²²⁶ See *supra* note 125.

of the "no words" doctrine, reaffirming the doctrine of the "reasonable man," and ostensibly asserting the right of the court to preclude the jury from considering some manslaughter issues.

Seven years later, the House of Lords decided *Bedder*, which unequivocally demonstrated the adherence of that tribunal to an objective standard. *Bedder* was a seventeen-year-old male who, knowing that he was impotent, nevertheless hired a prostitute with the tenuous hope of being able to perform. When he was unable to perform, the prostitute ridiculed the defendant. He slew her in what was undeniably true rage. The House of Lords held that *Bedder's* impotence was irrelevant, and that the jury had been properly instructed not to consider this fact. In effect, this meant that the legal issue to be decided by the jury was whether a reasonably *potent* man would have been incensed to the point of killing by taunts regarding his impotence. The question, of course, was silly, and the jury returned the only possible verdict: a murder conviction, which the House of Lords affirmed.

The reaction to the House of Lord's opinion was immediate. Glanville Williams²²⁷ and others²²⁸ attacked the decision.²²⁹ Within three years, only a decade after the *Holmes* decision, Parliament passed The Homicide Act of 1957, section 3 of which explicitly changed the rule of *Holmes*, allowing words to be provocation, drastically changed the approach to mitigation, and substantially broadened the "objective" inquiry. The act stated that:

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 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.²³⁰

On its face, the statute retained the reasonable man test, but made every issue of mitigation a proper subject for the jury. In practice the statute meant the death-knell of the objective tests in England.

The statutory changes were felt immediately. In *R. v. Simpson*,²³¹ decided only months after the act was passed, the court upheld a manslaughter reduction where the common

²²⁷ Williams, *supra* note 86.

²²⁸ See, e.g., Campbell, *The Anatomy of Provocation*, 2 VICT. U.C.L. REV. 7, 18 (1956).

²²⁹ *Bedder* was decided only one year after the Royal Commission on Capital Punishment objected to abrogating the reasonable man requirement, although noting that some "idiosyncrasies" might be considered in sentencing, while others should not be. ROYAL COMMISSION OF CAPITAL PUNISHMENT, CMD No. 8932, at 41-56 (1953). One can muse, at least, upon the fact that it took a case involving male sexuality, in its most direct form, to move the bar. No similar reaction occurred, for example, when it was held that the reasonable man could not be pregnant. See *In re Smith*, 11 Crim. App. 36 (1914).

²³⁰ Homicide Act, 1957, 5 & 6 Eliz. 2, pt. 1, § 3. Other commonwealth countries have statutorily allowed words to be sufficient provocation. See *R. v. Withers*, 25 N.S.W. St. R. 382, 385 (Austl., N.S.W. Ct. App. 1925) (citing Crimes Act, 1900 N.S.W. PUB. ACTS; see also *Taylor v. King*, 1947 S.C.R. 462, 466 (Can.) (citing CAN. CRIM. CODE § 261; *R. v. Krawchure* [1941] 2 D.L.R. 353, 363, 75 Can. Crim. Cas. 16, 27-28 (Can.); *Rex v. McLean*, [1947] 1 D.L.R. 844, 848 (Can., Man. Ct. App.).

²³¹ Noted in 1957 CRIM. L. REV. 815.

law would clearly have precluded such a reduction. The defendant and his wife had had one of their frequent arguments, during which the killing occurred. The trial court left to the jury the question of whether heated words could be provocation, and the jury returned a manslaughter verdict. As the commentator on this case observed, in a masterful understatement, "[b]efore the Act it would have been open to [Lord] Diplock to rule that no reasonable man would have been provoked to lose his self-control in these circumstances."²³²

The relatively clear²³³ intent of the drafters of section three of the Homicide Act was conclusively embraced by the 1978 decision of *Director of Public Prosecutions v. Camplin*,²³⁴ where the House of Lords, in a wide and sweeping opinion, held that under section three it was error to instruct the jury that a juvenile offender should be judged by the "reasonable" adult standard of provocation. The speeches of the Lords indicated that the issue of provocation would now be solely one of actual, subjective, self-control: whether the defendant, with all of his (or her) physical or psychological characteristics, but having the self-control of a reasonable person, would have been provoked. The nature of the provocation — slap, insult, mere touching, information words — became secondary or even irrelevant. Under this new standard, anything could be provocative. Even *Camplin*, however, did not eliminate the reasonable person test. The fear that the highly irritable, pugnacious person would somehow obtain a bonus sufficiently precluded adoption of a totally subjective standard. Nevertheless, *Camplin* makes clear that the core of provocation is loss of self-control, and that *any* action by the victim, as well as the characteristics (age, sex, physical condition) of the defendant,²³⁵ may be considered by the jury.

The subsequent decision in *R. v. Raven*²³⁶ removed any doubt as to the scope of the *Camplin* decision. Prior to *Raven*, it was uncertain whether the subjective inquiry of *Camplin* applied to all issues of provocation or was limited to the age of the defendant. The *Raven* court held that the jury should consider the mental age (nine) of the twenty-two-year-old defendant. Earlier cases which had held, or even suggested, that mental or physical characteristics of the defendant were irrelevant were clearly overruled. The

²³² *Id.* at 816. See also *R. v. Fantle*, noted in 1959 CRIM. L. REV. 584. The reaction of the English courts to such a striking change in the law is in marked contrast to that in other commonwealth countries. For example, in 1961 New Zealand amended its statute effectively to allow any conduct to be provocation, and to leave the major issues to the jury. In an opinion rife with sweeping dicta, the New Zealand Court of Appeals virtually obliterated the alterations which the legislature had promulgated. *Queen v. McGregor* [1962] N.Z.L.R. 1069, 1079. The case is severely criticized by Milligan, *Provocation and the Subjective Test*, 1967 N.Z.L.J. 19, 23-24. The court continued its narrow interpretation and application of the reformist legislation in *Queen v. Anderson*, [1965] N.Z.L.R. 29, 38-39, where it held that, although under the statute the jury was the determiner of whether there was adequate provocation, a judge could still preclude the jury from that determination if no reasonable jury could reach that conclusion, and in *R. v. Tai*, [1976] 1 N.Z.L.R. 102, 107, where the court dismissed an appeal on the grounds that the judge never should have sent the manslaughter question to the jury. The *Tai* court acknowledged, however, that *McGregor* had been heavily criticized, and showed some willingness to reconsider the opinion at a later time.

²³³ English, *What Did Article 3 Do to the Law of Provocation?*, 1970 CRIM. L. REV. 249, 255.

²³⁴ *Director of Pub. Prosecutions v. Camplin*, *supra* note 210, noted in 41 MOD. L. REV. 722 (1978); 8 N.Z.U.L. REV. 169 (1978).

²³⁵ Lord Diplock's opinion in *Camplin* mentions explicitly race, sex, physical infirmity, and "shameful past." Lord Simon adds to that list pregnancy, menopause, and menstruation.

²³⁶ Noted in 1982 CRIM. L. REV. 51.

"subjectivist bug"²³⁷ had conquered in the area of provocation. Indeed, a major committee report in Australia recently took the final step and recommended that every aspect of provocation be subjective. It stated:

we recommend that the question whether the defendant who relies on provocation was in fact provoked be an entirely subjective inquiry, directed in all aspects at ascertaining the defendant's actual state of mind at the relevant time.

We recommend in consequence the abolition of any rules of law importing objective tests, of which the ordinary man test, the rule of proportion and the requirement of an absence of cooling time may be instances.²³⁸

It is clear, at any rate, that the move toward subjectivity was widespread in the Commonwealth.

B. *The Model Penal Code: "Extreme Mental or Emotional Disturbance"*

1. Introduction

As did the 1957 Homicide Act, the Model Penal Code (MPC or Code) promulgated by the American Law Institute (Institute), sought to remove most, though not all, of the objectification which the nineteenth century writers and the twentieth century courts following those writers had placed upon the doctrine of heat of passion. Section 210.3 of the Code, as proposed in 1959, and adopted in 1962 without change by the Institute, provides that:

a homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be.²³⁹

²³⁷ Wells, *supra* note 23. There is some suggestion that the requirement (if there ever was one) of "proportionality," still remains. *R. v. Wardrope*, noted in 1960 CRIM. L. REV. 770; *Bullard v. The Queen*, [1957] A.C. 635, 644-45; White, *A Note on Provocation*, 1970 CRIM. L. REV. 446, 449-52. *Camplin* did not directly address this question, but the Criminal Law Revision Committee of England did, arguing that section three also abolished any "prerequisite" requirement of proportionality. See Criminal Law Revision Committee Working Paper on Offenses Against the Person, para. 51 (1976). In *Regina v. Brown*, [1972] 2 Q.B. 229, 234, the court of appeals held that section three appeared to abolish the doctrine, and that "it would be better [in future cases] not to use the precise words of Viscount Simon [in *Mancini v. Director of Pub. Prosecutions*, the leading twentieth century proportionality case]." And in *R. v. Davies* [1975] 1 All. E.R. 890, 895-96, the court of appeals decided that "whatever the position [of the law] before 1957," section three changed the "mis-aim" cases (see *infra* note 318 and accompanying text) and that a defendant who, angered by a cuckolding man, accidentally shot his own wife should have been allowed to go to the jury on the question of provocation.

²³⁸ CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE OF SOUTH AUSTRALIA, FOURTH REPORT, THE SUBSTANTIVE CRIMINAL LAW 394 (1977).

²³⁹ MODEL PENAL CODE § 210.3(1)(b) (proposed official draft 1962) [hereinafter cited as MPC].

Recognizing that the phraseology of the past carried unnecessary baggage, the Code:

sweeps away the rigid rules that limited provocation to certain defined circumstances. Instead, [the proposed rule] casts the issue in phrases that have no common-law antecedents and hence no accumulated doctrinal content. . . . [The section] avoids the strictures of early precedents and puts the issue in the terms in which it should be considered. This development reflects the trend of many modern decisions to abandon preconceived notions of what constitutes adequate provocation and to submit that question to the jury.²⁴⁰

The Code thus jettisoned all of the objective language and tests of the past 150 years — "adequate provocation," "cooling off," "reasonable man" — while still not adopting a completely subjective test, such as whether this defendant actually was "out of control" when the killing occurred.²⁴¹ This compromise between a subjective standard and the rules of the past was prompted by a concern that "low threshold" actors would be protected by a fully subjective assessment.

As of 1984, eleven states had adopted, in whole or in part, the Code's approach to provoked manslaughter. Only two states — Hawaii²⁴² and Montana²⁴³ — have adopted the precise wording of the Code. At least seven states — Arkansas,²⁴⁴ Connecticut,²⁴⁵ Delaware,²⁴⁶ Kentucky,²⁴⁷ New York,²⁴⁸ North Dakota,²⁴⁹ and Oregon²⁵⁰ — have omitted the word "mental" in the phrase "extreme mental or emotional disturbance" (EED). Two states — New Hampshire and Utah — have enacted the first sentence of the MPC requiring EED, but have not applied the "reasonable man" approach embodied in the Code's second sentence. Thus, Utah merely provides that a killing "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse"²⁵¹ is manslaughter, while New Hampshire defines as manslaughter any killing "[u]nder the influence of extreme mental or emotional disturbance caused by extreme provocation"²⁵² Finally, North Dakota, after reciting the second sentence of the

²⁴⁰ MPC (1980 comments), *supra* note 239, at 61. Of course, as already indicated, the "strictures" of "early" precedent were not very rigid at least if one means by "early" prior to the mid-nineteenth century. The fact that the Code commentators fell into the trap of believing that the pre-twentieth century cases rigidly fixed rules for defendants demonstrates the misconceptions about the "early" law of provocation which pervades most legal scholarship to this date. The 1959 comments to the Code were somewhat more ambiguous, criticizing the "rigid rules that have developed" with regard to the adequacy of provocation, thereby correctly suggesting that the "early rules" might have been less rigid. MPC (Comments to Tentative Draft No. 9 1959), *supra* note 239, at 46. See discussion of *Maher*, *supra* note 196 and accompanying text.

²⁴¹ Of course, even when a fully objective test is used, the defendant must still *actually* be out of control, so there is always a "fully subjective" test as well. The issue, however, is whether this should be the *only* question.

²⁴² HAWAII REV. STAT. § 707-702 (1976).

²⁴³ MONT. CODE ANN. § 45-5-103 (1983).

²⁴⁴ ARK. STAT. ANN. § 41-1504 (1974).

²⁴⁵ CONN. GEN. STAT. § 53a-54a(a) (1971).

²⁴⁶ DEL. CODE ANN. tit. 11, § 641 (1974).

²⁴⁷ KY. REV. STAT. § 507.030 (1975).

²⁴⁸ N.Y. PENAL LAW § 125.20 (McKinney 1975).

²⁴⁹ N.D. CENT. CODE § 12.1-16-01 (1983).

²⁵⁰ OR. REV. STAT. § 163.135 (1981).

²⁵¹ UTAH CODE ANN. § 76-5-205 (1978).

²⁵² N.H. REV. STAT. ANN. § 630:2 (1974).

Code, adds that "[a]n extreme emotional disturbance is excusable within the meaning of this subsection only if it is occasioned by substantial provocation, or a serious event, or a situation for which the offender was not culpably responsible."²⁵³

On the other hand, a number of jurisdictions have explicitly refused to adopt the Code's approach. Alabama, for example, preferred the wording that a killing is manslaughter if the defendant "causes death due to a sudden heat of passion caused by provocation recognized by the law, and before a reasonable time for the passion to cool and for reason to reassert itself."²⁵⁴ The drafters of the Alabama statute explicitly rejected the Code's broad language because it was considered "unsound, unclear and susceptible of abuse."²⁵⁵ Similarly, the New Jersey legislature rejected the Code's language, which was recommended by its drafting committee,²⁵⁶ and retained the common law view that manslaughter is a killing "committed in the heat of passion resulting from a reasonable [sic!] provocation."²⁵⁷

In 1974,²⁵⁸ Ohio legislatively adopted the Code's language that a killing in extreme emotional disturbance is manslaughter but several years later repealed the Code provisions, replacing them with a declaration that a killing "while under the influence of sudden passion or in a fit of rage, either of which is brought on by serious provocation occasioned by the victim that is reasonably sufficient to incite the person into using deadly force . . ." is manslaughter.²⁵⁹ Washington²⁶⁰ and Maine²⁶¹ have also legislatively adopted the Code, but judicially returned to the objective common law tests of the nineteenth century.

One of the more intriguing episodes in the EED history is the adoption and quick rejection of the standard by the Wisconsin Supreme Court. In *State v. Hoyt*,²⁶² a "battered wife" case, the defendant wife, having suffered both insults and beatings for many years, finally killed her policeman husband with his service revolver after a grueling set of arguments and insults. In a sweeping opinion, the Wisconsin Supreme Court adopted the EED standard as the common law norm of manslaughter in Wisconsin, focusing on the substantial difference in moral culpability between a second degree murder and a manslaughter. Speaking of the killing as an "act of desperate self-affirmation" by one

²⁵³ N.D. CENT. CODE § 12.1-16-01 (1983).

²⁵⁴ ALA. CODE § 13A-6-3-(a)(2) (1977).

²⁵⁵ *Id.* § 13A-6-3 commentary at 158.

²⁵⁶ FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION, Vol. I at 5, Vol. II at 163-65 (1971). See Knowlton, *Comments Upon the New Jersey Penal Code*, 32 RUTGERS L. REV. 1, 10-11 (1979).

