

SUDDEN FIGHT, CONSENT AND THE PRINCIPLE OF COMPARATIVE RESPONSIBILITY IN THE INDIAN PENAL CODE

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Sudden fight is one of four partial defences to murder in the Indian Penal Code. It was a late addition which lacks the qualifying provisos and illustrations that constrain applications of the partial defences of provocation and excessive force in private defence. A survey of recent decisions of the Indian Supreme Court suggests that sudden fight has the potential to subvert the principled limits that constrain the other partial defences. Sudden fight has no equivalent in other Commonwealth jurisdictions. It can be argued that it is an anachronism that should be eliminated from the law of murder. This essay argues in favour of its retention. The partial defences of provocation, excessive defence, sudden fight and consent are unified by an underlying principle of comparative responsibility that extenuates murder when the offender was seriously wronged by the victim or acted with the consent of the victim to die or engage in an activity that was likely to result in death. A set of provisos and illustrations is proposed that will constrain applications of the partial defence of sudden fight in conformity with the principle of comparative responsibility.

I. INTRODUCTION

In jurisdictions which adopted the Indian Penal Code, the partial defence of sudden fight reduces murder to the lesser offence of culpable homicide.¹ Sudden fight is the direct descendant of mutual combat, a common law defence which reduced murder to manslaughter when death resulted from an injury inflicted in anger during a sudden, unpremeditated fight on equal terms with no unfair advantage taken. Mutual combat has not survived in common law or in the statute law of other

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¹ *Indian Penal Code* 1860 (Central Act 45 of 1860) [IPC], s. 299. The offences of murder, IPC s. 300, and culpable homicide, s. 299, are different, in several significant respects, from the common law offences of murder and manslaughter. The fault elements of IPC murder are more inclusive than common law murder and the fault elements for culpable homicide are more restricted than those in common law manslaughter. For an extended discussion, see Stanley Yeo, *Fault in Homicide* (Annandale, New South Wales: Federation Press, 1997) [Yeo, *Fault in Homicide*]. The distinctions between the respective fault requirements for the homicide offences in the IPC are complex and have been a source of continuing confusion. See *Siri Kishan & Ors v. State of Haryana*, [2009] INSC 830 (27 April 2009) for a restatement of the fault elements by the Indian Supreme Court.

Commonwealth jurisdictions.² It was absorbed by the partial defence of provocation as courts extended the applications of that defence during the latter part of the 19th and the 20th centuries. In his monograph on criminal defences in the IPC, Professor Stanley Yeo canvassed the suggestion that the partial defence of sudden fight should be abolished.³ He concluded, without enthusiasm, that it should be retained because ‘people who kill in the course of a sudden fight are less morally culpable than, say, those who coolly plan and carry out a murder’.⁴

Sudden fight is an enigma that encompasses many unanswered questions. The first and most obvious is why a partial defence that has been absorbed by provocation elsewhere should be retained as an independent ground for extenuation in IPC jurisdictions. Stanley Yeo makes the point that sudden fight has applications that go beyond the reach of provocation. These will be identified in the discussion that follows. That does not, of course, justify retention. If sudden fight cannot be brought within the exculpatory limits of provocation or the other partial defences, one must ask what independent grounds of principle there are for sudden fight to extenuate murder. Professor Yeo’s passing suggestion that it should be retained because there is a difference in moral culpability between killing in a sudden fight and premeditated killing is not sufficient to justify retention. Premeditation is not a defensible criterion when moral or legal culpability for homicide is in issue, for brutal malignity may be spontaneous and sympathetic instances of euthanasia are invariably premeditated. The need for principled justification is apparent from a consideration of the apparent anomalies of the defence. Murder is extenuated though the offender did not kill with the intention of defending person or property, in circumstances where there was nothing that could be described as grave and sudden provocation and though the offender, albeit moved by anger, retained their self control.⁵ Something more than a rough equivalence of weaponry and absence of premeditation is required if there is to be principled justification for this additional partial defence. The enigma is compounded by the fact that sudden fight was a late and unexplained addition to the IPC.

² The decline of mutual combat and chance medley is traced in James William Cecil Turner, *Russell on Crime*, Vol. 1, 12th ed. (London: Sweet and Maxwell, 1964) at 455-457. Chance medley, a corruption of “chaud melee”, appears to have been related only in name to mutual combat: see William Oldnall Russell, *A Treatise on Crimes and Indictable Misdemeanours*, Vol. 1, 2d ed. (London: Joseph Butterworth, 1826) [*Russell on Crime*, 1826] at 543, 643-649. Chance medley was excusable homicide in self defence, where death occurred in course of an affray in the course of which the defendant killed from necessity. It merged with self-defence in all jurisdictions. For an alternative account, see Bernard Brown, “The Demise of Chance Medley and the Recognition of Provocation as a Defence to Murder in English Law” (1963) 7 *American Journal of Legal History* 310.

³ Stanley Yeo, *Criminal Defences in Malaysia and Singapore* (Selangor: LexisNexis, Malayan Law Journal, 2005) [Yeo, *Criminal Defences*].

⁴ *Ibid.* at 317-318. But see Christopher De Souza, “Expanding the Boundaries of Sudden Fight: The *Tan Chun Seng* Decision” (2003) 15 *Sing. Ac. L.J.* 334, welcoming an expansion of the scope of the sudden fight defence in *Tan Chun Seng v. Public Prosecutor* [2003] 2 *S.L.R.(R.)* 506.

⁵ See the well-established distinction between “loss of the power of self-control” in provocation and the “heat of passion” which is all that is required in sudden fight: Sir Hari Singh Gour, *Penal Law of India*, Vol. 3, 10th ed. (Allahabad: Law Publishers, 1983) [Gour] at 2366: Sudden fight is “founded upon the same principle [as provocation] for in both there is the absence of pre-meditation but while in the one case there is the total deprivation of self-control, in this there is only that heat of passion which clouds men’s sober reason and urges them to deeds which they would not otherwise do”. Compare Yeo, *Criminal Defences*, *supra* note 3 at 316: “[A] higher level of lost self-control is required for provocation than for sudden fight”.

There is an important practical dimension to this enquiry into the rationale of the sudden fight defence in IPC jurisprudence. Sudden fight is frequently pleaded in response to charges of murder and there is an extensive body of recent Indian Supreme Court case law on its applications.⁶ These appellate decisions suggest that the doctrinal restraints that limit the partial defences of provocation and excessive force in private defence of person or property (“excessive defence”) have been subverted by judicial willingness to allow defendants to rely on sudden fight as an alternative. There appears to have been an unprincipled drift in the applications of sudden fight. A sample of recent Indian appellate decisions, illustrating this drift, is discussed in an appendix to this essay.

I have two complementary tasks in mind in this discussion of sudden fight. The first is to discover a rationale for the partial defence. The second is to propose a statutory formulation of the limits of its application, consistent with that rationale, which will ensure that sudden fight is coherent with the other partial defences.

II. THE PRINCIPLE OF COMPARATIVE RESPONSIBILITY IN THE INDIAN PENAL CODE

The IPC is of particular interest for its substantial departures from both the English common law of unlawful homicide and from its implicit morality. These departures have their origin in Thomas Macaulay’s Draft Penal Code of 1837.⁷ Though Macaulay’s homicide provisions were modified when the Indian Penal Code was enacted in 1860, many of his innovations survived. His Draft Code and its supporting commentary in his *Report and Notes on the Indian Penal Code*⁸ are remarkable for their anticipation of issues in contemporary criminal law theory. Of particular relevance for the purposes of this essay is the significance that Macaulay assigned to individual rights and individual autonomy in the Draft Code. Attempted suicide was not an offence.⁹ Free and intelligent consent to harm or the risk of harm was a general defence which excused the infliction of any physical harm short of death.¹⁰ Though Macaulay was unwilling to go so far as to accept that consent might altogether excuse murder, he allowed a partial defence to murder in circumstances where

⁶ Yeo, *Criminal Defences*, *ibid.*, at 295, remarks the increased incidence of reliance on sudden fight in murder trials in Malaysia and Singapore dating from the last decade of the 20th century. Appellate decisions from those jurisdictions are few in number; Professor Yeo relies, for the most part, on Indian caselaw in his discussion of sudden fight.

⁷ *A Penal Code Prepared by the Indian Law Commissioners*, (London: Pelham Richardson, 1838) [*Draft Code*], reprinted from the Calcutta edition. Authoritative sources concur that Macaulay was the primary if not sole author of the Code.

