Florida State University Journal of Transnational Law & Policy

Volume 6 | Issue 1 Article 3

1996

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Cover Page Footnote

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DURESS AND PROVOCATION AS EXCUSES TO MURDER: SALUTARY LESSONS FROM RECENT ANGLO-AMERICAN JURISPRUDENCE

ALAN REED*

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I. INTRODUCTION

The defenses of duress and provocation can be analogized as concessions to human frailty. Both defenses are predicated upon "confession and avoidance."[1] In each scenario, the defendants actually admit the completion of the actus reus with the attendant mens

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1. Jeremy Horder, *Autonomy, Provocation and Duress*, 1992 CRIM. L. REV. 706, 706.

rea (confession) but seek to excuse their conduct to deny criminal liability (avoidance).[2] Essentially, both defenses involve a concoction of excuse, moral involuntariness, and human frailty.[3] They focus attention on legitimate societal expectations of the reasonable man in criminal law. Unfortunately, the Anglo-American tradition, vis à vis these defenses, is replete with vagaries, inconsistencies, and anomalies. Comparing these defenses in English and United States law, this article urges detailed consideration and reform of the two defenses. The salutary lessons from recent jurisprudence show that a more compassionate and logical approach, which reflects an enhanced role for jury determination of excusing conduct, must be established.

II. DURESS AS AN EXCUSE TO MURDER

A. The Historical Development of Duress

When pleading duress, an individual generally admits to committing the actus reus as well as having the requisite mens rea of an offense but argues that such conduct ought to be excused. The accused claims that his will has been overborne by another's wrongful threats to inflict harm on the accused or his family. For centuries, however, English criminal law has not recognized duress as a defense to murder. The denial of duress as an excuse to murder reflects an unbroken tradition of authority dating back to Hale's *The History of the Pleas of the Crown*[4] and repeated by Blackstone's *Commentaries on the Laws of England*.[5] Hale stated that as a matter of principle:

> [I]f a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent . . . .[6]

In the nineteenth-century case of *Regina v. Tyler*,[7] Chief Justice Denman emphatically told the jury that it should not accept a plea of duress as a defense to murder when the victims were innocent third

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2. *See id.*

3. *See id.* at 707.

4. 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 51 (P.R. Glazebrook ed., 1971) (1736).

5. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 30 (1809).

6. 1 HALE, *supra* note 4, at 51.

7. 173 Eng. Rep. 643 (Assizes 1838).

parties.[8] The logic underpinning the denial of duress as a defense is based upon "the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life."[9] In essence, the law has demanded heroism from the threatened individual coerced into criminal activity.

Within this century, however, the English courts have been marginally more receptive to the duress defense. For example, Lord Wilberforce provided an analysis of the correct operation of the duress defense in *Director of Public Prosecutions for Northern Ireland v. Lynch*:[10]

> At the present time, whatever the ultimate analysis in jurisprudence may be, the best opinion . . . seems to be that duress . . . is something which is superimposed upon the other ingredients which by themselves would make up an offence, i.e., upon act and intention. "Coactus volui" sums up the combination: the victim completes the act and knows that he is doing so; but the addition of the element of duress prevents the law from treating what he has done as a crime.[11]

Furthermore, American jurisprudence has adopted a similar explanation of the operation of duress.[12]

Subsequent to this explanation of the historical analysis of duress, it is important to examine the current egregious position adopted by English law, to contrast more appropriate United States amendments, and to propound that duress be accepted as a concession to human frailty, even to a charge of murder.

B. England's Modern Jurisprudence Regarding Duress

It is staggering how judicial legislating during the last two decades has created difficulties and inconsistencies within the duress defense. For example, a majority of the House of Lords in *Lynch*

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8. *Id.* at 645.

9. Regina v. Howe, 85 Crim. App. 32, 48 (1987) (per Griffiths, L.J.).

10. 1975 App. Cas. 653.

11. *Id.* at 679-80.

12. *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW 374-75 (1972). Another definition of duress is:

> A person's unlawful threat (1) which causes the defendant reasonably to believe that the only way to avoid imminent death or serious bodily injury to himself or to another is to engage in conduct which violates the literal terms of the criminal law, and (2) which causes the defendant to engage in that conduct, gives the defendant the defense of duress (sometimes called compulsion or coercion) to the crime in question unless that crime consists of intentionally killing an innocent third person.

Id. at 374.

established that duress applies to a person charged with aiding and abetting murder (a secondary party).[13] Subsequently, in *Abbott v. The Queen*,[14] the Privy Council drew a dichotomy between secondary parties and principals, withholding any defense to the latter group.[15] In *Regina v. Howe*,[16] however, the House of Lords rejected and removed this delineation by denying duress as a defense to murder whether as a principal or secondary party,[17] thereby reversing its decision in *Lynch*.

The conflicting dicta contained within these authorities exemplifies the problems of judicial lawmaking. The contrasting views of Lord Wilberforce in *Lynch* and of Lord Salmon in *Abbott* capture the debate regarding the judiciary's role in developing the duress defense. In *Lynch*, Lord Wilberforce advocated judicial activism:

> We are here in the domain of the common law: our task is to fit what we can see as principle and authority to the facts before us, and it is no obstacle that these facts are new. The judges have always assumed responsibility for deciding questions of principle relating to criminal liability and guilt, and particularly for setting the standards by which the law expects normal men to act .... The House is not inventing a new defence: on the contrary, it would not discharge its judicial duty if it failed to define the law's attitude to this particular defence in particular circumstances.[18]

Lord Salmon, on the other hand, propounded a fundamentally more restrictive role for judicial legislation in *Abbott*:

> Judges have no power to create new criminal offences; nor in their Lordships' opinion ... have they the power to invent a new defence to murder which is entirely contrary to fundamental legal doctrine accepted for hundreds of years without question. If a policy change of such a fundamental nature were to be made it could, in their Lordships' view, be made only by Parliament. Whilst their Lordships strongly uphold the right and indeed the duty of the judges to adapt and develop the principles of the common law in an orderly fashion they are equally opposed to any usurpation by the courts of the functions of Parliament.[19]

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13. *Lynch*, 1975 App. Cas. at 715-16.
14. 1977 App. Cas. 755 (P.C.) (appeal taken from Trin. & Tobago).
15. *Id.*
16. 85 Crim. App. 32 (1987).
17. *Id.*
18. *Lynch*, 1975 App. Cas. at 684-85.
19. *Abbott*, 1977 App. Cas. at 767.

Another striking example of the judicial extension of the English criminal law arose in *Regina v. Gotts*,[20] where the majority held that duress was not a defense to attempted murder.[21] Because *Howe* had already held that duress was inapplicable to murder, and because attempt requires greater "evil intent" than murder,[22] *Gotts'* rationale was supportable. However, Lord Keith, in his strong dissent in *Gotts*, did not see any reason for the courts to determine the exclusion of attempted murder.[23] He argued that the matter should have been left to Parliament because, contrary to murder, for which the duress defense had been excluded dating back to Hale and Blackstone,[24] the common law never determined whether duress was a defense to attempted murder.[25]

Furthermore, an extensive analysis of the four main arguments advanced by their Lordships in *Howe* illuminates the continuing debate in England regarding duress as a defense to murder.[26] The prima facie reason involved "the special sanctity that the law attaches to human life and which denies to a man the right to take an innocent life even at the price of his own or another's life."[27] Lord Hailsham's analysis was quite unrestrained on this issue. According to his view, the law is neither "'just [n]or humane' which withdraws the protection of the criminal law from the innocent victim and casts the cloak of its protection upon the coward and the poltroon in the name of a 'concession to human frailty.'"[28] Therefore, the ordinary man, rather than kill another, might be expected to sacrifice his own life.[29] As adumbrated later in this article, such a view imposes a fundamentally false standard on individual conduct. There is palpably no duty of heroism in the criminal law; the standard is that of the reasonable man, not the reasonable hero. To suggest otherwise is absurd.[30]

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20. [1992] 2 App. Cas. 412 (appeal taken from C.A., Crim. Div.).
21. *Id.*
22. *See, e.g.*, Whybrow, 35 Crim. App. 141, 142-43 (Crim. App. 1951).
23. *Gotts*, [1992] 2 App. Cas. at 419.
24. *See id.* at 420.
25. *See id.* at 419.
26. *See* Law Commission Consultation Paper No. 122, Legislating the Criminal Code: Offences Against the Person and General Principles 56 (1992) [hereinafter Consultation Paper No. 122].
27. Regina v. Howe, 85 Crim. App. 32, 48 (1987).
28. *Id.* at 42.
29. *See id.*
30. As Joshua Dressler stated:

> [S]ince duress is an excuse rather than a justification, the real issue (it bears repeating with some additional emphasis) is whether a coerced person who unjustifiably violates the moral principle *necessarily, unalterably, and unfailingly* deserves to be punished as a murderer, as the common law insists. If a murderer were insane,

The second argument in *Howe* focused on the dangers of terrorism and the importance of the law standing firm against an increase in violence and terrorist threat.[31] Their Lordships were particularly concerned that terrorists, via human tools, could kill many innocent victims if duress were embraced as a viable defense to murder. Chief Justice Lord Lane in the Court of Appeal, supported by Lords Bridge and Griffiths[32] in the House of Lords, viewed duress as a "highly dangerous relaxation in the law to allow a person who has deliberately killed, maybe a number of innocent people, to escape conviction and punishment altogether because of a fear that his own life or those of his family might be in danger if he did not."[33] This danger, according to Chief Justice Lord Lane, was exacerbated because "the defence of duress [was] so easy to raise and may be so difficult for the prosecution to disprove beyond [a] reasonable doubt."[34]

Third, their Lordships recognized the extreme rigor of the complete denial of the defense but argued that this could simply be ameliorated by the exercise of executive discretion.[35] Flexibility could prevail by executive decision not to prosecute or, alternatively, by the expeditious release by license of an individual serving a life sentence for murder.[36] Such an argument is staggering. Axiomatically, "if the defence is excluded in law, much of the evidence which would prove the duress would be inadmissible at the trial, not brought out in court, and not tested by cross-examination."[37]

Fourth, their Lordships noted that apart from the majority decision in the *Lynch* case, duress, dating back to Hale and Blackstone,

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> involuntarily intoxicated, or especially young, society would not necessarily, unalterably, and unfailingly demand punishment.
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> ....
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> . . . I am afraid that such a rule, like Lord Hailsham's opinion, has the imprint of self-righteousness, which the law should avoid. The rule asks us to be virtuous; more accurately, it *demands* our virtual saintliness, which the law has no right to require. It is precisely in the case of kill-or-be-killed threats that the criminal law ought to be prepared in some cases to attempt to assuage the guilt feelings of the homicidal wrongdoer by excusing him—by reminding him that he acted no less valiantly than any person of reasonable moral strength would have done.

Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for its Proper Limits*, 62 S. CAL. L. REV. 1331, 1372-73 (1989) (footnotes omitted).

31. *Howe*, 85 Crim. App. at 52 ("We face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it."); *see also id.* at 47 (Bridge, L.J., concurring with Griffiths, L.J.).

32. *See id.* at 47, 53.

33. Regina v. Howe, 1986 Q.B. 626, 641 (C.A.).

34. *Id.* at 641.

35. *See Howe*, 85 Crim. App. at 47, 53.

36. *See id.* at 43 (per Hailsham, L.J.); *see also id.* at 54 (Griffiths, L.J., concurring).

37. Director of Pub. Prosecutions for N. Ir. v. Lynch, 1975 App. Cas. 653, 685 (per Wilberforce, L.J.).

had uniformly not been a defense to murder.[38] Any alteration in the law had to be through Parliament, not by judicial legislation. As discussed later, such an approach is correct; however, this judicial reticence in *Howe* has not been replicated in other criminal law cases, most notably in *Gotts*.

