THE SUBJECTIVE ELEMENT IN PROVOCATION

The (English) Homicide Act, 1957, provides for two categories of murder. Sections 5 and 6 define special circumstances which constitute capital murder.[1] Non-capital murder covers other killings which are not justifiable, excusable, suicide, infanticide, child destruction or encompassed by manslaughter. This division of murder is not squarely founded on the abhorrence of current morality for particular killings by reason of their vile and/or premeditated nature. Rather, the distinction is drawn between killings which unless stamped out quickly Parliament fears will undermine the stability of society and those for whose eradication the same pressing urgency is not felt. The Act was born out of the competing interests of the Lords and Commons. Like other creatures of such compromise it represents the triumph of political expediency over criminal justice.

The only excuse for the provision of two degrees of murder is that the Home Secretary is thereby relieved of part of his burden of discharging the royal prerogative of mercy. The creation of non-capital murder does nothing to confine the amorphous sprawling mass of manslaughter within more definite limits. In fact the new crime seems destined before long to share manslaughter's 300 years old reputation for hybrid shabbiness.

What does and what does not constitute legally acceptable provocation is still a question of vital importance where the accused pleads the defence in extenuation of a charge of capital murder. Where the "aggravated circumstances" of sections 5 and 6 are absent, a successful plea of provocation will (as in the capital charge) reduce non-capital murder to manslaughter. But here the distinction is largely academic for apart from the lesser moral stigma of a manslaughter conviction, both crimes are punishable by imprisonment and/or fine. In short, murders outside the ambit of sections 5 and 6 which would have been capital

1. These are capital murders — when committed (i) in the course or furtherance of theft, (ii) by shooting or causing an explosion, (iii) in resisting a lawful arrest, (iv) against a police officer in the course of his duty, (v) against a prison officer acting in the course of his duty, and (vi) where a prisoner has committed more than one murder or where he has been previously convicted of another murder, or which are not covered by the verdict of guilty but insane.

   Section 1(1) of the Infanticide Act, 1938, leaves it open to the jury to return a verdict of manslaughter, of guilty but insane or of concealment of birth where a person is charged with the murder of her child in the circumstances within section 1(1). If charged with infanticide she may be found guilty of child destruction, or concealment of birth or of cruelty under section 1(4) of the Children and Young Persons Act, 1948. On a charge of murder, manslaughter, infanticide or for using means to procure an abortion the jury, after acquitting on any of these charges, may convict of child destruction. On a charge of child destruction the jury may convict of using means to procure an Abortion.

before the Homicide Act due to an insufficiency of provocation *, [2] are now punished as non-capital murders.

Like constructive malice the doctrine of provocation was by 1956 long overdue for legislative attention. Constructive malice deserved the surgeon's knife and got it. [3] Provocation deserved the surgeon's knife but received instead (by section 3 of the Homicide Act) a splint and a half-hearted licence to hobble on.

Section 3 affects provocation in two ways. First, it perpetuates the paradox of an objective test for a defence whose very essence is its concession to outbursts of an individual and unreasoning nature (although the question whether the provocation was enough to cause a reasonable man to act as the accused did is now left to the jury).[4] Secondly, it probably widens the "loophole" left by Viscount Simon in *Holmes* in respect of words (unaccompanied by provocative * acts) which may "in circumstances of a most extreme and exceptional character" reduce the crime to manslaughter.[5]

In addition an adaptation of the Scottish doctrine of diminished responsibility probably mitigates punishment if, when reacting to the provocation*, the accused was suffering from "such abnormality of the mind as substantially impaired his mental responsibility." [6]

Thus the ingredients of the legal defence of provocation remain substantially the same. They are (1) the subjective test: Did the accused in fact lose his self-control as the direct result of the provocation * ? and (2) the objective test: Did he react to the provocation* as a reasonable person would have reacted ? And: Was the provocation * of a nature that would cause in a reasonable person a sudden and temporary loss of self-control?

2. " Provocation * " means provocation not necessarily sufficient to constitute a defence; without the asterisk, "provocation" means provocation constituting a successful defence.
3. By s.l of the Act of 1957. For a lucid appraisement of the extent to which the knife was effective, see Edwards, pp. 17-38, *ante.*
4. For criticism of the standard of the reasonable man see Prevezer (1957) 57 *Columbia L.R.* 642-645, *Edwards* [1954] *Crim. L.R.* 898, and Glanville Williams [1954] *Crim. L.R.* 740-54.
5. *D.P.P.* v. *Holmes* [1946] 2 All E.R. 124, 128. For an example of the application of s.3 of the Homicide Act, see *R.* v. *Simpson, The Times* newspaper, September 24, 1957.
6. The Rt. Hon. Lord Cooper (Lord Justice-General) defined diminished responsibility thus: " If a man, charged with murder, was sane at the time but was suffering from some infirmity or aberration of mind or impairment of intellect to such an extent as not to be the master of his actions, the result is to reduce the quality of his offence from murder to culpable homicide." See Hill 1941 J.C. 59. The reception into English Law of this doctrine has supplied the accused with an additional defence which has already been invoked on several occasions, *e.g.* in *R.* v. *Spriggs* [1958] 1 All E.R. 300; *R.* v. *Dunbar* [1957] 2 All E.R. 737; *R.* v. *Bastian* [1958] 1 All E.R. 568; and *R.* v, *Matheson*, *The Times* newspaper, April 2, 1958,

Much has been said and written about the objectivism in the defence and its application before and after the Homicide Act.[7] This pre-occupation has obscured the need for an analysis of the function of the subjective element in provocation*. The purpose of this paper is to supply that need.

In law a man can fulfil all the requirements of reasonableness if, on finding his wife in the act of adultery, he picks up a handy domestic implement and straightaway delivers her a fatal blow. Although the law considers there is no greater provocation* than that provided by this "adultery situation," the defence will not avail him if it is proved that he killed whilst he was still the master of his self-control. Before the defence will operate, the accused must *in fact* have been deprived of his self-control at the precise moment he struck the blow (or blows) of retaliation.

THE SUBJECTIVE TEST — AUTHORITIES

The requirement that the accused must *in fact* have been deprived of his self-control when he committed the unlawful act causing death is the only one in which the particular state of the accused's mind is taken into account. This goes to the very heart of the defence of provocation and was the original test laid down by Coke and adopted by the other early writers on Crown law.

Coke described the doctrine as one in which "the heat of blood kindled by fire was never cooled till the blow was given."[8] Sir Matthew Hale wrote in similar terms,[9] as did Sir Michael Foster [10] a hundred years later: "The indulgence shown to the first transport of passion in these cases is plainly a condescension to the frailty of the human frame, to the *furor brevis,* which, while the frenzy lasted, rendereth the man deaf to the voice of reason. The provocation therefore extenuateth in the case of homicide must be which the man is conscious of, which he feeleth and resenteth at the instant the fact which he would extenuate is committed: not what time or accident may afterwards bring it to light."

7. See, *e.g.,* works listed in n.4, *supra*; Odgers (1954) *Cambridge L.J.* 165-8; Lowe [1958] *Crim. L.R.* 290 *et seq.* See the Report of the Royal Commission on Capital Punishment (Cmd. 8932), p. 56, paras. 151, 152. Only the Society of Labour Lawyers and Sir Basil Neild out of those who expressed opinions on the standard of the reasonable man in provocation were in favour of its abolition. See *Minutes of Evidence,* p. 563 and p. 232 respectively.

   For leading judicial pronouncements on the reasonable man see Keating J. in *R.* v. *Welsh* (1869) 11 Cox C.C. 336; Darling J. in *R.* v. *Alexander* (1913) 9 Cr. App. Rep. 139; Reading L.C.J. in *R.* v. *Lesbini* [1914] 3 K.B. 1116; Viscount Simon L.C. in *Mancini* v. *D.P.P.* [1942] A.C. 1 (H.L.); Viscount Simon again in *Holmes* v. *D.P.P.* [1946] A.C. 588 (H.L.); Goddard L.C.J. in *R.* v. *Duffy* [1949] 1 All E.R. 932.

8. 3 *Inst.* 55.

9. 1 Hale P.C. 453.

10. Foster C.C, and C.L. 290 *et seq.*

Hale and Foster considered that fulfilment of the requirements of the subjective test alone was enough to ensure the successful operation of the defence. East[11] was of the opinion that a serious and unlawful blow constituted sufficient provocation in all circumstances and his test is again purely subjective: "...if it [the blow] be resented immediately by the death of the aggressor, and it appears that the party acted in the heat of blood upon that provocation, [it] will reduce the crime to manslaughter."