⁸ Lord Macaulay, *Speeches and Poems With the Report and Notes on the Indian Penal Code*, Vol. 2 (New York: Hurd & Houghton, 1867) [*Notes on the Code*].

⁹ On self murder or *felo de se* at common law, see *Russell on Crime*, 1826, *supra* note 2, at 429-430. An attempt to suicide was punishable as an indictable misdemeanour, *R. v. Burgess* (1862), L.R. 2 Le. & Ca. 257. Attempted suicide was made an offence, IPC s. 309 in 1882, punishable by a fine or imprisonment for a maximum of one year. The far more serious offence of abetting suicide appears in both the Draft Code, s. 307 and IPC, s. 306.

¹⁰ The consent provisions in the Draft Code, s. 69 and the IPC, s. 87 distinguish between the general defence of consent to offences of causing harm to persons, and the defence of consent to harms that are done with consent and “in good faith for the benefit” of the person who suffers the harm, in the Draft Code, s. 70 and the IPC, s. 88. The latter defence is, in reality, a species of the defence of necessity. Harm done in good faith for the benefit of the victim is justified or excused when the victim consents or, alternatively, in circumstances where the victim is incapable of consent.

the victim made an informed and voluntary choice to die or risk death at the hands of the offender.¹¹ The Legislative Council qualified Macaulay's proposal for a general defence of consent when it enacted the Code: the IPC does not allow consent to excuse the infliction of serious harm. It does retain, however, a partial defence of consent that extenuates murder, reducing the offence to culpable homicide. The rationale for the partial defence of sudden fight must be sought in this radical reconstruction of the law of homicide in the IPC.

The relationships among the general defence of consent, the partial defence of consent and the other partial defences to murder were never clarified, either in the Draft Code or in the IPC. That failure may have been a consequence of the consciousness of all concerned that the provisions were a radical departure from both the precedents and the implicit morality of the common law. The gap between the IPC and common law conceptions of murder widened still further, as the partial defence of mutual combat gradually faded out of the common law. When considered together, in their relationship to the crime of murder, the partial defences of provocation, consent and sudden fight in the IPC mark a triangular terrain of extenuation that has no counterpart elsewhere. The first part of the essay explores the partial defences from this perspective and proposes a principle of coherence based on the comparative responsibility of the offender and victim for the homicide. The principle of comparative responsibility that I will propose draws on the recent monograph by Professor Vera Bergelson, *Victims' Rights and Victims' Wrongs: Comparative Liability in Criminal Law*.¹² It is this principle, I suggest, that lends coherence to the partial defences in the IPC. The victim's wrong against the offender in provocation or the victim's complicity in the conduct that results in their own death in the partial defences of sudden fight and consent reduces, though it cannot eliminate, the offender's culpability. Excessive defence against an unlawful attack, which will be considered in passing, falls into the same pattern of comparative responsibility.

Bergelson argues that there is a fundamental and implicit 'principle of criminal law, the principle of conditionality of our rights':¹³

The essence of the principle is that *the criminal liability of the perpetrator should be reduced to the extent that the victim, by his own acts, has diminished his right not to be harmed by the perpetrator*.¹⁴

There is more at stake than the victim's rights, of course, when death or very serious injury results from conduct that is intended to cause death or injury. There is a public interest in limiting the varieties and extent of intentionally inflicted harms to citizens of a polity, however willing the victims of those harms may be to risk or suffer them. Few if any Anglophone jurisdictions are prepared to go so far as Macaulay in his Draft Code and absolve a defendant from all criminal responsibility for an offence of

¹¹ In similar fashion, consent reduces inchoate murder (IPC, s. 308) to inchoate culpable homicide (IPC, s. 309). See also the offence of abetting suicide (IPC, s. 307).

¹² Vera Bergelson, *Victims' Rights and Victims' Wrongs: Comparative Liability in Criminal Law* (Stanford University Press, 2009). Bergelson's thesis has been the subject of extensive consideration among United States criminal law theorists. See, for e.g., the 'Forum' discussion of Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law* (2005) 8, No 2, *Buffalo Criminal Law Review* 385.

¹³ *Ibid.* at 61, emphasis in original.

¹⁴ *Ibid.* at 62, emphasis in original.

causing serious injury to a consenting victim. Macaulay himself drew the line when it came to murder and allowed no more than a partial defence when the consenting victim was killed. Death is likely to make a difference to the configuration of rights in at least one respect. The death of a consenting victim will crystallize the rights of family members and others, who did *not* give their consent to the offender's conduct. That does not exhaust the considerations of policy or justice that have a bearing on the acceptable limits of a defence of consent. Bergelson provides a lucid and persuasive account of the principle of comparative responsibility and its contested limits; it is unnecessary to retrace the steps of her argument here or to explore the nature of those limits. For present purposes it is sufficient to make the point that both the Draft Code and IPC provisions on murder and its exceptions provide an instantiation of the comparative responsibility principle that has no parallel in other Commonwealth jurisdictions.

There is an independent argument for retaining the partial defence of sudden fight which will not be discussed. The offence of murder in IPC jurisdictions is characterised by its breadth of definition and the mandatory severity of its penalty. Its fault elements extend to include cases in which the fatal injury inflicted by the offender was not intended to kill, not intended to cause serious injury and not known by the offender to be likely to cause death or serious harm.¹⁵ Murder continues to be punishable by death in IPC jurisdictions though the incidence of execution varies. Life imprisonment is mandatory when the offender is not executed. No other offence in the IPC is punishable with the same degree of mandatory severity. The breadth of definition of the fault elements of the offence, when coupled with the extreme severity of the penalty and limited opportunities for the exercise of judicial sentencing discretion, might be taken to provide an independent ground for the provision of an extended range of defences and partial defences. That argument will not be pursued. Discussion will proceed on the assumption that the defence of sudden fight should continue to extenuate murder even if the offence were to be limited by a requirement of proof that the offender intended to kill or knew that injuries intentionally inflicted would be likely to cause death.

III. THE ORIGIN AND RATIONALE OF THE DEFENCE OF SUDDEN FIGHT

Though provocation and mutual combat were distinct grounds for reducing murder to manslaughter in English law when Macaulay drafted his Code, he made no provision for mutual combat. It is a puzzling and unexplained omission. The Indian Law Commissioners, who considered the Draft Code in 1847, accepted the omission though the possibility of introducing such a defence was the subject of brief and inconclusive discussion in their Report.¹⁶ Mutual combat appears to have been introduced at the instance of a Select Committee appointed in 1851, which revised Macaulay's Draft Code over a period of five years and finally presented a revised version to the Indian Legislative Council in December 1856. This revised version

¹⁵ Stanley Yeo provides an exhaustive, comparative discussion in *Fault in Homicide*, *supra* note 1, in particular at 248-252, discussing the seminal decision in *Virsa Singh v. The State of Punjab*, [1958] A.I.R. 465 (S.C.) and subsequent authorities.

¹⁶ First Report, *Special Reports of the Indian Law Commissioners, Reports from Commissioners—Indian Law*, 1847-1848, Vol. 4, "Report on the Indian Penal Code" [*Indian Law Commissioners*] at 52-53.

was passed by the Council in 1857, received the assent of the Governor General in 1860 and came into effect in 1862. No record of the deliberations of the Select Committee is known to have survived.¹⁷ The account that follows of the reasons for including the partial defence of sudden fight is accordingly conjectural.

The original common law defence of mutual combat and the Code defence of sudden fight appear to have been identical in scope. For common law, I draw on the second and third editions of Russell's *Treatise on Crimes and Misdemeanours*, published in 1826 and 1843 respectively, which span the period during which Macaulay drafted his Code and the period during which it was under consideration by the Indian Law Commissioners. The accounts of mutual combat are essentially the same, though the authoritative Charles Sprengel Greaves, who edited the third edition, provides the more succinct formulation:¹⁸

[W]here upon words of reproach, or other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being sought to taken on either side . . . if death happen under such circumstances, the offence of the party killing will amount only to manslaughter If, therefore, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons and go into a field and fight, and one of them be killed, it will be but manslaughter, because it may be presumed that the blood never cooled.

That formulation is substantially equivalent to the partial defence of sudden fight in the IPC.¹⁹

Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

There is no reference to mutual combat in Macaulay's *Notes on the Code*.²⁰ It is reasonable to suppose that he ignored mutual combat because he considered that it was simply unnecessary. He had made provision for the partial defences of provocation, excessive defence and consent to death or the risk of death. He could have taken these to cover the field, leaving no reason for an additional ground of extenuation when the defendant killed another in mutual combat. The Select Committee evidently disagreed with that judgment and proposed an additional partial defence of sudden fight to complete the range of extenuations.