Judicial opinions such as those found in *Howe* have culminated in the development of a two-prong test with subjective and objective elements determining when duress may be used as a defense. Chief Justice Lord Lane clearly enunciated this test in *Graham*,[39] and the House of Lords has since affirmed it in *Howe*.[40] The defense is available only if, from an objective standpoint, the accused can be said to have acted reasonably and proportionately to avoid a threat of death or serious injury. Assuming the defense is available to the accused based on his facts, the defense should be a question for the jury, with instructions to determine two questions.

First, the subjective prong asks whether the accused was, or might have been, "impelled to act as he did . . . as a result of what he reasonably believed [the person issuing the threat] had said or done, [and] he had good cause to fear that" otherwise death or serious physical injury would result.[41] Second, the objective prong of the test asks whether "the prosecution made the jury sure that a sober person of reasonable firmness, sharing the characteristics of the defendant, would not have responded to" the threat by acting as the accused had acted.[42]

The objective test involves the standard of the reasonable man, i.e., "a sober person of reasonable firmness."[43] It is unfortunate that the current law does not recognize the defense for the objectively weak or timorous accused who fails to meet the reasonable person standard. Adopting a subjective perspective would be a welcome reform and would ask whether, considering all the circumstances, the accused could reasonably be expected to resist the threat.[44]

Because timidity in an individual makes him more willing to accede to a particular threat and undertake criminal activity, it ought to be a circumstance that is evaluated when the issue of duress is considered by the jury. An extremely welcome and long overdue reform would be the adoption of the Law Commission's proposals in

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38. *See Howe*, 85 Crim. App. at 38.
39. 74 Crim. App. 235, 238-41 (C.A. 1982).
40. *Howe*, 85 Crim. App. at 37 (per Hailsham, L.J.).
41. *Graham*, 74 Crim. App. at 241.
42. *Id.*
43. *Id.*
44. *See* Law Commission No. 218, Legislating the Criminal Code: Offences Against the Person and General Principles 52-54 (1993) [hereinafter Law Commission No. 218].

which "the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist."[45] It must be remembered that duress operates as a concession to human frailty, which must include the timid and weak. By adopting a subjective approach that focuses on the peculiarities of the individual, more logical and humane principles can be adopted.

Similar alterations ought to be replicated in the United States where the common law has demonstrated anomalies, vacillations, and inconsistencies regarding an applicable test for duress.[46] In *United States v. Jennell*,[47] the Ninth Circuit Court of Appeals established three essential requirements for duress: "(1) an immediate threat of death or serious bodily injury, (2) a well-grounded fear that the threat will be carried out, and (3) no reasonable opportunity to escape the threatened harm."[48] Such a test has pervading difficulties because it fails to determine whether the test for a "well-grounded fear" is an objective or subjective one. Furthermore, no specification is made determining against whom the threat has to be made.[49] A logical and fair improvement would be to adopt the subjective approach of the Law Commission.

C. *The United States' Modern Jurisprudence Regarding Duress*

The virtually unassailable position of Anglo-American common law has been that duress never excuses murder and that the threatened individual ought to die himself rather than escape by killing another human being.[50] The United States historical equivalent of

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45. *Id.* at 87 (Draft, cl. 26(2)(b)).

46. Unfortunately, there is no universally applicable test for duress. In *People v. Pena*, 197 Cal. Rptr. 264 (Cal. App. Dep't Super. Ct. 1983), a California superior court laid down six quintessential features for a duress defense. The court stated:

> 1. The act charged as criminal must have been done to prevent a significant evil;
> 2. There must have been no adequate alternative to the commission of the act;
> 3. The harm caused by the act must not be disproportionate to the harm avoided;
> 4. The accused must entertain a good-faith belief that his act was necessary to prevent the greater harm;
> 5. Such belief must be objectively reasonable under all the circumstances; and
> 6. The accused must not have substantially contributed to the creation of the emergency.

Id. at 270 (footnotes omitted). Such guidelines are unworkable on the basis of ambiguity and inflexibility. *See* Gerald A. Williams, Note, Tully v. State of Oklahoma: *Oklahoma Recognizes Duress as a Defense for Felony-Murder*, 41 OKLA. L. REV. 515, 524 (1988).

47. 749 F.2d 1302 (9th Cir. 1984) (holding that the trial court did not err by refusing to instruct the jury on duress in a case of conspiracy to import and distribute marijuana).

48. *Id.* at 1305.

49. *See* Williams, *supra* note 46, at 525.

50. *See* Dressler, *supra* note 30, at 1370.

the English nineteenth-century authority of *Tyler*[51] is *Arp v. State*.[52] Therein, the coerced perpetrator, acting under a threat to his own life by duressors who were present and armed with double-barreled shotguns, took the life of an innocent third party.[53] Subsequent to the killing, all parties stole money from the victim and the duressee followed the duressors, making no effort to leave them.[54] The Alabama Supreme Court, invoking the common law principle, held that a threatened defendant ought to die himself rather than escape by murdering an innocent victim.[55] The established doctrine was that duress was inapplicable as a defense to an intentional killing.

Clearly, given the prevailing orthodoxy on both sides of the Atlantic, it is necessary to provide strong arguments for any fundamental changes to the current position.[56] Palpably, all coerced defendants who kill should not be excused. However, the American Law Institute's approach in the Model Penal Code allows juries to excuse murder in some situations, and this approach ought to be adopted in England.[57]

The most significant difference between the common law and the Model Penal Code is that the Model Penal Code allows duress as a defense, even for murder.[58] Additionally, the Model Penal Code vastly enhances the jury's role in the determination of the excuse.[59] Under the Model Penal Code, the jury must consider "whether the hypothetical 'person of reasonable firmness' would have resisted the threat."[60] Within that choice is, in essence, a moral judgment regarding the ambit of fortitude of individuals constrained by prevailing circumstances. Thus a fundamental dichotomy exists between the Model Penal Code and the jury's limited role at common law.

The material part of the Model Penal Code, unfortunately adopted by only a minority of states,[61] defines duress as follows:

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51. Regina v. Tyler, 173 Eng. Rep. 643 (Assizes 1838).

52. 12 So. 301 (Ala. 1893).

53. *See id.*

54. *See id.* at 304.

55. *See id.* at 302; *cf.* State v. Nargashian, 58 A. 953 (R.I. 1904) (holding that duress is not a defense to homicide); Williams, *supra* note 46, at 519.

56. In this regard, note the dictum of Lord Hailsham in *Regina v. Howe*, 85 Crim. App. 32, 44 (1987): "[I]t ill becomes those of us who have participated in the cruel events of the twentieth century, [such as genocides and international terrorism,] to condemn as out of date those who wrote in defence of innocent lives in the eighteenth century."

57. MODEL PENAL CODE § 2.09(1)-(2) (1985).

58. *Id.* § 2.09(1).

59. *See* Dressler, *supra* note 30, at 1345.

60. *Id.* (quoting MODEL PENAL CODE § 2.09(1)(1985)).

61. *See, e.g.*, ALASKA STAT. § 11.81.440 (1995); HAW. REV. STAT. § 702-231 (1995); N.J. REV. STAT. § 2C:2-9 (1995); UTAH CODE ANN. § 76-2-302 (1995).

> (1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.
>
> (2) The defense . . . is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.[62]

Clearly, a test adopted by the Model Penal Code significantly differs from current English practice, whereby the threat must be that of death or serious physical injury, according to *Graham*.[63] Under the Model Penal Code, it suffices that the threat is to cause a less serious physical injury to either the coerced actor or a third party.[64] This flexibility, acknowledging the moral involuntariness of the defendant, reflects a laudable approach and should be welcomed.

Unfortunately, the majority of American jurisdictions still apply the common law, which is predicated on the presence of a deadly threat, an objective standard, and an intolerance for the defense of duress in cases involving any form of homicide or attempted murder.[65] In Oklahoma, however, the case of *Tully v. State*[66] provides a rare exception. Therein, an appellate court allowed duress as a defense in a felony-murder case.[67] This decision and its rationale demand closer attention, especially considering the extremely limited number of cases accepting duress as a defense to felony-murder before *Tully*.[68]

In *Tully*, the duressor coerced the defendant by threatening him with a baseball bat if he did not participate in the robbery of a stricken victim.[69] The defendant contended that he had initially

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62. MODEL PENAL CODE § 2.09(1)-(2) (1985).

63. *Graham*, 74 Crim. App. 235, 241 (C.A. 1982); *see also supra* text accompanying notes 39-43.

64. MODEL PENAL CODE § 2.09(1) (1985).

65. *See, e.g.*, Kee v. State, 438 N.E.2d 993 (Ind. 1982) (holding that duress was not a defense for attempted murder); State v. Chism, 436 So. 2d 464 (La. 1983) (holding that duress defense does not apply to a charge of being an accessory after the fact to murder); People v. Dittis, 403 N.W.2d 94 (Mich. Ct. App. 1987) (holding that duress was not a defense to first-degree murder).

66. 730 P.2d 1206 (Okla. Crim. App. 1986).

67. *See id.* at 1210.

68. Restricted to the following three cases: People v. Merhige, 180 N.W. 418 (Mich. 1920); People v. Kelly, 214 N.W.2d 334 (Mich. Ct. App. 1973); People v. Pantano, 146 N.E. 646 (N.Y. 1925), *aff'd*, 150 N.E. 572 (N.Y. 1926). The court in *Tully* expressly cited the case of *Merhige* with approval. *Tully*, 730 P.2d at 1210.

69. *Tully*, 730 P.2d at 1208.

refused this demand and that his eventual participation had occurred because he had no valid choice to do otherwise.[70] On appeal, the defendant claimed that the trial court's lacuna in failing to give the jury any instruction about duress constituted a reversible error.[71] The appellate court categorically agreed and refuted the common law principle that a defendant should die rather than kill a wholly innocent victim in the case of felony murder.[72]

This decision should be welcomed because it extends the ambit of duress, reflecting that correct legal analysis does not punish individuals who should not be held legally responsible. A defendant acting under duress cannot be accused of acting under his own intentions because there is no voluntary breaking of the criminal law and no truly evil intent on behalf of the accused. Furthermore, both Lords Keith[73] and Lowry[74] in their dissents in *Gotts* questioned the conclusion that the presence of an intent to kill, formed by duress, made the coerced actor so immoral as to deny a defense.[75] The view of Lord Keith seems particularly apposite: "I find it difficult to accept that a person acting under duress has a truly evil intent. He does not actually desire the death of the victim."[76] Although *Tully* introduces a welcomed relaxation by allowing duress as a defense for felony-murder, courts should examine whether duress should be a defense in an intentional killing. Certainly, the same arguments are applicable in either scenario.

D. Extending the Ambit of Duress

The duress defense requires the law to consider the type of conduct legitimately expected of our fellow citizens who are threatened by dire consequences and coerced into completely atypical behavior that is morally repugnant to them and their previous code of conduct. On the other hand, Lord Hailsham demands heroism and rejects the coward in such a scenario. However, the criminal law does not require or demand heroism but imposes the reasonable man standard. To demand more and attach liability when such a demand is not met is ludicrous. This rule, which an individual is likely to be

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70. *See id.*; Brief for Appellant at 7, Tully v. Oklahoma, 730 P.2d 1206 (Okla. Crim. App. 1986) (No. F-82-671).

71. *See* Williams, *supra* note 46, at 523. Tully was convicted and received a life sentence for second-degree murder and a seven-year sentence for second-degree burglary. *See id.* at 523 n.64.

72. *See Tully*, 730 P.2d at 1210.