²⁵⁷ N.J. STAT. ANN. § 2C:11-4b(2) (West 1981).

²⁵⁸ OHIO REV. CODE ANN. § 2903.03 (Page 1974) (repealed 1982).

²⁵⁹ OHIO REV. CODE ANN. § 2963.03 (Page 1982). The legislative comments to the 1974 act expressly declared that it was to reach "brooders": "this section . . . includes homicides done while under extreme emotional stress which may be the result of a build-up of stress over a period of time." OHIO REV. CODE ANN. § 2903.03(a) comment (Page 1974). This view was adopted in dictum by the court in *State v. Muscatello*, 57 Ohio App. 2d 231, 243, 387 N.E.2d 627, 637 (1977). In 1981, the Supreme Court of Ohio held that a killing with a rifle which culminated a day-long argument might be considered manslaughter. *State v. Solomon*, 66 Ohio St. 2d 214, 222, 421 N.E.2d 139, 144 (1981). This case, as well as some apparent concern that the Code provision might "protect" killers of nagging spouses, apparently led to the repeal of the Code language in 1982. See Note, *Voluntary Manslaughter after Paterson: An Analysis of Ohio Law*, 33 CLEV. ST. L. REV. 513 (1985).

²⁶⁰ See WASH. REV. CODE ANN. 9A.32.060 (1977) (repealing § 9.48.060).

²⁶¹ ME. REV. STAT. ANN. tit. 17-A, § 203 (1983).

²⁶² 21 Wis. 2d 310, 124 N.W.2d 47 (1963).

"suffering great emotional turmoil" and "extreme emotional distress," the court held that denial of a manslaughter instruction based on a subjective standard was error. The court's initial opinion carefully analyzed some of the disquieting aspects of mens rea of manslaughter.²⁶⁵

Shortly thereafter,²⁶⁴ however, the court withdrew the entire first opinion, and, although still reversing the murder conviction and confirming that a manslaughter instruction should have been given, spoke in traditional, though somewhat expanded, common law provocation terms:

If Mrs. Hoyt's testimony be believed, it could be readily found that her acts resulted from an emotional or mental disturbance produced by her husband's provocative conduct. *In terms of the standards for heat of passion manslaughter, the question would remain whether the provocation offered would be sufficient in character and degree to cause the same result in an ordinarily constituted person.*²⁶⁵

The court then concluded that the insults which Mr. Hoyt had hurled at his wife that night would not be sufficient in themselves, but that, combined with the prior beatings and humiliations to which she had been subjected, a jury might find the "cumulative effect" to "greatly magnify" the insults, resulting in sufficient provocation.²⁶⁶

The second opinion itself is an expansion of traditional common law provocation, because it recognizes the possible effect of "cumulative" provocation on "brooders."²⁶⁷ Yet not a single word appears in the opinion about the Model Penal Code, the new standard of EED, the "stress" under which the defendant found herself, or any of the other factors which the previous opinion had not merely discussed, but upon which it had focused in determining that the standard for provocation had been met.

Thus, the history of adoption of the Model Penal Code's EED language is mixed. Although it has won favor in some jurisdictions, it has been directly rejected by others, and severely modified in still others.

2. Applying the EED Standard

The case law applying the EED standard is also ambiguous. For example, one of the most important impacts of the new approach has been on the "brooder" cases, where the actual explosion of rage occurs some substantial time after the initial provocation. The common law refused to allow the jury even to consider these cases, on the grounds that, as a matter of law, there had been sufficient "cooling time" to dilute the "heat of passion" which was the essence of the reduction. In this area, the EED standard has affected the reaction of the courts.

Two cases are particularly important. In the 1980 Connecticut case of *State v. Zdanis*,²⁶⁸ the defendant had learned that his eight-year-old niece, to whom he apparently was deeply attached, was dying of cancer. After some days "brooding" about the news, the defendant entered his own house, threatened to kill his wife and killed his stepdaughter. There was no provocative act by the victim. Indeed, there appeared to be no

²⁶⁵ See *infra* note 326.

²⁶⁴ 21 Wis. 2d 284, 128 N.W.2d 645 (1965).

²⁶⁵ *Id.* at 291, 128 N.W.2d at 648 (emphasis added).

²⁶⁶ *Id.*, 128 N.W.2d at 649. See also *State v. Guido*, 40 N.J. 191, 191 A.2d 45 (1963).

²⁶⁷ See *supra* note 259.

²⁶⁸ 182 Conn. 388, 391-97, 438 A.2d 696, 698-701 (1980).

explicable reason for the killing. Although the murder conviction was upheld by the appellate court, the court strongly suggested that if the fact-finder had found the defendant guilty only of EED manslaughter, that verdict also would have been upheld. Undoubtedly, at common law, defendant's attempt to obtain a provocation reduction would have been rejected as a matter of law because the defendant had not acted immediately after the provocation. Therefore, the implications of *Zdanis* seem clear — virtually any reaction to any stimulus may be considered in an EED jurisdiction.

More persuasive evidence that the Code has had some impact in these "brooder" cases is the 1979 case of *State v. Elliot*.²⁶⁹ In *Elliot*, the defendant, again without any apparent impetus, suddenly appeared at his brother's house one morning, pushed past his sister-in-law and niece and, without saying a word, shot his brother twice. After being convicted of murder, the defendant obtained a reversal on the grounds that the trial court should have instructed the jury on the basis of EED.²⁷⁰ The court's conclusion was based upon the psychiatric testimony for the defense that for years the defendant had had an "overwhelming" fear of his brother, and that he was acting under extreme emotional disturbance. In explaining its decision, the court contrasted the century-old notion that heat of passion occurred only on a sudden impulse:

the defense [of EED] does not require a provoking or triggering event; or that the homicidal act occur immediately after the cause or causes of the defendant's extreme emotional disturbance A homicide influenced by an extreme emotional disturbance is not one which is necessarily committed in the "hot blood" stage, but rather one that was brought about by a significant mental trauma that caused the defendant to brood for a long period of time and then react violently, seemingly without provocation.²⁷¹

Several cases have considered the relationship between EED and so-called "imperfect" self-defense. Present common law decisions are split over whether a defendant who honestly but unreasonably believes that he is in danger, and kills under that belief, is (1) guilty of murder, since he has no actual defense of self-defense,²⁷² or (2) guilty of manslaughter.²⁷³ Prior to the adoption of EED language, some courts had found that "great fear" might reduce a killing to manslaughter,²⁷⁴ but other courts had refused a reduction.²⁷⁵ Several courts applying an EED standard have held that such a defendant may show that he is acting under an extreme emotional disturbance, and thereby may obtain a manslaughter verdict, rather than be convicted of murder.²⁷⁶ The Supreme

²⁶⁹ 177 Conn. 1, 411 A.2d 3 (1979).

²⁷⁰ *Id.* at 10, 411 A.2d at 8. The trial court had essentially given a traditional "heat of passion" instruction, although using the term EED. *Id.*

²⁷¹ *Id.* at 7-8, 411 A.2d at 7. *Accord* *State v. Corbin*, 15 Or. App. 536, 548-49, 516 P.2d 1314, 1320 (1973).

²⁷² The defense of self-defense requires a reasonable, if mistaken, belief.

²⁷³ *See* W. LAFAYE & A. SCOTT, *supra* note 49, at 397.

²⁷⁴ *See, e.g., State v. Bonano*, 59 N.J. 515, 524, 284 A.2d 345, 349-50 (1971); *Commissioner v. Colandro*, 231 Pa. 343, 80 A. 571 (1911); *see also* ME. REV. STAT. ANN. tit. 17-A, § 203(1)(B) (1982) ("extreme anger or extreme fear").

²⁷⁵ *Ashworth, supra* note 193, at 297, argues that "a loss of self-control caused by fear, panic or mental instability cannot be brought within the defense of provocation," but cites no cases in support of the proposition.

²⁷⁶ *E.g., State v. Freeman*, 183 Mont. 334, 344, 599 P.2d 368, 374 (1979); *State v. Collins*, 178 Mont. 36, 52, 582 P.2d 1179, 1188 (1978). It is perhaps ironic that, in earlier days, the relationship

Court of Hawaii has moved further, holding that wherever the evidence raises a self-defense issue, the jury must be instructed on EED manslaughter as well.²⁷⁷

Other cases show an expansion of common law doctrines as well. In the 1976 case of *People v. Lytle*,²⁷⁸ a diagnosed schizophrenic killed the people who he thought were going to commit him to an institution. Although he was not actually going to be institutionalized, the court held that because reasonableness must be determined from the viewpoint of a person in the defendant's situation, and because the defendant actually thought it was a life or death situation, he could be found to have acted under extreme emotional disturbance.

In another extraordinary case, which clearly would never have qualified for a provocation instruction under the common law at its most lenient, the defendant killed his paramour, who, apparently contrite that she had spread rumors concerning their affair, asked him to kill her. After several minutes of her insistence, the defendant complied and killed her. The Delaware Supreme Court, affirming a first degree murder verdict, upheld the giving of the following instruction on EED:

[E]xtreme emotional disturbance or distress means that the defendant's psychic or physical feelings were thrown into such disorder as exceeding the ordinary usual or expected. That is, such exceptional excitement or disturbance as to produce a frenzy of mind which makes one deaf to the voice of reason and there must have been a reasonable explanation for the existence of the extreme emotional disturbance or distress . . . You should consider whether a reasonable person in the defendant's position or situation under the circumstances as he believed them to be, would have suffered from extreme emotional disturbance or distress . . . *The presence of extreme emotional distress or disturbance . . . is in a way the antithesis of the intention to kill.* When some incredible evidence bordering the presence of extreme emotional disturbance has been presented the state must then prove beyond a reasonable doubt that the defendant intentionally caused the death of the victim and also the absence of extreme emotional disturbance . . .²⁷⁹

between the two cases was even closer, though in a very different way. Prior to and through the eighteenth century, a killing in chance medley was manslaughter (*see supra* notes 34-38 and accompanying text). But if the killing party "retreated to the wall" before using deadly force (or at least before successfully using it), then the killing was excusable self-defense. See W. BLACKSTONE, *supra* note 34, at 186-87. This relationship was dissolved in the nineteenth century, when the law ignored the distinction between excusable self-defense (killing after retreat due to a chance in which both participants were at "fault") and justifiable self-defense (called prevention of felony, and exemplified by the homicidal attack upon an innocent party who slayed without retreating). I hope in a future paper to address this basic alteration in self-defense doctrine.

²⁷⁷ *State v. Warner*, 58 Hawaii 492, 500-01, 573 P.2d 959, 964 (1977). In *State v. Manloloyo*, 61 Hawaii 193, 600 P.2d 1139 (1979), defense counsel urged that this rule be expanded to include cases where the defense was insanity, not self-defense. The rationale, of course, was straightforward — that evidence of mental disease or defect, even if not accepted by the jury for purposes of insanity, might show that the defendant was acting under EED. Without even pointing out that the EED standard still requires that the "provocation" be sufficient to activate a "reasonable" person in the defendant's "position," the court in *Manloloyo* rejected this reasoning. *Id.* at 197, 600 P.2d at 1141.

²⁷⁸ 95 Misc. 2d 879, 885, 408 N.Y.S.2d 578, 582 (Saratoga County Ct. 1976).

²⁷⁹ *Boyd v. State*, 389 A.2d 1282, 1286-87 (Del. 1978), *cert. denied*, 439 U.S. 969 (1978).

Perhaps the most extraordinary case thus far reported, however, is *People v. Ford*.²⁸⁰ In *Ford*, the defendant, diagnosed as a schizophrenic, argued that his marijuana smoking caused him to shoot a police officer in the neck as the officer was apprehending the defendant's girlfriend for holding up a gasoline station. The court concluded that the defendant was entitled to an EED instruction.

In a number of cases the courts have upheld a refusal to grant an EED instruction. In *People v. Edwards*, for example, a New York court held that a defendant's use of drugs, which caused him to lack any feeling or emotion, was alone insufficient to require an EED instruction.²⁸¹ Similarly, in *State v. Lopez*,²⁸² the defendant, during what was essentially a barroom brawl, used apparently excessive force when he twice kicked the victim in the head. The court curtly rejected the defense argument that an EED instruction was mandated.²⁸³

Although New Hampshire has adopted the "extreme mental or emotional" language of the MPC, it has also required that the disturbance be caused by "extreme provocation." This additional language in the New Hampshire statute provided the court in *State v. Smith*²⁸⁴ with the opportunity to hold that legal acts could not qualify as provocation, much less extreme provocation. Thus, where defendant was outraged by lawful force applied by a bouncer, there was no "extreme provocation," even if there was "extreme mental or emotional disturbance," and a verdict of murder was upheld.²⁸⁵

3. Defining "Extreme Emotional Disturbance"

If the courts have generally been ready to act to broaden the EED reduction, they have been less able, or willing, to parse carefully the statutory language to define firmly the term EED. The leading decision interpreting the Model Penal Code's language is *People v. Shelton*.²⁸⁶ The *Shelton* court declared that the defendant must show²⁸⁷ that he:

²⁸⁰ 102 Misc. 2d 160, 164, 423 N.Y.S.2d 402, 405, (Sup. Ct. 1979). *But see* *People v. Edwards*, 64 A.D.2d 201, 202, 409 N.Y.S.2d 872, 873 (App. Div. 1978).

²⁸¹ *People v. Edwards*, 64 A.D.2d 201, 202-03, 409 N.Y.S.2d 872, 873 (App. Div. 1978).

²⁸² 626 P.2d 483, 486 (Utah 1981). *See also* *Henley v. Commonwealth*, 621 S.W.2d 906, 909 (Ky. 1981); *Gall v. Commissioner*, 607 S.W.2d 97, 109 (Ky. 1980); *People v. Shelton*, 88 Misc. 2d 136, 149-53, 385 N.Y.S.2d 708, 717-20 (Sup. Ct. 1976).

²⁸³ *Lopez*, 626 P.2d at 486. Similarly, in *State v. Skjonsby*, 319 N.W.2d 764, 769-70 (N.D. 1982), defendant, having been called by an apparent enemy who informed him that the enemy had his girlfriend in a hotel room, spent some time getting to the hotel room, where he then killed the enemy. The court held that no EED instruction was necessary. *Id.* at 779. Although this decision seems wrong on its facts, the point is that not all courts have construed the EED defense overbroadly.

²⁸⁴ 123 N.H. 46, 49, 455 A.2d 1041, 1043 (1983).

²⁸⁵ *Id.* The court continued to apply an objective test to the adequacy of provocation issue in *State v. Little*, 123 N.H. 433, 436, 462 A.2d 117, 118-19 (1983), where the trial court, though instructing on manslaughter, told the jury that the provocation would have to be something which would send a reasonable man into emotional disturbance. The jury returned a second degree murder verdict, which was upheld. *Id.* The facts of *Little* strongly suggest that there was EED. Defendant and his estranged wife were having a discussion, not an argument, when he began looking for his wedding band. When she declared that he could not go to look for it in "her" house, he "went blank" and killed her. *Id.* at 434-35, 462 A.2d at 118.

²⁸⁶ 88 Misc. 2d 136, 149-53, 385 N.Y.S.2d 708, 717-20 (Sup. Ct. 1976).

²⁸⁷ *See infra* note 373 for a discussion of the burden of proof issue.