Consent, which appears to have the most significant bearing on the enigma of sudden fight and the role of the comparative responsibility principle in the partial defences, will be considered after excessive defence and provocation.

¹⁷ Yeo, *Fault in Homicide*, *supra* note 1 at 98-100, provides a succinct account of the history of the IPC and relates the unavailing efforts of scholars to locate any record of official deliberations on the IPC between the years 1851-1860.

¹⁸ William Oldnall Russell edited by Charles Sprengel Greaves, *A Treatise on Crimes and Indictable Misdemeanours*, Vol. 1, 3d ed. (Saunders & Benning, 1843) [*Russell on Crime*, 1843] at 585. To the same effect, see *Russell on Crime*, 1826, *supra* note 2 at 643, 646.

¹⁹ IPC, s. 300, Exception 4. The Code adds the further qualification that death must not be inflicted in a "cruel or unusual manner". This probably derives from Blackstone, *Commentaries on the Laws of England*, Book 4, Chapter 4, "Of Homicide": "[I]f even upon a sudden provocation one beats another in a cruel and unusual manner, so that he dies, though he did not intend his death, yet he is guilty of murder of express malice".

²⁰ *Notes on the Code*, *supra* note 8.

It is unnecessary to discuss excessive defence in detail; it is consistent with the other partial defences but adds little to an understanding of their internal relations. Sudden fight and excessive defence are mutually exclusive categories. If the offender intended death or knew that death was likely to result from an attack on V, both private defence under IPC, s. 97 and excessive defence under IPC, s. 299 require proof that the defendant acted for the purpose of defending a person or property. Neither the complete nor the partial defence has any application if the offender was aware that the force used was unnecessary or excessive.²¹ As a consequence, an offender who chose to fight in the knowledge that the fight was unnecessary and could have been avoided has no recourse to private defence or excessive defence. Extenuation based on excessive defence is distinct both in theory and in practice from sudden fight, for the offender bears the burden of proving that the fatal acts were done for a defensive purpose.

The relationship between sudden fight and provocation is more complex. At common law, mutual combat could supplement provocation, which had no application when the defendant killed in anger provoked by insulting or offensive words or conduct. Macaulay eliminated that particular bar to reliance on the provocation defence. It was extended to insulting conduct, whether by words or gestures, so long as the conduct could be said to amount to “grave and sudden provocation” that would be “likely to move a person of ordinary temper” to violent passion.²² That extension of provocation to include offensive words and gestures might cover some cases that fell within the common law doctrine of mutual combat. It would not cover them all however, for mutual combat could extenuate murder in cases where the words of reproach or offensive conduct by the victim that initiated the fight fell far short of grave provocation.²³ Nor did it matter in mutual combat, who started the altercation or “who gave the first blow”.²⁴ Though excessive defence had no common law counterpart²⁵ and provocation had been extended beyond its common law limits, Macaulay cannot have believed that these reforms would be sufficient to displace mutual combat. It was consent, the third point in the triangular terrain of extenuation, that might be taken to have had that consequence.

A. *Varieties of Extenuation: Four Variations on Nosepulling*

Nosepulling provides a convenient basis for discussion of the relationships among the partial defences. To pull another man’s nose was a conventional challenge which

²¹ Draft Code, ss. 299, 75, 84.

²² Draft Code, s. 297. In the IPC s. 300, Exception 1, the provocation defence was reformulated. It retains, however, the requirement that the provocation be “grave and sudden”. For a discussion of the exculpatory basis for provocation, see Ian Leader-Elliott, “Provocation” in Chan Wing Cheong *et al.*, eds. *Codification, Macaulay and the Indian Penal Code: The Legacies and Modern Challenges of Criminal Law Reform* (Ashgate, 2011) (forthcoming) [Leader-Elliott, “Provocation”].

²³ *Russell on Crime*, 1826, *supra* note 2 at 646, “insufficient legal provocation”.

²⁴ *Russell on Crime*, 1843, *supra* note 18 at 587.

²⁵ The Australian High Court managed to construct a common law basis for such a defence in *R v Howe*, (1958) 100 C.L.R. 448 (H.C.). This experiment in purposive reconstruction of precedents was abandoned by the Court in *Zecevic v. Director of Public Prosecutions (Victoria)* (1987) 162 CLR 645. Discussed, Stanley Yeo, “The Demise of Excessive Self-Defence in Australia” (1988) 37 *International and Comparative Law Quarterly* 348.

could be expected to induce the victim of such indignity either to retaliate or suffer the disgrace of humiliating submission to the insult.²⁶ When Lieutenant Randolph pulled President Jackson's nose in 1833,²⁷ a famous incident of which Macaulay was probably well aware, the President reached for his cane to thrash his assailant. Fortunately perhaps for both of them, Jackson was restrained from doing so by his attendants. Four variations on nosepulling, taking each of the partial defences in turn, will be used to delineate the relationships they bear to each other. Observance of the convention of gender neutrality is unnecessary in sketching these peculiarly masculine scenarios.

1. *Provocation*

The first and most familiar is the case where the man whose nose is pulled kills his assailant in immediate anger at the outrage. This was a conventionally accepted illustration of provocation sufficient to reduce murder to manslaughter in 18th and early 19th century cases and texts.²⁸ Nosepulling was a grave provocation and a serious wrong to its victim. In a curious reversal, however, Macaulay drew on the nosepulling scenario for an illustration of the limiting rule that conduct which is undertaken in lawful self defence can never amount to provocation:²⁹

A attempts to pull Z's nose. Z, in the exercise of the right of private defence, strikes A. A is moved to sudden and violent passion by the blow, and kills Z. This is not manslaughter but murder.

The rule that lawful self defence can never amount to provocation is an obvious bar to extenuation, akin to the rule that the lawful actions of officials, however infuriating to the offender, can never provide grounds for reducing murder to manslaughter. The limiting rule may be obvious, but Macaulay's nosepulling illustration of the limit was bound to cause confusion. It was to become a source of contention among the judges and government lawyers who made submissions to the Indian Law Commission on the Draft Code in 1846. W Hudleston, a judge of the Sudder Court in Madras, and G Norton, who was the Advocate General of Madras, invoked the common law in support of their argument that the would-be nosepuller in the Illustration should be guilty of no more than manslaughter.³⁰ In their view, this was a case of common law mutual combat. The Commissioners rightly rejected the submissions, which were based on a misreading of the illustration. Z's response was preventive rather than offensive - Z strikes A "in the exercise of the right of private defence."³¹ This

²⁶ *Russell on Crime*, 1843, *supra* note 18 at 587: "Where an *assault* is made with violence or circumstances of indignity upon a man's person, as by pulling him by the nose, and the party so assaulted kills the aggressor, the crime will be reduced to manslaughter, in case it appears that the assault was resented immediately, and the aggressor killed in the heat of blood, the *furor brevis* occasioned by the provocation."

²⁷ On the Randolph incident and, more generally, on the meaning of nose-pulling, see Kenneth Greenberg, "The Nose, the Lie and the Duel" (1990) 95 *American Historical Review* 57.

²⁸ See, for e.g., *Russell on Crime*, 1843, *supra* note 18 at 580.

²⁹ Draft Code, s. 297, Illustration (d).

³⁰ *Indian Law Commissioners*, *supra* note 16, at paras. 274-275.

³¹ Draft Code, s. 297, Illustration (d). It appears in the IPC as s. 300, Exception 1, Illustration (e) with modifications evidently intended to reduce the risk of confusion. Z does not "strike" A, but "lays hold" of him and the illustration is reinforced with a more emphatic conclusion, "This is murder, in as much as the provocation was given by a thing done in the exercise of the right of private defence."

early skirmish foreshadowed the subsequent introduction of sudden fight in the IPC. It provides a warning as well of the need for careful delineation of the distinctions between the partial defences of provocation and sudden fight.