THE SUBJECTIVE TEST — DIFFICULTIES

It is no easy matter to establish the fact of the accused's absence of self-control. The court normally shows a healthy scepticism of such a well-worn allegation as "...then I saw 'red' and hit him before I knew what I was doing." Were the accused better acquainted with the doctrine of provocation he would have more cause for alarm at the precarious nature of his position. For in recent times two pronouncements, of the House of Lords (in 1946) and of the Judicial Committee of the Privy Council (in 1953), in an attempt to define the appropriate state of mind of one who is subject to "legal provocation," have demonstrated a striking lack of accord. As will be seen later, the former *(per* Viscount Simon L.C. in *Holmes* v. *D.P.P.*)[12] must be regarded as erroneous, and the latter (in *A.G. for Ceylon* v. *Kumarasinghege Don John Perera)*[13] as providing a correct statement of the present law. The key to the state of the accused's mind is discoverable in the evidence as to his overt acts. (Such evidence is of particular importance where there were no witnesses to the crime).[14]

Stephen's factors [15] provide a useful basis for investigation. They are: (i) the nature of the act by which death was caused; (ii) the length of time which elapsed between the provocation* and the act; and (iii) the accused's conduct during that period. Any other circumstances which may have a bearing on the accused's state of mind are also taken into account. Evidence of the use of poison or of a carefully concealed weapon; of the passage of a number of hours or even minutes between the provocative* conduct and the fatal blow; or of an intervening act which showed that reason had resumed her seat; are all indicative of

11. 1 East P.C. 232 *et seq.*

12. [1946] A.C. 588, 597 (H.L.).

13. [1953] A.C. 200, 206; [1953] 2 W.L.R. 238, 243.

14. And if the accused's allegation of provocation * is true he is in the unhappy position of having deprived himself of his most valuable witness.

15. As enumerated by Sir J. Fitz-J. Stephen in *Digest of the Criminal Law* 9th ed., art. 226, adopted by Viscount Simon L.C. in *Mancini v. D.P.P.* [1942] A.C. 1, 9, 28 Cr. App. Rep. 65, 74.

the presence of express malice in the mind of the accused and negative the assumption that there was a want of self-control when the death was caused. Further elaboration on these considerations will follow after a discussion of the accused's mental attitude in provocation*.

THE PROBLEM OF THE STATE OF MIND OF THE ACCUSED IN PROVOCATION*

The essence of "murder" in Coke's classical definition of homicide was "unlawful killing with malice aforethought" and of "manslaughter" "unlawful killing without malice aforethought." The difference thus lay in the absence or presence in the killing of "malice aforethought."

Malice in Coke's time signified wickedness of mind — the original and popular meaning of the word. *Aforethought* represented the necessary period of contemplation prior to the act of killing. This period had to be of sufficient length and calmness to allow a choice to be made between proceeding with the crime or putting malice right out of mind.[16] The impulsive character of provocation* obviously excluded the opportunity for such a choice.

But during the last 400 years the meaning of "malice aforethought" due to its abuse "in pleading, and thence in forensic and judicial language in many places where [it was] superfluous,"[17] has degenerated into a term of art descriptive of a mere wrongful intention.[18] The prevailing attitude to this "arbitrary symbol" has been summed up in these words: "the 'malice' may have in it nothing really malicious, and need never be really 'aforethought', except in the sense that every desire must necessarily come before — though perhaps only a moment before — the act which is desired." [19]

No better illustration of the inadequacy of "malice aforethought" as the modern criterion of liability in homicide can be found than that enshrined in a dictum of Viscount Simon L.C. in *Holmes.*[20] This

16. Coke regarded malice aforethought as a premeditated and planned intention to kill.
17. Sir F. Pollock, *Law of Tort,* 6th ed., p. 24.
18. A " wrongful intention " is one for which there exists no legal approval. So, in fact, it amounts to little more than a mere intention. See Markby *Elem. Law* (1874), 226: "In the best known definitions of malice it is scarcely distinguishable from intention." Also Bayley J. in *Bromage* v. *Prosser* (1825) 4 B. & C. 247, 255: "Malice in common acceptation means ill-will against a person, but in its legal sense it means a wrongful act done intentionally without just cause or excuse."
19. Kenny, *Outlines of Criminal Law,* 15th ed. (1947), at pp. 32-33.
20. [1946] A.C. 588, 598 (H.L.). This is not an exception to the "rule" that there should be no intent to kill but an exception to the rule that only provocation by a physical assault constitutes provocation at law. It is submitted that the Lord Chancellor's remarks on the necessity for the negation of malice (as he defined it here) were based on a misconception. His dictum has been adopted (and thus presumably approved) by Lord Parker C.J. in *R.* v. *Cunningham* [1959] 2 W.L.R. at p. 65 and by J.P. Eddy Q.C. in "The New Law of Provocation" [1958] *Crim. L.R.* at p. 780.

purported to indicate the state of mind required for the operation of the defence of provocation: "The whole doctrine relating to provocation depends on the fact that it causes, or may cause, a sudden and temporary loss of self-control whereby malice, which is the formation of an intention to kill or to inflict grievous bodily harm, is negatived. Consequently, where the provocation inspires an actual intention to kill (such as *Holmes* admitted in the present case), or to inflict grievous bodily harm, the doctrine that provocation may reduce murder to manslaughter seldom applies. Only one special exception has been recognised viz. the actual finding of a spouse in the act of adultery."

This assessment of the mental attitude in provocation* is incompatible with that enunciated by Coke who sought to draw a distinction not between intentional and unintentional killings but between intentional killing in hot blood on sudden provocation* and intentional killing when the blood was cooled ("*sedato animo*").

In *Mawgridge's Case* (1706)[21] Holt C.J. mentioned with approval several cases where the defence of provocation had applied where the intention to kill or to inflict grievous bodily hurt was clearly exhibited. Likewise both Foster and East quoted examples (from the eighteenth and nineteenth centuries) where such an intention did not exclude the defence.[22] Despite this fact, Foster was guilty of several misstatements of the doctrine in his writings.[23] These lapses are attributable to the problems arising from the development of principles of liability in crime with which he and his contemporaries were confronted. In an attempt to achieve conformity with these general principles he ignored the question of what provocation* was necessary to reduce murder to manslaughter where the killing was *intentional.* Foster's legal/non-legal provocation* distinction depended on the method of killing rather than the mental attitude of the killer. Of the rule excluding the defence where provocation * was by words or gesture he wrote:[24] "This rule will, I conceive, govern every case where the party killing upon such provocation maketh use of a deadly weapon, or otherwise manifesteth an intention to kill or do some great bodily harm: but if he had given the other a box on the ear or had struck him with a stick not likely to kill and had unluckily and against his intention killed, it had been but manslaughter."

21. Kel. 119; 1 East P.C. 276, 278; Fost. 274, 296.

22. *E.g.* see *Stedman's Case* (1704) Foster C.C. and C.L. 292.

23. *E.g.* see Foster, *Crown Cases* (1809), at p. 274, on *Mawgridge's Case.* See also p. 271.

24. C.C. and C.L. 290. The "lightness of the assault" would disprove the existence of a "wicked depraved and malignant spirit." But where a moderate blow is struck and death is caused unluckily and against the intention of the striker, he can never be found guilty of murder. See also East P.C. i. 235-8.

This lack of understanding was emphasised in 1839 when Her Majesty's Commissioners reported :[25] "...what is such provocation as will repel the legal presumption of malice arising from sudden killing? The question the judges decide as cases occur."

Yet, about this time, the defence of provocation held good in a number of cases where a mere homicidal intention (as distinct from a predisposed or expressed malice) was plainly manifested.[26] In a comprehensive direction to the jury[27] in *R. v. Hayward* (1833) Tindal C.J. showed a thorough appreciation of the function of the defence.[28] It was in an atmosphere of uncertainty that Keating J. first formulated his restrictive doctrine of the reasonable man.[29] This pronouncement not only gave birth to the idea of an objective standard in provocation but also provided that the defence could not operate unless the provocation "negatives malice aforethought." (Which signified intent to kill or to do grievous bodily harm). If this is taken to automatically negative intent when self-control is lost then it is of little importance. But if, on the other hand, it denies the defence to a man who *in fact* lost his self-control but also showed an intention to kill, then it places further limitations on the operation of provocation. This latter construction was adopted by the House of Lords in *Holmes* (see *per* Viscount Simon L.C. above).[30] The scope of the doctrine was, however, extended seven years later (1953) by a pronouncement of the Judicial Committee of the Privy Council in *A.G. for Ceylon* v. *Kumarasinghege Don John Perera*:[31] "The defence of provocation may arise where a person does intend to kill or inflict grievous bodily harm but his intention to do so arises from sudden passion involving of self-control by reason of provocation."

THE EFFECT OF INTOXICATION AND WEAKNESS OF MIND ON THE INTENT IN PROVOCATION

Drunkenness which produces an insane mind[32] or one which is "substantially impaired" is as much a defence as mental unbalance within the definition of the M'Naghten Rules and the doctrine of diminished responsibility. But intoxication not amounting to insanity at law is of relevance as an excuse only where it has prevented the accused

25. (168) xix. See Stephen 3 *H.CL.* 63.
26. *R.* v. *Lynch* (1832) 5 C. & P. 324; *R.* v. *Thomas* (1837) 7 C. & P. 817; *R. v. Sherwood* (1844) 1 C. & K. 556; *R.* v. *Selten* (1871) 11 Cox C.C. 674.
27. Which has been adopted by the Court of Criminal Appeal. See Hewart, L.C.J. in *R. v. Hall* (1928) 21 Cr. App. Rep. 48, 54.
28. (1838) 6 C.&P. 157, 159.
29. *In R.* v. *Welsh* (1869) 11 Cox C.C. at pp. 337-8.
30. At p. 597.
31. [1953] A.C. 200, 206; [1953] 3 W.L.R. 238, 243.
32. Usually in the form of delirium tremens.

from forming a specific intent.[33] Such intoxication does not under the present law receive consideration in the determination of the sufficiency of provocation as assessed on the objective standard of the reasonable man. [34] But this was not always the case. In *R.* v. *Grindley* (1819) [35] Holroyd J. stated the law thus: "The material question is whether an act was premeditated or done only on sudden heat and impulse, the fact of the party being intoxicated is a proper circumstance to be taken into consideration."