- (a) has no mental disease or defect that rises to the level established by Section 30.05 of the penal Law; and
 (b) is exposed to an extremely unusual and overwhelming stress; and
 (c) has an extreme emotional reaction to it, as a result of which there is a loss of self-control and reason is overborne by intense feelings, such as passion, anger, distress, grief, excessive agitation, or other similar emotions Perhaps the key factor in this determination is the loss of self-control.²⁸⁸

This broad definition has been followed by other courts.²⁸⁹

Courts have grappled with the issue of whether the term "extreme emotional disturbance" should be treated as a single phrase, a term of art, or separated into its various components. Most have opted for dividing the term, concentrating particular energy on the definition of "extreme." Thus, although the thrust is the same, different courts have defined, or upheld definitions of, "extreme" as: "the greatest degree of intensity away from the norm for [the defendant],"²⁹⁰ "outermost or furthest . . . final; or last,"²⁹¹ or have given it its ordinary dictionary sense.²⁹²

Although nothing in the comments to the MPC would clearly resolve this issue, the better approach would seem to be to treat the words together, as a single term of art. Obviously the use of the term "extreme" is significant, and is intended to demonstrate that not every emotional disturbance will qualify for the manslaughter reduction. Nevertheless, attempting to dissect the phrase seems to lose the generic sense that the defendant must have lost self-control due to a gross displacement of his emotional stability. Parsing the phrase tends to miss this point. Indeed, one is tempted to agree with the Kentucky Court of Appeals, which declared that "[w]e find it unnecessary to define extreme emotional disturbance. It is sufficient to say that we know it when we see it."²⁹³

4. Psychiatric Dominance in a Common Sense Context

Possibly the most striking development under the EED standard is the mounting use of psychiatric testimony in these cases. Thus, in EED cases, psychiatric evidence has been admitted, though not always found credible, to explain why a high school counselor killed a student who threatened to expose the counselor's use of marijuana,²⁹⁴ why a husband shot his estranged wife after the last of many arguments,²⁹⁵ why a defendant walked into his brother's house one morning and shot him without saying a word,²⁹⁶ and why a boyfriend stabbed his former girlfriend with a steak knife when she rejected his proffered gift of a bottle of liquor.²⁹⁷ Perhaps the most notorious instance of psychiatric

²⁸⁸ 88 Misc. 2d at 149, 385 N.Y.S.2d at 717.

²⁸⁹ *E.g.*, State v. Elliott, 177 Conn. 1, 9, 411 A.2d 3, 8 (1979); State v. Trieb, 315 N.W.2d, 649, 659 (N.D. 1982); State v. Carson, 292 Or. 451, 459, 640 P.2d 586, 590 (1982).

²⁹⁰ *Shelton*, 88 Misc. 2d at 149, 385 N.Y.S.2d at 717.

²⁹¹ State v. Akridge, 23 Or. App. 633, 635, 543 P.2d 1073, 1074 (1975) (emphasis in original).

²⁹² State v. Gaxiola, 550 P.2d 1298, 1303 (Utah 1976).

²⁹³ *Edmunds v. Commissioner*, 586 S.W.2d 24, 27 (Ky. 1979).

²⁹⁴ *Shelton*, 88 Misc. 2d at 139, 385 N.Y.S.2d at 711.

²⁹⁵ *People v. Brown*, 50 A.D.2d 1070, 376 N.Y.S.2d 335 (1975) (mem.); *see also* *Eaton v. State*, 394 A.2d 217, 220 (Del. 1978).

²⁹⁶ *Elliot*, 177 Conn. at 3, 411 A.2d at 5.

²⁹⁷ *People v. Casassa*, 49 N.Y.2d 668, 674, 427 N.Y.S.2d 769, 772, 404 N.E.2d 1310, 1313 (1980); *see also* State v. Trieb, 315 N.W.2d 649 (N.D. 1982), where the defendant tried to establish "extreme emotional disturbance" by offering psychiatric testimony that he was suffering from "acute

evidence in an EED case, however, is the unreported "Yale Murder" case,²⁹⁸ where Richard Herrin killed his girlfriend, Bonnie Garland, by pummeling her with a hammer while she slept in her house, at which he was a guest. Herrin killed Garland because she had told him that, while she still loved him, she wished to have some [sexual] "freedom" for a time. The case appeared to be nothing more than a typical jilted suitor case, but five psychiatrists turned the trial into a dispute over whether Herrin had suffered from "transient situational reaction."²⁹⁹ The testimony described in detail Herrin's dependence on women, and his hope that he would find a stable relationship with Garland. When this appeared improbable, according to the psychiatric testimony, despair seized Herrin and he acted without self control. In short, his distress over being turned aside was greater for him than for most men, and his reaction was "in excess of a normal and expectable reaction . . ."³⁰⁰ Because his action was "in excess of a normal and expectable reaction," it followed that he had a "transient situational reaction." The jury returned a verdict of manslaughter, clearly predicated upon this testimony.

Indeed, a number of courts have gone so far as to suggest, if not actually hold, that psychiatric testimony is absolutely mandatory for a defendant who wishes even to enter a plea of EED. Thus, for example, the Connecticut Supreme Court declared, "[a]s to the evidence of extreme emotional disturbance, the expert testimony was of utmost importance."³⁰¹

The admissibility of psychiatric evidence in EED cases is unquestionably a change in the common law of "provocation" slayings. Although few cases deal with the issue, it seems clear that such expert evidence was irrelevant under the common law.³⁰² It is also

alcohol intoxication, a psychosis with drug intoxication," when he killed his victim for no apparent reason. The court rejected defendant's contentions, holding that this did not constitute a sufficient evidentiary basis to warrant a manslaughter instruction. 315 N.W.2d at 659. Similarly, in *Edwards*, 64 A.D.2d at 202, 409 N.Y.S.2d at 873, the defendant shot a woman in the head without apparent cause. The defense offered psychiatric testimony to establish that his drug-induced emotionless state amounted to an "extreme emotional disturbance." The court held that "since there is no proof that the defendant was exposed to any unusual stress and the common consensus of the psychiatrists is that he had no feeling or emotion when he fired the rifle, no 'reasonable view of the evidence' merits a charge of the affirmative defense of 'extreme emotional disturbance' or the lesser offense of manslaughter in the first degree." *Id.*

²⁹⁸ P. MEYER, *THE YALE MURDER* (1982); W. GAYLIN, *THE KILLING OF BONNIE GARLAND: A QUESTION OF JUSTICE* (1982).

²⁹⁹ DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 300 (1980). Transient situational reaction is defined as "a maladaptive reaction to an identifiable psychological stressor, that occurs within three months of the onset of the stressor [and] . . . is indicated by either of the following: (1) impairment in social or occupational functioning; (2) symptoms that are in excess of a normal and expectable reaction to the stressor." *Id.* This is a typical "EED" diagnosis. See *Shelton*, 88 Misc. 2d at 146 n.1, 385 N.Y.S.2d at 716 n.1. Psychiatrists for the defense argued that soldiers under the stress of battle, or persons in love who had discovered that their lover has been unfaithful could suffer from this mental trauma. P. MEYER, *supra* note 298, at 240.

³⁰⁰ P. MEYER, *see supra* note 298, at 240.

³⁰¹ *State v. Zdanis*, 182 Conn. 388, 393, 438 A.2d 696, 700 (1980), *cert. denied*, *Zdanis v. Connecticut*, 450 U.S. 1003 (1981).

³⁰² This hardly can be surprising. In jurisdictions which required that the provoking acts fit into a specific category, or that the reasonable person be provoked, a psychiatrist's testimony that this defendant was provoked because he was different than the "reasonable" person would be irrelevant. Moreover, to the extent that the common law categories of adequate provocation assumed that if the reasonable person would be provoked, the defendant would also be provoked, testimony as to the defendant's actual state of mind would also be unnecessary, unless there previously was

doubtful whether the drafters of the Model Penal Code, let alone those legislatures

some evidence that the defendant in fact had not been acting in the heat of passion. Furthermore, other questions of admissibility remained. Thus, in *Regina v. Turner*, [1975] Q.B. 834, 841 (C.A.), while holding that a psychiatrist's opinion as to why the defendant killed his girlfriend after she told him, with a grin, that she had been sleeping with other men while he was in prison, was "relevant," the court ruled the evidence inadmissible. According to the court there was no need for expert opinion in this provocation case:

What, in plain English, was the psychiatrist in this case intending to say? [T]hat he [defendant] had had a deep emotional relationship with the girl which was likely to have caused an explosive release of blind rage when she confessed her wantonness to him [These matters] are well within ordinary human experience. We all know that both men and women who are deeply in love can, and sometimes do, have outbursts of blind rage when discovering unexpected wantonness on the part of their loved ones; the wife taken in adultery is the classical example of the application of the defence of "provocation" Jurors do not need psychiatrists to tell them how ordinary folk who are not suffering from any mental illness are likely to react to the stresses and strains of life The proposed evidence was not admissible to establish that the defendant was likely to have been provoked.

Id., accord *State v. Klimas*, 94 Wis. 2d 288, 302, 288 N.W.2d 157, 164 (1979). *But see* the unreported cases of *Ruth Ellis* in *Eddy*, *The New Law of Provocations*, 1958 CRIM. L. REV. 778, 781-82.

In short, the application of a common law definition of provocation, surely if surrounded or qualified by a "reasonable man" test (which was applied in most common law jurisdictions), asks for the "common sense" notion of the jury, upon which a psychiatrist is not expert.

This view has been affirmed, as to English cases after the 1957 Homicide Act, by four leading scholars. *See* personal correspondences from Glanville Williams, John Smith, Brian Hogan, and Andrew Ashworth, in the author's private files, all agreeing that psychiatric evidence would not be allowed in a provocation case in England.

I have found only one case in which a court acting under a common law definition of provocation held that psychiatric evidence was admissible. A perusal of the common law standards of various practical treatises and guidebooks for criminal trials has revealed no discussion of the possibility of seeking to introduce psychiatric evidence in a provocation case. The books consulted were: F. BAILEY & H. ROTHBLATT, *COMPLETE MANUAL OF FORMS: FEDERAL AND STATE* (1974); F. BAILEY & H. ROTHBLATT, *CRIMES OF VIOLENCE* (1973); F. BAILEY & H. ROTHBLATT, *SUCCESSFUL TECHNIQUES FOR CRIMINAL TRIALS* (1971); F. BAILEY & H. ROTHBLATT, *INVESTIGATION & PREPARATION OF CRIMINAL CASES: FEDERAL AND STATE* (1970); C. BARTOL, *PSYCHOLOGY AND AMERICAN LAW* (1983); W. BLACK, *HOW TO CONDUCT A CRIMINAL CASE* (1935); E. CLEARY & J. STRONG, *EVIDENCE* (1909); S. HRONES, *HOW TO TRY A CRIMINAL CASE* (1982); J. SCHLOSS, *EVIDENCE AND ITS LEGAL ASPECTS* (1976); C. SCHOENFELD, *PSYCHOANALYSIS AND THE LAW* (1973); H. SPELLMAN, *DIRECT EXAMINATION OF WITNESSES* (1968). The one contrary case is *Commissioner v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972), where the Supreme Court of Pennsylvania reversed a trial court refusal to admit such evidence. The facts of *McCusker* are not clear, but it appears that the defendant for some time knew that his wife had been carrying on an affair with his stepbrother. At the moment of the crime, however, after threatening to leave him and to take their child, she informed him that she was pregnant by his stepbrother. The Pennsylvania court first declared that this series of events could be considered adequate provocation. *Id.* at 390, 292 A.2d at 290. This statement, of course, was probably unnecessary, since either (a) the confession of adultery or (b) the admission of the adultery combined with the new announcement of pregnancy might be considered enough (as rekindling) under earlier cases. The court then addressed the question of whether, assuming this series of events to be sufficient grounds for a jury conclusion of provocation, the psychiatric evidence should be admitted to determine the state of mind of the defendant. Here the court stressed three factors: (1) whether the defendant actually was provoked; (2) whether the provocation caused the slaying; (3) whether there was sufficient "cooling time" for a "reasonable man." Without much explanation, the court held that the psychiatric evidence was admissible. *Id.* at 393, 292 A.2d at 292.

The court's reasoning is not persuasive. First, the court suggested that "it would be anamalous

which have adopted it with modifications, intended to turn the issue of EED into a

[sic] to receive psychiatric evidence to establish the complete defense of insanity but at the same time reject psychiatric evidence which seeks to establish only a partial defense . . ." *Id.* at 392, 292 A.2d at 291. Anomalous it surely is, but in *McCusker* itself, as in many other cases, both the Pennsylvania Supreme Court and others have rejected psychiatric evidence going to "diminished capacity."

The court's second argument is that evidence of intoxication has been admitted widely to reduce the level of conviction and that, therefore, psychiatric evidence going to heat of passion should be admitted. This, too, is an anomalous position; but logic has never been the life of the law. Intoxication has almost uniformly been held to reduce the degree of murder, but never to reduce a murder to manslaughter. The relationship of intoxication and provocation has never been smooth or clear. Some courts have held that the reasonable man is always sober, while others have held that the defendant's intoxicated state is part of the "circumstances" to be considered by the jury. The leading case is *R. v. McCarthy*, 38 Crim. App. 74, 82 (1954); see also *Taylor v. The King*, 1947 S.C.R. 462 (Can.). Again the fiction of the "ordinary" or "average" man obstructs clear analysis. But perhaps the most intriguing aspect of this particular dispute is that the doctrine that intoxication may reduce a capital homicide to a noncapital one was originally created so that juries could consider the effect of insults upon the intoxicated defendant who stood before them. See, e.g., *State v. Heisler*, 116 Wis. 2d 657, 661, 344 N.W.2d 190, 193 (Wis. Ct. App. 1983); See the conflicting opinions in *Taylor v. The King*, 1947 S.C.R. 462 (Can.), for an exposition of the opposing views.

Finally, the court did not explain how the psychiatric evidence could assist the jury in its exploration for answers to any of the three questions it posed. Since the third question — cooling time — is an "objective" one, the evidence could even be arguably relevant only to the first two questions. Yet, since the court found that the series of acts could be adequate provocation, there is no apparent need for psychiatric testimony about the first question, just as there is no apparent need for psychiatric testimony about whether a defendant could be enraged by finding his spouse in flagrante delicto. See *McCusker*, 448 Pa. at 390, 292 A.2d at 290.