2. *Excessive defence*

The second variation is drawn from Macaulay's *Notes on the Code*. Suppose that the offender responded to a threatened nosepull by an intentional use of *deadly* force to prevent the assault. It was a case, let us say, in which the offender had reason to believe there was no other way in which the assault could be averted. Necessity will not justify or excuse a wholly disproportionate response. Common law doctrine required a conviction for murder in such a case. Both the Draft Code and IPC depart from common law and treat this as a case of excessive defence when murder is reduced to the lesser offence of culpable homicide.³² Macaulay remarks in his *Notes on the Code* that "a man who deliberately kills another in order to prevent that other from pulling his nose" should be punished, but not with the severity reserved for murder.³³

A provisional conclusion, which draws on the comparative responsibility principle, is appropriate at this point, before proceeding to a consideration of the partial defences of consent and sudden fight. Passion, no matter how extreme, and loss of self control are not sufficient to reduce murder to culpable homicide. The common element in provocation and excessive defence is that the offender kills in response to a serious wrong by the victim, either of grave and sudden provocation or of unlawful attack on person or property.³⁴ It is the wrong done to the offender by the victim, which precipitates the fatal attack, that extenuates the offender's criminal responsibility for murder.

3. *Sudden fight*

In the third variation, the offender has managed to pull his victim's nose. There is no threat of repetition and no necessity for self defence; the thing is done and the humiliation has been inflicted. The victim retaliates immediately in anger and strikes the offender who responds in kind. Blows are exchanged until a point is reached where both begin to fight in earnest with weapons, each intending to kill or inflict serious injury. In the event, the nosepuller kills his victim. There can be no question of reliance on provocation in such a case for the victim did nothing that could count as 'grave and sudden provocation' to the offender. Self defence and excessive defence have no application for they fought in circumstances where neither could have believed that retaliation was necessary for any defensive purpose. It is in such a case as this that the common law doctrine of mutual combat and the

³² See IPC, s. 300, Exception 2 and its Illustration, which instances a comparable assault: "Z attempts to horsewhip A, not in such a manner as to cause grievous hurt to A. A draws out a pistol. Z persists in the assault. A believing in good faith that he can by no other means prevent himself from being horsewhipped, shoots Z dead. A has committed voluntary culpable homicide in defence."

³³ *Notes on the Code*, *supra* note 8 at 417.

³⁴ See Leader-Elliott, "Provocation", *supra* note 22 for an extended discussion of the nature of 'grave and sudden provocation' with particular reference to its character as a wrong against the offender.

IPC defence of sudden fight would permit the survivor who initiated the combat to escape conviction for murder, if no unfair advantage was taken and the retaliation was neither cruel nor unusual.³⁵

4. *Consent*

In the fourth of the variations the offender pulls the nose of his victim who responds not with immediate violence but with a measured challenge to fight a duel with guns, knives or other weapons on the day following. The combatants meet, fight on equal terms and, once again, the nosepuller kills his victim in circumstances allowing no doubt that he intended to inflict a wound that he knew would be likely to cause death. At this point there is another radical difference between common law doctrine and the IPC. Common law declared the survivor of a duel guilty of murder without any possibility of extenuation. This was a case of 'premeditated' murder.³⁶ Macaulay allowed an extenuation of murder to culpable homicide on the ground that the victim "suffers death, or takes the risk of death, by his own choice".³⁷ In his *Notes on the Code*, Macaulay proposed a "general rule":³⁸

[N]othing ought to be an offence by reason of any harm which it may cause to a person of ripe age who, undeceived, has given a free and intelligent consent to suffer that harm or to take the risk of that harm.

When murder was in issue, however, he modified his position, so as to provide a partial rather than complete defence.³⁹ The IPC accepted the partial defence in principle, though it did not adopt Macaulay's formulation:⁴⁰

Culpable homicide is not murder when the person whose death is caused, being above the age of eighteen years, suffers death or takes the risk of death with his own consent.

As a consequence the duelist, who consents to the risk of death, would escape conviction for murder.

This is the reason, I suggest, why Macaulay eliminated the common law defence of mutual combat from the Draft Code. He had made explicit provision for a partial

³⁵ If the original aggressor is killed by the victim of that aggression, there can be circumstances in which both provocation and sudden fight may be available to the offender to reduce murder to culpable homicide.

³⁶ *Russell on Crime*, 1826, *supra* note 2 at 643, 646; *Russell on Crime*, 1843, *supra* note 18 at 585.

³⁷ Draft Code, s. 298: "Voluntary culpable homicide is voluntary culpable homicide by consent when the person whose death is caused, being above 12 years of age, suffers death, or takes the risk of death, by his own choice". The partial defence of consent was adopted in the IPC, s. 300, Exception 5 which, however, increased the age of consent from 12 to 18 years of age.

³⁸ *Notes on the Code*, *supra* note 8 at 352. The defence of consent is to be distinguished from the defence of medical necessity or other necessity in the IPC ss. 88-90 which exculpate a defendant from offences of causing harm by conduct that was intended to benefit and done with the consent or presumed consent of the victim.

³⁹ *Ibid.* at 854: "[B]y prohibiting a man from intentionally causing the death of another, we prohibit nothing which we think it desirable to tolerate." The reasoning here, as elsewhere in the discussion of consent, is unconvincing. The Draft Code definition of murder extends beyond the case of *intentionally* causing death to include cases of causing death by conduct that the offender knew to be likely to cause death. The distinction between intention and knowledge of a likelihood was one of which Macaulay was acutely aware, *ibid.*

⁴⁰ IPC, s. 300, Exception 5.

defence when the homicide victim chose to put their life at risk. If the principle applied in the case where participation in combat was premeditated and the subject of an explicit agreement, it had to include a spontaneous outbreak of mutual aggression. If this was indeed the reason why Macaulay made no provision for an equivalent to common law mutual combat it is apparent that the partial defence of consent required a far more articulate formulation than it received in his Draft Code or the IPC. In his leading judgment in *Queen Empress v. Nyamuddin*,⁴¹ Pigot J. remarked that the provision was “not easy to construe: the wholly anomalous rule that it lays down is expressed but in few words, unaided by definitions”.⁴²

IV. DUELS, SUDDEN FIGHTS AND MUTUAL CONSENT TO RISK OF DEATH

In his account of the partial defence of consent, Macaulay appears to have been less than frank in his explanation of its effect. His *Notes on the Code* refer to instances of mercy killing of a dying soldier on the battlefield, a Hindu widow who suffers immolation at her own request and a “high-born native of India who stabs the females of his family at their own entreaty in order to save them from the licentiousness of a gang of marauders”.⁴³ There is no mention of dueling. The Draft Code of 1837 has only one Illustration of the partial defence of consent: a person who lights the funeral pyre on which a Hindu widow chooses to be burned with her husband, so causing her death, is guilty of “voluntary culpable homicide by consent”, rather than murder.⁴⁴ Contemporary observers had no doubt that the provision was meant to extenuate murder committed by a duelist who killed in a fair contest.⁴⁵ Macaulay must have shared their view; challenges to duel were not uncommon when he prepared the Draft Code. He had himself been challenged as a consequence of one of his polemics. He may have considered, however, that it would be impolitic to emphasise, by an

⁴¹ (1891) I.L.R. 18 Cal. 484.

⁴² *Ibid.* at para. 6.

⁴³ *Notes on the Code*, *supra* note 8 at 415. Macaulay’s references to the “Hindu widow” and “high born Native” are instances of his concern to ensure that the Code was consistent with Indian mores: *ibid.*: “We are legislating for them, and though we may wish that their opinions and feelings may undergo a considerable change, it is our duty, while their opinions and feelings remain unchanged, to pay as much respect to those opinions and feelings as if we partook of them.” The Illustration of widow burning was eliminated from the IPC. The practice had been outlawed since 1829. Though the Illustration was omitted from the IPC, it appears to have been accepted that murder would be reduced to culpable homicide when the offender caused the death of a widow who consented to die on her husband’s funeral pyre. For an account of the contemporary laws against *sati*, see Sir Walter Morgan and Arthur George Macpherson, *Indian Penal Code, with notes* (London: G.C. Hay & Co., Calcutta, 1861) [Morgan and Macpherson, *Indian Penal Code*] at 260-7. For an account of the cultural meaning of the practice, see Catherine Weinberger-Thomas, *Ashes of Immortality: Widow Burning in India* (Chicago: University of Chicago Press, 1999).

⁴⁴ This Illustration was omitted from the IPC.