Regardless of this learned Judge's retraction of his opinion twice within the space of five years (in *Burrow* (1823)[36] and *Rennie* (1825)),[37] there ensued a number of decisions which accorded with the direction in *Grindley*.[38] However, in a strong judgment in *R.* v. *Carroll* (1835),[39] supported by Park and Littledale JJ., the strict view, that excess of alcohol (not amounting to drunkenness negativing all intention) could not be considered as aggravating the provocation*, was upheld. This view was regarded as good law by Brett J. in *R. v. Stopford* (1870):[40] " If he was merely so drunk as to put himself in a passion, drunkenness would be no excuse; he must have been so drunk as to be incapable of knowing what he was doing." It was also supported by dicta by the Court of Criminal Appeal in *R.* v. *Mason* (1912).[41]

A temporary backsliding occurred in the same court in *R.* v. *Hopper* [42] and *R. v. Letenock* [43] — two decisions which caused a defection from the standard of the reasonable man. This fault was corrected by

33. *I.e.* self-induced intoxication — sometimes referred to as voluntary intoxication — as opposed to that state of intoxication into which a man may be coerced and for which he is not held responsible at law. On drunkenness see *R.* v. *Moore* (1852) 2 C. & K. 319; *R.* v. *Doody* (1854) 6 Cox C.C. 463; *R.* v. *Doherty* (1887) 16 Cox C.C. 306, 308; *R. v. Meade* [1909] 1 K.B. 895, 899; *D.P.P.* v. *Beard* [1920] A.C. 479 (H.L.); *H.M. Advocate* v. *Campbell* 1921 S.C. (J.) 1; *Mancini* v. *D.P.P.* [1942] A.C. 1 (H.L.), 28 Cr. App. Rep. 65; *Holmes* v. *D.P.P.* [1946] A.C. 588 (H.L.), 31 Cr. App. Rep. 123; *R.* v. *McCarthy* [1954] 2 Q.B. 105 (C.C.A.), 34 Cr. App. Rep. 74.

35. Worcester Assizes. It cannot now be regarded as an authority. See Lord Birkenhead L.C. in *Beard* at p. 495.

36. *R.* v. *Burrow* 1 Lewin 75.

37. *R.* v. *Rennie* 1 Lewin 76.

38. These were *Marshall's Case* 1 Lewin 76; *Goodiers Case* 1 Lewin 76n.; *R.* v. *Pearson* (1835) 2 Lewin 144; *R.* v. *Thomas* (1837) 7 C. & P. 817; *R.* v. *Cruse* (1838) 8 C. & P. 541.

39. 7 C. & P. 145, where Park J. announced his anxiety for the safety of human life if the law were otherwise.

40. 11 Cox C.C. 643.

41. (1912) 8 Cr. App. Rep. 121.

42. *R.* v. *Hopper* [1915] 2 K.B. 431 (C.C.A.).

43. *R.* v. *Letenock* (1917) 12 Cr. App. Rep. 221.

a judgment of the House of Lords in *Beard* (1920),[44] where the following authoritative pronouncement was made: "Evidence falling short of a proved incapacity in the accused to form the intent necessary to constitute the crime, and merely establishing that his mind was affected by drink so that he more readily gave way to passion, does not rebut the presumption that a man intends the natural consequences of his acts."[45] This passage was approved recently by the Court of Criminal Appeal in *R.* v. *McCarthy* (1954).[46] In giving the judgment of the Court Lord Goddard C.J. also made reference to part of the judgment of the House of Lords in *Mancini* v. *D.P.P.* (1942):[47] "It is not all provocation that will reduce the crime of murder to manslaughter...the test to be applied is that of the effect of provocation on a reasonable man as was laid down in *Lesbini."*

Lesbini (1914)[48] established that an unusually excitable or pugnacious individual could not avail himself of the defence unless the provocation* would have caused a reasonable man to lose his self-control. This objective standard had been applied in the previous year by Darling J. in *R.* v. *Alexander* (1913)[49] to the case of a man on whose behalf it was argued (albeit without success) that his weakness of mind rendered him more readily responsive to provocative* conduct. These decisions (in *Lesbini* and *Alexander)* have been upheld by the House of Lords in *Mancini*, *Holmes* and *Bedder*.[50]

Prior to the establishment of the Court of Criminal Appeal no such certainty existed as to the position of the mentality enfeebled (though not legally insane) person. The words of Lord Tenterden C.J. in *R.* v. *Lynch*[51] are representative of the general feeling of the nineteenth century to the individual who lacked those mental attributes accorded to the notional "ordinary man." Again: "If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of man-slaughter."

44. [1920] A.C. 479 (H.L.). See pp. 479 *et seq.* for a full historical account of drunkenness as a defence, and note the earliest authorities which treat drunkenness rather as an aggravation of the crime than as a mitigating factor; *R.* v. *Fegossa* 1 Plowden 19 (1551); Coke upon Littleton 247a; 1 Hale P.C. 32; Blackstone, *Commentaries,* Book IV., c.2, s. 111, p. 25.

45. *Per* Lord Birkenhead L.C. at pp. 501-2.

46. [1954] 2 Q.B. 105 (C.C.A.).

47. *Mancini* v. *D.P.P.* [1942] A.C. 1, 9 *(per* Viscount Simon L.C.).

48. *R.* v. *Lesbini* [1914] 3 K.B. 1116 (C.C.A.).

49. (1913) 9 Cr. App. Rep. 139.

50. *Bedder* v. *D.P.P.* [1954] 1 W.L.R. 1119; [1954] 2 All E.R. 801.

51. *R.* v. *Lynch* 5 C. & P. 324, 325.

PROVOCATION AND THE IRRESISTIBLE IMPULSE DOCTRINE

The attitude of American courts to the state of mind produced by the impulsive reaction necessary for the defence of provocation was described [52] by Justice Cardozo as an impulse which "must be the product of an emotion or passion so swift and overmastering as to sweep the mind from its moorings."

Carried one stage further this would suggest the invoking of the irresistible impulse doctrine. In fact, Mr. J. W. C. Turner has deemed the acceptance of the defence of provocation as evidence of the court's willingness to entertain a defence of irresistible impulse.[53] The line drawn between the mental attitude of one who acts according to the dictates of an irresistible impulse and of one who loses his self-control on provocation*, is sometimes blurred and hard to define. The former springs from disorder of the mind but did not normally afford the accused the shelter of the M'Naghten Rules. Although rendered incapable of resisting the impulse, he is yet enabled to appreciate the quality and nature of his act, and to realise that it was wrong. There is no mental disorder implicit in the defence of provocation. In fact the standard of the hypothetical reasonable man would tend to dissuade the accused from adducing evidence of mental abnormality.

The essential difference between the two states of mind is to be found in the uncontrollable nature of an *irresistible* impulse as opposed to the *uncontrolled* nature of the immediate reaction to provocation.

Although discoveries have been made during the last hundred years which have helped towards a better understanding and treatment of psychiatric disorders, the question of psychological operation of passion has not troubled the common law courts unduly. The same does not hold for some American courts which have required for the operation of provocation a mental disturbance (short of insanity) which negatives both intention and knowledge.[54] This obviously defeats the rule for, in the absence of intention and knowledge the killing can never amount to murder. This was brought out in *R.* v. *Charlson,*[55] where the accused was charged with inflicting grievous bodily harm to his small son. Here the question of insanity was not raised and the defence argued that the injury was inflicted whilst

52. As quoted by the Chairman of the (English) Royal Commission on Capital Punishment, *Minutes of Evidence* at p. 581.

53. Kenny, *Outlines of Criminal Law,* 17th Ed. by J. W. C. Turner, at p. 80. The defence has been occasionally admitted, *e.g.* in *R.* v. *Hay* (1911) 22 Cox C.C. 268; *R.* v. *Fryer* (1915) 24 Cox C.C. 403; *R.* v. *Jolly* (1919) 83 J.P. 296. In 1924 Lord Atkin's Commission on Insanity and Crime recommended that an irresistible impulse should be accepted but it was opposed by most of the judges and not adopted by the legislature. Its inclusion within the M'Naghten Rules has been widely advocated particularly by the British Medical Association.

54. See, *e.g., Johnson* v. *State,* 129 Wis. 146, 158 *et seq.*

55. [1955] 1 W.L.R. 317; (1955) 39 Cr. App. Rep. 37.

the accused was in a state of automatism. The onus was on the prosecution to prove that the acts were consciously performed — an onus which they failed to discharge.