73. Regina v. Gotts, [1992] 2 App. Cas. 412, 418 (appeal taken from C. A., Crim. Div.).

74. *Id.* at 436.

75. *See* Law Commission No. 218, *supra* note 44, at 52.

76. *Gotts*, [1992] 2 App. Cas. at 418.

unaware of or unable to comply with, does not effectively protect innocent life.[77]

Consider the following hypothetical scenario presenting an odious dilemmatic choice. A female army officer in Virginia is driving her two young children to school when gunmen hijack the car and tell her that both children will be shot unless she drives the car back to the army barracks where they intend to shoot a guard. The woman, constrained by the threat to her children and the imminent peril of their deaths, acts as an accomplice by driving the vehicle; the gunmen accomplish the plan and kill the guard. Since duress is inapplicable to murder under prevailing Anglo-American doctrine, the woman would be guilty of murder.[78]

The logical corollary, however, must be that no criminal liability should be attached when individuals cannot reasonably be expected to behave other than the way they did.[79] In such a scenario, no real choice exists because the actions involve moral involuntariness. Lord Morris provides the correct analysis:

> [I]t is proper that any rational system of law should take fully into account the standards of honest and reasonable men. By those standards it is fair that actions and reactions may be tested. If then someone is really threatened with death or serious injury unless he does what he is told to do is the law to pay no heed to the miserable, agonising plight of such a person? For the law to understand not only how the timid but also the stalwart may in a moment of crisis behave is not to make the law weak but to make it just. In the calm of the courtroom measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and the well disposed.[80]

In essence, the criminal law demands that a person who killed another under duress, whatever the circumstances, has to comply with a higher standard than that demanded of the average person.[81] Such an exception to the general rule in criminal law is not justified. Nor is it sufficient to rely simply on executive discretion to not prosecute or on quick release on license as a mitigating device. As the Law Commission stresses most cogently, such a rationale is improper both in principle and in practice.[82] Clearly, even when a

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77. *See* Consultation Paper No. 122, *supra* note 26, at 57.

78. Of course, it may be possible through prosecutorial discretion for the individual not to be prosecuted; nevertheless, by strict analysis, liability is incurred for murder.

79. *See* Case Comment, R. v. Gotts, 1992 CRIM. L. REV. 721, 726.

80. Director of Pub. Prosecutions for N. Ir. v. Lynch, 1975 App. Cas. 653, 670.

81. *See* State v. Goliath, 1972 (3) SALR 1, 25 (S. Afr.) (per Rumpff, J.).

82. *See* Consultation Paper No. 122, *supra* note 26, at 57.

prosecutor is aware of the duress plea, he may believe it incorrect to rule on its merits. Additionally, those with the duty to rule on a prisoner's release would have to do so without recourse of a proper trial on the defendant's claim of duress.[83]

It is eminently logical that current law does not make duress available to members of criminal or terrorist groups.[84] However, it is illogical to deny it to innocent tools of such groups, as in the earlier postulation. Axiomatically, such matters ought to be for jury determination, and there is no doubt that juries are commendably robust in rejecting the defense where appropriate.[85] When the offense is more heinous and the greater number are killed, juries will palpably determine the desert of punishment. The jurors are peculiarly well situated to determine society's legitimate expectations of moral courage, so they should be charged with applying duress to murder. A jury applying Lord Hailsham's demanding heroism would leave the current law unaltered; however, a less rigorous test, applying the reasonable man standard, would be more humane and compassionate. Thus the jury ought to be charged with making such determinations. In this regard, the renewed onus on jury determination would replicate the excusing decision imposed on juries under the Model Penal Code.[86]

Finally, it is necessary to highlight a flagrant anomaly under current English law. Duress may be pleaded on a charge under section 18 of the Offences Against the Person Act,[87] i.e., wounding with intent to cause grievous bodily harm. The mens rea of murder embraces this latter constructive liability, based on an intention to kill or to cause serious bodily injury. Accordingly, a defendant may be acquitted of wounding with intent to cause grievous bodily harm based on the defense of duress, but if the victim dies within a year and a day, duress is inapplicable and a murder conviction is operative. In each scenario, the culpability of the coerced criminal actor is identical, but liability is imposed depending on the victim's survival. Such an anomaly, which can cause gross injustice, provides an example of the need for urgent reform in this area of the law.

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83. *See id.*

84. *See, e.g.*, Regina v. Fitzpatrick, 1977 N. Ir. 20; Shepherd, 86 Crim. App. 47 (C.A. 1987); Regina v. Sharp, 1987 Q.B. 853 (C.A.).

85. Even Lord Hailsham was prepared to accept that juries are commendably robust. *See* Regina v. Howe, 85 Crim. App. 32, 44 (1987).

86. *See supra* text accompanying notes 56-62.

87. Offences Against Persons Act, 24 & 25 Vict. 6, ch. 100, § 18 (Eng.).

E. *Distinguishing the Roles of the Legislature and the Judiciary When Legal Reform Is Needed*

Given the current anomalous state of the duress defense, reform must proceed expeditiously. However, is this a duty for the legislature or the judiciary? Certainly, the vacillations exemplified by *Lynch, Abbott, Howe,* and *Gotts* during the last two decades in English law fail to establish any cogent reasons for the latter approach.[88] Recent case developments have demonstrated a clear dichotomy between principles of stare decisis and those of judicial lawmaking.

For example, in *Regina v. R.*,[89] the issue was whether the law recognized rape if the defendant was the husband of the alleged victim.[90] Similar to the doctrine denying duress in murder cases, a common law doctrine dating back to Hale and Blackstone denied rape convictions when marital partners cohabited together, albeit that assault charges could be brought.[91] Notwithstanding the common law situation, the House of Lords used judicial creativity and lawmaking by holding

> that there was no longer a rule of law that a wife was deemed to have consented irrevocably to sexual intercourse with her husband; and that, therefore, a husband could be convicted of the rape or attempted rape of his wife where she had withdrawn her consent to sexual intercourse. [92]

This holding demonstrates that the common law was capable of evolving with changing social, economic, and cultural developments. Hale's propositions meant that marriage constituted a wife's irrevocable consent to sexual intercourse with her husband under all circumstances, irrespective of the state of her health or how she happened to be feeling at the time. Their Lordships, led by Lord Keith, asserted that in modern times any reasonable person must regard that concept as unacceptable.[93] Certainly, it is egregious to countenance that a husband today could intentionally, subjectively, or recklessly have nonconsensual sexual intercourse with his wife and not be guilty of rape. However, less certain is whether such a fundamental alteration in the criminal law should be accomplished by judicial legislation rather than by statute. Such uncertainty

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88. *See supra* Part II.A-B.

89. [1992] 1 App. Cas. 599 (1991) (appeal taken from C.A., Crim. Div.).

90. *Id.* at 602.

91. 1 HALE, *supra* note 4, at 629 ("But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.").

92. *Regina v. R.*, [1992] 1 App. Cas. at 600.

93. *See id.* at 623.

resonates against the issues in *Regina v. R.*, where statutory reform of the law of rape was in immediate contemplation. The court in *Regina v. R.* held the defendant guilty of attempted rape of his wife, even though no such offense existed at the time of his conduct.[94]

It is extremely noteworthy that their Lordships in *Regina v. R.* disregarded the common law position adopted by Hale and Blackstone vis à vis the marital rape exemption. Recently, however, in *C. (A Minor) v. Director of Public Prosecutions*,[95] their Lordships categorically refused to disregard the common law regarding the *doli incapax* presumption,[96] whereby the prosecution must show discretion toward children aged ten through fourteen. Despite the court's obvious dissatisfaction with the doctrine, the court declined to abrogate the common law doctrine.[97] As Lord Lowry commented in *C. (A Minor)*, it is extremely difficult "when discussing the propriety of judicial lawmaking, to reason conclusively from one situation to another."[98] However, in *C. (A Minor)*, Lord Lowry attempted to explain judicial legislation:

> (1) If the solution is doubtful, the judges should beware of imposing their own remedy. (2) Caution should prevail if Parliament has rejected opportunities of clearing up a known difficulty or has legislated, while leaving the difficulty untouched. (3) Disputed matters of social policy are less suitable areas for judicial intervention than purely legal problems. (4) Fundamental legal doctrines should not be lightly set aside. (5) Judges should not make a change unless they can achieve finality and certainty.[99]

The House of Lords in *C. (A Minor)*, applying the above principles, refused to alter the *doli incapax* presumption.[100] Such an approach is commendable on the grounds of legal certainty and tidiness. Overall, when the law is out of step with the needs of the modern world for social, moral, or educational reasons, the best policy is to wait for parliamentary legislation. The present Anglo-American common law seems fundamentally flawed. Hopefully, legislation regarding duress as a defense to murder proceeds expeditiously by applying proposals suggested by academians and the Law Commission. In the United States, it would be extremely beneficial if

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94. *Id.* at 600.

95. [1995] 2 W.L.R. 383.

96. *Id.* This again is a presumption which dates back to Hale and Blackstone. *See* 4 BLACKSTONE, *supra* note 5, at 23-24.

97. *See C. (A Minor)*, [1995] 2 W.L.R. at 403.

98. *Id.* at 392.

99. *Id.*

100. *Id.* at 403.

more states were to adopt the Model Penal Code, thereby applying a more logical and compassionate approach.

F. An Analogy to Duress: Necessity

English courts have never expressly recognized a general defense of necessity, where an individual commits an offense to avoid the greater evil to himself or another that would occur from the dangerous circumstances in which he or the other person is placed.[101] The famous case of *The Queen v. Dudley*[102] expressly denied necessity as a defense for intentional killings.[103] As Lord Denning stated in *Southwark London Borough Council v. Williams*,[104] the danger is that "[n]ecessity would open a door which no man could shut . . . . The plea would be an excuse for all sorts of wrongdoing. So the courts must, for the sake of law and order, take a firm stand."[105] However, as discussed below, several recent Court of Appeal's cases have allowed a form of necessity as an excuse, albeit within the duress terminology and, therefore, through the backdoor by judicial sleight of hand.

The limited defense of duress of circumstances, i.e., necessity, has developed in English law in relation to road traffic cases involving reckless driving[106] and driving while disqualified.[107] In *Regina v. Conway*, the defendant was charged with reckless driving and pleaded necessity on the ground that he had driven as he had because he and his passenger feared an attack from two men who were approaching the car.[108] In fact, these two individuals were plainclothes police officers who were approaching the car to arrest the passenger.[109] The court treated the defense of duress of circumstances (necessity) as a logical corollary of duress *per minas* (by threats) because the duress defense was similarly limited by the fact that the harm sought to be avoided must be death or serious injury.[110] Lord Justice Woolf expressly stated:

> We conclude that necessity can only be a defence to a charge of reckless driving where the facts establish "duress of

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101. *See, e.g.*, MICHAEL J. ALLEN, TEXTBOOK ON CRIMINAL LAW 145 (3d ed. 1995).
102. [1884] 14 Q.B. 273.
103. *Id.*
104. 1971 Ch. 734 (C.A. 1970).
105. *Id.* at 744.
106. *See, e.g.*, Willer, 83 Crim. App. 225 (C.A. 1986); Regina v. Conway, 1989 Q.B. 290 (C.A.).
107. *See, e.g.*, Regina v. Martin, 88 Crim. App. 343 (C.A. 1988).
108. *Conway*, 1989 Q.B. at 294.
109. *See id.*
110. *See id.* at 297.