⁴⁵ See *Indian Law Commissioners*, *supra* note 16 at paras. 286-290; Morgan and Macpherson, *Indian Penal Code*, *supra* note 42 at 267; Whitley Stokes, *The Anglo-Indian Codes*, Vol. 1 (Oxford: Clarendon Press, 1887) at 209, n. 5; Sir James Fitzjames Stephen, *A History of the Criminal Law of England*, Vol. 3, (London: Macmillan and Co., 1883) at 315. See, in addition, Stephen’s discussion of desirable reforms of the law of murder, *ibid.* Vol. 2 at 84-85. Early decisions on the IPC were equally explicit in recognising that the partial defence of consent would extenuate a murder committed by the survivor of a fairly conducted duel: *Shamshere Khan v. The Empress*, (1881) I.L.R. 6 Cal. 154; *Queen-Empress v. Nyamuddin* (1891) I.L.R. 18 Cal. 484. In his leading judgement in the latter case, *ibid.* at 489, Pigot J. expressed his disquiet, describing the partial defence of consent as a “wholly anomalous rule”.

Illustration in the Draft Code or in his *Notes on the Code*, this particular consequence of his radical proposal that the victim's choice to suffer death or to risk death could reduce murder to culpable homicide.⁴⁶ Consistent with that suggestion is the fact that an early printed version of the Draft Code did include a dueling death among the Illustrations of the partial defence.⁴⁷

There is another peculiarity of Macaulay's provisions on the exculpatory effects of the victim's choice. In a Draft Code otherwise remarkable for its forthright clarity, the partial defence is both obscure and defective in its formulation. That is a consequence, in part, of Macaulay's oscillation between the concepts of 'consent' and 'choice' and inconsistency in his formulations of the defence and the partial defence. When the general defence is in issue, no liability for causing harm is incurred if the victim has given "free and intelligent consent", whether express or implied, to harm or to a likelihood of harm short of death.⁴⁸ Free and intelligent consent is defined by exclusion, listing circumstances in which consent is vitiated by incapacity, coercion, mistake or ignorance.⁴⁹ When it comes to the partial defence to murder, however, it is the victim's 'choice', not their 'consent', which provides the ground of extenuation.⁵⁰ When the victim "suffers death or takes the risk of death, *by his own choice*," murder is reduced to "voluntary culpable homicide *by consent*" [author's italics]. Choice, like consent, is defined by excluding instances where it is coerced or uncomprehending. The Legislative Council did not follow Macaulay in this curious and unexplained shift. In the IPC the partial defence is based on the victim's 'consent'.⁵¹ The effect of these changes can be explored by continuing the speculation about Macaulay's intentions as author of the Draft Code.

Perhaps Macaulay's reference to the victim's 'choice' in the formulation of the partial defence was meant to express some more restrictive principle of extenuation than the "consent, whether or express or implied" of the general defence.⁵² There are obvious dangers in permitting an *implied* consent to bar a conviction for murder. The

⁴⁶ See Martin Wiener, *Men of Blood* (Cambridge: Cambridge University Press, 2004) c.2 "When Men Killed Men" for an account of the declining tolerance for duelling during the 19th century. Conviction for murder in accordance with the common law rule was, however, exceedingly rare. See Macaulay, *Notes on the Code*, *supra* note 8, "Note M—On Offences Against the Human Body", "The distinction between murder and voluntary culpable homicide by consent has never, so far as we are aware, been recognised by any code in the distinct manner in which we propose to recognise it; but it may be traced in the laws of many countries, and often, when neglected by those who have framed the laws, it has had a great effect on the decisions of the tribunals and particularly on the decisions of tribunals popularly composed."

⁴⁷ *Indian Law Commissioners*, *supra* note 16 at 55, para. 290. Compare Draft Code, s. 69, Illustration (c) where A and Z agree to a fencing match "for amusement". The Illustration has its own peculiarities. It continues: "If this agreement implies the consent of each to suffer any harm which, in the course of such fencing, may be caused without foul play, then if A, while playing fairly, hurts Z, A has committed no offence." The references to "amusement" and "play" understate the intended effect of the original provision, which was meant to extend to include a match arising from enmity, in which the participants accepted a likely risk of *grievous* hurt. The fencing match survives as the sole Illustration of the effect of the IPC, s. 87. It is unchanged except that consent to a risk of harm is presumed from participation in the match.

⁴⁸ Draft Code, s. 76.

⁴⁹ *Ibid.* ss. 30, 31.

⁵⁰ *Ibid.* s. 298.

⁵¹ There are several other differences between the Draft Code and IPC formulations of the consent defences. They will be discussed only when they have a direct bearing on issues relating to the defence of sudden fight.

⁵² Draft Code, s. 69.

circumstances that might allow an inference of implied consent to die are speculative in the extreme. There is, moreover, a problem of credibility. When the general defence is in issue, there is usually a victim who is able to contradict a fabricated account of a consent implied from circumstances. When murder is in issue, however, a partial defence that can be based on the victim's *implied* consent to death or the risk of death is an invitation to perjury by the offender. Whatever the motive for Macaulay's switch from 'consent' to 'choice' it is apparent on reflection that it was a mistake, for the fact that the victim *chose* to put their life at risk cannot, of itself, provide grounds for extenuation in morality or in law.⁵³ Macaulay's error can be illustrated by reference to a failed attempt to rely on the partial defence of consent in *Rajinder Kumar Sharma v. State*,⁵⁴ a decision of the Delhi High Court in 1996. Sharma was a disgruntled security guard who quarreled with his employer because he had not been given his supper on time. When the employer approached Sharma to placate him, he was warned by Sharma that he would be shot if he continued to approach. When he disregarded the warning, Sharma fired a single shot which killed his employer. It is unlikely that the victim took the warning seriously, the dispute being so trivial, but let us suppose he did consciously choose to risk his life in order to disarm a man who was in such a state of agitation that he might endanger others. The fact that he *chose* to risk his life cannot reduce the offender's culpability in the slightest degree. To count as an extenuation the victim's choice to incur the risk would imply that an offender who kills a hero is less blameworthy than one who kills a coward.

There is no doubt that 'choice', which implies an individual decision rather than a bilateral relationship of mutuality between the offender and the victim, was the wrong concept. The IPC provision requires instead that the offender prove that the victim was killed or risked death "with his own consent". It was a makeshift solution. The IPC definition of consent is inadequate and the problem about *implied* consent was evaded by omission.⁵⁵ In practice, courts can be expected to require an express consent or circumstances that compel an unequivocal finding of implied consent, when offenders seek to rely on consent in response to a charge of murder.⁵⁶ In *Rajinder Kumar Sharma v. State*, the Delhi High Court had no difficulty in rejecting the argument that the offender's liability for murder should be reduced to culpable homicide because the victim 'consented' to risk his life. The requirement of 'consent' for the partial defence nevertheless conceals the ground for extenuation. Consider the

⁵³ The confusion is compounded by the "Explanation", which was omitted from the IPC, "Explanation. Voluntary culpable homicide committed by inducing a person voluntarily to put himself to death is voluntary culpable homicide by consent, except when it is murder." The explanation appears to confuse the case of an offender causing death with that of an offender abetting a suicide. The import of the final exception is unclear. Oscillation between 'choice' and 'consent' in the provision deepens the obscurity. Finally, it is uncertain whether the reference to a person "voluntarily" putting himself to death is meant to refer to: (a) a death that is chosen, (b) consented to, (c) governed by the definition of causing an effect "voluntarily" in s. 26 or, (d) all of the foregoing.

⁵⁴ [1996] IIAD Delhi 371.

⁵⁵ Yeo, *Criminal Defences*, *supra* note 3 at 75, "For the sake of increased clarity, there should be a Code definition of consent, the one under s. 90 being inadequate in only stating what does not constitute consent."

⁵⁶ *Queen-Empress v. Nayamuddin* (1891) I.L.R. 18 Cal. 484, 489, per Pigot J.: The partial defence "should receive a strict and not a liberal construction . . . it should only be applied to cases which quite clearly fall within it".

following variation on the facts of that case. Suppose the employer does not attempt to disarm the offender himself. Instead, he asks security guard A and security guard B, successively, to disarm the offender. Guard A refuses because he is terrified. Guard B heroically consents to risk his life. The offender kills both A and B. Once again, Victim B's consent to risk his life, no matter how conscious, free, intelligent and informed, cannot extenuate the murder. It is not 'choice' or 'consent' to die or take the risk of death that extenuates; it is the existence of a relationship of mutuality between the victim and the offender. That is the common element in the cases of euthanasia, sacrificial immolation and dueling. One who agrees with another to permit conduct that will result in their death or risk death at the hands of that other, is complicit in their own fate. That, I suggest, is the ground for reducing murder to culpable homicide. Bergelson's principle of the 'conditionality of our rights' extenuates the offence when it was the outcome of an agreement between the victim and the offender.