Since the Homicide Act, 1957, the defence of "diminished responsibility" (under section 2) has been raised in several cases.[56] Although the doctrine demonstrates a more sympathetic attitude to those who formerly could not have availed themselves of the M'Naghten Rules, it is clear that its only concern is with the mental processes of the brain and not with emotional disturbances of personality or character.

EXPRESS MALICE

Where the presence of an express or predisposed malice is proved the defence of provocation will not lie for the express malice disproves a loss of self-control. To determine whether such malice exists Stephen recommended recourse to those tests enumerated in article 226 of his *Digest* which have already been adverted to.[57]

Evidence of express malice may show either (a) that self-control has never been lost; or (b) that even if it had been lost upon the provocation* it was regained before the fatal blow was struck. The most obvious case in which the loss of self-control is negatived is where the provocation* was actually *sought* by the accused. Foster quoted *Mason's Case* as the supreme instance of circumstances in which "the blows were plainly a provocation sought on his part, that he might execute the wicked purpose of his heart, with some colour of excuse."[58] The accused Mason and the deceased D. quarrelled in a tavern. The quarrel developed into a brawl on the termination of which Mason left the building. About half an hour later he returned, having concealed a sword beneath his coat. He then proceeded deliberately to incite D. to renew the affray. As D. advanced to strike him, Mason cried: "Stand off or I'll stab you." Allowing D. no opportunity for retreat, he produced the sword and ran him through. It is difficult to conceive of circumstances in which the accused would be less entitled to the defence of provocation.

Stephen (by article 224 of his *Digest)* expressly excluded from the defence that provocation* which "was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm." In support of this he cited *Mason.*

56. *R.* v. *Spriggs* [1958] 1 All E.R. 300. See also *R.* v. *Dunbar* [1957] 2 All E.R. 737; *R.* v. *Bastian* [1958] 1 All E.R. 568; *R.* v. *Matheson*, *The Times* newspaper, April 2, 1958. The position in Malaya regarding "irresistible impulse" is expressed in *Sinnasamy* v. *Public Prosecutor* (1956) 22 M.L.J. 36, (C.A.). It approximates to that generally held in English law prior to the 1957 Act.

57. See n. 15, *ante.*

58. 1756 Summer Assizes, Winchester: Foster's *Crown Cases* (1809) p. 132; 1 East P.C. 239.

The matter was considered in *R.* v. *Whiteley* (1829)[59] and *R.* v. *Selten* (1871),[60] and in both was re-emphasised the rule that "sought-after provocation*" disproved an alleged loss of self-control. The principle is of wide application and was vindicated in the Indian case of *R.* v. *Lochan* (1886).[61] Here, L., armed with an axe, followed his cousin's widow, who had dwelt with him, to the rendezvous she had arranged with her lover. L. came upon them in the act of sexual connection and killed her with the axe. It was held on appeal that since he deliberately pursued the woman for the purpose of compromising her and affording himself the chance to kill her, he could not be considered a victim of the "grave and sudden" provocation necessary to deprive him of his self-control.[62] The lower court's verdict of "culpable homicide" was altered to one of murder.

(1) *The nature of the act causing death*

The *nature of the fatal act* provides, in most cases an indication as to whether or not the killer was deprived of his self-control. Some methods of inflicting death even in the face of the most severe provocation* can never entitle the accused to the palliative operation of the defence. An instance of this is where a man secretly observes his wife in the act of adultery[63] and then encompasses her death by the systematic administration of poison. Implicit in such a killing is a predisposed malice — the product of cold-blooded revenge and a diabolical mind.

Two relevant factors demand consideration in assessing the nature of the act by which death was inflicted. They are: (a) the nature of the weapon; and (b) the manner in which death was caused.

(a) It was a principle generally held by the older writers on Crown Law that where the fatal blow was struck with "a deadly weapon" a greater provocation* was required to achieve a reduction of the offence to manslaughter than where no weapon was used. [64]

The definition of what constitutes a "deadly weapon" would today give rise to no little controversy. Indeed it would be argued that a "weapon" becomes as "deadly" as he who wields it allows. To both the trained Commando and the exponent of ju-jitsu the human hand or even the human finger, if scientifically applied, could be a deadly weapon. On the other side, an instrument which is dangerous *per se* (like a knife or

59. *Sub nom. Whiteley's Case* (1829) 1 Lew. 173, 168 E.R. 1002 where accused entered contest with concealed dagger which he intended to use.
60. *R.* v. *Selten* (1871) 11 Cox C.C. 674. The accused feigned a reconciliation; after the respite thus achieved, accused renewed the quarrel intending to use a deadly weapon.
61. I.L.R. 8. See also *R.* v. *Mohan* (1886) I.L.R. 8 All. 622 and the South African Case *R.* v. *Ngcobo* [1921] A. D. 92.
62. For the requirements of the Indian Penal Code, s.300, exception 1.
63. Which, it is generally agreed, constitutes the greatest provocation that man can suffer.
64. 1 Hawk P.C. c.13, ss.33, 34; Fost. 290, 291; 1 East P.C. 233.

an axe) may be transformed, according to the intent of the user, into a thing of purely domestic function. The lawyers of the seventeenth, eighteenth and early nineteenth centuries were led into the erroneous belief that he who killed with an intrinsically dangerous weapon possessed a predisposed malice and should therefore be convicted of murder.[65] This was a fair enough conclusion when the grave social evils of the times are borne in mind, for "society was less secure and less settled in its habits...[and]...duelling was regarded as involving no moral stigma if fairly conducted."[66] The "police" were unorganised and unable to conserve a general peace. Matters had reached a head in the first years of the seventeenth century on the succession to the English throne of James VI of Scotland. The Scots and the English, old enemies and ever-sensitive of their respective traditions, found it impossible to desist from angry sword-play and duelling.[67] In an attempt to combat this, Parliament introduced a statute in 1603,[68] (known as the Statute of Stabbing), which Foster cryptically described as "made upon special and pressing occasions, and savouring rankly of the times."[69]

The statute was directed against those persons "of inflammable spirits and deep resentment; who, wearing short daggers under their cloths, were too well prepared to do quick and effectual execution upon provocations extremely light." It provided that should any person *stab* or *thrust* another who at that moment had no weapon drawn (or had not struck the first blow), then in the event of the victim's death, the stabber should be guilty of murder.[70]

This made serious inroads into the prevailing common law relating to provocation. As the result of judicial extension it rapidly out-grew the bounds of its original function and its operation was extended with equal severity to cases where blows were struck with staffs, cudgels and other weapons, and even to shots fired from pistols. Another object of the statute found expression in *Lord Morly's Case* (1666) where it was announced that the Statute of Stabbing was "made to prevent the inconveniences" arising from the forwardness or compassion of juries, "...who were apt to believe that to be a provocation to extenuate a murder, which in law was not."[71]

65. And conversely an unpremeditated attack with a deadly weapon will only amount to manslaughter. See, *e.g.*, *R*, v. *Lord Morly* (1666) 1 Sid. 277, 82 E.R. 1103.
66. *Per* Lord Goddard C.J. in *R.* v. *Semini* [1949] 1 All E.R. 233, 236, [1949] 1 K.B. 405, 409.
67. See *York Castle Depositions* (Seldon Society).
68. 1 Jac. 1, c. 8; see Fost. p. 297.
69. Fost. p. 300.
70. Provided the victim died of his wounds within six months of the stabbing. Cases of self-defence, misfortune, conserving the peace and lawful correction and chastisement of children and servants were expressly excluded from the operation of the statute.
71. Kelyng J. 55, in 84 E.R. 1080.

This undue emphasis placed on the nature of the instrument by which death was caused, led to the growth of the "rule of thumb" that where a deadly weapon was used the provocation* must be greater than where no weapon, or where a weapon not likely to kill, caused the victim's death.[72]

This rule was qualified by Lord Tenterden C.J. in *R.* v. *Lynch* (1832)[73] where he drew attention to the question whether the fatal instrument was or was not one which the accused normally carried. Tindal C.J., in *R.* v. *Hayward* (1833),[74] was prepared to allow the matter of provocation* to go to the jury in a case where the accused had resented a kick during a quarrel by stabbing his adversary with a butcher's chopper. His one proviso was that the accused had to be labouring under provocation* "so recent and so strong that the prisoner might not be considered at the moment master of his own understanding."

Parke B., made a further qualification when he stated in *R.* v. *Thomas* (1837)[75] that to immediately avenge a blow by whatever instrument he had in his hand entitled the accused to the defence of provocation.[76] But the defence would not apply if, from the circumstances, it appeared that the accused, before he received the provocation*, had armed himself with the instrument intending to use it against anyone who might provoke* him.