The *McCusker* court also declared erroneously that the "almost unanimous voice of professionally recognized authorities" held psychiatric evidence competent on the manslaughter issue. Most of the citations are to articles or books dealing generally with the issue of psychiatric testimony. Some of them expressly deal with the question of diminished responsibility (or capacity), which traditionally has been raised only with regard to differentiating between first and second degree murder, or, more broadly put, between "specific" and "general" intent crimes. The cases cited by the *McCusker* court are similarly off point. In *State v. DiPaolo*, 34 N.J. 279, 168 A.2d 401 (1961), defendant contended (and the court agreed) that the psychiatric testimony actually given "is competent upon the issue whether the crime was murder in the first degree or murder in the second degree." *Id.* at 294, 168 A.2d at 408. The court properly did not discuss manslaughter or heat of passion, since the defendant purposefully armed himself and inflicted some forty stab wounds on the victim. The only way the court could have discussed those issues is by expanding the law to reach cases of "culminating distress." Indeed, the New Jersey court expressly held in answering the contention that the trial court should have instructed on manslaughter due to heat of passion, "an instruction that in such circumstances the crime of manslaughter could be found would have been prejudicially erroneous if a verdict of manslaughter had been returned." *Id.* at 299, 163 A.2d at 411. In *State v. Sikora*, 44 N.J. 453, 210 A.2d 193 (1965), the New Jersey Supreme Court upheld a refusal of the trial court to admit psychiatric evidence which it found "unreliable or too speculative or incompetent when tested by concepts established in law for the determination of criminal responsibility." *Id.* at 469-70, 210 A.2d at 202. Again, the defendant sought to have the evidence introduced to reduce first degree murder to second degree; not a word about manslaughter appears in the opinion. Furthermore, the court declared that "trite as it may sound to some, the law must distinguish between mental disease and character deformity." *Id.* Similarly off point are the other cases cited. In *People v. Wells*, 33 Cal. 2d 330, 334, 202 P.2d 53, 56 (1949), for example, defendant was charged with an assault committed "with malice aforethought." Proof of this element would result in a death penalty, defendant being a life prisoner. *Id.* The court held that even if the evidence of defendant's abnormal fears negated malice aforethought, it would not be sufficient to establish self-defense. *Id.* at 358, 202 P.2d at 70. *Wells* arguably suggests that psychiatric evidence

psychiatric one. First, the drafters of the Code did not see the EED language as touching upon issues of "responsibility," to which psychiatric analysis is generally directed. Second, during the floor debate, in a critical colloquy, Herbert Wechsler clearly suggested that the language was not to be technically applied.³⁰³

may be used to establish lack of capacity, and thereby negate malice aforethought. It does not suggest that it may establish heat of passion, which negates malice aforethought. In *People v. Henderson*, 60 Cal. 2d 482, 386 P.2d 677 (1963), all of defendant's psychiatric evidence on the capacity to deliberate was admitted. *Id.* at 491, 386 P.2d at 682. Defendant's counsel, moreover, declared that "in closing . . . the only issue in this case is the premeditation and the intent . . . I do not excuse nor condone Mr. Henderson, but I say to you he is guilty of nothing greater than murder in the second degree." *Id.* (emphasis added). Clearly, the relevance of the testimony toward a manslaughter verdict was not raised in *Henderson*. Similarly, in *People v. Gorshen*, 51 Cal. 2d 716, 731, 336 P.2d 492, 502 (1959), the issue was the admission of psychiatric evidence as relating to second degree murder, although the court did say that the evidence might have some effect to reduce a conviction to manslaughter. The court affirmed a second degree conviction. One other case cited by the court, *Battalino v. People*, 118 Colo. 587, 596, 199 P.2d 897, 902 (1948), dealt with the effect of insanity upon mens rea. The last case cited by the court, *State v. Gramenz*, 256 Iowa 134, 126 N.W.2d 285 (1964), not only does not support the *McCusker* view, but thoroughly rejects it. As in the other cases, defendant sought to use evidence to go to the issue of first or second degree murder, but did not ask the jury to consider a reduction to manslaughter. In upholding the trial court on both decisions, the court said in part:

We cannot . . . agree . . . that the jury should have been allowed to consider the evidence of his mental condition on the elements of malice aforethought and general criminal intent. While malice aforethought is the specific state of mind necessary to convict of murder, it is far different from the specific intent which is a necessary element of murder in the first degree.

Id. at 142, N.W.2d at 290. The court also rejected the analogy to intoxication evidence, which in Iowa may reduce a murder charge to manslaughter, as "not sound." *Id.*

It is thus clear the *McCusker* was wrong at least to the extent that it declared that psychiatric evidence is generally admitted for the purpose of reducing a killing to manslaughter.

Following *McCusker*, psychiatric evidence was admitted in *Commonwealth v. Shaver*, 501 Pa. 167, 460 A.2d 747 (1983). Upset at his estranged spouse for seeing another man, the defendant told his daughter that he would be in jail after "today," and then bought a shotgun. He then found and shot the lover and went to the wife's workplace and shot her. The psychiatrist testified that defendant was under "extended provocation" brought about by the stress, anger and hostility created by his marital problems. *Id.* at 171-73, 460 A.2d at 743-44. There was no indication that either victim or wife had done anything on that day or recently which would qualify as provocation under the common law. The jury returned a first degree murder conviction. *Id.* at 173, 460 A.2d at 745. The contrary issue — whether expert evidence, or even evidence, is either admissible or required upon the question of what the "reasonable person" or the "reasonable pregnant person," or the "reasonable impotent person," would do — has almost never been addressed in the literature or the cases. Lord Simon of Glaisdale did address the question in *Regina v. Camplin*, [1978] 2 W.L.R. 679, 694, and rejected the argument of the prosecution that such evidence would be either required or admissible, saying that:

whether defendant exercised reasonable self-control in the totality of the circumstances (which would include the pregnancy or the immaturity or the malformation) would be entirely a matter for the consideration by the jury without further evidence. The jury would, as ever, use their collective common sense to determine whether the provocation was sufficient . . . I certainly do not think that is beyond the capacity of a jury.

Id.

³⁰³ AMERICAN LAW INSTITUTE PROCEEDINGS 126-27 (1959):

MR. GRINNELL: Mr. President, I would like to ask whether the words "extreme mental condition" . . . run into your definition of insanity . . .

PROFESSOR WECHSLER: I don't think it touches the responsibility formulation . . .

This short and somewhat ambiguous colloquy is the only material anywhere in the debates that addresses the question. It suggests, among other things, that the phrase "emotional and mental disturbance" is to be read as a single term of art, rather than parsed. But more importantly, to the extent that one can glean from this dialogue any help at all, the notion that these words were to be "simple and non-technical" suggests that psychiatric testimony was, at least, not on the minds of the drafters.

More particularly, the position that psychiatric expertise is critical is tenuous in at least those seven states which have omitted the word "mental" when adopting the Code.³⁰⁴ A normal application of statutory interpretation rules might suggest that the legislatures in those states were seeking to implement a "non-technical" approach to the issue of killings done under stress, and at least implicitly to exclude testimony concerning "mental" disturbance. Yet in Oregon,³⁰⁵ New York³⁰⁶ and Delaware,³⁰⁷ the courts have allowed psychiatric evidence despite this statutory argument. The Connecticut courts have gone so far as to declare that such testimony is *essential* to an EED plea.³⁰⁸

Of course, the jury is not bound by this expert testimony any more than in any other case.³⁰⁹ The appearance of psychiatrists in what would have been provocation — heat of passion reduction — cases is, however, somewhat startling. This is particularly true in light of the Code's purpose, which was to broaden the instances in which the jury, by using its common sense and standards of ordinary life, could grant a reduction in punishment.³¹⁰ The paradox has not escaped all the courts. In *Gall v. Commonwealth of Kentucky*,³¹¹ defendant, without any apparent reason, picked up and killed a twelve-year-old girl who was on her way to a friend's home. The defendant argued insanity, but the jury was not persuaded. On appeal, defendant argued that even if the mental disability was short of insanity, it was grounds for a manslaughter verdict. The court

I think the words "extreme mental or emotional disturbance" are simple and non-technical . . . we do not say "diseases" here. We are simply trying to use the broadest terms that we can use to designate an abnormality in the feelings and reactions and capacities of the actor at the time.

³⁰⁴ See *supra* notes 244–50.

³⁰⁵ *State v. Ott*, 61 Or. App. 576, 582, 659 P.2d 388, 291 (1983), *rev'd on other grounds*, 297 Or. 375, 392, 686 P.2d 1001, 1015 (1984).

³⁰⁶ *Shelton*, 88 Misc. 2d at 149–53, 385 N.Y.S.2d at 717–20.

³⁰⁷ *Eaton*, 394 A.2d at 220.

³⁰⁸ See *supra* note 301 and accompanying text.

³⁰⁹ *State v. Hamilton*, 406 A.2d 879, 882 (Del. Super. Ct. 1974); *People v. Solari*, 43 A.D.2d 610, 612, 349 N.Y.S.2d 31, 35 (1973). In some instances, the proffer of psychiatric testimony has been refused, and the denial upheld. See *People v. Diaz*, 51 N.Y.2d 841, 413 N.E.2d 1166, 433 N.Y.S.2d 751 (1980) (mem.).

³¹⁰ See MPC, *supra* note 239, at 62–63. The question, of course, parallels the issue of expert dominance where the insanity plea is raised.

In some instances, the courts are clearly correct in admitting psychiatric evidence as to EED, because the legislature has, at least implicitly, indicated its desire to allow (and perhaps require) such evidence. In Oregon, for example, the legislature required that there be advance notice of an EED defense, and provided that the state would then have a right to expert examination of the defendant. OR. REV. STAT. § 163.135 (1983). On the other hand, it seems ironic that the American Psychiatric Association is calling for an end to, or severe reduction of, psychiatric testimony in insanity cases because psychiatrists are unable to diagnose accurately loss of volitional control, see AMERICAN PSYCHIATRIC ASSOCIATION, STATEMENT ON THE INSANITY DEFENSE (Dec. 1982). Psychiatric testimony is becoming *de rigueur* in cases where formerly the applicable standard was the "ordinary man" standard.

³¹¹ 607 S.W.2d 97 (Ky. 1980), *cert. denied*, 450 U.S. 989 (1981).

rejected this argument, and in dictum declared, "[t]here is much to be said for the proposition that an emotional disturbance inhering in a mental illness is not the kind of an emotional disturbance contemplated by the statute."³¹²

On the other hand, the criticism has been made that allowing evidence on defendants' overly subjective sensibilities begins to tolerate defendants with a low threshold for irritability — the perennial problem which for so long was used to perpetuate the reasonable man standard. Professor Bernard Gegan, for example, has observed:

[m]ental disorder short of legal insanity comes perilously close to conditions traditionally categorized as violent temper or excitability. Every defect and imperfection to which mortal man is subject can be called a "disease" or "defect" and even given a medical name. The bad tempered offender of the common law becomes "emotionally unstable" or "suffering from anxiety neurosis." If a verdict could be found based on expert testimony which assumes any falling short of the ideal of rational serenity to be by hypothesis a mental disorder, the path is clear to a sweeping inclusion of every impulsive killing within voluntary manslaughter. Yet, the legislature plainly rejected a wholly subjective test. The statute does not put mitigation on the ground of extreme emotional disturbance per se, as some have urged.³¹³

Between 1950 and the present, the law of provocation came under increasing attack. This attack resulted in the continuous liberalizing and broadening of the provocation standard, both in this country and in England. None of this reform, however, was uniformly acclaimed, and a number of states in this country expressly rejected a more subjective approach to the crime of manslaughter. On the other extreme, psychiatric evidence threatens to bring total subjectivity to the inquiry, and to allow experts to overwhelm the jury's function of providing a common sense moral judgment to the facts of a provocation pattern.

There are many reasons for these increasing tensions in the law of provocation, as in the criminal law generally, not the least of which is that the criminal law never fully understood *why* heat of passion was really relevant to criminal liability. For nearly 400 years, the law has allowed provocation to be a reductive force without ever fully articulating the reason for the reduction in a fully understandable way. As Professor Joshua Dressler has said, provocation and heat of passion are truly doctrines in search of a rationale.³¹⁴

IV. THE RATIONALE OF PROVOCATION

A. *Confusion and Conflict*

One major reason for the variety of responses to provocation doctrine, by both common law courts and legislatures, is the confusion about the underlying purpose or rationale of the doctrine. First, there is the question, over which Professors Dressler and

³¹² *Id.* at 109.

³¹³ Gegan, *Criminal Homicide in the Revised New York Penal Law*, 12 N.Y.L. FORUM 565, 574 (1966).

The point could also be made that the Code, and many states which have adopted it, provide for mental illness falling short of "insanity" under the common law essentially by defining the requisite predicate "mental illness" to include "diminished capacity." See MPC, *supra* note 239, at § 4.04(1).

³¹⁴ Dressler, *supra* note 96.

Ashworth have debated,³¹⁵ of whether provocation is a partial justification for the killing, essentially on the grounds that the victim "asked for it" in some clear and definable way, or instead should be viewed as a partial excuse.³¹⁶ Second, there is the entire issue of the relationship of provocation to mens rea: whether a killing in the heat of passion lacks an element of murder (malice aforethought) or whether, instead, there is no relation between heat of passion and malice aforethought, but the state, in its grace, gives mercy to the intentional or severely reckless killer who has been provoked.

1. Excuse v. Justification

Professor Ashworth has argued that provocation reduces murder to manslaughter not because it affects the mens rea element, but because it touches the actus reus — that the killing is "partially justified." He stated:

[t]he doctrine of provocation as a qualified defense rests as much on notions of justification as upon the excusing element of loss of self-control. The term "partial justification" does not imply a connection with the legal concept of justifiable force [I]ts closest relationship is with the moral notion that the punishment of wrongdoers is justifiable. This is not to argue that it is ever morally right to kill a person who does wrong. Rather, the claim implicit in partial justification is that an individual is *to some extent* morally justified in making a punitive return against someone who intentionally causes him serious offense, and that serves to differentiate someone who is provoked to lose his self-control from the unprovoked killer.³¹⁷

Ashworth's chief support for this proposition stems less from any a priori argument than from precedent, in particular the so-called "mis-aim" provocation cases,³¹⁸ where *D*, having received legally adequate provocation from *X* such that a killing of *X* would be manslaughter, instead kills *V*, who did not participate in the provocation. Some of these cases refuse a reduction, and Ashworth argues that this is because the *actual* victim did not "ask for it." If the concern was with the defendant's mens rea, this would be irrelevant to a court's determination of whether the killing should be classified as a murder. It becomes relevant, however, if we are concerned not with the defendant's mental state, but with whether a bad act of the victim somehow "justified" the defendant's reaction. From those cases, and from the English doctrine of proportionality, Ashworth concludes that a heat of passion killing is "partially justified."³¹⁹ But the cases are in conflict as to the proper resolution of this issue,³²⁰ and at least one very early case is to the contrary.³²¹ Moreover, it is difficult to reconcile in principle the position on killing

³¹⁵ Compare Ashworth, *supra* note 193, with Dressler, *supra* note 96.

³¹⁶ The term is that of Professor Wasik, *Partial Excuses in the Criminal Law*, 45 MOD. L. REV. 516, 517 (1982).

³¹⁷ Ashworth, *supra* note 193, at 307; see also Alldridge, *The Coherence of Defenses* 1983 CRIM. L. REV. 665, 669-70.

³¹⁸ *R. v. Gross*, 23 Cox Crim. Cas. 455, 456 (Crim. Ct. 1913); *State v. Fowler*, 268 N.W.2d 220, 222 (Iowa 1978), *cert. denied*, 439 U.S. 1072 (1979); *Smiley v. Commonwealth*, 235 Ky. 735, 739, 32 S.W.2d 51, 53 (1930). See O'Regan, *Indirect Provocation and Misdirected Retaliation*, 1968 CRIM. L. REV. 319, 321; W. LAFAVE AND A. SCOTT, *supra* note 49, at 582.

³¹⁹ Ashworth, *supra* note 193 *passim*.

³²⁰ See, e.g., *Rex v. Manchuk*, [1937] 4 D.L.R. 737, 738-39 (Can. Sup. Ct.), *noted in* 51 HARV. L. REV. 928 (1938).

³²¹ *The King v. Brown*, 1 Leach 148, 150, 168 Eng. Rep. 177, 177 (P.C. 1776).

in mistaken self-defense, which stems from heightened fear, and which in many jurisdictions is regarded as manslaughter,³²² with a refusal to allow "mistaken" or "mis-aimed" provocation.