> circumstances," . . . i.e., where the defendant was constrained by circumstances to drive as he did to avoid death or serious bodily harm to himself or some other person.
>
> [T]o admit a defence of "duress of circumstances" is a logical consequence of the existence of the defence of duress as that term is ordinarily understood, i.e., "do this or else."[111]

Justice Simon Brown, in *Regina v. Martin*, established the applicable principles pervading this area.[112] The defendant drove his stepson to work while disqualified because the defendant's wife, who had suicidal tendencies, threatened that she would commit suicide if he did not do so.[113] After the trial judge ruled that driving while disqualified was strict liability because the defense of necessity did not exist, the defendant pleaded guilty.[114] The Court of Appeal quashed the conviction, holding that necessity (duress of circumstances) should have been a question for the jury.[115] Justice Simon Brown summarized the principles governing duress of circumstances:

> First, English law does, in extreme circumstances, recognise a defence of necessity. Most commonly this defence arises as duress, that is pressure upon the accused's will from the wrongful threats or violence of another. Equally, however, it can arise from other objective dangers threatening the accused or others. Arising thus it is conveniently called "duress of circumstances."[116]

The defense is only available if, from an objective standpoint, the accused can be said to be acting reasonably and proportionately in order to avoid a threat of death or serious injury.[117] Derived from the subjective and objective principles established by *Graham*,[118] the test for necessity is essentially identical to that for duress by threats, with the exception of the situational source from which the threat emanates. In this regard, it is only through these recent significant developments that English law has caught up with a limited number of United States jurisdictions that have adopted the Model Penal Code provisions requiring a balancing of competing evils.

> Conduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: (a) the

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111. *Id.* (citations omitted).
112. *Martin*, 88 Crim. App. at 343.
113. *See id.* at 345.
114. *See id.* at 344-45.
115. *See id.* at 346.
116. *Id.* at 345-46.
117. *See, e.g.*, Case Comment, D.P.P. v. Pittaway, 1994 CRIM. L. REV. 600.
118. 74 Crim. App. 235 (C.A. 1982).

> harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged ....[119]

The test allows flexibility and compassion for the coerced actor.

However, the extent of such a defense needs to be considered. The ambit of duress of circumstances, closely related to duress by threats, has recently been determined by a Court of Appeal in *Regina v. Pommell*,[120] a vitally important decision. Therein, police officers had entered the defendant's home to execute a search warrant, and they found him lying in bed with a loaded gun in his right hand.[121] He was convicted under the Firearms Act 1968[122] of possessing a prohibited weapon and ammunition without a firearms certificate.[123] The defendant contended that during the night, someone carrying a gun had come to see him with the intention of shooting some people because they had killed his friend.[124] The defendant said that he had persuaded the man to give him the gun, which he took upstairs; he took the bullets out, then put them back, having decided to wait until morning to give the gun to his brother to hand to the police.[125] The trial judge stated that necessity could not be an issue because, even assuming that the defendant was originally driven by necessity to take possession of the gun, his failure to go immediately to the police robbed him of the defense.[126] However, the Court of Appeal stressed that no grounds existed for limiting the necessity defense to road traffic offenses.[127] On the contrary, since the necessity defense is closely related to the defense of duress by threats and appears to be general in nature, the court stated that it applies to all crimes except murder, attempted murder, and some forms of treason.[128] Therefore, the defense was open to the defendant in *Pommell* with respect to his acquisition of the gun.[129]

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119. MODEL PENAL CODE § 3.02(1)(a) (1985).

120. [1995] 2 Crim. App. 607 (C.A.).

121. *See id.* at 609.

122. Firearms Act, 1968, ch. 27 (Eng.).

123. *See Pommell*, [1995] 2 Crim. App. at 608.

124. *See id.* at 609.

125. *See id.*

126. *See id.* at 610-11.

127. *See id.* at 615.

128. *See id.* In this regard, the Court of Appeal approved Professor Smith's commentary on *Director of Public Prosecutions v. Bell*, Case Comment, D.P.P. v. Bell, 1992 CRIM. L. REV. 176, 177. *See Pommell*, [1995] 2 Crim. App. at 615.

129. A related matter that arose in *Pommell* is that of a duty to desist. In their Lordships' judgment, a person who had taken possession of a gun, in circumstances where he has the defense of duress of circumstances, must desist from committing the crime as soon as he reasonably can. *See Pommell*, [1995] 2 Crim. App. at 607. It is a factual question on the evidence for determination by the jury. Clearly, the defendant must desist from the unlawful conduct as

It seems eminently logical to equate the ambit of the defenses of duress by threats and of duress by circumstances. Accordingly, the decision in *Pommell* is correct in the sense that it draws the line at murder and attempted murder. However, the whole tenor of this article focuses on allowing duress by threat to operate as a defense to murder under Anglo-American law. Thus the ambit of duress of circumstances should also include intentional killings.

G. Conclusion: The Need for Urgent Reform

It is evident that Anglo-American jurisprudence demands radical alteration regarding duress as a defense to murder. If a criminal trial represents a theater of morality, then the jury is perfectly capable of delineating legitimate societal expectations of the coerced actor. The approach adopted by those states applying the Model Penal Code provisions is the best solution because this approach imposes the decision on juries, even in cases of murder.[130] Furthermore, the decision in *Tully* regarding felony-murder is laudatory but does not go far enough.[131] An enhanced role for the jury, even in cases of intentional killings, represents the only legitimate approach to the problem.

The Law Commission's concern regarding the views on duress that were expressed by their Lordships in *Howe* and *Gotts*,[132] cannot rationally or justly be met by withholding duress as a defense to murder or by reducing it to a mitigating factor.[133] Additionally, the Law Commission's proposal to reverse the burden of proof seems unobjectionable.[134] The evidential onus ought to be on the defendant

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soon as he is aware that the threat is no longer operative. In *Director of Pub. Prosecutions v. Jones*, 1990 R.T.R. 33 (Q.B. 1989), the defendant may have had a defense of duress when he began to drive with an excess of alcohol, but it was held that there was no necessity for him to drive the entire two miles to his home. It seems clear that on the possibility of duress becoming operative, the burden is imposed on the prosecution to demonstrate that it ceased in operation at the time of criminal activity and that the defendant failed the duty to desist.

130. *See supra* text accompanying notes 58-60.

131. *See supra* text accompanying notes 66-72.

132. *See supra* notes 20-36, 38 and accompanying text.

133. *See* Law Commission No. 218, *supra* note 44, at 59.

134. This proposal provides as follows:

> (1) No act of a person constitutes an offence if the act is done under duress by threats.
>
> (2) A person does an act under duress by threats if he does it because he knows or believes—
>
> (a) that a threat has been made to cause death or serious injury to himself or another if the act is not done, and
>
> (b) that the threat will be carried out immediately if he does not do the act or, if not immediately, before he or that other can obtain effective official protection, and

to show that duress applies. This would allow the jury to concentrate directly on the plausibility of the accused's story.[135] Furthermore, it would be incumbent upon the jury to decide, based on all the evidence, whether what the defendant claimed had in fact occurred.[136]

The salutary lessons from recent jurisprudence demand changes and an immediate relaxation from the current intransigence. By analogy to duress *per minas*, the operative defense ought similarly to apply to necessity (duress of circumstances). In both circumstances, the moral involuntariness of the coerced actor needs to be recognized.

III. PROVOCATION AS AN EXCUSE TO MURDER

A. Recent English Developments as a Basis for Reform in the United States

An enhanced role for jury determination of excusing conduct is similarly the lesson to be appreciated from the vagaries created by recent Anglo-American precedents applicable to provocation. The defense of provocation in crimes of homicide has always represented an anomaly in English law. In violent crimes that result in injury short of death, the fact that the accused committed the violent act under provocation does not affect the nature of the offense. The fact that the provocation caused the accused to lose his self-control is merely a matter to be taken into consideration in determining the appropriate penalty to impose. In homicide, however, provocation effects a change in the offense, reducing it from murder, for which the penalty is imprisonment for life, to manslaughter, for which the penalty is at the discretion of the judge.

The origins of the provocation are ancient[137] and predicated on a concession to human frailty.[138] In *Rex v. Hayward*,[139] for example,

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(c) that there is no other way of preventing the threat being carried out, and the threat is one which in all the circumstances (including any of his personal characteristics that affect its gravity) he cannot reasonably be expected to resist. It is for the defendant to show that the reason for his act was such knowledge or belief as is mentioned in paragraphs (a) to (c).

Id. at 104 (Draft, cl. 25).

135. *See id.* at 61.

136. *See id.*

137. *See* Watts v. Brains, 78 Eng. Rep. 1009 (K.B. 1600); John Royley's Case, 79 Eng. Rep. 254 (K.B. 1612); *see also* 1 HALE, *supra* note 4, at 453-54; MATTHEW HALE, PLEAS OF THE CROWN: A METHODICAL SUMMARY 48 (P.R. Glazebrook ed., 1972) (1678).

138. *See* Glanville Williams, *Provocation and the Reasonable Man*, 1954 CRIM. L. REV. 740, 742 ("Surely the true view of provocation is that it is a concession to 'the frailty of human nature' in those exceptional cases where the legal prohibition fails of effect. It is a compromise, neither conceding the propriety of the act nor exacting the full penalty for it.").

Chief Justice Tindal directed the jury to consider whether the prisoner had acted "while smarting under a provocation so recent and so strong, that [he] might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only."[140]

Under English common law, a judge could withdraw the defense from the jury if there was no evidence that a reasonable man would have lost his self-control and done as the accused had done.[141] However, the situation was fundamentally altered by section 3 of the Homicide Act 1957 ("Homicide Act"), which prohibited this and imposed the requirement that, if there is evidence that the accused may have been provoked, then the issue of provocation must be left to the jury to decide.[142] The dual test for provocation states that the provocation must have caused the accused to lose his self-control as well as be of such a nature as to cause a reasonable man to react as the accused did.[143] The correct delineation between the role of the judge and jury regarding the provocation defense was the focus of the recent appellate decision in *Regina v. Baillie*.[144] This decision reflects, as discussed in this article, an approach directly contrary to United States common law precedents and ought to presage the correct path for American jurisprudence to follow.

B. Regina v. Baillie: *The Role of Judge and Jury in Determining the Provocation Defense*

The facts in *Baillie* bear close examination. The defendant had three teenage sons and was concerned about their use of soft drugs.[145] One day, after the defendant had consumed a large amount of alcohol, the defendant's youngest son told the defendant

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139. 172 Eng. Rep. 1188 (N.P. 1833).

140. *Id.* at 1189.

141. *See, e.g.*, Mancini v. Director of Pub. Prosecutions, 1942 App. Cas. 1 (appeal taken from Crim. App.).

142. Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (Eng.).

143. *See id; see also infra* text accompanying note 156. The purpose of the reasonable person test is to provide an assessment of the insult in order to determine whether it was grave enough to justify the accused's loss of control and to invoke the compassion of the law. Assessment of the insult necessarily involves some acceptance of the circumstances of the accused, and the crucial question for the courts, of course, is how far those circumstances may be taken into account in order to fully appreciate the insult before the objective person becomes the individual accused. *See, e.g.*, Timothy Macklem, *Provocation and the Ordinary Person*, 11 DALHOUSIE L.J. 126, 137 (1987).

144. [1995] 2 Crim. App. 31 (C.A. 1994).

145. *See id.* at 32.

that he had been threatened by one of his brother's drug suppliers.[146] The defendant, armed with a sawed-off shotgun and a razor, went to the supplier's house.