The rationale of sudden fight in the IPC can now be elucidated. Unlike provocation and excessive defence, the exculpatory effect of the partial defence of sudden fight does not depend on proof that the victim wronged the offender. They are equals in wrongdoing. It is their mutual engagement in combat, each of them acting in response to the other and fighting as equals, that extenuates the survivor's use of deadly force. Sudden fight occupies the space between "consent, whether express or implied" in the general defence and the unqualified requirement of 'consent' in the partial defence of IPC, s. 300, Exception 5. Common law mutual combat supplied the legislature with a ready made pattern for the partial defence of sudden fight, which is a crystallized instance of implied consent to risk death. If we put to one side cases where the victim incurs the risk in order to secure some countervailing benefit, which are the subject of a different provision in the Code,⁵⁷ it is difficult to envisage any circumstances other than those defining sudden fight that could provide acceptable grounds for a finding of implied consent to risk the likelihood of death. If the offender and the victim were not engaged in a sudden fight, reliance on consent as a partial defence will fail unless the offender can prove that there was an articulate expression of consent on the part of the victim to engage in an activity in the knowledge death was likely or certain to follow.⁵⁸

V. RESTATING THE LIMITS OF THE SUDDEN FIGHT DEFENCE

A survey of recent appellate decisions of the Indian Supreme Court in which the appellant succeeded in overturning a conviction for murder, suggests that the defence of sudden fight has lost contact with its doctrinal moorings: see Appendix. In the proposals for reform that will follow, I will address that particular concern. Before doing so, however, it is necessary to outline the critical distinctions between sudden fight and provocation.

There are six things that the defendant must prove in order to escape conviction for murder on the ground that death was a consequence of a sudden fight. They are listed in the IPC with vivid, descriptive brevity:

⁵⁷ See IPC, s. 88: "Act not intended to cause death, done by consent in good faith for person's benefit".

⁵⁸ Gour, *supra* note 5 at 2379-2380.

s. 300 Murder . . . Exception 4: Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

The “Explanation” attached to the Exception for sudden fight declares, in case it was not sufficiently clear already, that “[i]t is immaterial which party offers the provocation or commits the first assault”. Dr Sir Hari Singh Gour formulates the rationale for the partial defence in language that reflects the judicial precedents; it is meant to apply in cases of “mutual provocation”:⁵⁹

The position of the combatants under this clause is . . . this: There is no previous deliberation or determination to fight. A fight suddenly takes place, for which both parties are more or less to blame. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn that it did. There is then mutual provocation and aggravation and it is difficult to apportion the blame that attaches to each fighter.

Gour’s emphasis on the element of mutuality in the conflict between the defendant and victim is apparent in other texts dealing with murder and its defences.⁶⁰ The standard judicial explanation of the partial defence of sudden fight, repeated with mechanical regularity in recent decisions of the Indian Supreme Court,⁶¹ is a more extended version of Gour’s summary statement.⁶² In the Court’s words, the origin of the dispute does not matter, “the subsequent conduct of both parties puts them in respect of guilt on an equal footing”. Sudden fight “implies mutual provocation and blows on each side”:⁶³

A fight suddenly takes place, for which both parties are more or less to be blamed. It may be that one of them starts it, but if the other had not aggravated it by his own conduct it would not have taken the serious turn that it did.

The requirement of a sudden fight with ‘blows on each side’ is repeated in most of the Indian precedents. As we shall see, however, established doctrine does not reflect the reality of recent applications of the defence. A significant proportion of cases do not involve an exchange of blows. Nor is there an unequivocal statutory foundation for that requirement. All that is required is a ‘sudden fight in the heat of passion on a sudden quarrel’. As I noted earlier, sudden fight was a late inclusion in the IPC. A concise formulation of the doctrine of mutual combat was lifted from its common law context, where it was subject to a variety of implied and unarticulated limitations, and incorporated without qualification in the IPC. It was never subjected to the discipline or constraints of codification. There are no provisos and no illustrations.

⁵⁹ Gour, *supra* note 5 at 2366.

⁶⁰ Morgan and Macpherson, *Indian Penal Code*, *supra* note 42 at 261-262; C.K. Thakker & M.C. Thakker, *Ratanal and Dhirajlal’s Law of Crimes: A Commentary on the Indian Penal Code, 1860*, 26th ed. (New Delhi: Bharat Law House, 2007) Vol. 1 at 1458: “‘Fight’ postulates a bilateral transaction in which blows are exchanged. It takes two to make a fight.”

⁶¹ See, for e.g., *Baban Bandu Patil v. State of Maharashtra*, [2009] INSC 737 for a standard judicial account to the same effect.

⁶² The immediately following passages are taken by the Court’s judgment in *Baban Bandu Patil v. State of Maharashtra*, *ibid*.

⁶³ *Ibid*.

It appears to have escaped the notice of the legislature that sudden fight must be subject to the same limiting provisos as provocation.⁶⁴

The provisos that I will propose are of two kinds. The first is the set of constraints that sudden fight shares with provocation. The second constraint distinguishes sudden fight from provocation and marks the border between the two defences.

Sudden fight must share with provocation the limiting rule that reliance on the partial defence is barred when the victim's response is "provoked by the offender as an excuse for killing, or doing harm to any person".⁶⁵ Similarly, there can be no question of reliance on sudden fight when the offender kills an official acting in the lawful exercise of their powers. The most important of the shared limitations, however, concerns private defence. If the offender attacks the victim, who responds forcefully and lawfully in defence of person or property, that response cannot amount to provocation when the offender kills the victim. Nor can the victim's lawful response provide the basis for a plea of sudden fight. There is no mutuality here. The victim has not *aggravated* the attack by exercising their right of self defence. Nor is there tacit consent to engage in combat or equality in blameworthiness. This is murder, if the fault elements for that offence can be established.⁶⁶ Earlier, I referred to Macaulay's scenario in which the homicide victim is killed when he attempts to prevent the offender from pulling his nose. The illustration is more remarkable for its ambiguities than for its explanatory value. It is certainly possible to imagine more perspicuous examples to illustrate the proviso for private defence in provocation. So, for example, if A is enraged when Z rejects his sexual overtures and A resorts to force rather than blandishments and kills Z when she resists, provocation will not extenuate murder if A kills Z. The reasons for denying a partial defence of provocation in these circumstances equally preclude reliance on sudden fight. It does not matter how infuriated A may have been by Z's physical resistance to his advances or how unpremeditated his attack. Nor does it matter that her resistance might have threatened his life. A person threatened with sexual assault is lawfully entitled to use whatever degree of force may be necessary to resist the attack.

I turn now to consider the need for a proviso that will distinguish between provocation and sudden fight. It is possible to envisage circumstances in which the defences can overlap, so that an offender can rely on either or both. That is implicit in the rule that it does not matter, in sudden fight, who gave the first blow. There can be no reliance on sudden fight, however, unless the offender and victim have engaged in a 'fight'. The critical point for the purposes of the defence is when a quarrel involving argument, reproach or insult goes beyond words or gestures and physical violence

⁶⁴ IPC, s. 300, Exception 1, provisos.

⁶⁵ It may be objected that this constraint is implied in the requirement that the homicide is not "premeditated". There are two responses: (1) implications are more likely to constrain courts if they are buttressed by explicit provisions; (2) explicit provisos have a precision that is lacking when courts must resort to implication. So, for example, the partial defence of provocation is not available to an offender who induced provocative conduct by the victim with the intention of doing the victim some 'harm' *less* than homicide.

⁶⁶ Note, however, that sudden fight, like provocation, has both a doctrinal and an evidential function. Evidence that fails to match the doctrinal requirements of the partial defences of provocation or sudden fight may lend support to a defendant's denial of the fault elements of murder. If the victim was killed in a heated encounter, it may not be possible for the prosecution to prove that the wound that caused death was the wound that the defendant intended to inflict on the victim. See, for *e.g.*, *Gokul Parashram Patil v. State of Maharashtra*, [1981] INSC 105 (4 May 1981).

begins. There is, in the Indian Penal Code provisions on provocation and sudden fight, an implicit distinction between words, no matter how hostile, and physical violence.⁶⁷ If there is not a mutual exchange of blows or other violence, we are in the province of provocation, not sudden fight. Words, gestures or other conduct falling short of physical violence cannot extenuate murder unless the offender can prove that the victim's conduct amounted to "grave and sudden provocation".