Professors O'Regan³²³ and Dressler³²⁴ on the other hand, argue that both in principle and on the balance of authority, heat of passion killings are not partially justified, but partially excused because it is the concern with blameworthiness and culpability of the defendant, not the malevolence of the victim, that is ultimately at issue. As Professor O'Regan noted, "[o]nce an accused loses his self-control it is unreal to insist that his retaliatory acts be directed only against his provoker. When his reason has been dethroned a man cannot be expected, in the words of a Queensland judge, 'to guide his anger with judgment.'"³²⁵

2. Heat of Passion and Mens Rea

Another reason for agreeing with Dressler and O'Regan that provocation sounds in excuse rather than in justification is negative. There has been little discussion in the past 200 years concerning the philosophical premises for the manslaughter doctrine. But what discussion there has been has concerned the defendant's mens rea. Since mens rea sounds more in excuse rather than in justification, which is concerned primarily with the objective conditions of the act, this suggests that most writers agree that provocation should be treated as an excusing condition. It may be too grand to label the litany echoed by courts and writers throughout the past 200 years as an "argument."³²⁶ The courts

³²² See *supra* note 276.

³²³ O'Regan, *supra* note 318.

³²⁴ Dressler, *supra* note 96.

³²⁵ O'Regan, *supra* note 318, at 323.

³²⁶ Indeed, it could be argued that any attempt to explain provocation as a mitigating force is bound to fail because its sole function was to allow some "murderers" to escape the death penalty. This view could be buttressed by the observation that provocation has no reductive value for nonhomicidal injury. See W. LAFAVE & A. SCOTT, *supra* note 49, at 582. Two responses are possible. First, since even at common law, most "murderers" were in fact not capitally punished, see L. RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW* 83-230 (1948), the argument is askew. Second, with the introduction in this country of second degree (nonintentional, but still malice aforethought) murder, the need for manslaughter as a mitigation is no longer present. See Dressler, *supra* note 96, at 423.

Some, indeed, argue that where the death penalty is abolished, the murder-manslaughter distinction should also be abolished. See, e.g., *Hyam v. Director of Pub. Prosecutions*, [1974] 2 All E.R. 41, 72 (Lord Kilbrandon, dissenting) (H.L.); see also Wells, *The Death Penalty of Provocation*, 1978 CRIM. L. REV. 662, 671; Lambert, *Reform in the Law of Homicide*, 127 NEW L.J. 571, 574 (1977). This, however, misses the point that there is still a substantial difference between the kinds of killings, and that there should be some way by which the jury, and society generally, can articulate that distinction.

That the manslaughter verdict reflects a determination that there is less moral blame, and that it is not merely an archaic appendix, was recently recognized in a dramatic way by the English Law Revision Committee. The Committee discussed the suggestion that the fixed penalty of life imprisonment for murder be abolished, and that there merely be one category for "homicide," leaving the actual sentence to the judge's discretion. The Committee argued that the two categories, murder and manslaughter, reflected differences in levels of culpability which the fact-finder should be able to express, even if the fixed penalty for murder were abolished. Therefore, the Committee concluded, any sentence could be imposed for either crime. ENGLISH LAW REVISION COMMITTEE, OFFENCES AGAINST THE PERSON, FOURTEENTH REPORT (1980). According to Kaye, early distinctions between murder and manslaughter rested not on chance medley, but on whether, given a fight, *D*

have frequently adopted, sometimes in the same opinion, conflicting views of the reason for the reduction. Again, the writers were similarly silent or unhelpful on this question.

The problem is both simple and complex, for it involves both a doctrinal analysis and an inquiry into the nature and purpose of the criminal sanction. Doctrinally, the question is simply put: does the law grant a reduced punishment to a manslaughterer because (1) given the definition of murder, his killing is not murder or (2) although conceptually and doctrinally he is a murderer, the law grants him an undeserved mercy? More succinctly, but perhaps more cryptically: does heat of passion negate malice aforethought so that a killing in the heat of passion cannot be murder? Philosophically, the question is whether a person who has killed in the heat of passion is, for a utilitarian, less deterrable, less dangerous or less in need of rehabilitation than a murderer or, for a retributivist, less morally blameworthy than a murderer and therefore less deserving of the punishment imposed upon a murderer. After examining the doctrinal question, and finding it sterile, this article will analyze the philosophical question in terms of the purposes of penal policy.

As already seen,³²⁷ manslaughter, at least the type considered here, was initially limited to killings that occurred upon chance-medley. Coke explained this result by declaring that a killing in the heat of passion was a killing without malice aforethought. Indeed, according to Coke, the very presence of heat of passion and provocation negated the presence of malice aforethought.³²⁸ Thus, the first partially articulated analysis of provocation suggested that manslaughter *could not* be murder because the essential criminal element of murder — malice aforethought — was absent. In large part, this view could be taken because malice aforethought still rested on a notion of actual premeditation accompanied by actual ill-will, if not toward the specific victim, then at least toward society in general. The defendant's entire character, as well as his act, was in question.³²⁹ A killing in chance-medley, which, by definition, the defendant had not sought, did not show pre-existing ill-will. An element of murder was simply missing from a heat of passion killing.

By the beginning of the nineteenth century "malice aforethought" had become a term of art. True malice had become irrelevant, and the law shifted its attention to the actor's mere "intent," accompanied by a presumption that he intended any "natural and probable" consequences of an act.³³⁰

intended to kill *V.* If so, it was murder; if not, manslaughter. Thus, an intentional killing during a chance medley was, at least prior to 1550, in Kaye's view, murder. Kaye, *supra* note 28, at 595 ff. However, 3 J. STEPHEN, *supra* note 13, at 59, states, however, that in Coke's time manslaughter was limited to chance medley with weapons. Coldiron, *supra* note 32, concurs, as does W. LAMBARDE, EIRENACHA 243 (1599). Indeed, throughout both Coke and Eirenacha, all the examples of manslaughter are chance medleys, and all true chance medleys are deemed manslaughter. There is no discussion by either of these writers regarding the presence of absence of intent (malice) in chance medley, for they define an intentional killing as *not* being in chance medley.

³²⁷ See *supra* note 34.

³²⁸ 3 E. COKE, *supra* note 34. See also M. HALE, *supra* note 57, at 455 (provocation "takes off the presumption of malice").

³²⁹ Langbein, *supra* note 1 at 284-87.

³³⁰ The Model Penal Code comments explain the difficulty historically:

[malice aforethought] was once construed to require actual premeditation in advance of the homicidal act. It therefore followed that one who killed in a sudden rage or in the "heat of passion" lacked the state of mind required for murder. In time, prior deliberation disappeared from the definition of "malice aforethought" and it became

At least in many cases, a provoked defendant did *intend* to kill his opponent, even if that intent was not born of general ill-will toward the victim, or anyone else. Thus, Coke's notion that the requisite elements of murder were simply not present in a provocation-heat of passion killing could not always be sustained where mere intent, without pre-existing malice or malevolence, was sufficient for murder.

Moreover, the need to reassess the manslaughter reduction was heightened because of a concomitant movement in statutory law. In the United States, numerous states enacted legislation distinguishing between "first degree" (capital) and "second degree" (noncapital) murder. Thus, the manslaughter offense was created to mitigate the death penalty,³³¹ that rationale was no longer necessary, and a new explanation of the mitigation seemed desirable. Doctrinally, there is confusion on at least two counts: (1) whether the proper mens rea element to which provocation relates is (a) intent or (b) the broader "malice aforethought"; (2) whether heat of passion does³³² or does not³³³ negate the

clear that any intent to kill, however suddenly conceived, could support liability for murder. Provocation nevertheless survived as a rule of mitigation for intentional homicides committed in certain extenuating circumstances, and many authorities continued to describe heat of passion as negating "malice aforethought."

MPC (1980 Comments), *supra* note 239, at 54. An almost totally contrary view is given by Judge Edmunds in *People v. Austin*, 1 Parker Crim. R. 154, 166 (N.Y. Sup. Ct. 1847), who suggests that rather than the doctrine of malice aforethought creating difficulty for heat of passion theory, the presence of manslaughter, which was a "lenient" punishment, forced the common law courts to create the fiction of implied malice. This is probably wrong as a matter of history, but is certainly a provocative thesis.

The development and growth of this presumption of intended consequences cannot be traced here, although I hope to do that in a later article. It should be noted, however, that to the extent the "presumption" is read as mandatory, or even as shifting the burden of proof to the defendant, it is now patently unconstitutional. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). Beyond its procedural dubiety, the "presumption," even if stated as a permissive one, *see Allen v. Ulster County Court*, 442 U.S. 140, 163 (1979), is on shaky ground, at least as applied in homicides. *Allen* requires that permissive presumptions be tested by a "more likely than not" standard. While it may be true, as an abstract proposition, that actors "more likely than not" intend the "natural and probable" consequences of their acts, it is arguable — an argument I hope to explore in the anticipated later article — that death is not the "natural and probable consequence" of a stabbing, or even a shooting (as an abstract proposition). One would have to examine carefully the facts of a particular killing — the manner of killing, the weapon used, the distance between the defendant and the victim, the number of events, etc. — even to begin to establish such an inference as "more likely than not." For example, death is not a "probable" consequence of a stabbing in the arm, or a shooting in the leg and indeed is not even a "probable" consequence of a shooting in the stomach. On the other hand, death is a "probable" consequence of six bullets shot into the head at point-blank range, or of fifty stab wounds to the torso and heart area. Since it is only "probability" that distinguishes the criminal law at this point from tort law, (since "natural" consequences may be both improbable and unintended, *see In re Polemis*, [1921] 3 K.B. 560, 572) the point is critical.

³³¹ *See supra* note 326.

³³² *Does negate intent*: *See Holmes v. Director of Pub. Prosecutions*, 1946 A.C. 588, 598 (H.L.) (Viscount Simon: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby . . . the formation of an intention to kill . . . is negated"); *People v. Risico*, 191 A.D. 355, 358, 181 N.Y.S. 569, 571 (1920) ("The words 'heat of passion' are inserted in the statute as the expression of a condition of mind which prevents the inference of an intent to kill . . ."). There is some suggestion that the courts of South Africa have recognized that provocation negates intent to kill, although it is somewhat unclear. *See Dugard, Provocation: No More Rides on the Sea Point Bus*, 83 S. AFRICAN L.J. 261, 266 (1966), reporting

relevant element of mens rea. Not surprisingly, one can find judicial statements that an act of passion does or does not negate intent, or that it does or does not negate malice aforethought.³³⁴

The difficulty in resolving the conflict between these positions is that in some sense each is correct. There are different fact and psychological patterns to which the notions of heat of passion, and certainly EED, have been applied; the apt paradigm for one situation may not fit another. Even in the most egregious heat of passion situations, like discovery of adultery, different persons will act in different ways. Some individuals may simply flail out at whomever is present. For those actors, it is probably accurate to say that they have temporarily "lost control," and that any attempt to reason with them will simply be unavailing. If in that flailing out they happen to kill someone, that act should

on a recent case, and rehearsing the South African precedents. *Accord* R. PERKINS, *supra* note 204, at 49-50, 53-54.

³³³ *Does not negate intent*: E. EAST, *supra* note 48, at 232: "Herein is to be considered under what circumstances it may be presumed that the act done, *though intentional*, of death or great bodily harm, was not the result of a cool and deliberate judgment . . . but reputable to human infirmity alone." (emphasis added); *White v. State*, 44 Tex. Crim. 346, 348, 72 S.W. 173, 174 (Crim. App. 1902). *See also* English, *Provocation and Attempted Murder*, 1973 CRIM. L. REV. 727-28:

It is now acknowledged that provocation may arise as a defense notwithstanding an intent to kill. Indeed, a moment's reflection shows that this ought to be so. Because of the taunts, blows, insults — the provocation — the accused suddenly wants to, intends to kill or really hurt his provoker. That, surely is what it is all about.

Accord G. WILLIAMS, *TEXTBOOK OF CRIMINAL LAW* 478 (1978).

The Privy Council, reviewing an appeal from the High Court of Australia, took the view that intent and provocation could co-exist in *Parker v. The Queen*, 1964 A.C. 1369, 1390-91 (P.C.). For a comment on *Parker* and the later case of *R. v. Johnson*, *see* Sharma, *Provocation in the South Wales: From Parker to Johnson*, 54 AUSTRALIAN L.J. 330 (1980). *Cf.* *Chun Chem v. the Queen* 1963 A.C. 220, 234 (P.C.).

After grouping the state statutes in categories, the Model Penal Code commentary, in 1957, declared that in at least six jurisdictions (Kansas, Minnesota, New York, North Dakota, Oklahoma, South Dakota) heat of passion could not reduce unless there also was no intent to kill, MPC (Tentative Draft No. 9), *supra* note 239, at 43. These jurisdictions, then, seemed to suggest that intent to kill could exist in the presence of heat of passion. Again, according to the Comments, the Louisiana statute explicitly reserved manslaughter for intentional homicides committed under heat of passion, while Wisconsin expressly called manslaughter only unintentional homicides committed in the heat of passion. *Id.* at 44.

The differences continue with the MPC's provision of EED. In Kentucky, Montana, New York and Oregon, either by statute or decision, a killing in EED is an intentional, but mitigated, killing. *See* *Patterson v. New York*, 432 U.S. 197, 206-07 (1977); *State v. Davis*, 44 Or. App. 549, 553-54, 606 P.2d 671, 673 (1980). In Montana, a killing in EED is denominated a deliberate mitigated killing. MONT. CODE ANN. § 45-5-103 (1983). On the other hand, in Wisconsin and Delaware, a killing in EED is nonintentional. *State v. Hoyt*, 21 Wis. 2d 284, 287, 128 N.W.2d 645, 647-48 (1965); *Boyd v. State*, 389 A.2d 1282, 1286-87 (Del. 1978).

³³⁴ Most states are that heat of passion negates malice aforethought. *See* *State v. Johnson*, 23 N.C. 354, 360 (1840); *McHargue v. Commonwealth*, 231 Ky. 82, 87, 21 S.W.2d 115, 119 (1929): ("proof of reasonable and adequate provocation will negative malice and reduce the offense to voluntary manslaughter."); *Elsmore v. State*, 132 Tex. Crim. 261, 262, 104 S.W.2d 293, 295 (Crim. App. 1937) ("murder without malice"). Georgia's statute provided that there would be a reduction to manslaughter if there was proof of "circumstances to justify the excitement of passion and exclude all idea of deliberation or malice, either express or implied." GA. CODE § 4325, *quoted in* *Mack v. State*, 63 Ga. 693, 696 (1879). *See also* An Act Relating to Offences Against the Person 24 & 25 Vict. ch. 100, § 6 (1861).

be treated as the act of an epileptic would be treated — truly beyond the control of the individual defendant.