> He used the razor to inflict serious injuries on the supplier who ran out of the back of the house. The [defendant] followed him and fired the shotgun twice. The shots did not hit the supplier directly, but he was struck by particles blasted from a wire mesh fence by the force of one of the shots and died. There was evidence that immediately after the killing the [defendant] asked a friend to fabricate an alibi for him, although the [defendant's] evidence was that he had no recollection of so doing. The [defendant] was charged with murder, and at his trial his defence was that he had discharged the gun to frighten rather than to kill or cause bodily harm; he relied, in the alternative, on provocation to reduce the charge to manslaughter. He was convicted of murder.[147]

The central issue on appeal was whether the judge had

> erred in ruling that there was insufficient evidence of provocation [to leave to the jury] on the basis of the threat to the [defendant's] son and in directing the jury that the only evidence capable of giving rise to the defence of provocation was that of "self-induced" provocation after the [defendant] had entered the deceased's house.[148]

The defense contended that the provocation was not simply limited to events transpiring within the victim's abode.[149] According to the defense, the jury should have considered "whether the threat to [the defendant's] son would not have caused both the defendant and the hypothetical reasonable man to lose their self-control, arm themselves appropriately for the dangerous confrontation . . . and go directly round to the drug dealer's house while still suffering from sudden and temporary loss of self-control."[150]

In *Regina v. Duffy*,[151] Chief Justice Lord Goddard stated the common law definition of provocation:

> "Provocation is some act, or series of acts [or words spoken], done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden and temporary loss of self-control, rendering the accused so subject

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146. *See id.* at 33.
147. *Id.* at 31.
148. *Id.*
149. *See id.* at 35-37.
150. *Id.* at 37.
151. [1949] 1 All E.R. 932 (Crim. App.).

> to passion as to make him or her for the moment not master of his [or her] mind."[152]

Therefore, if at the time of the killing the defendant was not provoked to lose his self-control, he cannot rely on a history of provocation.[153] However, this does not exclude the effect of cumulative provocation,[154] which is a series of acts or words over a period of time which culminate in the "sudden and temporary loss of self-control" by the accused.[155] The common law rule has been modified by section 3 of the Homicide Act, which provides:

> Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.[156]

The changes effected by section 3, as interpreted by the courts, are of fundamental importance because this section (i) establishes that words alone may be sufficient provocation if the jury decides that they would have provoked a reasonable man;[157] (ii) "treats the 'mode of resentment' or proportionality rule only as a factor, not a prerequisite, in judging whether a reasonable man would have acted as the actor did";[158] (iii) takes away the power of the judge to withdraw the defense from the jury on the grounds that there was no evidence on which the jury could find that a reasonable man would

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152. *Id.* (quoting with approval the trial judge's charge to the jury).

153. In *Ibrams*, 74 Crim. App. 154, 155-56 (C.A. 1981), the appellants had been threatened by the victim over an extended period up to October 7, 1979. They hatched a plan to kill the victim on October 12 and completed the agreement on October 14, there being no evidence that the victim had done anything after October 7 to provoke them. *See id.* at 159-60. The Court of Appeal considered that the interval of time and the formulation of a plan negatived claims of loss of self-control. *See id.* at 160.

154. *See* Martin Wasik, *Cumulative Provocation and Domestic Killing*, 1982 CRIM. L. REV. 29, 30.

155. In *Regina v. Thornton*, 96 Crim. App. 112 (C.A. 1991), a case involving a battered spouse who killed her husband, the court rejected an argument that the words "sudden and temporary" are no longer appropriate. *See* J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 355 (7th ed. 1992) ("It seems that the function of these words is to emphasise to the jury that there must have been no time in which [defendant] was able to . . . think and reflect between the final provocation and the fatal act.").

156. Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (Eng.).

157. *See* Phillips v. The Queen, [1969] 2 App. Cas. 130, 137 (P.C. 1968) (appeal taken from Sup. Ct., Judicature of Jam.).

158. Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 429 (1982); *see also* Regina v. Brown, [1972] 2 Q.B. 229 (C.A.).

have been provoked to do as the defendant had done;[159] (iv) "authorizes the defense to be used even if a third person, not the victim, is the provoker";[160] and (v) removes the power "of the judge to dictate to the jury what were the characteristics of the reasonable man."[161]

In *Baillie*, the defense pointed to section 3, under which the jury is the sole arbiter of whether the reasonable man would have been provoked.[162] Based on the statute, the court accepted that provocation is only available when there is sufficient evidence for the jury to decide whether the defendant was suffering from a sudden and temporary loss of self-control at the time of the fatal act.[163] Whether sufficient evidence existed is to be determined by the judge.[164]

In *Baillie*, the trial judge had ruled that there was no such evidence, and the issue on appeal was whether this was reversible error.[165] Their Lordships ruled that sufficient evidence existed that the defendant was provoked.[166] Restricting their analysis of provocation to events occurring after the defendant had entered the deceased's house, they found that the trial judge's approach had been too austere for section 3.[167] The provisions of this section must be construed as showing deference and sensible regard to human frailty as well as respect for the jury's role in determining the provocation issue.[168] As Lord Justice Russell said of section 3 in *Rossiter*:[169]

> The emphasis in that section is very much on the function of the jury as opposed to the judge. We take the law to be that wherever there is material which is capable of amounting to provocation, however tenuous it may be, the jury must be given the privilege of ruling upon it.[170]

Therefore, the Court of Appeal in *Baillie* ordered a retrial, so that the plea of provocation could be considered by a jury.[171]

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159. *See* Director of Pub. Prosecutions v. Camplin, 67 Crim. App. 14, 19 (1978).
160. Dressler, *supra* note 158, at 429; *see also* Regina v. Davies, [1975] Q.B. 691, 701 (C.A.).
161. J.C. SMITH & BRIAN HOGAN, CRIMINAL LAW 337 (6th ed. 1988).
162. Regina v. Baillie, [1995] 2 Crim. App. 31, 37 (C.A. 1994).
163. *See id.*
164. *See id.*
165. *Id.*
166. *See id.* at 37-38.
167. *See id.* at 37.
168. *See id.*
169. 95 Crim. App. 326 (C.A. 1992).
170. *Id.* at 332.
171. *Baillie*, [1995] 2 Crim. App. at 40.

C. *An Evaluation of* Regina v. Baillie: *What Constitutes Provocation*

Although the common law definition of provocation is a "sudden and temporary loss of self-control," it seems logical that a loss of self-control may endure over a lengthy period; however, the longer the period, the less cogent the defense.[172] In fact, loss of self-control may not persist for days, resulting in the defendant acting out of control.

Considering the facts in *Baillie*, where the defendant had time for reflection and cooling off, the court adopted an approach that is extremely favorable to the defendant.[173] *Baillie* seems to be directly contrary to the instant strike, the paradigm scenario in which provocation is raised as a defense. For example, the earlier decision in *Regina v. Ahluwalia*,[174] a case where a battered wife killed her husband[175] after a long history of domestic violence, is extremely significant.[176] The Court of Appeal, therein, stated that only Parliament could change the law on provocation:

> We accept that the subjective element in the defence of provocation would not as a matter of law be negatived simply because of the delayed reaction in such cases, provided that there was at the time of the killing a "sudden and temporary loss of self-control" caused by the alleged provocation. However, the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation.[177]

Under existing English principles, judges ought to adopt an extremely generous interpretation of whether a defendant was provoked to lose self-control and allow jury determination of the provocation plea. This result is an inexorable consequence of changes made by section 3 of the Homicide Act,[178] in tandem with *Baillie*, and predicates the matter as essentially within the province of the jury.

In this regard, a corollary can be drawn between *Baillie* and the decision in *Doughty*,[179] with *Baillie* replicating the jurisprudential

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172. *See* Case Comment, R. v. Baillie, 1995 CRIM. L. REV. 739, 740.

173. *Baillie*, [1995] 2 Crim. App. at 38-40.

174. 96 Crim. App. 133 (C.A. 1992). For a discussion of *Ahluwalia*, see Case Comment, R. v. Ahluwalia, 1993 CRIM. L. REV. 63; *infra* notes 267-70 and accompanying text.

175. *Ahluwalia*, 96 Crim. App. at 134.

176. *See, e.g.*, Aileen McColgan, *In Defence of Battered Women Who Kill*, 13 OXFORD J. LEGAL STUD. 508 (1993); Donald Nicolson & Rohit Sanghvi, *Battered Women and Provocation: The Implications of* Regina v. Ahluwalia, 1993 CRIM. L. REV. 728; Celia Wells, *Battered Woman Syndrome and Defences to Homicide: Where Now?*, 14 LEGAL STUD. 266 (1994). For further discussion of battered woman syndrome, see *infra* Part III.H.

177. *Ahluwalia*, 96 Crim. App. at 139.

178. Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (Eng.).

179. 83 Crim. App. 319 (C.A. 1986).

principles adopted by the court in *Doughty*. In *Doughty*, the judge refused to leave the issue of provocation to the jury where the defendant claimed that the persistent crying of his seventeen-day-old son had caused him to lose his self-control and kill the child.[180] The Court of Appeal quashed his conviction of murder, substituting one of manslaughter.[181] Section 3 of the Homicide Act clearly establishes that it is mandatory to leave the issue of provocation to the jury when there is any evidence that the defendant was provoked to lose his self-control.[182] Essentially, both *Baillie* and *Doughty* place reliance on the common sense of juries, upon whom Parliament imposed the task of deciding the issue of provocation.[183]

D. *United States Precedents: An Opposite Approach to* Regina v. Baillie

It is evident that because the United States predicates its provocation jurisprudence on the English system, which has spent more time than its American counterpart considering the correct ambit of the defense, it is essential to review English provocation law.[184] Similar to English common law, United States case law has generally applied the defense only if the provocation "would render any ordinarily prudent person for the time being incapable of that cool reflection that otherwise makes it murder."[185] However, major differences in approach still persist, exemplified by the recent decision of the Supreme Court of Ohio in *State v. Shane*.[186] Furthermore, the dichotomy is exacerbated by inconsistent state law.[187]

In *Shane*, the defendant shared an apartment in Philadelphia with his fiancee and their infant son.[188] After she verbally confessed to sleeping with other men and stated that she no longer cared for the defendant, the defendant lost control and strangled her to death.[189] Two important matters arose for consideration by the Supreme Court of Ohio: (i) the issue of the exact province of judge and jury

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180. *Id.* at 324.

181. *See id.* at 327.

182. *See id.* at 326 (citing Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (Eng.)).

183. *See id.*

184. *See* Dressler, *supra* note 158, at 427.

185. Addington v. United States, 165 U.S. 184, 186 (1897); *see also* Fields v. State, 52 Ala. 348, 354 (1875) (stating that in order to constitute a defense, the provocation must "in the mind of a just and reasonable man stir resentment to violence endangering life . . . ."); People v. Webb, 300 P.2d 130, 139 (Cal. Dist. Ct. App. 1956) (finding provocation as would "naturally tend to arouse the passion of an ordinarily reasonable man").

186. 590 N.E.2d 272 (Ohio 1992).

187. *See* Mark W. Biggerman, Note, State v. Shane: *Confessions of Infidelity as Reasonable Provocation for Voluntary Manslaughter*, 19 OHIO N.U. L. REV. 977 (1993).

188. *Shane*, 590 N.E.2d at 273.

189. *See id.*

over the ambit of a provocation plea[190] and (ii) the issue whether "mere words" of a victim were reasonably sufficient provocation to incite the use of deadly force.[191]

Addressing the first issue, the court held that even when some evidence of adequate provocation is presented, the judge should only grant a voluntary manslaughter instruction if the jury could reasonably find the defendant guilty of the lesser offense.[192] In essence, the trial judge is granted discretion to decide whether to give a voluntary manslaughter instruction by applying a wholly objective standard to determine whether a reasonable person would be provoked to act out of passion rather than reason.[193] Thus a fundamental dichotomy exists between the English approach in *Baillie* and the principle applied by the Supreme Court of Ohio in *Shane*. The latter authority conflicts with the generous analysis in *Baillie* regarding the correct province of the jury's role. Under prevailing English law, the judge applies a subjective test to decide whether evidence exists that the defendant was provoked and, where such evidence exists, to leave the issue of provocation to jury determination. This palpably differs from the austere delineation made in *Shane*, negating jury consideration of provocation. *Shane* conflicts with the approach articulated by Professor Glanville Williams:

> The Homicide Act, in allowing insults as provocation, inevitably alters the position, because an insult uttered in private is neither a crime nor even a tort. Section 3 contains no restriction to unlawful acts, and the courts seem to be ready to allow any provocative conduct to be taken into consideration, even though that conduct was itself provoked by the defendant. Consequently, there is no longer any reason why the defence should not be available (if the jury uphold it) to the jilted lover who kills the object of his affections or her new lover, or the man who kills his irritating neighbor, or the parent who kills a constantly crying baby.[194]

Courts should rely on the common sense of juries to determine the provocation defense. Under English law, Parliament imposes this

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190. *See id.* at 276.