From the direction to the jury in *R.* v. *Hagen* (1837)[77] emerged the idea of the necessity for proportionate resentment. It was stated that retaliation with a deadly weapon on the receipt of a slight blow would be murder if death should ensue. But if a serious blow (e.g. one which knocked the accused to the ground) were to be so avenged, then a verdict of manslaughter should be returned. This sentiment was reiterated by Pollock C.B., in *R.* v. *Sherwood* (1844).[78]

It had been almost axiomatic that any physical assault would cause the defence of provocation to operate even where the resentment was fatal, provided death was not inflicted by a "deadly weapon."[79] In *Sherwood* it was stated that "every provocation by blows will not reduce the crime of murder to manslaughter." The Chief Baron went on to say

72. See *Stedman's Case* (1704) Fost. 292, 2 Ld. Raym. 1307; *R.* v. *Reason and Tranter* (1722) 1 Strange 499; *R.* v. *Willoughby* (1791) 1 East P.C. 288. By shifting the matter of proof from evidence of the accused's state of mind to the relevance of the weapon, the quasi-self-defence blow-for-blow policy came later (in the Twentieth Century) to be adopted for cases of provocation. *
73. 5 C. & P. 324.
74. 6 C. & P. 157.
75. 7 C. & P. 851.
76. Provided, of course, that self-control was actually lost.
77. 8 C. & P. 167.
78. 1 C. & K. 556.
79. See *e.g. R.* v. *Ayes* (1810) R. & R. 166.

that this was particularly true where the accused resented the blow with a weapon calculated to cause death, but pointed out that a violent blow could constitute provocation* for a retaliation with a deadly weapon if the reaction were immediate and struck in the heat of passion. But Erle C.J., in *R.* v. *Eagle* (1862),[80] decided that a flurry of trifling blows given during a quarrel amounted to provocation sufficient to render a fatal stabbing no more than manslaughter. Keating J. recognised the dangers inherent in such a lenient attitude and formulated the objective test as a safeguard. He directed the jury that despite the fact that the fatal blow (with a deadly weapon) was struck in the heat of passion directly traceable to the provocation*, the "ungovernable passion" must be such as would have been "kindled...in the mind of an ordinary and reasonable man." [81] After *R.* v. *Lesbini* (1914)[82] this test became one of general application. Once the doctrine of objectivity had taken root it was only a matter of time before it was extended to the mode of resentment. Viscount Simon L.C. in *Mancini* v. *D.P.P.* (1942) was able to deduce from "to retort in the heat of passion induced by provocation *, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger" — that "In short the mode of resentment must bear a reasonable relationship to the provocation* if the offence is to be reduced to manslaughter." [83] This, of course, is a *non-sequitur.* However, it was approved by the House of Lords in *Holmes* v. *D.P.P.* (1946)[84] and applied in subsequent cases by the Court of Criminal Appeal.[85]

The case of *R.* v. *Gauthier* (1943)[86] is of significance insofar as the Court of Criminal Appeal, in disallowing the appeal, concluded that it was illustrative of most of the factors which disqualified the operation of the defence of provocation. This was especially true of the nature of the weapon and the mode of resentment. The facts were that the accused, a Canadian soldier stationed in England, had been conducting an adulterous intrigue with a woman whose husband was a prisoner of war in German hands. Another paramour came upon the scene. Temporarily, at least, he was preferred to the accused. After a short quarrel, the accused returned to the house with a bren-gun, and, in a fit of jealous rage, called the woman down to him, assuring her that she would come to no harm. He then shot her. The court *(per* Cassels J.) with

80. 2 F. & F. 827.

81. See *R.* v. *Welsh* (1869) 11 Cox C.C. 336 (headnote).

82. [1914] 3 K.B. 1116 (C.C.A.).

83. [1942] A.C. 1, 9, thereby insisting on the presence (for the operation of the defence of provocation) of the requirements of justifiable self-defence.

84. [1946] A.C. 588 (H.L.).

85. In particular *R.* v. *McCarthy* [1954] 2 All E.R. 262 and *R.* v. *Duffy* [1949] 1 All E.R. 932.

86. (1943) 29 Cr. App. Rep. 113.

reference to the mode of resentment, decided that, "A bren-gun which fires bullets in quick succession is one thing, but a woman showing preference for a particular lover is another."

(b) *The manner in which the killing was executed*

A retaliation which is outrageous in its violence and out of all proportion to the provocation* received is generally accepted as showing the accused's ferocity of purpose and "is considered as flowing rather from brutal rage or diabolical malignity than from human frailty."[87] This has been good law from as early as *Halloway's Case* in 1628.[88] There the accused, a park-keeper, came upon a boy stealing wood from a tree. He ordered the boy to come out of the tree. As he descended the accused hit him two blows with a cudgel. He then took hold of the free end of a piece of rope which the boy had secured around his middle and attached it to the tail of a horse. As the boy cowered on the ground trying to avoid further blows, the horse took fright and ran off dragging him to his death. The accused was convicted of murder, for by tying the boy to the horse and striking him. he had provided evidence of a cruel and malicious intention. Hale, Sergeant Hawkins and other writers on Crown law all expressed opinions consonant with this decision.[89] Foster discussed the method of resentment to provocation * in some detail[90] and referred his readers to the three leading cases on the subject — *Stedman's Case, Lutterel's Case* and *Rowley's Case.* In none of these were the facts precisely ascertained.

In *Stedman*[91] a woman, observing the accused, sword drawn, move towards an affray, cried out "you will not murder the man will you?" He replied "what is it to you, you bitch?" At this she struck him (as it first appeared) with her hand; a blow which he resented by striking her with the pommel of his sword. Then, pursuing her down the street, he stabbed her in the back. She died from the wounds. Lord Holt C.J. considered it was murder for the pursuit and the stabbing was out of all proportion to the provocation* which the court determined would have been adequately avenged by the blow of the sword pommel. But new evidence — that the woman had struck him in the face with an iron pattern — was adduced and the verdict was correspondingly adjusted to manslaughter.

The true facts of *Lutterel's Case*[92] proved even more elusive. A verdict of manslaughter was returned against two men who resented blows from a cane by stabbing the deceased in nine places and (whilst

87. Foster p. 291. East uses practically the same words. P.C. i 234.
88. (1628) Cro. Car. 131.
89. See 1 Hale P.C. 454; 1 Hawkins P.C., c.13, s.42.
90. Foster C.C. p. 291 *et seg.*
91. (1704) Fost. 292, 2 Ld. Raym. 1307.
92. Fost. 292-3.

he lay wounded and begging for mercy) by shooting him with a pistol. These were the circumstances as recorded by Sir John Strange. In this light, Foster described it as "an extraordinary case...that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane." But the printed trial disclosed the discovery of a drawn and broken sword at the deceased's side and also the fact that one of the accused had suffered a superficial injury. However, even on the construction of these facts most favourable to the accused (i.e. that the deceased had drawn first and had struck the first blow), the ferocity of purpose shown by them in the method of inflicting death was quite beyond extenuation.

From *Rowly* (1612),[93] *a* much earlier case, it appeared that the accused's son arrived home one afternoon his face "all bloody" after a skirmish with another youth. One reporter has it that the accused straightaway took up a staff, ran three-quarters of a mile and beat the offending boy to death. The killing was held to be no more than manslaughter because it was "done in sudden heat and passion." But Croke's report probably approximated more to the truth when it established that "Rowly struck the child with a small cudgel, of which stroke he afterwards died." [94] Both Lord Raymond and Foster, ever anxious to reconcile old decisions with the law as it existed in their time, sought to emphasise the "fact" that only one blow of the cudgel was delivered and that this single blow was unaccompanied by any murderous intention. It is doubtful whether *Rowly's Case* was decided by reference to any standards of proportionate resentment. A far more likely ground for the reduction to manslaughter would probably be that the decision was based on the old superficial murder/manslaughter distinction enunciated by Lord Coke between — (i) killing on premeditation and waylaying and (ii) killing on a sudden falling out.

By the late Eighteenth Century an elaboration of (ii) had emerged. This was succinctly put by Stephen: "the moral character of the homicide must be judged principally by the extent to which the circumstances of the case show, on the one hand, the brutal ferocity, whether called into action suddenly or otherwise, or on the other, inability to control natural anger excited by a serious cause." [95] An appreciation of this development was shown in practically all the nineteenth century cases in which the question of the method of killing was discussed.[96] *A* notable exception however was the case of the French prisoner of war *Ayes* in 1810.[97] The accused, the deceased and several other prisoners

93. 12 Co. Rep. 87; Fost. 294-5.
94. Cro. Jac. 296, *sub nom. John Rowley's Case.*
95. 3 H.C.L. 71.
96. See, *e.g., R.* v. *Thorpe* (1829) 1 Lew. C.C. 171; *R.* v. *Shaw* (1834) 6 C. & P. 372; *R.* v. *Thomas* (1837) 7 C. & P. 817; *R.* v. *Smith* (1837) 8 C. & P. 160; *R.* v. *Eagle* (1862) 2 F. & F. 827.
97. *R.* v. *Ayes* (1810) R. & R. 166 (Exeter Assizes).