The second factual-psychological scene is different. *D*, having been provoked by *Y*, spends some time — anywhere from 10 seconds to 10 years — thinking about the injury *Y* has inflicted and “decides” to retaliate against *Y*. Obviously, the amount of time in which *D* thinks about this may — but need not — indicate his “intent,” whether to kill, to injure, or simply to “retaliate,” without any thought given to the ultimate result. If *D* spends 10 years brooding about the injury, and then seeks *Y* out, it is at least open to the jury to find that *D* intended serious bodily harm or death, thus making *D* guilty of murder, as Coke defined it. But a jury *could* conclude that the act is still done under a loss of control caused by the passion. On the other hand, if *D* spends only 10 minutes, or even 10 days before killing it is more difficult to say that *D* even recklessly killed *Y*: *D*'s state of mind is such that *D* intends only to retaliate — to return, to some degree, the psychological harm which *Y* has inflicted. When that state of mind is pursued with violence, it does not necessarily indicate that *D* “intended” the violence to end in death, or even that he was “depravely” reckless about it. This killing, too, is done “in anger” but is different from the first killing. A more careful inquiry as to “intent” and whether it was “negated” is necessary. As one court put it:

Provocation may, of course, inspire the intent required for murder. There may, however, be cases where the conduct of the victim amounting to provocation produces in the accused the state of excitement, anger or disturbance, as a result of which he might not contemplate the consequences of his acts and might not, in fact, intend to bring about those consequences.³⁵⁵

This quotation affirms what common sense dictates: that persons in extreme situations normally do not “intend” very much of anything; they merely wish to end the stressful situation. Most killers in these situations would be content if the “stressor,” however defined, simply disappeared. It is because they see the only solution to their anguish in the injury or removal of the stressor that they act as they do. They are not, in any meaningful sense, the moral equivalent of a purposeful murderer. As the comments to the Model Penal Code put it, these actors strike out “in blind distress.”³⁵⁶

The confusion which the intent-heat of passion dichotomy raised provided the impetus for the adoption of a second “explanation” for the provocation reduction. This “explanation” was said to have first been put forward by Foster, who argued that the

³⁵⁵ *Regina v. Campbell*, 38 Can. Crim. Cas.(2d) 6, 15–16 (Can. Ont. Ct. App.) (1977). An exceptionally careful and helpful analysis of the philosophical explanation for the reduction, as well as of the various fact patterns in manslaughter is Von Hirsh and Jareborg, *Provocation and Culpability in NEW DIRECTIONS ON RESPONSIBILITY* (F. Sherman, ed.) (forthcoming).

³⁵⁶ MPC (Tentative Draft No. 9), *supra* note 239, at 46 (citing *Rex v. Simpson*, 84 L.J.K.B. 1893, 1895 (1915) (soldier home on short leave kills sick child, angered by wife's absence and neglect of child)); *State v. Speyer*, 207 Mo. 540, 554, 106 S.W. 505, 510 (1907). This same analysis would apply under other extreme situations, such as duress or necessity. Wells, *supra* note 23, at 670, disagrees, arguing that these doctrines, like provocation, “are based . . . on the ground of concession to human frailty and do not correspond with the requirements of criminal law.” But as Dressler, *supra* note 96 observes, this is wrong. Necessity is a justification, which clearly corresponds with the requirements of criminal liability by negating the very *actus reus* of crime, and duress is not a “concession to human frailty” but a case of overborne will where volition is at least partially, and perhaps totally, negated. See *R. v. Hudson*, [1971] 2 All E.R. 245, 246–47.

law "indulge(s) human frailty" to the point of allowing a reduced punishment.³³⁷ This remark was expanded upon by Blackstone, "the law has regard to human frailty as not to put a hasty and a deliberate act upon the same footing with regard to guilt."³³⁸ The core notion here is that the heat of passion killer is a murderer, but the law, from mercy, grants a reduction. The reduction is not required by the doctrines of the law.

It is doubtful that Foster actually intended to suggest that the heat of passion killer was in fact a murderer. Foster had taken the term "human frailty" from Hawkins but had failed to consider the context. The full passage of Hawkins reads:

And such an indulgence is shown to the frailties of human nature, that where two persons who have formerly fought on malice, are afterwards to all appearance reconciled, and fight again on a fresh quarrel, it shall not be presumed that they are moved by the old grudge, unless it appear by the whole circumstances of the face.³³⁹

It seems clear here that Hawkins is explaining that the law "indulges" the "frailties of human nature" and will not presume, or infer, malice aforethought when two old enemies meet and begin a new quarrel.³⁴⁰ Instead, the law will begin with the assumption that, because of human weakness, the killing is "on a sudden," and it will be for the prosecution to prove that it stems from a pre-existing, and continued, malice. Thus, far from suggesting that the reduction to manslaughter is a boon, Hawkins appears to be taking the somewhat heretical view that the general proposition should be that all killing is manslaughter, unless there is good indication that it stemmed from malice aforethought.³⁴¹

The commentators of the nineteenth century failed adequately to analyze this problem, much less to attempt to resolve it. Russell, for example, follows Foster's position that although the killing in manslaughter is done intentionally, it is "imputable" to human infirmity.³⁴²

Nevertheless, throughout the nineteenth century, the cases³⁴³ repeat the "frailty" doctrine; indeed, it is still in vogue today.³⁴⁴ It is a clean, crisp explanation. There is no

³³⁷ M. FOSTER, *supra* note 34, at 291.

³³⁸ 4 W. BLACKSTONE, *supra* note 34, at 191.

³³⁹ W. HAWKINS, *supra* note 61, § 30, at 97.

³⁴⁰ *Cf.* *Watts v. Brynes*, Noy 171, 74 Eng. Rep. 1129, also reported as *Watts v. Brains*, Cro. Eliz. 778, 78 Eng. Rep. 1009.

³⁴¹ In assessing this issue, it may help to remember that we are creatures of our history, and that the common law history, so far as we know it, appears to have been that initially one was strictly liable for any criminal result. Thus, any reduction, or defense, was likely to be viewed warily, since it departed from the "normal" order of things. Thus, manslaughter was seen as "murder without malice"; murder was not seen as "homicide with malice and intent." Putting the case the latter way illuminates, I think, a number of issues, including the problem of burden of proof. First, it would seem more logical, in a society that treasures freedom, that we start analyzing every criminal event as being at the lowest level of culpability, and then *add* facts that need to be proved in order to justify any, and then increased, punishment and stigma.

³⁴² *E.g.*, W. RUSSELL, *supra* note 43, at 631. Russell's position is perhaps more defensible than Foster's, given the change which gradually occurred with the meaning of "malice aforethought." See MPC Comments, *supra* note 239, at 54.

³⁴³ *Rowland v. State*, 83 Miss. 483, 487, 350 So. 826, 827 (1904). In *Rowland*, the court stated: "the law, from the earliest ages, recognizing and considering the passions and frailties of man, in

need to determine the relationship of heat of passion, suddenness, lack of reason, and lack of self-control, with the mental state necessary for murder. The law, without regard to these niceties, simply grants the slayer a bonus, which neither doctrine nor policy requires.

The "frailty" doctrine accomplished at least two objectives. First, it allowed the courts and writers to justify a reluctance to investigate the rationale for the provocation reduction — if it was truly "arbitrary" and "merciful," there was no reason to investigate the rationale. Second, it permitted the development of objective categories, since any grace could be surrounded by as many conditions as seemed tenable.

The point can be made another way. The most common metaphor used to explain the mitigating effect upon mens rea (intent) of heat of passion is that of "loss of control" or "loss of reason." Thus, the court in *State v. Hill* explained that provocation and passion were regarded as reductions, "[n]ot because the law supposes that this passion made him unconscious of what he was about to do, and stripped the act of killing of an intent to commit it — but because it presumes that the passion disturbed his way of reason, and made him [the killer] regardless of her [the victim's] admonitions."³⁴⁵ Similarly, Judge Tindal declared in *R. v. Hayward* that the defendant "might not be considered at the moment as master of his understanding."³⁴⁶ Yet probably because the judges recognized that some heat of passion killings could not be ascribed total loss of self control, that is, were still "intentional" in some sense, the courts repeatedly emphasized that the loss of volition need not be total. As one authority noted, "[t]he question which every homicide

its mercy, has said that deliberation cannot be predicated on the deeds of a man situated as was the appellant at the moment of the homicide" (emphasis added).

³⁴⁴ E.g., Wells, *The Death Penalty for Provocation?*, 1978 CRIM. L. REV. 662, 670: "Duress and necessity are based, like provocation, on the ground of concession to human frailty and do not correspond with the positive requirements of criminal liability."

³⁴⁵ 20 N.C. 629, 634 (1839). *Accord* *Hannah v. Commonwealth*, 153 Va. 863, 871, 149 S.E. 419, 422 (1929).

³⁴⁶ 6 Car & P. 157, 159, 172 Eng. Rep. 1188, 1189 (Shropshire Assizes 1833). This latter concession — that the loss of volition need not be total — is intriguing since at the same time, Judge Tindal refused to consider a total lack of volition resulting from mental illness as establishing an insanity defense. Judge Tindal was the presiding judge at the trial of Daniel M'Naughten, who was acquitted on grounds of insanity after Tindal, in the middle of the psychiatric evidence, suddenly interrupted the testimony, asked the prosecutor if there was any rebuttal evidence (there was none) and then effectively directed the jury to return an insanity verdict. *M'Naughten*, of course, is the prototypical case of a person who knows that what he is doing is perceived by others as morally and legally wrong, but who "cannot help himself" from doing it. Tindal then presided over a session of all the judges of England, convened by the House of Lords after receipt of an irate letter from the Queen, and delivered the famous *M'Naughten* rules, which allowed an insanity defense only when the accused did not know that what he was doing was morally or legally wrong. *M'Naughten's case*, 10 Cl. & F. 200, 205, 8 Eng. Rep. 718, 721 (H.L. 1843). In short, those rules would have precluded M'Naughten's acquittal. It is at least as intriguing today, when psychiatric testimony is being used to establish an EED defense of partial volition at the same time the American Psychiatric Association is declaring that psychiatry is insufficiently precise on issues of volition for its members to testify in court on that question. See *supra* note 310. This paper is no place to rehearse that issue; it is sufficient here, I think, to note that at least until Blackstone's time, volition was an essential element of mens rea and malice aforethought. Indeed, in discussing what we now term "excuses," Blackstone and all the earlier writers talk in terms of "moral involuntariness." See, e.g., M. HALE, *supra* note 57, at 42. The continued concern, in provocation doctrine, and the constant tension between *M'Naughten* and the irresistible impulse addition to those rules, demonstrates, at the least, that the inquiry is not yet abandoned.

presents is whether the person who inflicted it had really the command of his passions, and acted from a mind undisturbed, or whether reason had lost *in part* its sway"³⁴⁷

These doctrinal "explanations," however, fail to explain why the defendant is guilty of anything at all. If there was truly a loss of control, then, as Professor Howard has said, the defendant's "conduct become[s] by definition involuntary. This ought to mean that he should be acquitted, not merely convicted of a lesser offense."³⁴⁸ Yet the common law never even considered full exoneration as a possibility; it neither coped with the doctrinal points nor with the larger policy issues.

All disputes over whether "malice" is or is not negated by "heat of passion" are bound to be fruitless, however, just as disputes over whether all killers "in the heat of passion" "intend" to kill are fruitless, for one simple reason — they are sterile doctrinal controversies over semantic fictions.³⁴⁹ This is not to say that the emotions themselves are fictions — it is not uncommon to experience malice, or hatred, or a "blinding rage." But these are mere metaphors, and to expect one metaphor to "annul" another metaphor is ludicrous.

Neither the view that heat of passion does, or does not, involve loss of control sufficiently explains the cases where there should be a reduction to at least a lesser penalty and, perhaps, no penalty at all. The reason for this failure is that virtually no writer, or court, has clearly articulated the obvious point that the issue must be considered

³⁴⁷ 2 J. BISHOP, *supra* note 110, § 630, at 407–08 (emphasis added) (citing *Preston v. State*, 25 Miss. 383 (1853) and *State v. Hill*, 20 N.C. 629, 634 4 Dev. & Bat. 495, 496 (1839)); see Ashworth, *supra* note 193, at 306.

There is, intriguingly, some physiological data which at least indirectly supports the "loss of reason" metaphor. Studies of organic changes in the brain suggest that during periods of anger and fighting, the area of the brain generally considered the most advanced and responsible for the "reasoning" side of the human specie will "release" the hypothalamus, the coordinator of emotional responses, and allow that organ to control the body's reaction. This is probably due to chemical changes not yet understood, involving adrenalin, noradrenalin, and other hormones. See A. STORR, *HUMAN AGGRESSION* 12–13 (1968). For a more sophisticated analysis, see Bronson & Desjardins, *Steroid Hormones and Aggressive Behavior in Mammals*, and Moyer, *A Preliminary Physiological Model of Aggressive Behavior*, both in B. ELEFThERIOU & J. SCOTT, *THE PHYSIOLOGY OF DEFEAT* (1971) at 43 and 223, respectively.

In examining the provocation doctrine from a psychological viewpoint, Nagel, *supra* note 188, at 246, declares that "It is feasible that a similar process could result in the accumulation of emotional arousal sufficient to elicit an impulsive response from a series of subprovocative events. Thus, a provoked reaction need not be just the result of the continuity between a *single* provocation event immediately preceding the retaliation."

³⁴⁸ HOWARD, *AUSTRALIAN CRIMINAL LAW* 323 (2d ed. 1970), quoted in Ashworth, *supra* note 193, at 314; Wasik, *Partial Excuses in the Criminal Law*, 45 MOD. L. REV. 516, 525 n.53 (1982) states that I BURCHELL & HUNT, *SOUTH AFRICAN CRIMINAL LAW AND PROCEDURE* 242 takes the view that provocation should produce an acquittal because it negates intent.

³⁴⁹ The issue is far from academic. If "heat of passion" negates mens rea, then the burden of proof that there was no heat of passion rests on the prosecutor. *Mullaney v. Wilbur*, 421 U.S. 684, 704 (1975). If, on the other hand, there is no "negation" of "malice aforethought," but the "mitigation" goes to something else, the burden may be placed upon the defendant. *Patterson v. New York*, 432 U.S. 197, 210 (1977). In *Patterson*, the Supreme Court adopted a purely formalistic approach to determining whether something was an "element" of the crime which was "negated" by a "mitigating factor." Justice Powell rightly excoriated the majority's position. Unhappily, Mr. Justice Powell's dissent, which argued that malice aforethought is negated by heat of passion, rests upon a reading of only one line of cases in the historical debate. Instead, the Justice should have argued that in order to convict of manslaughter, the state must first show "x" mental state, and that to convict of murder, it must show "x" plus malice aforethought.

from the viewpoint of the overall purpose of the criminal sanction. Yet only in this way may we rationally assess the dilemma created by current doctrine and discover the "rationale" which Professor Dressler has urged us to find.

B. *Manslaughter, Reduced Punishment and the
Purposes of the Criminal Sanction*

Although it is surely contestable, I wish to simply posit here that the purpose of the criminal sanction, as opposed to potential civil processes, is to impose punishment and stigma only upon the morally blameworthy. If that is the purpose of punishment, then the question of manslaughter is whether the defendant who kills after losing control is morally blameworthy at all and, if so, for what act or omission.