191. *Id.* at 277.

192. *See id.* at 275.

193. *See id.* at 278 ("[I]n each case, the trial judge must determine whether evidence of reasonably sufficient provocation occasioned by the victim has been presented to warrant a voluntary manslaughter instruction"); *id.* at 276 n.2 ("'The judge furnishes the standard of what constitutes adequate provocation . . . which would cause a reasonable person to act out of passion rather than reason.'") (quoting People v. Pouncey, 471 N.W.2d 346, 350 (Mich. 1991)).

194. GLANVILLE WILLIAMS, TEXTBOOK OF CRIMINAL LAW 534-35 (2d ed. 1983) (footnote omitted).

onus on juries through the Homicide Act, as interpreted in *Baillie*,[195] and the common sense of juries can be relied upon to bring in fair verdicts.

Addressing the issue of whether "mere words" of a victim are reasonably sufficient provocation to incite the use of deadly force, the *Shane* court responded in the negative.[196] In applying its analysis, the court drew a bright-line test.[197] The majority of jurisdictions in the United States hold that mere words, no matter how inflammatory, are not sufficient provocation to allow reduction of murder to voluntary manslaughter,[198] albeit some courts permit it in a marital relationship.[199] In *Shane*, the denial of words alone as a touchstone for provocation, again, conflicts with English guidelines contained within section 3 of the Homicide Act 1957, as interpreted by case precedents.[200]

The synergistic effect of the twin issues determined in *Shane* is to egregiously curtail any provocation plea in Ohio, as well as in other states adopting similar guidelines. The court held that the trial judge is solely responsible for conducting the objective portion of the

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195. Regina v. Baillie, [1995] 2 Crim. App. 31, 37 (C.A. 1994).

196. *Shane*, 590 N.E.2d at 278. Some United States courts adopt a contrary approach of allowing words to constitute provocation. *See, e.g.*, State v. Harwood, 519 P.2d 177, 181 (Ariz. 1974) (finding that when the testimony of the defendant establishes the elements of manslaughter, he is entitled to present his theory to the jury).

197. *See Shane*, 590 N.E.2d at 278.

198. *See, e.g.*, Hambrick v. State, 353 S.E.2d 177, 179 (Ga. 1987) ("[P]rovocation by words alone is inadequate to reduce murder to manslaughter."); Perigo v. State, 541 N.E.2d 936, 939 (Ind. 1989) (holding that victim's words alone, though highly emotional, were not sufficient provocation to reduce murder to manslaughter); People v. Eagen, 357 N.W.2d 710, 711-12 (Mich. Ct. App. 1984) (noting that defendant's claim of provocation based on former girlfriend's remark about sex was without merit).

199. *See, e.g.*, People v. Williams, 576 N.E.2d 68, 73 (Ill. App. Ct. 1991) ("[A]n admission of adultery is equivalent to a discovery of the act itself."); Commonwealth v. Schnopps, 417 N.E.2d 1213, 1215-16 (Mass. 1981) (holding that sufficient provocation may be found in information conveyed to a defendant by word alone when there is a marital relationship). Note Joshua Dressler's criticism of this limitation to marriage in the cases where one unmarried lover discovers another being unfaithful:

> [A]n unmarried individual who kills upon sight of unfaithfulness by one's lover or fiancé is [considered] a murderer. Only a highly unrealistic belief about passion can explain this rule in terms of excusing conduct. It is implausible to believe that when an actor observes his or her loved one in an act of sexual disloyalty, that actor will suffer from less anger simply because the disloyal partner is not the actor's spouse. Instead, this rule is really a judgment by courts that adultery is a form of injustice perpetrated upon the killer which merits a violent response, whereas "mere" sexual unfaithfulness out of wedlock does not. Thus, it has been said that adultery is the "highest invasion of [a husband's] property," whereas in the unmarried situation the defendant "has no such control" over his faithless lover.

Dressler, *supra* note 158, at 440 (footnote omitted).

200. *See* Regina v. Brown, [1972] 2 Q.B. 229 (C.A.); Director of Pub. Prosecutions v. Camplin, 67 Crim. App. 14 (1978).

reasonable provocation test, in tandem with denying verbal confessions of infidelity as constituting reasonable provocation.[201] *Shane* reflects too austere an approach to a defense that constitutes a concession to human frailty, which should be determined by a jury properly directed by the trial judge. The English analysis in *Baillie* reflects a more appropriate solution and ought to be followed in the United States.

E. Self-Induced Provocation

A related issue discussed in *Baillie* involves self-induced provocation. The arguments raised on this matter illustrate the pervading elliptical nature of the provocation plea. A restricted submission by the defense in *Baillie* was that the defendant had been provoked to lose his self-control by the deceased's attempt to wrestle the gun from him (the main contention being that the threats to the defendant's son, which continued up to and including the shooting, triggered the loss of self-control).[202] The defense's submission of self-induced provocation was based on *Edwards v. Regina*:[203]

> On principle it seems reasonable to say that: (1) a blackmailer cannot rely on the predictable results of his own blackmailing conduct as constituting provocation sufficient to reduce his killing of the victim from murder to manslaughter, and the predictable results may include a considerable degree of hostile reaction by the person sought to be blackmailed, for instance vituperative words and even some hostile action such as blows with a fist; (2) but, if the hostile reaction by the person sought to be blackmailed goes to extreme lengths, it might constitute sufficient provocation even for the blackmailer; (3) there would in many cases be a question of degree to be decided by the jury.[204]

However, it is rather surprising that the defense sought to rely on the restrictive analysis in *Edwards*[205] when the Court of Appeal, in the later authority of *Johnson*,[206] significantly widened the correct ambit of self-induced provocation and expressly disapproved *Edwards*.[207] *Edwards'* "extreme lengths" justification of self-induced provocation was held to be inconsistent with the words of section 3 of the Homicide Act, which requires that when there is any evidence

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201. *See Shane*, 590 N.E. 2d. at 276.
202. Regina v. Baillie, [1995] 2 Crim. App. 31, 35 (C.A. 1994).
203. 57 Crim. App. 157 (P.C. 1972) (appeal taken from Sup. Ct., H.K.).
204. *Id.* at 168.
205. *See* Case Comment, R. v. Edwards, 1974 CRIM. L. REV. 540, 541-42.
206. 89 Crim. App. 148 (C.A. 1989).
207. *Id.* at 152.

that the accused was provoked, the issue must be left to the jury.[208] In *Johnson*, both the defendant and the victim had been drinking at a nightclub.[209] The defendant made threats of violence to the victim's female friend and to the victim himself.[210] A fight developed, and the defendant, who was carrying a flick knife, stabbed the victim and killed him.[211] On his appeal against a conviction for murder, the defendant asserted that the judge should have instructed the jury on the issue of provocation, albeit self-induced.[212] The Court of Appeal quashed the murder conviction, substituting one of manslaughter.[213] Lord Justice Watkins stated the guiding principles on self-induced provocation:

> In view of the express wording of section 3, as interpreted in *D.P.P. v. Camplin*, which was decided after *Edwards v. R.* we find it impossible to accept that the mere fact that a defendant caused a reaction in others, which in turn led him to lose his self-control, should result in the issue of provocation being kept outside a jury's consideration. Section 3 clearly provides that the question is whether things done or said or both provoked the defendant to lose his self-control. If there is any evidence that it may have done, the issue must be left to the jury.[214]

It is evident that under English law, which conflicts with United States jurisprudence, the correct delineation regarding the province of the judge and jury has now been made, as seen in *Baillie*. However, difficulties still persist regarding pertinent characteristics of the objective limb of the dual test that incorporates the reasonable man concept. These difficulties were highlighted by the recent decisions of the House of Lords in *Regina v. Morhall*[215] and of the Court of Appeal in *Regina v. Humphreys*.[216] It is instructive to examine these authorities and to make a comparative analysis of the pervading principles adopted by other Commonwealth jurisdictions[217] and by those United States jurisdictions that have codified the Model Penal Code.[218]

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208. Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (Eng.).
209. *Johnson*, 89 Crim. App. at 149.
210. *See id.*
211. *See id.*
212. *See id.*
213. *See id.* at 152.
214. *Id.*
215. [1995] 3 All E.R. 659.
216. [1995] 4 All E.R. 1008 (C.A.) (N.Z.). For a discussion of this case, see *infra* Part III.H.
217. *See, e.g.*, Regina v. McCarthy, [1992] 2 N.Z.L.R. 550 (C.A.) (N.Z.); The Queen v. McGregor, 1962 N.Z.L.R. 1069 (C.A.) (N.Z.).
218. MODEL PENAL CODE § 210.3(1)(b) (1980).

F. Regina v. Morhall: *Characteristics That Constitute the Reasonable Man*

As previously stated, the English law applies a dual test—the provocation must not only have caused the accused to lose his self-control but must also have caused a reasonable man to react as the accused did. The reasonable man is imbued with relevant characteristics of the accused pertinent to the provocation. The nature of the characteristics to be considered by the jury is unclear. This very issue has been recently considered by the House of Lords in *Regina v. Morhall*,[219] but unfortunately English law remains deeply flawed.

In *Morhall*, the defendant, after a lengthy period of sniffing glue, stabbed the victim during a fight.[220] The deceased had chided the defendant throughout the day about the glue sniffing, but the defendant continued unabated.[221] The victim died from his stab wounds, and the defendant was charged with murder.[222] At the trial, his principal defense was provocation.[223] The judge gave the usual direction on provocation, namely that it depended on whether the provocation was such as to make a reasonable man lose his self-control.[224] However, the judge did not make any reference to special characteristics of the defendant, such as his glue sniffing addiction, that the jury might think would affect the gravity of the provocation.[225]

The Court of Appeal upheld the defendant's murder conviction.[226] The court reasoned that his self-induced addiction to glue sniffing was profoundly inconsistent with the concept of the reasonable man for the purposes of section 3 of the Homicide Act and that, therefore, it was not a characteristic of an accused that the jury could take into account as affecting the gravity of provocation.[227] In essence, should the judge exclude from the jury's consideration prevalent characteristics and past behavior of the defendant which, in the judge's view, are inconsistent with the concept of a reasonable man? The English statutory legislation made it clear that if there were any evidence that the defendant was provoked to lose his self-

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219. *Morhall*, [1995] 3 All E.R. at 659.
220. *Id.* at 662.
221. *See id.* at 661-62.
222. *See id.* at 661.
223. *See id.* at 662.
224. *See id.*
225. *See id.*
226. *See id.*
227. *See id.* at 663.

control, regardless of how slight it might appear to the judge, the judge was bound to leave the question to the jury.[228]

In *Director of Public Prosecutions v. Camplin*,[229] their Lordships determined that the age of the defendant, fifteen,[230] ought to be taken into account by the jury, along with other physical characteristics that might affect the gravity of the taunts and insults addressed to the defendant and the degree of self-control to be expected of him as a reasonable person.[231] For the purposes of the objective provocation test, the quintessential feature of the hypothetical reasonable man, according to Lord Diplock, is self-control.[232] Lord Diplock gave the following model direction, which embodies current English law:

> In my opinion a proper direction to a jury on the question left to their exclusive determination by section 3 of the Act of 1957 would be on the following lines. The judge should state what the question is using the very terms of the section. He should then explain to them that the reasonable man referred to in the question is a person having the power of self-control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think

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228. *See* Homicide Act, 1957, 5 & 6 Eliz. 2, ch. 11, § 3 (Eng.).