I choose, from the sample of Indian Supreme Court appeals in the Appendix, one of the more egregious examples of doctrinal drift in the application of the partial defence of sudden fight.⁶⁸ The offender, Govindu, was an abusive husband who killed his wife, Dhanalakshmi, by inflicting two wounds with a sickle, the second of which severed a major blood vessel in her throat. Ten days before the attack, Govindu sold his autorickshaw and asked Dhanalakshmi to get money from her parents to buy another autorickshaw. The parents refused to provide money. Their refusal rankled and the early hours of the morning of the killing "there was an exchange of hot words and quarrel" between Govindu and his wife. He suddenly attacked her with a sickle, first inflicting a hacking wound to her back and, when she fell to the floor, another hacking wound to her throat. There is no indication in the report that Dhanalakshmi had gone beyond verbal reproaches or abuse in their quarrel. Govindu was convicted of murder and eventually appealed to the Indian Supreme Court, which reduced his offence to culpable homicide. The Court made no attempt to bridge the gap between its doctrinal recitation of the law of sudden fight and the summary of the events that culminated in the death of Dhanalakshmi. The Court simply characterizes this as a case in which the offender killed "without premeditation in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage and not having acted in cruel or unusual manner".⁶⁹ There is no indication in the report of anything said or done by Dhanalakshmi that could possibly amount to 'grave and sudden provocation'. Nor is there any indication that she used or threatened violence against her husband. There is a complete failure on the part of the Court to draw the distinction between a 'fight' and a 'quarrel' in which the homicide victim may have been completely justified in her reproaches, her expression of anger and her refusal to accord with the wishes of her husband. In terms of the principle of the conditionality of rights, there appears to have been nothing in the conduct of Dhanalakshmi that could amount to a serious wrong to her husband or an implied consent to incur a risk of death at his hands.

The doctrinal basis for the defence has been clear from the beginning and it has not changed.⁷⁰ It is the applications that give cause for concern. The recommendations

⁶⁷ Save in extraordinary circumstances, words uttered in a quarrel, no matter how hurtful, shocking or humiliating, will not kill. Note, however, that Macaulay was quite prepared to contemplate the possibility that a conviction for murder might be founded on death caused by words alone, as for example when D intends to kill a person of known vulnerability by a deadly insult: *Notes on the Code*, supra note 8 at 410, "The reasonable course, in our opinion, is to consider speaking as an act, and to treat A as guilty of voluntary culpable homicide, if by speaking he has voluntarily caused Z's death, whether the words operated circuitously by inducing Z to swallow poison, or directly by throwing Z into convulsions." He did not pursue the curious implications for the defences and partial defences that might follow in such a case.

⁶⁸ *Golla Yelugu Govindu v. State of Andhra Pradesh*, [2008] INSC 513 (26 March 2008), Appendix, case number 5.

⁶⁹ *Ibid.* at para. 12.

⁷⁰ See Morgan and McPherson, *Indian Penal Code*, supra note 42 at 261-262.

for reform that follow propose no change to the core provision that defines the partial defence. The recommendations propose the addition of provisos and two illustrations to the statement of the core principle.

Recommendations: The first three of the proposed provisos are adapted from the definition of provocation in s300—Exception 1. The fourth proviso, which is new, adds the requirement that a sudden fight involve an exchange of blows or other force. The illustrations, which are also new, resemble the illustrations in the exception for provocation in the fact that they are privative: they exemplify situations in which Exception 4 cannot defeat an allegation of murder.

Exception 4.—Culpable Homicide is not murder if it is committed without pre-meditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation—It is immaterial in such cases which party offers the provocation or commits the first assault.

The above exception [for sudden fight] is subject to the following provisos:

First—That the sudden fight was not sought or voluntarily provoked by the offender as an excuse for killing, or doing harm to any person

Secondly—That the person killed was not acting in obedience to the law or acting as a public servant in the lawful exercise of the powers of such public servant.

Thirdly—That the person killed was not acting in the lawful exercise of the right of private defence

Fourthly—That the exception has no application unless there was an exchange of blows, or other force, between the defendant and the person who is killed.

Illustrations:

- a. A demands money from Z, his wife, to buy a motorbike. She refuses to give him money and calls him a wastrel. They quarrel bitterly. A picks up a sickle in the heat of passion and cuts Z's throat. This is murder, unless Z's words amount to grave and sudden provocation, there being no exchange of blows or other force by Z.⁷¹
- b. A had a consensual sexual relationship with Z until Z terminated the relationship. A came to Z's house and asked her if she would have sex with him. Z refused. A became angry and said he would use force, if necessary. He grappled with Z who resisted his advances and struck his face. Enraged by her resistance, A kills Z. This is murder, since Z was acting in self defence.

VI. CONCLUSION

Codification of the common law of unlawful homicide required a dissection of malice aforethought and distinctions to be drawn between what modern theorists would call the 'elements of the offence' and 'defences', whether of justification, excuse or

⁷¹ Illustration based on *Golla Yelugo Govindu v. State of Andhra Pradesh*, [2008] INSC 313.

extenuation. The Draft Penal Code of 1837 was remarkable for departures from the common law of murder that were intended to ensure a closer match between legal and moral understanding of the offence.⁷² Though the Legislative Council retreated, in some respects, from Macaulay's recommendations it accepted and, indeed, extended the range of partial defences in the IPC. Most had no common law equivalent. Codification of the defences and partial defences required an articulate statement of their limits, to ensure that one did not subvert the principles that constrained the application of another. Sudden fight was a late addition to the IPC and it was never integrated, by provisos and illustrations, in the code provisions on murder. The cases suggest that there is an unprincipled drift in the applications of the partial defence. An explicit statement of provisos and illustrations to constrain the application of sudden fight has been proposed.

I have suggested that the underlying basis for the partial defences of excessive defence, provocation, sudden fight and consent can be found in a principle of comparative responsibility.⁷³ That principle, which can be traced in the criminal jurisprudence of other jurisdictions received more overt recognition in the IPC codification of unlawful homicide. Intentional killing is extenuated when it is a response to a serious wrong by the victim or the conduct of the victim evinces their consent to die or engage in mutual combat in the knowledge that death is likely or certain.

VII. APPENDIX: A SAMPLE OF RECENT DECISIONS OF THE INDIAN SUPREME COURT ON "SUDDEN FIGHT" AS A PARTIAL DEFENCE

A. Tabular Summary

The table that follows summarises 26 cases⁷⁴ in which defendants convicted of murder under s. 300 of the Indian Penal Code appealed to the Indian Supreme Court

⁷² *Notes on the Code*, *supra* note 8 at 416, 419.

⁷³ It is likely that Macaulay would have drawn on an alternative, Benthamite rationalization for the partial defences. When the victim induces the homicide by wrongful conduct against the offender or agrees with the offender to engage in conduct that risks their own life, the 'secondary evil' of general anxiety or alarm is reduced. See *Notes on the Code*, *supra* note 8 at 416; Jeremy Bentham, *Dumont's Traité de Legislation*, Vol. 2, c. 13, "Of Circumstances Influencing the Degree of Alarm", online: The Online Library of Liberty < http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=2009&chapter=139303&layout=html&Itemid=27 >.

⁷⁴ (1) *Ramesh Krishna Madhusudan Nayar v. State of Maharashtra*, [2008] INSC 16 (7 January 2008); (2) *Rakesh v. State of MP*, [2008] INSC 166 (11 February 2008); (3) *Trimbak v. State of Maharashtra*, [2008] INSC 367 (4 March 2008); (4) *Bavisetti Kameswara Rao v. State of A P Rep*, [2008] INSC 497 (25 March 2008); (5) *Golla Yelugu Govindu v. State of Andhra Pradesh* [2008] INSC 513 (26 March 2008); (6) *Suresh Kumar v. State of Himachal Pradesh*, [2008] INSC (27 March 2008); (7) *Kotikalipudi Subba Rao v. State of A P & ANR*, [2008] INSC 814 (6 May 2008); (8) *Shaikh Azim & Vakil & Kuku v. State of Maharashtra*, [2008] INSC 1122 (14 July 2008); (9) *Kashi Prashad v. State of U P*, [2008] INSC 1151 (16 July 2008); (10) *Shambhoo Singh v. State of Rajasthan*, [2008] INSC 1205 (22 July 2008); (11) *Iqbal Singh v. State of Punjab*, [2008] INSC 1399 (21 August 2008); (12) *Bangaru Venkata Rao v. State of A P*, [2008] INSC 1308 (5 August 2008); (13) *Arumugam v. State Rep. by Inspector of Police, T Nadu*, [2008] INSC 1705 (13 October 2008); (14) *A Maharaja v. State of Tamil Nadu*, [2008] INSC 1942 (14 November 2008); (15) *Samsuddin Sheikh v. State of Goa*, [2008] INSC 2023 (26 November 2008); (16) *Buddin Khan v. State of Uttarkhand*, [2009] INSC (12 January 2009); (17) *Hawa Singh v. State of Haryana*, [2009] INSC 77 (16 January 2009); (18) *Ravindra Shalik Naik v. State of Maharashtra*, [2009] INSC 259 (9 February 2009); (19) *Santokh Singh v. State of Punjab*, [2009] INSC 305 (12 February 2009); (20) *Vishal Singh v. State of Rajasthan*, [2009] INSC 423 (25 February 2009); (21) *Mohd. Asif v. State of Uttaranchal*,

on the ground that their offence should have been extenuated to culpable homicide under s. 304 of the Code. The table lists the reports in chronological order from January 2008 to August 1st 2010, being all reported cases in which the partial defence was a ground for appeal. The appeals succeeded in 21 of 26 cases. In most, sudden fight was the only ground of appeal: provocation was very rarely argued in tandem with sudden fight.⁷⁵ The issue most frequently raised, in addition to sudden fight, was the contention that the offender did not intend to cause an injury that was likely, in the natural course of events, to result in death.⁷⁶