were interned in a West Country prison. A group including the deceased (but not the accused) were either gambling or onlooking in an upstairs room when a general clamour was raised against the deceased who was suspected of attempting to steal a tobacco pouch from one of the gamblers.[98] The deceased went downstairs but the clamour followed him, and the accused, a more heavily-built man who had been drinking in the lower room, hit him with fist several times and then pushed him to the ground. As the deceased struggled there the accused "gave him two or three great stamps in the stomach and belly" causing his death. The only possible provocation* the deceased could have afforded him was an unsuccessful attempt to steal from a third person and a half-hearted effort to shield himself from the accused's fatal onslaught.[99] The manner of inflicting death was brutal in the extreme but the trial verdict of murder was reduced to one of manslaughter by the judges for whom the case was reserved. The cruelty shown in the continuance of the violence should have sufficed to rebut the inference of the accused's lack of self-control. Baron Parke summed up the prevailing attitude of the courts to such conduct in *R.* v. *Thomas* (1837) : [1] "Suppose for instance, a blow were given and the party struck beat the other's head to pieces by continued, cruel and repeated blows; then you could not attribute that act to the passion of anger, and the offence would not be murder." Where the method of inflicting death was so barbarous as to show a cruel and deliberate intent to kill or do grievous bodily hurt an express malice was implied. This notion has guided courts for 150 years in assessing *the accused's state of mind* in provocation. But during the past fifteen years there has been fixed a more exacting burden on to the operation of the defence: the requirement that the retaliation should not be disproportionate to the provocation*. This rule of "reasonable resentment" has been subjected to severe criticism.[2] It has, for instance, been pointed out that fulfilment of this test not only helps to achieve a reduction of the crime to manslaughter, but, at the same time, entitles the accused to an acquittal because his retaliation, being reasonable,[3] is made in lawful self-defence. In fact, the anomalous situation has been reached wherein it is more difficult to establish provocation (which at the

98. An incident of which the accused had no first-hand knowledge.

99. Any blows he might have struck the deceased when he was grounded would have been given in justifiable self-defence. The only conceivable reasons for the lenient point of view could have been (a) the act of resentment was sudden; (6) the presence of drink.

1. 7 C. & P. 817, 819.

2. See, *e.g.,* Glanville Williams "Provocation and the Reasonable Man" [1954] *Crim. L.R.* 740 *et seq.* Edwards, "Provocation and the Reasonable Man" [1954] *Crim. L.R.* 898 *et seq.*

3. In relation to the blow(s) struck at him.

best can only alter *the nature of the crime)* than to prove justifiable self-defence (which is no crime at all). [4]

Just prior, in point of time, to *Mancini* [5] (which laid down the strict objective test for resentment) it was decided by the Court of Criminal Appeal in *R.* v. *Cobbett* (1940)[6] that the attention of the jury should have been drawn to the possibility of a verdict of manslaughter where a truncheon blow was resented by a fatal knife wound in the groin. Such "excessive retaliation" was excluded from the defence in *Mancini.* This decision of the House of Lords was followed in *Gauthier*, *Holmes*, *Duffy*, *McCarthy* and *Wilkinson.*[7] The circumstances of the infliction of death in the last two cases are particularly relevant and demand closer inspection.

In *McCarthy* (1954) the accused, who had by repeated blows smashed the deceased's head on a stony road surface (causing "terrible" facial injuries and fracturing the skull in two or three places), alleged that the deceased, a much smaller man, had attempted a sodomous assault on him.[8] It was held by the Court of Criminal Appeal that no reasonable man on receipt of such provocation* could have been driven through transport-of passion to the degree and method of violence with which the accused caused death. Even more cruel and long-continued barbarity was evident in *Wilkinson* (1955). To an alleged knife attack by his middle-aged mistress, a young man retaliated by strangling the woman and also her adolescent daughter and son. He then proceeded to ravage the sexual parts of the three bodies with such diabolical contrivance that it is with surprise that failure of the plea of insanity (jointly raised with provocation *) is noted.[9]

(2) *The Amount of Time between the Provocation* and the Act which caused Death.*

The longer the interval between the receipt of provocation* and the resentment, the more difficult it becomes to rebut the presumption that the accused had during that period recovered his self-control. This is a straightforward subjective consideration and it is likely that Stephen would have deemed relevant to the question of rebuttal factors which

4. Because a loss of self-control *in fact* has to be proved in provocation. It does not have to be proved for self-defence.
5. [1942] A.C. 1 (H.L.).
6. (1940) 28 Cr. App. Rep. 11.
7. *R.* v. *Gauthier* (1943) 29 Cr. App. Rep. 113; *Holmes* v. *D.P.P.* [1946] A.C. 588; *R. v. Duffy* [1949] 1 All E.R. 932; *R.* v. *McCarthy* [1954] 2 All E.R. 262; *R.* v. *Wilkinson* reported in *The Times* newspaper, July 27, 1955.
8. A healthy scepticism is usually shown for these unwitnessed allegations; although, unless evidence to disprove them is forthcoming, the presumption of innocence (or of provocation) as outlined in *Woolmington* v. *D.P.P.* [1935] A.C. 462 works in favour of the accused.
9. A case like this would probably now be covered by diminished responsibility.

indicate defective control (*e.g.* lack of mental balance, influence of drink, unusual excitability and any other marked susceptibility).

The conduct of the accused during such an "interval" is particularly pertinent to the question of his alleged emotional condition. For example evidence that he had made a long distance phone call[10] or had gone out to fetch a bren-gun[11] between the receipt of provocation * and the killing would (and still will) entitle the judge to exclude the defence from the jury.

In *Mancini* Viscount Simon L.C. insisted not only on the subjective requirement in "lapse of time," but formed an additional test of: "whether a sufficient interval has elapsed since the provocation* to allow a reasonable man time to cool."[12] This constituted a development on the objective plane of the tests recommended by Stephen to help the jury determine whether the accused had killed whilst temporarily deprived of his self-control. This extension of objectivism was an incidental application of the general reasonable man doctrine of *Welsh* (1869),[13] and *Lesbini* (1914).[14] This addition, like that in the mode of resentment, was effected on the ground that it would be anomolous for the law to refuse to indulge the accused's idiosyncrasies in relation to the nature of the provocation*, yet recognise them as affecting the length of time it takes him to reassert his self-control after receiving the provocation*.

Examination of the cases where "lapse of time" has been a relevant issue almost invariably reveals the presence of express malice in the accused.

The old authorities were more generous than modern judges in their estimation of the length of time the accused required to allow his passion to subside. Hale tells us that the defence was successfully invoked where two men after quarrelling, went away to collect their weapons and later returned to fight it out.[15] The argument could well have been that had the accused cooled after setting off to arm himself he would have thought better about returning to spill his adversary's blood and run the incidental risk of having his own spilled ! But even if this were so it is doubtful whether a modern court of law would concede that any man's deprivation of self-control could have been so long sustained.

In *R.* v. *Lynch* (1832)[16] the accused killed his friend about ten minutes after the latter had hit him in the face with his fist. On receipt

10. *State* v. *Delbrono* (1924) 306 Mo. 553, 268 S.W. 60.
11. *R.* v. *Gauthier* (1943) 29 Cr. App. Rep. 113.
12. [1942] A.C. 1, 9. See also *Holmes* v. *D.P.P.* [1946] A.C. 588, 597; *Kwaku Mensah* v. *The King* [1946] A.C. 83, 93.
13. 11 Cox C.C. 336.
14. [1914] 3 K.B. 1116.
15. 1 Hale P.C. 453.
16. 5 C. & P. 324.

of the blow the accused left the scene though apparently not to arm himself. He returned and stabbed the deceased with "a common bread and cheese knife" which he normally carried with him. Lord Tenterden C.J. directed the jury in these words: "If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to gain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter. But if you think that the act was the act of a wicked, malicious and diabolical mind...then you will find him guilty of murder." [17] Immediately prior to the first firm judicial vindication *(per* Reading L.C.J. in *Lesbini)* [18] of the reasonable man test laid down by Keating J. in *Welsh* [19] the question in its subjective context was raised before the Court of Criminal Appeal in *R.* v. *Albis* (1913).[20] The time element was pointedly illustrated in this case. Albis killed his shipmate who was asleep in his bunk. He later alleged that the deceased had some time before (thirteen hours in fact) invited him to commit sodomy. Dismissing the appeal, Darling J. after alluding to the "many hours (which) had elapsed before the attack which caused death" and to the fact that, when struck, the deceased was asleep, stated "If the provocation * took the form of blows, and only a short time elapsed between the blows and a murder, a jury might be warranted, on receiving a proper direction from the judge, in reducing the verdict to one of manslaughter." [21]

Indian law, with some mysterious aberrations, agrees with English law that a lapse of time between the provocation* and resentment raises a strong presumption against continuance of the killer's passion. Raju tells us *(Penal Code* page 866) that "The offender must not have reflected, deliberated or cooled," and quotes an imposing array of cases to support his statement. In *Konar* (1954)[22] the accused was guilty of murder where he slew his provoker who had gone to sleep under a tree. The accused in *Jaga* (1937)[23] went away after the provocation* and fetched a gondasa. He then concealed himself until his victim returned and thereupon killed him. This was a clear case of revenge and was rightly held to be outside exception 1 to section 300 of the Penal Code. It is hard to reconcile with these the decision in *Boya.*[24] In this case A observed his wife *in flagrante delicto* with X on the evening before the morning he killed her. At breakfast the wife attended most conscientiously to X to the neglect of A, thus making an open avowal of her preference. It was held that the wife's conduct at breakfast (when

17. *ibid.,* 325.
18. [1914] 3 K.B. 1116, 1118-1120.
19. (1869) 11 Cox C.C. 336, 338
20. 9 Cr. App. Rep. 158.
21. *ibid.,* 160.
22. 1954 Mad. 1006; Cr. 1545; M.W.N. 463.
23. 1937 Lah. 692; 171 I.C. 314.
24. 3 Mad. 33.

linked to that of the previous night) was "grave and sudden" provocation within exception 1. The inference that A could lose his self-control over his wife's conduct at breakfast when the night before he had been able to contain his passion at the sight of her in adultery is a difficult one to sustain.