229. 1978 App. Cas. 705 (appeal taken from C. A., Crim. Div.).

230. In *Camplin*, the appellant, a boy, alleged that he had been buggered against his will by an older man and then mercilessly taunted about the conduct. *Id.* at 705-06. Losing self-control, the defendant then violently assaulted the victim with a kitchen utensil known as a chapati pan, causing the victim's death. *See id.*

231. *Id.* Lord Diplock, in *Camplin*, defined the reasonable man as "an ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today." *Id.* at 717.

232. *See id.* at 716. Both Lord Morris and Lord Simon expressed the same view. Lord Morris stated, "[i]n my view it would now be unreal to tell a jury that the notional 'reasonable man' is someone without the characteristics of the accused: it would be to intrude into their province." *Id.* at 721. Lord Simon said:

> But it is one thing to invoke the reasonable man for the standard of self-control which the law requires: it is quite another to substitute some hypothetical being from whom all mental and physical attributes (except perhaps sex) have been abstracted.
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> . . . .
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> . . . But if the jury cannot take into account the characteristic which particularly points the insult, I cannot see that they *are taking "into account everything* . . . according to the effect . . . it would have on a reasonable man." In my judgement the reference to "a reasonable man" at the end of the section means "a man of ordinary self-control." If this is so the meaning satisfies what I have ventured to suggest as the reason for importing into this branch of the law the concept of the reasonable man—namely, to avoid the injustice of a man being entitled to rely on his exceptional excitability [whether idiosyncratic or by cultural environment or ethnic origin] or pugnacity or ill-temper or on his drunkenness.

Id. at 725-26.

> would affect the gravity of the provocation to him; and that the question is not merely whether such a person would in like circumstances be provoked to lose his self-control but also whether he would react to the provocation as the accused did.[233]

This model direction was applied in *Regina v. Newell*,[234] where another issue arose concerning the necessity of a direct connection between the identifiable characteristic and the provocation. The defendant, a chronic alcoholic, lived for some time with a young woman.[235] One day, the defendant was drinking heavily with a friend who made disparaging remarks about the young woman and suggested that the defendant forget her and come to bed with him.[236] Thereupon, the defendant picked up a heavy ashtray and struck the friend over the head twenty times, causing the friend's death.[237] The defendant was charged with murder and sought to raise the defense of provocation under section 3 of the Homicide Act.[238] The Court of Appeal rejected this defense.[239] The characteristic necessary to uphold such a defense had to be of sufficient permanence as to be regarded as part of the individual's character or personality.[240] Additionally, and most importantly, there had to be some *real connection* between the nature of the provocation and the particular characteristic of the offender.[241] The defendant's drunkenness was only transitory and not relevant to the words by which he was provoked.[242]

The court applied the same meaning to the word "characteristics" as the New Zealand court did in *The Queen v. McGregor*,[243] a murder case involving underlying tension between neighbors:

> Moreover, it is to be equally emphasised that there must be some real connection between the nature of the provocation and the particular characteristic of the offender by which it is sought to modify the ordinary man test. The words or conduct must have been exclusively or particularly provocative to the individual because, and only because, of the characteristic. In short, there must be *some direct connection between the provocative words or conduct and*

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233. *Id.* at 718.
234. 71 Crim. App. 331 (C.A. 1980).
235. *See id.* at 332.
236. *See id.* at 333.
237. *See id.*
238. *See id.* at 334.
239. *See id.* at 340.
240. *See id.* at 339-40.
241. *See id.*
242. *See id.* at 340.
243. 1962 N.Z.L.R. 1069 (C.A.).

the characteristic sought to be invoked as warranting some departure from the ordinary man test.[244]

In essence, an admissible characteristic that is not typical of the reasonable man is one that is permanent, not transitory, and directly connected to the provocative words or actions. In *Camplin*, their Lordships gave several examples of these characteristics: age, sex, race, color, ethnic origin, physical deformity or infirmity, impotence, some shameful incident in the past, an abscess on the cheek (where the provocation relied on was a blow to the face) or, in a female defendant, the conditions of pregnancy or menstruation.[245] What about addiction to glue sniffing, as arose in *Morhall?* As the *Morhall* court stated:

> Not only would a defendant, who habitually abuses himself by sniffing glue to the point of addiction, be entitled to have that characteristic taken into account in his favour by the jury, logic would demand similar indulgence towards an alcoholic, or a defendant who had illegally abused heroin, cocaine, or crack to the point of addiction. Similarly, a paedophile, up-braided for molesting children, would be entitled to have his characteristic weighed in his favour on the issue of provocation . . . . Whilst *Camplin* decided that the "reasonable man" should be invested with the defendant's characteristics, they surely cannot include characteristics repugnant to the concept of the reasonable man. [The court expressly regarded such addictions or propensities as wholly inconsistent with the reasonable man concept.] Quite apart from the incongruity of regarding glue, or drug addiction, or paedophilia, as characteristics of a reasonable man, the problem of getting a jury to understand how possession of any of those characteristics, and being bated about it, would affect the self-control of a reasonable man who *ex-hypothesis* would not have such a characteristic, seem[ed insuperable to the court].[246]

The House of Lords, however, has refused to follow the Court of Appeal's decision in *Morhall* by holding that when words of provocation are directed at exploiting an idiosyncratic characteristic, that characteristic is relevant to determining whether the provocation justifies the defendant's loss of self-control.[247] The provocative words were directed towards the defendant's addiction to glue sniffing and his inability to overcome it.

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244. *Id.* at 1081-82 (emphasis added).

245. Director of Pub. Prosecutions v. Camplin, 1978 App. Cas. 705, 724 (appeal taken from C. A., Crim. Div.).

246. Regina v. Morhall, 98 Crim. App. 108, 113 (C.A. 1993).

247. Regina v. Morhall, [1995] 3 All E.R. 659, 659-60.

However, *Camplin*, the leading authority, does not suggest that an idiosyncratic characteristic should be excluded from consideration. To deny a relevant characteristic because it is discreditable is absurd. The accused's physical deformity and impotence are misfortunes but do not connote individual fault and "must be taken into account if they are relevant" to the provocation.[248] Even where individual fault is presumptively involved, such as previous convictions for theft or pedophilia, *Morhall* makes it clear that such disreputable characteristics can be pertinent to jury consideration of the modified "reasonable man" concept.

The decision in *Morhall* appears to follow inexorably from the earlier judgments in *Camplin* and *Newell*. The reasonable man concept should be modified in order to recognize an addiction. Of course, a strict delineation needs to be made in this area. The addiction to glue sniffing formed a permanent characteristic, not simply the isolated and transitory event of intoxication. A dichotomy exists between addiction (permanent) and intoxication caused by individual inhalation (transitory). Only provocation directed to the former merits relevance as a defense under existing English law.

G. The Model Penal Code's Relevant Characteristics

Only a minority of states in the United States have passed legislation similar to the American Law Institute's Model Penal Code,[249] that reflects a radical departure from the common law's restrictive position.[250] Under section 210.3 of the Model Penal Code, any intentional killing will be viewed as manslaughter when "committed under the influence of extreme mental or emotional disturbance for which there is 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."[251]

The Model Penal Code adopts a less austere approach than *Shane* and abandons preconceived notions of what constitutes adequate provocation by allowing more jury determination of the issue. Additionally, the Model Penal Code applies a more subjective approach because it requires a jury to examine the reasonableness of the actor's

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248. Case Comment, R. v. Morhall, 1993 CRIM. L. REV. 957, 958.

249. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1103 (Supp. 1995); CONN. GEN. STAT. ANN. § 53a-55 (West 1994); DEL. CODE ANN. tit. 11, § 632 (1995); HAW. REV. STAT. § 707-702 (1993); N.Y. PENAL LAW § 125.20 (McKinney 1996); OR. REV. STAT. § 163.115 (1990); UTAH CODE ANN. § 76-5-205 (1995).

250. *See* Dressler, *supra* note 158, at 431.

251. MODEL PENAL CODE § 210.3(1)(b) (1985).

conduct "from the viewpoint of a person in the actor's situation."[252] In this regard, direct parallels exist with English jurisprudence contained within *Camplin, Newell,* and now *Morhall,* and the Model Penal Code. However, the extent of jurisdictions following the Model Penal Code is limited, and in other states, the prevailing common law applies with consequential attendant difficulties.

A cogent solution to what constitutes a reasonable man is to invest the reasonable man with the defendant's idiosyncratic characteristics of which the defendant could reasonably assume that the victim knew.[253] Clearly, the closer the relationship was between the accused and the victim, the number of idiosyncratic characteristics of which the victim should have been aware increases.[254] Such a rationale would avoid the difficulties experienced by the court in *Morhall,* where the victim, a long-term friend, knew of the appellant's glue sniffing addiction.[255] This systematic analysis acknowledges a concession to human infirmity within defined boundaries.

H. Regina v. Humphreys: *Battered Woman Syndrome and Abnormal Characteristics Pertinent to the Reasonable Man Concept*

Redefining what constitutes the reasonable man would negate the difficulties attendant to battered woman syndrome.[256] *Humphreys* is the most recent English authority that attempts to rationalize the syndrome within the confines of previous case precedent.[257] Relief for battered women must be reformed considering the prevailing jurisprudence on provocation. The woman, a victim of

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252. *Id.; see also* Dressler, *supra* note 158, at 431.

253. *See* Timothy Macklem, *Provocation and the Ordinary Person,* 11 DALHOUSIE L.J. 126, 146 (1987).

254. *See id.*

255. Regina v. Morhall, [1995] 3 All E.R. 659, 661-62. The Australian High Court's decision in *Moffa v. Regina,* 13 A.L.R. 225 (1977), sharply raised the pervading difficulties attendant to the objective test for provocation. Therein, Justice Murphy stated:

> The objective test is not suitable even for a superficially homogenous society, and the more heterogeneous our society becomes, the more inappropriate the test is. Behaviour is influenced by age, sex, ethnic origin, climatic and other living conditions, biorhythms, education, occupation and, above all, individual differences. It is impossible to construct a model of a reasonable or ordinary South Australian for the purpose of assessing emotional flashpoint, loss of self-control and capacity to kill under particular circumstances.

Id. at 243.

256. *See, e.g.,* Anne M. Coughlin, *Excusing Women,* 82 CAL. L. REV. 1, 51-63 (1994); Elizabeth A. Sheehy et al., *Defending Battered Women on Trial: The Battered Woman Syndrome and Its Limitations,* 16 CRIM. L.J. 369 (1992); Celia Wells, *Domestic Violence and Self-Defence,* 140 NEW L.J. 127 (1990).