There are, no doubt, inaccuracies in the tabular summary of the occasions when the offender struck the first blow and the few occasions when the victim used force in response to the offender's attack. A disturbing feature of many of the reports of these appellate proceedings is the *absence* of judicial selection, specification and emphasis on facts relating to the respective roles of offender and victim. In some instances, I have indicated uncertainty on these questions. In most, however, I have made a judgment based on the brief account given by the Court. The question that appears to be of particular concern to the Court is the presence or absence of premeditation. No equivalent concern is apparent with the existence of facts that would determine whether or not the death resulted from a "sudden fight" within the meaning of s. 300 Exception 4.

In almost all of the cases, the reports are very brief, no more than 3 pages. Reports usually consist of an account of the facts with primary emphasis on the wounds inflicted on the victim and *post mortem* evidence of the cause of death. The medical evidence is followed, in most instances, by the Code provisions on the partial defence of sudden fight and a standardized recitation in summary form of caselaw doctrine. The Court's conclusion, in cases where the appeal succeeds, is typically inscrutable and formulaic.⁷⁷

B. *Comments on the Cases*

The comments that follow ignore the five instances in which the offender's conviction for murder was upheld. In almost all of the cases where the appeal succeeded, the recitation of doctrine that accompanies each decision bears scant relation to the facts disclosed in the judgment. With the exception of the statutory wording of the first

[2009] INSC 504 (6 March 2009); (22) *Posuram Deshmukh v. State of Chhattisgarh*, [2009] INSC 714 (9 April 2009); (23) *Suchand Bauri v. State of West Bengal*, [2009] INSC 716 (9 April 2009); (24) *Baban Bandu Patil v. State of Maharashtra*, [2009] INSC 737 (15 April 2009); (25) *Gurmukh Singh v. State of Haryana*, [2009] INSC 1485 (25 August 2009); (26) *Shaukat v. State of Uttaranchal*, [2010] INSC 346 (22 April, 2010).

⁷⁵ Case 21, in which the defendants' convictions for murder were upheld is exceptional in that both partial defences were raised. There was, however, a complete absence of evidence that would satisfy the requirements of either partial defence.

⁷⁶ See cases nos. 4, 12, 21, 23, 25.

⁷⁷ Case 24 is typical in this respect as in most others. After the standardized recitation of doctrine, without any discussion of the evidence, the Court concludes that the conviction for murder should be reduced to manslaughter: "Considering the background facts it would be appropriate to convict the appellant for offence punishable under Section 304 Part 1 IPC. Custodial sentence of 10 years would meet the ends of justice." The 10 year sentence is conventional and common to all cases in which the appeal succeeds. In the few cases where the appeal does not succeed and the conviction for murder is upheld, the reasoning is equally formulaic.

INDIAN SUPREME COURT - SUDDEN FIGHT APPEALS: JANUARY 2008—APRIL 2009							
Case	Defendant strikes first blow	Defendant uses weapon	Victim was unarmed	Victim: no force used in response	Victim: Number of wounds	Murder 302 reduced to m/s 304	Comments: Date of incident and other features
1	?	log	unarmed	?	2	yes	1999
2	?	knife	?	?	?	yes	1998
3	yes	axe	unarmed	none	1	yes	2000
4	yes	knife	unarmed	none	?	Murder 302	2000
5	yes	sickle	unarmed	none	2	yes	2002 – D kills wife
6	yes	knife	unarmed	?	1	yes	2001
7	yes	knife	unarmed	none	2	yes	2001 – 2 assailants
8	yes	stick	unarmed	none	1	yes	1986
9	yes	spear	unarmed	none	2+	yes	1980 – 2 assailants
10	yes	knife	unarmed	none	3	yes	1999 – 3 assailants
11	yes	knife(?)	unarmed	none	1	yes	2001
12	yes	knife	unarmed	none	1	yes	2000 – D kills wife
13	yes	spike	unarmed	none	1	yes	1986
14	yes	sword	unarmed	none	7	yes	2003
15	yes	knife	unarmed	none	1	yes	1998
16	victim	brick	unarmed	none	1+	yes	1993
17	yes	swords	unarmed	none	multiple	Murder 302	2000 – revenge gang
18	yes	axe, knife	unarmed	none	multiple	yes	1999 – 3 assailants
19	yes	pistol	unarmed	none	1	yes	1996
20	yes	knife	unarmed	none	1	Murder 302	1996
21	yes	knife	unarmed	none	1	Murder 302	1981
22	yes	hoe	unarmed	none	multiple	yes	2000
23	yes	knife	unarmed	none	1	Murder 302	1986 – revenge gang
24	yes	axe	unarmed	none	1	yes	2001
25	yes	lathi	unarmed	none	1	yes	1997
26	?	knife	unarmed	'scuffle;	2	yes	1981 – 2 assailants

heading, each of the headings for the comments that follow is taken from the Court's standard recitation of caselaw doctrine on the partial defence.

1. "*Sudden fight . . . upon a sudden quarrel*": Exception 4 requires proof that the offender caused death "in a sudden fight in the heat of passion upon a sudden quarrel". In these decisions the essential difference between a quarrel and a fight has been elided. If there was evidence in these cases that a quarrel was followed by a fight, it is not apparent in the reports. In several, the elision is explicit: the Court concludes that the offender cannot be convicted of murder simply because the killing was preceded by a "sudden quarrel".⁷⁸
2. "*Mutual provocation (and blows on each side)*": The standard recitation of legal doctrine rationalizes the sudden fight doctrine in the following passage:

Exception 4 deals with cases in which notwithstanding that a blow may have been struck, or some provocation given in the origin of the dispute, or in whatever way the quarrel may have originated, yet the subsequent conduct of both parties puts them in respect of guilt upon an equal footing.

It is an important element of IPC jurisprudence that fault on the part of a victim can extenuate guilt for an offence of violence. It is not apparent in most of these cases that the victim and offender were on an "equal footing". Evidence of a quarrel or evidence that the conduct of the victim infuriated the offender is not evidence of fault, for the victim may have prompted the offender's fury by a justifiable complaint or claim. There is no indication, in the Court's judgment in these cases, of what conduct of the victim might have amounted to "provocation" for the offender's attack.

3. "*(Mutual provocation and) blows on each side*": In the large majority of these cases, there is no indication in the Court's account of the circumstances that the victim struck the offender or attempted to do so during the incident that ended in the victim's death.
4. "*The offender has not taken undue [or unfair] advantage or acted in a cruel or unusual manner*": In none of the cases surveyed is it specified that the victim was armed at the time of the fatal incident. In most it is apparent that the victim was unarmed. In every case, the offender used a weapon: most commonly a knife. In the single instance where a firearm was used,⁷⁹ there had been an earlier "scuffle" between the offender and victim arising out of a dispute about land ownership. After a lapse of some considerable time, the offender returned and shot the victim, who was unarmed, as he was descending from his tractor.
5. "*There is provocation as in Exception 1; but the injury is not the direct consequence of that provocation*": Nothing in the evidence in any of the cases suggests that the conduct of the victim amounted to "provocation" within the meaning of Exception 1.
6. "*Both parties are more or less to be blamed*": The grounds for imputing blame to the victim are not apparent and not specified in the decisions.

⁷⁸ See cases nos. 11, 14, 15, 16, 19, 22.

⁷⁹ Case 19.