(3) *Any Other Circumstances which Tend to Throw Light on the State of the Accused's Mind.*

Stephen's third category is a hybrid one and contains within it all evidence relevant to the accused's emotional condition which is not apparent from a consideration of (1) the nature of the fatal act or from (2) the accused's conduct during any period of time between provocation* and resentment. (3) covers a vast area : one which cannot be exhaustively examined here. However, the most common examples of this type of evidence appear to be: (a) that there had existed a long standing enmity between the accused and his victim; alternatively (b) that there was no such enmity or that there had flourished a positive amicability; (c) evidence of character of the accused and the deceased; (d) the accused's demeanour immediately before and after his alleged loss of self-control; (e) the presence or absence on his body or elsewhere of marks suggestive of violence or other physical interference; and (f) relative rank or status of the provoker* to the accused.

A shortcoming of this kind of evidence is that in many cases the accused is in the sad/enviable position of having deprived the court of the testimony of the only other eye-witness to his crime. With alarming frequency the question of provocation * has to be decided on the accused's own version of the facts. Sometimes the story would strain the credulity of the most naive. It may be that well-based suspicion of such allegations has led the bench into making questionable extensions to the doctrine before conceding to juries the opportunity to return a verdict of man-slaughter where near certainty points to murder. (See, for example, *Mancini* [25] for the exclusion of disproportionate resentment. However there are other cases where Lord Sankey's golden thread must have assumed unusual elasticity).

(a) Where there is proof of a long nourished grudge against the deceased, the accused will find it difficult to ward off the inference that his resentment was the product of a revengeful mind.[26]

Coleridge J., in his direction to the jury in *R.* v. *Kirkham* (1837) supplied an extreme instance in which predisposed malice would be plainly shown: "Suppose a man destroyed another by poison; if it were proved that he had previously bought the poison and prepared the cup, although he should have had a quarrel with the party at the very time

25. [1942] A.C. 1, 9.

26. As, for example, Mancini's relationship with his victim and Holmes' telegram to his lover (sent before he killed his wife) that she could expect his arrival.

of administering it, you could not doubt that there was express and actual malice."[27]

In an Indian case, A accused B of being the cause of her illegitimate pregnancy. Some days later they met again and B questioned her further. She repeated the allegation and he struck her down with an axe. The court refused to regard B's actions as flowing directly from the provocation* afforded him by her second allegation. It could not be "sudden" within the meaning of the statutory exception because from the memory of his earlier encounter with A, the accused could safely forecast the vituperative nature of her reply to his challenge.[28]

The trial judge in the recent Malayan case of *Mat Sawi Bin Bakodin*[29] withdrew the issue of provocation* from the jury on the ground that evidence of long domestic tribulation aggravated by the interference of the appellant's mother-in-law could not constitute "sudden" provocation*. The Court of Appeal *(per* Thompson C.J.) agreed that there could be no question of "suddenness" about such provocation*, but held that the judge had misdirected the jury by passing over evidence of other more recent provocative* conduct by the deceased. This viewed together with the previous animosity was considered substantial enough to have made the question one of fact for the jury, though "We do not say for one moment that...they would have decided it in favour of the appellant."[30]

The facts of *Kirkham*[31] revealed another troubled domestic background. The accused was charged with the murder of his son John. A witness testified to quarrels which had disrupted the Kirkham household and to threats made by the accused against the son and his mother. The following extracts from this witness's evidence show on the face of it that the accused entertained most unpatriarchal sentiments towards his family prior to the alleged provocation*. "I saw the prisoner on the Monday before the death of his son. He came to my house drunk and said that he had lost his wife, and that he and his wife had been quarrelling the Saturday before, and if his son John came over the door sill again, he would be his butcher." And: "On the evening before the deceased was killed...[the accused] said if his wife talked to me he would hit her, and he added, 'Tomorrow is the day of execution, and that day I shall settle their hash. I told him if he was sober he would not say so..."[32] In his summing-up Coleridge J. warned the jury against the temptation of convicting the accused before examining the threats in the context of the circumstances of their utterance. He confessed: "I for

27. 8 C. & P. 115, 117-118.
28. *Manju* 8 N.L.J. 56: 1923 Nag. 251.
29. *Public Prosecutor* v. *Mat Sawi Bin Bahodin* (1958) 24 M.L.J. 189.
30. *ibid.*, 191.
31. 8 C. & P. 115.
32. *ibid.*, 115-116.

one...am not disposed to pay much attention to declarations of this description. In some cases they may be deserving of consideration, but least of all if they proceed from a passionate man in that situation of life in which the prisoner is." [33] He reminded them that the accused was not sober when he made the threats, at which time he was also distraught at having alienated his family. The learned Judge regarded these circumstances as divesting the threats of any murderous signification. From the cross-examination of the same witness the court deduced that the phrase "he'd be his butcher" was one from which all the sinister innuendo had been extracted by common local usage. Granted their inebriated and colloquial implications, the writer remains unconvinced that Kirkham's utterances were so innocuous as to justify the court's total disregard. However, the lesson of sceptical inquiry advocated by Coleridge J. is one that the modern judge and jury would do well to keep constantly in mind.

(b) Where there is no evidence of old hostility between the parties, and especially where a positive amicability had flourished, the court is more likely to attribute the resentment to sudden passion than waste time searching every hole and corner for a cloven hoof. In *R.* v. *Lynch* (1832) the accused and deceased had been on good terms before the killing. Lord Tenterden C.J. advised the jury to bear in mind "the previous habits and connection of the deceased and the prisoner with respect to each other. If there had been any grudge between them, then the crime...might be murder. But it seems that they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together." [34]

Had the victim in *Manju* [35] thrown herself upon the charity of the prisoner and then suddenly and unjustly accused him of causing her pregnancy, then there would have arisen a strong presumption that he had lost his self-control. There would have been no damning evidence of the animosity proceeding out of earlier allegations.

(c) That the accused is susceptible to a particular brand of "twitting," that he is excitable, pugnacious, unpredictable in drink or abnormally sensitive about his physical shortcomings, are all factors which may be relevant to the subjective issue. But under those systems whose doctrines of provocation necessitate a comparison of the accused with "a reasonable person" it would be most unwise to adduce evidence of such idiosyncrasies which label him "unreasonable." The same discretion must be exercised when adducing evidence that the deceased had systemmatically exploited the accused's susceptibilities. But evidence that the former had for instance homosexual tendencies, of which the accused was not aware, would add credence to an allegation that the latter had lost his self-control when sodomously assaulted.

33. *ibid.*, 117.

34. 5 C. & P. 325.

35. 8 N.L.J. 56: 1923 Nag. 251. See p. 310, *ante*.

It seems that the accused is given full rein to impute the gravest provocative* excesses to the man he has killed. But it is different where he is on trial for a non-fatal offence. In *R.* v. *Cunningham* (1959) [36] the appellant was tried at the Worcester Assizes for maliciously wounding a man called Truman. He alleged that Truman had made homosexual overtures to him. The Deputy Chairman warned the appellant's counsel of the dangers of attacking a witness's character, but it was insisted that such attack was essential to establish provocation. In consequence the accused's previous convictions were revealed. His appeal against conviction and sentence was dismissed by the Court of Criminal Appeal. This decision could have the effect of putting an intolerable fetter on defending counsel in all cases where it is necessary to allege misconduct by the complainant.

The position before *Cunningham* was much more realistic in that the accused was not deemed to put his character in issue where his attack upon the character of a prosecution witness was incidental to denial of one of the essential elements of the crime charged.[37]

(d) The demeanour of the accused both immediately before and after the period during which absence of self-control was alleged is an additional factor which may throw light on his true emotional condition. The court would take an unfavourable view of evidence that the accused's first reaction to the provocation* was to look round for a weapon of retaliation. In the heat of passion a blow is struck with the fist or whatever comes to hand. The subjective test accommodates the product of a reflex action. There it stops. Armstrong's scones [38] would pass the test when thrown, but not when laced with arsenic.