257. Prior to *Humphreys,* the issue had been addressed in several cases, *see, e.g.,* Gardner, 14 Crim. App. R(S) 364 (1992); Regina v. Ahluwalia, [1992] 96 Crim. App. 133 (C.A. 1992); Regina v. Thornton, 96 Crim. App. 112 (C.A. 1991).

cumulative provocation (physical and verbal), kills in a moment, when objectively viewed, there was no provocation. Furthermore, the battered woman may not have acted under a "sudden and temporary loss of self-control."[258] This raises the issue of cumulative provocation as a modification to the reasonable person concept and asks whether the defense of provocation is applicable, or rather, an extended concept of self-defense should presumptively be applied.[259]

In *Humphreys*, the defendant, who had a history of cutting her wrists to gain attention, cut her wrists with a knife.[260] The victim, her live-in lover, taunted her, telling her that she had not done a good job slitting her wrists.[261] Furthermore, he also undressed, wearing only a shirt, causing her to fear rape.[262] Then the defendant fatally stabbed the victim with the knife, and she was convicted of murder.[263] At the trial, a psychiatrist testified that the defendant had an abnormal mentality with immature, explosive, and attention-seeking traits.[264] The judge directed the jury that the reasonable person standard did not include a person with a distorted and explosive personality.[265] On appeal, the defense argued that the trial judge's failure to instruct the jury regarding cumulative provocation, as well as regarding relevance of the defendant's idiosyncratic characteristics, was a reversible error.[266] The presence of abnormal traits modifying the reasonable woman concept relates to the second part of the dual provocation test; it asks whether the provocation might be such as to cause a reasonable person to react to it as the accused did.

After years of callous indifference, the English judiciary has been more sympathetic to the plight of the battered woman, albeit piecemeal and unsystematic. The English approach retreated from intransigence in *Ahluwalia*, where the Court of Appeal determined that a "cooling time" between provocation and killing no longer constituted an absolute bar to the defense.[267] The court held that evidence showing that the defendant had suddenly lost her self-

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258. Wasik, *supra* note 154, at 32.

259. *See, e.g.*, Christine Boyle, *The Battered Wife Syndrome and Self-Defence:* Lavalee v. R., 9 CAN. J. FAM. L. 171 (1990); Jacqueline R. Castel, *Discerning Justice for Battered Women Who Kill*, 48 U. TORONTO FAC. L. REV. 229 (1990).

260. Regina v. Humphreys, [1995] 4 All E.R. 1008, 1011 (C.A.).

261. *See id.* at 1012.

262. *See id.*

263. *See id.*

264. *See id.*

265. *See id.* at 1014.

266. *See id.* at 1012-13.

267. Regina v. Ahluwalia, 96 Crim. App. 133, 139 (C.A. 1992).

control was properly left to the jury to consider.[268] The jury was granted discretion to examine this question from the view point of a reasonable woman[269] suffering from the battered woman syndrome.[270]

This wind of change was further augmented by *Humphreys*, where their Lordships determined that the trial judge had been mistaken in failing to instruct the jury regarding the effects of cumulative provocation[271] and in failing to modify the reasonable woman standard.[272] The history of the defendant's and victim's relationship was relevant, including past violence, victim's cheating, and defendant's fear of rape.[273] In this regard, *Humphreys* may represent a panacea to the provocation difficulties. Hopefully, courts have now clearly established that cumulative provocation is significant.

Furthermore, the court held that immaturity and attention-seeking could constitute a psychological illness or disorder which is in no way repugnant or wholly inconsistent with the concept of the reasonable person.[274] Thus the court ruled that the defendant's characteristics of immaturity and attention-seeking are characteristics that, if possessed by the accused, should be considered by the jury when deciding whether a reasonable person would have been provoked and thus lose self-control.[275]

These characteristics modify the classic reasonable person concept defined by Lord Diplock in *Camplin*: "[A]n ordinary person of either sex, not exceptionally excitable or pugnacious, but possessed of such powers of self-control as everyone is entitled to expect that his fellow citizens will exercise in society as it is today."[276] The characteristic necessary to uphold such a defense had to be of sufficient permanence as to be regarded as part of the individual's character or personality, not something transitory.[277] Additionally, and most importantly, there had to be some real connection between

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268. *See id.* at 139; *see also* Donald Nicolson & Rohit Sanghvi, *More Justice for Battered Women*, 145 NEW L.J. 1122 (1995).

269. *See Ahluwalia*, 96 Crim. App. at 141.

270. *See id.* at 141-43. The decision by the Court of Appeal in *Ahluwalia* was followed two months later by that of *Regina v. Gardner*, 14 Crim. App. R(S) 364 (1992), where the five-year sentence of the defendant for the provoked manslaughter of her partner was reduced to probation on the grounds of fresh evidence of diminished responsibility.

271. *Humpreys*, [1995] 4 All E.R. at 1023.

272. *Id.* at 1022.

273. *See id.* at 1024.

274. *See id.* at 1022.

275. *See id.*

276. Director of Pub. Prosecutions v. Camplin, 1978 App. Cas 705, 717 (appeal taken from C.A., Crim. Div.).

277. *See Humpreys*, [1995] 4 All E.R. at 1022.

the nature of the provocation and the particular characteristic of the offender.[278] The Court of Appeal in *Humphreys* determined that this criterion was satisfied.[279] It was clearly open to the jury to conclude whether the provocative taunt was directed towards the defendant's immaturity and attention-seeking.

However, it is difficult to fully reconcile the facts contained in *Humphreys* with the earlier approach in *Newell*, wherein the Court of Appeal rejected the defense of provocation because there was no connection between the provocation and the particular characteristic of the offender (chronic alcoholism).[280] The court made the following assertion:

> The appellant's drunkenness, or lack of sobriety, his having taken an overdose of drugs and written a suicide note a few days previously, his grief at the defection of his girl friend, and so on, are none of them matters which can properly be described as characteristics. They were truly transitory in nature . . . .[281]

Perhaps the delineation between *Newell* and *Humphreys* exists because in *Humphreys* there was a clearer connection between the provocative words and the defendant's peculiar traits. However, the specious line drawing to determine what the relevant and irrelevant characteristics are serves only to illustrate the egregious difficulties permeating the current law on provocation. Because *Humphreys'* decision ameliorates intrinsic difficulties caused by the classical definition of provocation, this decision is to be welcomed. Certainly, English law is now less austere than its American counterpart.[282]

Although the *Ahluwalia* court conceded that the subjective element in the defense could be satisfied even when there is a delayed reaction,[283] the provocation doctrine still requires a "sudden and temporary loss of self-control" caused by the alleged provocation at the time of the killing.[284] Furthermore, the court in *Humphreys* recognized that cumulative historical provocation is pertinent.[285] Some commentators have identified this requirement as continuing "to

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278. *See id.*

279. *Id.*

280. Regina v. Newell, 71 Crim. App. 331, 331-32 (C.A. 1980). For a detailed discussion of *Newell*, see *supra* text accompanying notes 234-42.

281. *Newell*, 71 Crim. App. at 340.

282. Evidence from the United States suggests that female defendants receive harsher sentences. *See generally*, ANGELA BROWNE, WHEN BATTERED WOMEN KILL (1987).

283. Regina v. Ahluwalia, 96 Crim. App. 133, 139 (C.A. 1992).

284. *See* Wells, *supra* note 176, at 273.

285. Regina v. Humphreys, [1995] 4 All E.R. 1008, 1024 (C.A.).

pose problems for battered women who tend to kill in an outwardly calm manner."[286]

Given the enduring problems regarding provocation, notwithstanding the judicial trend of compassion for the battered woman, it has been cogently argued that the way forward for battered defendants lies in a specific defense created by legislation.[287] An alternative response supported by several academic commentaries is to extend the existing law on self-defense.[288] In essence, this involves recognition of domestic violence as an instrument of psychological and emotional control requiring a special psychological self-defense.[289] Undoubtedly, English developments will be noticed in the United States, where the provocation law is heavily predicated on English precedent.[290]

I. Conclusion

In *Morhall,* the House of Lords drew a strict distinction between addiction (permanent) and intoxication caused by individual inhalation (transitory).[291] Under existing English law, only provocation directed to the former merits relevance as a defense. This distinction, although crucial, seems spurious. There is also a certain perversity about the need to establish a direct connection. If no real connection is demonstrated, the individual is judged as a sober and reasonable person. Would such a sober and reasonable person have stabbed the victim seven times? Glue sniffing intoxication in such a scenario is wholly disregarded unless the provoking words are addressed to it. Such a delineation seems to invoke invidious semantics. Additionally, the reasonable man concept pervading the area is a contradiction. *Ex hypothesis,* it is hard to countenance the reasonable man killing with the mens rea of murder.

English law, imposing a direct connection criterion, is based on the New Zealand decision in *McGregor.*[292] It is interesting to note in this regard that even in New Zealand the judgment of Justice North in *McGregor* has been the subject of severe judicial criticism in the later decision of *Regina v. McCarthy,*[293] which concerned a retaliatory

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286. Nicolson & Sanghvi, *supra* note 268, at 1124.

287. *See id.*

288. *See, e.g.,* McColgan, *supra* note 176, at 527-29; Wells, *supra* note 176, at 271.

289. *See* Wells, *supra* note 176, at 273.

290. *See* Dressler, *supra* note 158, at 427.

291. Regina v. Morhall, [1995] 3 All E.R. 659.

292. The Queen v. McGregor, 1962 N.Z.L.R. 1069 (C.A.); *see also supra* text accompanying notes 243-44.

293. [1992] 2 N.Z.L.R. 550 (C.A.).

killing subsequent to physical ejection of the defendant from a party.[294] The court stressed that the obiter observations in *McGregor*, imposing the requirement that the provocation must be directed at a particular characteristic, go too far, add needless complexity, and had not been found workable or followed closely in practice.[295] "A racial characteristic of the accused, his or her age or sex, mental deficiency, or a tendency to excessive emotionalism as a result of brain injury are . . . examples of characteristics . . . to be attributed to the hypothetical person."[296] Certainly the English experiences, with attendant problems over the categorization of relevant characteristics of the reasonable man concept, as shown in *Morhall* and *Humphreys*, replicate the view of the New Zealand court in *McCarthy*.

The use of a reasonable man concept for killings involving the mens rea of murder is a total contradiction in terminology.[297] The central issue, as Lord Diplock asserted in *Camplin*, is lack of self-control.[298] The English Criminal Law Revision Committee has proposed an abolition of the reasonable man concept for provocation.[299] In this regard, the recent approach of the New Zealand court in *McCarthy* mirrors those proposals:

> Only the effect of alcohol, being transitory and not a characteristic, is to be ignored . . . . In short the questions are whether the alleged provocation in fact caused the accused to lose self-control to the extent of committing the homicide, and whether a person with the accused's characteristics other than any lack of the ordinary power of self-control could have reacted in the same way.[300]

Finally, it is important to reiterate that recent English developments in the area of provocation reflect a markedly less austere approach than that taken in the United States. A comparison of the decisions in *Baillie* and *Shane*[301] embodies this fundamental dichotomy. Similarly, the sea wind of change appurtenant to battered woman syndrome, with *Humphreys* the latest to reflect an altered

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294. *Id.* at 552.

295. *Id.* at 558.

296. *Id.*

297. *See* Case Comment, R. v. Morhall, *supra* note 248, at 957.

298. Director of Pub. Prosecutions v. Camplin, 1978 App. Cas. 705, 718 (appeal taken from C.A., Crim. Div.).

299. *See* 21 Law Commission Reports 423 (Commentary on the Draft Criminal Code Bill, cl. 58) (1992). Following the recommendations of the Criminal Law Revision Committee, the Law Commission has omitted all reference to the reasonable man standard and stated the second, objective limb of the test as follows: "[T]he provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for the loss of self-control." *Id.* at 234 (Draft Criminal Code Bill, cl. 58(b)).

300. *McCarthy*, [1992] 2 N.Z.L.R. at 558.

301. *See* discussion *supra* Part III.D.

judicial perspective, shows an alternative analysis of perceived difficulties incumbent within the reasonable person concept. Clearly, the new English precedents will need time to percolate into American jurisprudence. Similarly, the synergistic effect of recent developments over the defense of duress needs time for gestation.