The point is as old as Aristotle, who, in his *Ethics*, distinguished among four levels of acts and responsibilities:

Now when (1) the injury takes place contrary to reasonable expectation, it is a misadventure. When (2) it is not contrary to reasonable expectation, but does not imply vice, it is a mistake (for a man makes a mistake when the fault originates in him, but is the victim of accident when the origin lies outside him). When (3) he acts with knowledge but not after deliberation, it is an act of injustice — e.g. the acts due to anger or to other passions necessary or natural to man; for when men do such harmful and mistaken acts they act unjustly, and the acts are acts of injustice, but this does not imply that the doers are unjust or wicked; for the injury is not due to vice. But when (4) a man acts from choice, he is an unjust man and a vicious man.³⁵⁰

One concurring justice has stated these ideas somewhat more directly, "the manslaughter defense assumes that the defendant is morally blameworthy to some degree. The basic question is whether he is as culpable as a person who kills solely for self-aggrandizement or out of sheer malevolence."³⁵¹

In Coke's time, the answer to this inquiry would be relatively simple — the person who, suddenly caught up in a fight, kills "almost" in self defense cannot be equated with the killer who premeditatedly plans a slaying, or even with the one who plans a felony, knowing that he may have to kill to avoid capture and *the death penalty* for the felony. But as Stephen suggested, not all "unpremeditated" killings are clearly less blameworthy or less indicative of a need for incapacitation than planned slayings:

A disposition at least as dangerous to society, probably even more dangerous, is shown by sudden as by premeditated murders A, passing along the road, sees a boy sitting on a bridge over a deep river and, out of mere wanton barbarity, pushes him into it and so drowns him A man civilly asked to pay a just debt pretends to get the money, loads a rifle, and blows out his

³⁵⁰ 5 NICHOMACHAEN ETHICS 8.

³⁵¹ Hoyt v. State, 21 Wis. 2d 284, 300, 128 N.W.2d 645, 654 (1965) (Wilkie, J., concurring). Indeed, most of the doctrines of criminal law, such as imperfect self-defense, reckless murder, etc., ignore that question. One of the contributions which the Model Penal Code did make to this inquiry was to equate, for exposure to serious punishments, all homicides (whether premeditated or not) so long as there was "knowledge" or "serious recklessness" involved. This follows the well articulated and prescient observation of, among others, Stephen, that some nonpremeditated killings, such as the wanton throwing of a child off a building, are at least as morally blameworthy as those which are premeditated. 3 J. STEPHEN, *supra* note 13. At some later point, I hope to explore that issue more thoroughly.

creditor's brains. In none of these cases is there premeditation . . . but each represents even more diabolical cruelty and ferocity than that which is involved in murders premeditated in the natural sense of the word.³⁵²

The solution here, I submit, is to adopt a totally subjective approach to the question of reduction of stigma and punishment, and to have that question informed by the singular purpose of the criminal law — to measure moral blameworthiness and punish it proportionately. The law should ask only whether (1) the defendant lost control due to some emotional event or series of events; (2) in losing that control, was the defendant as morally blameworthy as a person who deliberately or recklessly kills? In assessing this liability, the jury should consider only the defendant and his emotional characteristics; no suggestions of "reasonable" people or "adequate" provocation should be allowed. This view, even if partially or totally wrong, nevertheless has the virtue of focusing on the critical inquiry: was the defendant blameworthy for having lost his temper, given everything known about the defendant. If so, then his "blameworthy conduct" is in failing to control his temper, *not* in killing once his temper had "replaced his reason."

An analogy may be helpful here. Glanville Williams,³⁵³ Jerome Hall,³⁵⁴ and many other commentators,³⁵⁵ have attacked the current law relating to intoxication as facile and wrong-headed. Under current doctrine, a person who becomes voluntarily intoxicated has no defense to a crime of "general intent,"³⁵⁶ which essentially means that he was reckless in creating a risk of serious harm. The theory behind this doctrine, apparently, is that expressed by the drafters of the Model Penal Code³⁵⁷ — that "everyone" knows the risks associated with drinking, and therefore should not be able to deny their own recklessness in becoming intoxicated. This, however, is superficial. Recklessness, at least in terms of the Model Penal Code,³⁵⁸ and in most common law formulae,³⁵⁹ requires that the defendant be consciously aware of and reject "substantial" risk that the result will ensue. It is simply not true that most people who drink recognize that, for them, there is a "substantial" risk that they will become sufficiently intoxicated to be a criminal danger. Unless one is willing to agree that any person who sees even the remotest possible risk of this occurring consciously disregards this risk as "substantial,"³⁶⁰ the semantics, as well as the reality, are off kilter.

³⁵² 3 J. STEPHEN, *supra* note 13, at 94.

³⁵³ G. WILLIAMS, *CRIMINAL LAW, THE GENERAL PART* 573 (2d ed. 1961).

³⁵⁴ J. HALL, *GENERAL PRINCIPLES OF CRIMINAL LAW* 554 (2d ed. 1960).

³⁵⁵ For others supporting the notion that intoxicated persons should be punished for becoming drunk, with whatever state of mind they did that act, but not for the results, see Berner, *The Defense of Drunkenness — A Reconsideration*, 6 U.B.C.L. REV. 309, 349 (1971); Frankel, *Narcotics Addiction, Criminal Responsibility and Civil Commitment*, 1966 UTAH L. REV. 581, 607; Parker & Beck, *The Intoxicated Offender — A Problem of Responsibility*, 44 CAN. BAR. REV. 563, 608-09 (1966); Note, *A Common Sense Inquiry into the Problem of the Intoxicated Offender — Proposed Amendments to the Criminal Code of Canada*, 4 MANITOBA L.J. 365, 369 (1971); Note, *Volitional Fault and the Intoxicated Criminal Offender*, 36 U. CIN. L. REV. 258, 304 (1967). *Contra* Bruden, *Mens Rea and the Intoxicated Offender*, 1968 JURID. REV. 48, 53; Paulsen, *Intoxication as a Defense to Crime*, 1961 U. ILL. L.F. 1, 6.

³⁵⁶ W. LAFAVE & A. SCOTT *supra* note 49, at 346.

³⁵⁷ MODEL PENAL CODE § 2.08 (Tentative Draft No. 9, 1959).

³⁵⁸ MODEL PENAL CODE § 2.02(2)(c) (Proposed Official Draft 1962).

³⁵⁹ See, e.g., *R. v. Cunningham*, 41 Crim. App. 155 (1957). There has been a recent spate of decisions and commentary in England on the meaning of recklessness, but this debate does not affect the general point here.

³⁶⁰ Some cases seem to suggest this analysis. See, e.g., *Commonwealth v. Welansky*, 316 Mass. 383, 55 N.E.2d 902 (1944).

Williams and Hall suggest a much more sophisticated approach, dependent upon the actual defendant's past drinking habits. A person who has a history of (1) becoming intoxicated frequently after he has begun to drink, and (2) of thereupon acting rashly or criminally, can be said "consciously" to disregard a "substantial" risk that a criminal result will ensue. But a person who has never become drunk before, or who, being intoxicated on previous occasions, has never committed a criminal or reckless act, should not be presumed, irrebuttably under both the common law and Model Penal Code doctrine, to have actually and consciously foreseen the "substantial" risk of a criminal result.³⁶¹ This distinction may help with one of the major problems which has haunted the provocation debate — the responsibility of an actor with a "low threshold" for violent action. It is this actor against whom the reasonable man standard usually has been inveighed, and with good reason: that actor could well be as morally culpable as most actors whose conduct demonstrates "reckless indifference to the value of human life."³⁶²

³⁶¹ Of course, as the Code has it in its definition of "reckless," the risk needs to be both unjustifiable and substantial. MPC, *supra* note 239, at § 2.02(b)(3). This does not suggest that "low threshold" actors get "one free killing" before being punished at all, if they react violently to a minor provocation, but it would mean that the jury would have to know something about what the defendant knew about his own tolerance to insults. If the defendant had never lost his control in such a situation before, or had never used violence before, he would be treated differently than if the evidence showed that he had lost his temper every week and had consistently resorted to violence. But the even-tempered defendant would be equally so treated; in that sense both would get one "free" bite. Similarly in the intoxication analogue, if past experience has shown the defendant that he cannot drink more than three beers, or the epileptic that he has frequent seizures, it is clear that his drinking five beers, or his driving a car, is unjustifiable. Whether the risk is "substantial" or not depends on the number of times that the drinker has actually been unable to drive a car after five beers, or the epileptic has actually lost control of his motor actions (not necessarily lost control of a car, or even a machine).

A similar suggestion is made by Samuels, *Excusable Loss of Self-Control in Homicide*, 34 MOD. L. REV. 163, 170-71 (1971): "Provocation as a head of manslaughter could be abolished and replaced with the offence of criminal loss of self-control causing the death of another person, sentence being for culpable failure to exercise self-control." Indeed, Samuels even offers a proposed new offence:

If the jury are satisfied that the accused lost his self-control so as to form the intent to kill . . . and so caused the death of the deceased they shall return a verdict of criminal . . . killing . . . if, having regard to all the circumstances, including in particular the standard of self-control properly to be expected of the accused, they are satisfied that the act was to some degree excusable.

Id. at 171. *Contra* Robinson, *Causing the Conditions of One's Own Defense: A Study in the Limits of Theory in Criminal Law Doctrine*, 71 VA. L. REV. 1, 4 (1985).

³⁶² It is arguable that we may be able to deter some crimes, although the empirical evidence for even such an equivocal statement is doubtful. See NATIONAL RESEARCH COUNCIL, *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (1978). The premise here would be that even if some crimes can be deterred, heat-of-passion killings are not among these; except perhaps for the "general preventive" effects suggested by Andenaes, *The General Preventive Effects of Punishment*, 114 U. PA. L. REV. 949, 951 (1966).

At the very least, it would seem that the burden of demonstrating these alleged deterrent, or even educational, effects would be upon the proponents of that view, and that until we have firm data demonstrating the effect, we should not proceed as though a penalty could deter. That the Supreme Court or the United States does not agree, *see, e.g.,* *Gregg v. Georgia*, 428 U.S. 153, 185-86 (1976), does not deter me from this proposal.

Even if one were to talk of deterrence as a purpose of the criminal law, it would be difficult indeed to talk of the true heat-of-passion killer as in need of, or as responsive to, threat. And, surely, if the defendant has truly lost his control, he is unlikely to be in need of incapacitation for the time he would be punished under a manslaughter conviction. If, however, either deterrence or

An increasing number of commentaries also have proposed adoption of a subjective view.⁵⁶³ Weber⁵⁶⁴ has urged that the standard of manslaughter be limited to the first

incapacitation were "necessary," the proposal of a lesser offense would appear to meet these needs sufficiently. A recent article by Professor Morse has suggested that all "partial excuses," including provocation, diminished capacity, and others, be removed from the criminal law. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. AND CRIM. 1 (1984). While Professor Morse is willing to acknowledge that some actors so lose self-control that they cannot be held accountable at all, *see id.*, at 34, he rejects the view that there should be a "sliding scale" of responsibility based upon "diminished self-control," apparently due both to a fear that we cannot accurately detect the spot on the scale at which the impulse was not irresistible, but simply not resisted sufficiently, and also on the grounds that the harm done is equally grave in both cases. Professor Dressler has demonstrated the difficulty with these concerns, *see Dressler, Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse*, 75 J. CRIM. L. AND CRIM. 953 (1984), and I will not rehearse that general rebuttal here. Specifically with regard to provocation, however, the concern should *not* be that the defendant is lying, and was able to restrain his reaction, but rather that he *ought* to have been able to restrain his reaction (a situation not as immediately present in diminished capacity, where by hypothesis the defendant, even in a stable setting, does not have the normal ability to control himself). This may well justify the refusal of the criminal law to exculpate, but the issue then becomes whether the penalty for (essentially) negligence should be as severe as the penalty for manslaughter. Instead, perhaps, the better approach is to exculpate the defendant of homicide as such, but penalize him for the new crime of negligently failing to control his passions to the extent that a reasonable person would have done. In stark contrast to Professor Morse, this view would make the *result* of the failure irrelevant. I cannot here discuss the relationship of the result and desert philosophy, but there is certainly a good argument that, from a *desert viewpoint*, result is irrelevant in all cases. *See R. SINGER, supra* note 20, at 25; *Cf. Schulhofer, Harm and Punishment: A Critique of the Emphasis on the Results of Conduct in the Criminal Law*, 122 U. PA. L. REV. 1497 (1974).

⁵⁶³ *People v. MacEoin*, 1978 Ir. R. 27, 34 (Crim. App.) is said to have adopted a totally subjective view.

Others favoring a subjective test: Painter, *Provocation, the Reasonable Man and the Criminal Law Revision Committee*, 127 NEW L.J. 708-10 (1977); Samuels, *Excusable Loss of Self-Control in Homicide*, 34 MOD. L. REV. 163, 166-69 (1971); J.C. SMITH AND B. HOGAN, *CRIMINAL LAW* 215 (1965); Note, *Provocation*, 94 L.Q. REV. 19, 21 (1978); *see also* LAW REFORM COMMISSION, VICTORIA, AUSTRALIA, *PROVOCATION AS A DEFENSE TO MURDER* (1978). For a summary of arguments against the reasonable man standard, and in favor of a totally subjective standard, *see* Donovan and Wildman, *supra* note 64, at 462-67.

Among those who have attacked the objective standard as too rigid are Brett, *The Physiology of Provocation*, 1970 CRIM. L. REV. 634, 638; English, *What Did Section Three Do to the Law of Provocation?*, 1970 CRIM. L. REV. 249, 267; Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1308 (1974); Ingber, *A Dialectic: The Fulfillment and Decrease of Passion in Criminal Law*, 28 RUTGERS L. REV. 861, 942-64 (1975). Donovan and Wildman, *supra* note 64, at 458, argue, perhaps somewhat speciously, that adoption of a totally subjective standard "would simplify the jury's task because the inquiry into the accused's own mental state is more concretely grounded in reality than are conjectures about a mythical reasonable person." This, of course, assumes that the court will allow evidence as to all aspects of the defendant's make-up. If the test is one of a reasonable person, other than the defendant, then the jury's task is quite simple — they have merely to ask whether they would have acted as defendant did. Surely that is easier than attempting to probe the mind of the actual defendant, and all his foibles and experiences.

The English Criminal Law Revision Committee urged an almost totally subjective approach: We think that the doctrine of provocation should be reformulated so that the accused is judged with due regard to any disability, physical or mental, from which he suffered . . . there should be a requirement that provocation is sufficient if, on the facts as they appear to the accused, it constitutes a reasonable excuse for the loss of self-control on his part.

sentence of the Model Penal Code's provision, thereby eliminating the "reasonableness" test. Although this would create some internal problems in jurisdictions adopting the Code,³⁶⁵ they are certainly manageable. In England and Australia Criminal Law Reform Committees have recommended adoption of a fully subjective standard for manslaughter. Australia, for example, has declared, "... we recommend that the question whether the defendant who relies on provocation was in fact provoked be an entirely subjective inquiry, directed in all aspects as ascertaining the defendant's actual state of mind at the relevant time."³⁶⁶

Moreover, there has been some experience in this country with a subjective standard. In addition to those states that have broadened the definition of "adequate provocation"

CRIMINAL LAW REVISION COMMITTEE'S WORKING PAPER ON OFFENCES AGAINST THE PERSON, Para. 54 (1976).

That *Camplin* fully adopted a subjective view as to physical characteristics is evidenced by the fact that the Court of Appeal had held that the boy's age should be considered, but distinguished *Bedder* on the ground that impotency, unlike age, was not a "normal characteristic." The House of Lords could have adopted that narrow position — leaving to one side the question of what a "normal characteristic" is — but it did not. Instead, Lord Diplock explicitly declared that the jury should consider any of the "accused's characteristics as they think would affect the gravity of the provocation to him . . ." *R. v. Camplin*, [1978] 2 W.L.R. 679, 686.

³⁶⁴ Weber, *Some Provoking Aspects of Voluntary Manslaughter Law*, 10 ANGLO-AM. L. REV. 159, 173 (1981).

³⁶⁵ At least sixteen states, following the Code's structure in death penalty cases, provide that one mitigating factor which the jury may find to avoid the death penalty is that the killing was done in "extreme mental or emotional disturbance." Since this standard omits the reference to "reasonableness," the effect is that if the jury finds that the defendant was emotionally overwrought, but that a reasonable person in his situation would not have been, he may be guilty of murder, but then not capitally punishable.

State murder statutes containing provision that EED:

- (a) mitigates death sentence to life imprisonment
- (b) reduces murder charge to manslaughter

1. Alabama	a) 13A-5-51(5)	b) 13A-6-3(a)(2)
2. Alaska	a) 11.41.115(a)	b) 11.41.115(a)
3. Arizona	a) 13-703(G)(2)	b) 13-1103(A)(2)
4. Arkansas	a) 41-1304(1)	b) 41-1504(a)
5. Colorado	a) 16-11-103(5)(C)	b) 18-3-104(1)(C)
6. Florida	a) 921.141(6)(b)	b) 782.03
7. Illinois	a) tit. 38 sec. 9-1(c)(2)	b) 38 sec. 902(a)
8. Kentucky	a) 507.020(1)(a)	b) 507.030(1)(b)
9. Missouri	a) 565.012.3(2)	b) **Not In Statute**
10. Montana	a) 46-18-304(2)	b) 45-5-103(1)
11. Nebraska	a) 29-2523(2)(c)	b) 28-305(1)
12. Nevada	a) 200.035.2	b) 200.050
13. New Jersey	a) 2C:11-3C.(5)(a)	b) 2C:11-4b(2)
14. New Mexico	a) 30-2-1-B	b) 30-2-3-A
15. North Carolina	a) 15A-2000(f)(2)	b) **Not In Statute**
16. Ohio	a) 2929.04(B)(2)	b) 2903.03(A)
17. Pennsylvania	a) 9711(e)(2)	b) 2503(a)
18. Utah	a) 76-3-207(1)(b)	b) 76-5-205(1)(b)
19. Wyoming	a) 6-2-102(J)(ii)	b) **Not In Statute**

³⁶⁶ CRIMINAL LAW AND PENAL METHODS REFORM COMMITTEE OF SOUTH AUSTRALIA, FOURTH REPORT: THE SUBSTANTIVE CRIMINAL LAW 27 (1977).

to include words and gestures³⁶⁷ and have allowed brooders to be considered as killing in the heat of passion by leaving the issue to the jury.³⁶⁸ The experience of New York may be instructive. In 1829, New York totally revised its criminal code, thereby inaugurating what could have been an intriguing experiment in the distinction between murder and manslaughter. "The great advance . . . was the clear-cut and decisive cleavage between murder and manslaughter upon the single principle of the absence or presence of the 'design to effect death.'"³⁶⁹ Any "designed," (that is, intended), death was murder: killings on a "heat of passion" (the words used by the statute) were manslaughter. Most critical, however, the manslaughter statute did not require that any provocation exist. In other words, if the killing in fact was done without an intent to kill, *and* was done in a heat of passion, its impetus was irrelevant. Perhaps just as importantly, the New York statute did not judge the heat of passion by an objective standard — the question was whether this defendant, not the "reasonable" or "average" or "ordinary" person, was in a "heat of passion."

The New York case law, however, did not entirely free itself from common law restrictions, although at least some were eschewed by the courts. In the 1859 case of *Wilson v. People*,³⁷⁰ for example, the trial court had sought to require that there be an altercation, probably chance-medley, for the defendant to plead manslaughter. But this view was rejected on appeal as inconsistent with the words of the statute. In dictum, the court went further, declaring that the common law rule that "mere words" could not be provocation was not the law in New York, and that,

[t]he passions may be heated as effectually by the words as by act. In cases of assault of the person, it has always been held that provocation by words has gone far to mitigate the legal wrong. It cannot be that the accused must always show a combat and a sufficient provocation. It is enough that the passions are heated by the acts or conduct of the one upon whom the assault is made, and it matters not whether this state is produced by acts or words.³⁷¹

After this declaration, "the courts seemed to take it for granted that the sole fact to be determined was the actual state of the officer's mind."³⁷² And later cases agreed that fear, or anger, engendered by almost any cause, could be sufficient to be "heat of passion."³⁷³

³⁶⁷ See *supra* notes 107, 110, 222, 235.

³⁶⁸ See *supra* note 259.

³⁶⁹ REPORT OF THE NEW YORK LAW REVISION COMMISSION, COMMUNICATION AND STUDY RELATING TO HOMICIDE 30 (1937) [hereinafter cited as N.Y.L. REV. COMM.].

³⁷⁰ 4 Parker Crim. R. 619, 642-47 (N.Y. Sup. Ct. 1859). Cf. *Shuffin v. People*, 62 N.Y. 229, 237 (1875).

³⁷¹ 4 Parker Crim. R. at 648 (emphasis added).

³⁷² N.Y. L. REV. COMM. *supra* note 369, at 210.

³⁷³ See, e.g., *People v. Risico*, 191 A.D. 355, 358, 181 N.Y.S. 569, 571 (1920); *People v. Koerber*, 244 N.Y. 147, 150, 155 N.E. 79, 81 (1926); *People v. Granger*, 187 N.Y. 67, 71, 79 N.E. 833-34 (1907). In *Patterson v. New York*, 432 U.S. 197, 210 (1977), the Supreme Court held that the legislature could constitutionally place the burden of proof that the killing was done under "extreme emotional disturbance" upon the defendant who seeks to obtain a manslaughter, rather than a murder, verdict. See *supra* note 18. The articulated reason for this determination — that lack of emotional disturbance is not an element of the crime of murder because the legislature has said it is not — is specious, as Justice Powell's dissent makes clear, 432 U.S. at 216-32 (Powell, J., dissenting). The Court's decision, however, could be seen as encouraging legislatures to broaden the typical common law defenses, and as accepting the view, articulated by Judge Breitel in the New York

Unhappily, the potentially revolutionary implications of the New York Statute were never fully realized, because the New York statutory requirement that a killing be "undesignated to effect death" to qualify as manslaughter, even if done in the heat of passion, came to mean that the death had to be "unintended." With the application of the presumption that one intends the natural and probable consequences of one's acts,³⁷⁴ the potential of the totally subjective view which New York took was substantially diluted. Nevertheless, the New York history does not suggest, as do opponents of a totally subjective standard, that the criminal law will be frustrated if such a standard is adopted.

The New York case law which openly adopted a quasi-fully subjective approach, is not necessarily indicative nor persuasive of what would happen if a totally subjective standard were adopted. And the reaction of several states³⁷⁵ to the EED standard may indicate that embrace of a fully subjective approach is not imminent the United States.

Although most commentators have strongly urged a subjective standard,³⁷⁶ Professor Ashworth has stood firm against it, urging that chaos would ensue, and that there would be virtual negation of the moral, and utilitarian, bases of the criminal law, since "tout comprendre, c'est tout pardonner."³⁷⁷ Ashworth has stated that "[t]he link with popular moral judgments about causation and blameworthiness would be severed; it would no longer be possible to say that the defense implies that the provocation was the substantial cause of the loss of self-control."³⁷⁸

But Ashworth's position seems built upon his notion that the reduction itself is based upon a partial justification, and not upon a partial excuse,³⁷⁹ a position which must be

Court of Appeals, that legislatures would be more prone to do so if they could place the burden of proving the more lenient defense on the defendant. 432 U.S. 197, 211 n.13 (quoting *Patterson v. New York*, 39 N.Y.2d 288, 305-07, 347 N.E.2d 898, 909-10, 383 N.Y.S.2d 573, 583-85 (1976)). In a sense, this rationale is that the legislature would be giving the defendant a new "bonus" defense, to which he was not otherwise (constitutionally?) entitled, and the burden could therefore be placed upon him. In most jurisdictions this might be sensible; but *Patterson* involved a New York statute which, given the foregoing history of the criminal law of that state in the nineteenth century, did not give *Patterson*, or other criminal defendants, a broader "mitigation" than had been allowed them for 150 years. On its own terms, therefore, *Patterson* was wrong as applied to New York, even if it was defensible with regard to other states which had in fact applied the restrictive common law rules of provocation to manslaughter prosecutions.

³⁷⁴ See *supra* note 4.

³⁷⁵ See *supra* text accompanying notes 242-73.

³⁷⁶ See *supra* note 363.

³⁷⁷ Although this encapsulates full determinism, a topic upon which discourse here is not possible, the fear that the criminal law will be overrun by determinist principles which reject free will may be at the base of many of the doctrines of criminal law. I simply note here that the manslaughter and provocation doctrines are arguably of that type.

³⁷⁸ Ashworth, *supra* note 193, at 318. He continues:

How would the subjective condition be defined? If the phrase 'sudden loss of self control' were used, what degree of loss of self-control would be required? . . . Would the proposed test refer to provocation at all? . . . Do the abolitionists seriously maintain that every quarrel or petty affront which causes a loss of temper should become ground for reducing murder to manslaughter?

Id.

In this last question, Ashworth betrays the weakness of these otherwise cogent inquiries: the argument relies upon his view that provocation is a partial justification, not a partial excuse. Instead of asking whether the victim "deserved" (even partially) to die for the "petty affront," the issue is whether the defendant deserves to be treated as severely as a murderer, rather than as someone who has lost partial (or full) self-control.

³⁷⁹ See *supra* notes 317-25 and accompanying text.

rejected. Moreover, if Ashworth is correct, the jury, whose "popular moral judgments" are what the criminal law is all about, would simply refuse to expand the subjective test to the extent he fears. Finally, Ashworth does not explain why "non-provoked" but real emotional distress which leads to loss of control should not, equally with provoked distress, be considered by the criminal law in its initial stigma-imposing stage. In short, while his concerns may be valid, they do not appear to impose an insuperable barrier to a fully subjective test. At base, Ashworth fears the jury's inherent sense of fairness; indeed, at one point he raises the "spectre" of "complete jury discretion."³⁸⁰ It also has been argued, from a utilitarian point of view, that "as society advances, it ought to call for a higher measure of self-control in all advances, it ought to call for a higher measure of self-control in all cases."³⁸¹ On the other hand, it might be argued that as society becomes "advanced" and more secure, it should be more willing to accept that some persons either do not, or cannot, control themselves as others do, and cannot be held subjectively guilty for an act which society as a whole proscribes.

The position of the Model Penal Code's minority standard in the area of insanity may also be informative on this point. That test eschews not only *M'Naghten*, but all formulae of the test, and ask the jury merely to decide whether, in light of the evidence concerning the defendant's mental state at the time of the act, the defendant "may justly be held responsible."³⁸² In addition to that instruction, the jury should be instructed that where the circumstances are such that the "ordinary man" would be highly emotionally disturbed, such as in finding a spouse in adultery, or in being grossly insulted, it is presumed that the killing was in heat of passion, and that the prosecution bears the burden of rebutting that specific presumption.³⁸³

³⁸⁰ Ashworth, *supra* note 193, at 302.

³⁸¹ Director of Pub. Prosecutions v. Holmes, [1946] A.C. 588, 601.

³⁸² Donovan and Wildman, *supra* note 64, at 466. These scholars stated:

The application of the abstract, objective reasonable man standard as test of individual criminal responsibility exemplifies the way in which the law is divorced from the social reality in which it operates. Common sense tells us that the social context in which an individual acts is relevant to a determination of his or her moral culpability. The failure of the law to take that social reality into account perpetrates injustice of individuals who are accused of homicide. Not only is injustice done to the particular individual, but any conditions of social inequity which may have contributed to the act of violence at issue are in some sense perpetuated or condoned by the law's failure to take them into account in adjudicating criminal responsibility.

Id., Samuels, *supra*, note 363, at 166-69, strongly urges a totally subjective approach:

The jury might then take account of the virility or size or colour or psychological make-up of the accused and ask themselves what would be the effect of this provocation upon a person having these physical or mental characteristics but having that degree of self-control that can properly be expected from that person . . . What the jury should be required to do is to fix upon the proper norm of behavior to be expected from that man in that situation and then to judge whether or not he acted in conformity with it. If the situation could be expected to put him beyond the threshold of self-control, then he is excusable. If not, then he is not excusable.

³⁸³ The instruction could read something as follows:

To find the defendant guilty of manslaughter, you must find beyond a reasonable doubt that the killing was done while the defendant was extremely emotionally disturbed. There are no circumstances under which a person may not be suffering from such disturbance. However, there are some situations in which, over the centuries, the law has presumed that such emotional disturbance exists. For example, if a defendant is grossly insulted by words or gestures of another, or finds or suspects that another

One qualification on this subjective approach, however, seems warranted. Any jury decision in a criminal case is at least partially, and hopefully totally, a reflection of the morality of the community and the standards of behavior it espouses. This is common sensical "rough justice," not highly sophisticated. Indeed, to attempt to cerebralize this process too much might make it sophomoric. In short, psychiatric evidence which, as we have seen,³⁸⁴ has proliferated under the EED test of the Model Penal Code, should be admitted only rarely in such instances. Although it is harsh, particularly in a subjective world, to limit the jury's information about the defendant's subjective state, the declaration of the *Turner* court,³⁸⁵ that the issue for the jury is really one of common sense, and not one upon which others are expert, is applicable. While psychiatrists may help probe the emotional background of the defendant in a way layman cannot, direct examination of the defendant at trial by his attorney, who has been informed by the psychiatrist about this background, should suffice.³⁸⁶

Almost a century ago, the Kentucky Supreme Court urged that lower courts should not try to define the term "adequate provocation," but should simply leave the term to the jury without further guidelines.³⁸⁷ A similar solution to the manslaughter issue now would eradicate the interminable difficulties which four centuries of inconsistency, inaccuracy, and formalism have generated. This approach may seem simplistic. But after four centuries of recognizing that some distinction must be made among killers, while struggling with a verbal formula to capture that distinction, it may, perhaps, be true that here, as in many other areas, less really is more.

is committing adultery with his spouse [, or (X),] the law presumes that there is such emotional disturbance. While these are not the only cases in which such emotional disturbance exists, and while it is your duty to determine whether the defendant was in fact suffering such disturbance in this case, I further instruct you that if you find any of those facts to be the facts in this case, you should *presume* that the defendant is not guilty of murder, but of manslaughter, unless the state convinces you beyond a reasonable doubt that, notwithstanding those facts, the defendant in this case was not so disturbed.

Id.

³⁸⁴ See *supra* text accompanying notes 299-314.

³⁸⁵ [1975] Q.B. at 841. See *supra* note 302.

³⁸⁶ Even such a position, if adopted, would not solve the problems of the "real world," for in many instances defense counsel would proffer a weak, possibly totally untenable, defense of insanity so as to get the psychiatric evidence before the jury on the manslaughter issue. This is patently what was done in the Richard Herrin trial, discussed *supra* note 298 and accompanying text. Because courts should preclude an insanity defense only in the most extreme instances (if ever), an attempt to ban psychiatric evidence on a manslaughter charge might be unenforceable.

³⁸⁷ *Campbell v. Commonwealth*, 88 Ky. 402, 411, 11 S.W. 290, 292 (1889) (citing *Maher v. People*, 10 Mich. 212 (1863)).

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