Where the violence is continued after the resumption of self-control an express malice is indicated. To avoid the incredibly complex problem of determining the line between the non-possession and reassertion of self-control, the English courts have surrendered to the objective standard which excludes from the defence any "disproportionate resentment." [39]

(e) Where the court is prepared to subscribe to Justice Holmes' contention that "Detached reflection cannot be demanded in the presence

36. [1959] 2 W.L.R. 63; [1958] 3 All E.R. 711. In his judgment in the Court of Criminal Appeal Parker L.C.J. stated ([1959] 2 W.L.R. at p. 65) that the nature of the crime of malicious wounding did not admit of alteration by evidence of provocation. * Such evidence is only relevant in assessing punishment.

37. *R.* v. *Turner* [1944] K.B. 463, [1944] 1 All E.R. 559, 114 L.J.K.B. 45, 171, L.T. 246, 60 T.L.R. 332, 30 Cr. App. Rep. 9. See also the judgment of Goddard L.C.J. in *R.* v. *Butterwasher* [1948] 1 K.B. 4.

38. *R.* v. *Armstrong* [1922] 2 K.B. 555; 16 Cr. App. Rep. 149. In this case Armstrong, having poisoned his wife, invited a solicitor colleague to partake of a buttered scone which contained arsenic. In the latter instance the dose did not prove fatal.

39. *Mancini* v. *D.P.P.* [1942] A.C. 1, 28 Cr. App. Rep. 65.

of an uplifted knife,"[40] it will, where the knife has fallen and drawn his blood, draw the strongest inference that the accused was deprived of his control. To this end wounds and bruises inflicted on the accused in the course of the provocation * provide valuable corroborative evidence for his allegation. This is particularly true now in view of the fact that in some circumstances words (which are supposed to break no bones)[41] are accepted as lawful provocation.[42]

(f) The English doctrine of provocation has always made some concession to the relative status of the parties. The discovery of a spouse in adultery is traditionally regarded as the greatest provocation that a man can suffer. Certainly until the mid-nineteenth century the defence was also available to one who killed his mistress in similar circumstances.[43] In India, occasional extensions have been made to accommodate some very tenuous relationships. These have operated in favour of the killers of a sister found with her lover,[44] a brother's wife detected in adultery[45] and the compromising of the wife of a near-relation.[46]

English cases do not appear to go much further than the provocation afforded by violence against a close blood-relative.[47]

The authors of the Indian Penal Code thought that some dispensation should be afforded persons of elevated social and religious station.[48] For instance a gross insult to his faith in the presence of "a zealous professor" should be taken to provide graver provocation* than a violent physical

40. In *Brown* v. *U.S.* 256 U.S. 335, 343 (1921).

41. According to Viscount Simon L.C. in *Holmes* v. *D.P.P.* [1942] 2 All E.R. 124, 127.

42. S.3 of the Homicide Act, 1957. For an example of its application see *R.* v. *Simpson* [1957] *Grim. L.R.* 815.

43. *R.* v. *Kelly* (1847) 2 C. & K. 814. Neither was the absence of a husband/wife relationship taken into account in the much later cases of *Alexander* (1913) 9 Cr. App. Rep. 139, *Gauthier* (1943) 29 Cr. App. Rep. 113, and *Larkin* [1943] K.B. 174 which were decided on other grounds.

44. *Chumni* 18 All. 497; *Amar* 1956 mbh. 107; *Inayat* 1933 Lah. 869.

45. *Dinni* 1926 Lah. 485.

46. *Guree* 5 W.R. (Cr.) 42.

47. *R.* v. *Harrington* (1866) 10 Cox C.C. 370 where a father killed his daughter's husband who was beating her; and *R.* v. *Fisher* (1837) C. and P. at p. 185 where a father, having heard a man had committed an unnatural offence against his son, killed the former. See also the Commonwealth cases of *R.* v. *Hollett* (1884) 7 Nfld. L.R. 29 where a son killed "in defence of" his father; and *R.* v. *Spartels* [1953] V.L.R. 194 where a woman shot and injured her husband's brother whom she mistakenly thought was about to shoot her husband.

48. Note M. p. 144.

assault. It is difficult to gauge how far this attitude prevailed. However, its application appears to have been drastically reduced in modern times.[49]

The question of status is always relevant to the subjective test whether the provocation* is physical or verbal. By section 3 of the (English) Homicide Act, 1957, it may also be relevant to the objective standard. Before the Act words were thought to amount to provocation only in exceptional circumstances. Section 3 contemplates that words unaccompanied by blows or gestures may be enough. Whether such words will be regarded by the jury as sufficiently aggravated provocation* to cause a reasonable man to lose his self-control involves a consideration of the circumstances in which they were uttered. Such an examination would be incomplete without taking into account the status of the provoker* in relation to the accused. A blasphemous affront by a drunken lout may deprive a Plymouth Brother of his self-control whereas its effect upon a London 'bus driver would probably be negligible.

A similar attitude to the subjective element in provocation prevails in those Commonwealth countries whose penal law is founded on Stephen's Draft Code,[50] where the English common law definition obtains[51] and also in South Africa and Southern Rhodesia. Although provocation is not defined (in so many words) by statute in any American state the subjective requirement is substantially the same as that of the English common law. For example in Missouri murder is reduced to manslaughter whenever the provocation* "is calculated to excite the passion beyond control."[52] The subjective element in Wisconsin stipulates that the accused be excited "to the heat of passion so that the mind is uncontrollable and incapable of competent reflection."[53]

CONFLICT BETWEEN THE SUBJECTIVE AND OBJECTIVE STANDARDS

The first work of the state is to eliminate all forms of non-justifiable self-help. This achieved, the true strength of the law is demonstrated in its incidental concessions to human frailty. The doctrine of provocation is one of these concessions. The "civilizing process" to which man has been subjected has brought him a readier access to courts of law and

49. The accused (a Brahim) killed the deceased (a barber) who had insulted him. The difference in status was not considered to enhance the degree of the provocation. * *Kanhaiyalal* 1952 Bho. 21.

50. New Zealand, Canada, Tasmania, Queensland, Western Australia; and those countries whose criminal law is based on the Indian Penal Code: India, Pakistan, Ceylon, Malaya, Singapore.

51. The English common law definition applies to Victoria and South Australia. In New South Wales the common law definition has been extended by statute.

52. *State* v. *Porter* 208 S.W. 2d 240-3.

53. From Appendix 11 of the Report of the (English) Royal Commission on Capital Punishment (Cmd. 8932), p. 455.

organized police forces. In return it calls upon him to exercise greater restraint when confronted with provocative* conduct. This attitude is reflected in the words of Viscount Simon L.C. in *Holmes:* "...as society advances, it ought to call for a higher measure of self-control in all cases." [54] A similar sentiment was voiced by the authors of the Indian Penal Code with regard to killing on provocation: "It ought to be punished in order to teach men to entertain a peculiar respect for human life; it ought to be punished in order to give men a motive for accustoming themselves to govern their passions." But they made this reservation: "...however... We think that to treat a person guilty of such homicide, as we would treat a murder, would be a highly inexpedient course, a course which would shock the universal feeling of mankind and would engage the public sympathy on the side of the delinquent against the law." [55]

Bearing in mind this thinly-veiled warning of the dangers of an over-strenuous application of the defence, contrast the untidy picture of the English law of provocation presented by the Royal Commission on Capital Punishment in 1953: "On the one hand the courts have steadily limited the...scope of provocation recognised as adequate to reduce murder to manslaughter and have subjected it to increasingly strict and narrow tests. On the other hand the greater severity of the law has been tempered by leniency in its application. Judges have instructed juries in terms more favourable than the letter of the law would allow. Juries, sometimes with the encouragement of the Judge, sometimes in the face of his direction, have returned verdicts of manslaughter, where, as a matter of law, the most favourable interpretation of the evidence could scarcely justify them in doing so. Successive Home Secretaries have been ready to recommend the exercise of the Prerogative of Mercy for he who has been convicted of murder but has acted under substantial provocation* of a kind or degree insufficient to reduce the crime to manslaughter." [56] The Commissioners concluded: "We have indeed no doubt that if the criterion of the 'reasonable man' was strictly applied by the courts and the sentence of death was carried out in cases where it was so applied, it would be too harsh in its application." [57]

54. [1946] 2 All E.R. 124, 128.

55. Note M. p. 144.

56. Cmd. 8932, para. 133. Despite the 1957 Homicide Act a sympathetic attitude still appears to prevail see *e.g. R.* v. *Fantle*, *The Times* newspaper, September 26, 1958. For a commentary on this case see Eddy [1958] *Crim. L.R.* pp. 782-784.

57. *ibid*., para. 145. However, the Commissioners did not feel justified in recommending the abolition of the reasonable man. The probable reason for their reluctance can be found in the bench's unanimous insistence on its retention for reasons stated in para. 143 of the report. See the judges' views in the *Minutes of Evidence.* The surprisingly few voices raised against the objective standard were those of Sir Basil Neild Q.C., *Minutes of Evidence* p. 232, the representatives of the Society of Labour Lawyers p. 563, and the Institute of Psycho-Analysis, p. 545.

Despite this state of affairs the framers of the 1957 Homicide Act resisted the opportunity to banish the reasonable man from provocation. However some concession was made to palliate the strenuous nature of the test. In addition to preserving (and it seems widening) the "loop-hole" left by Viscount Simon in *Holmes* in respect of words which may, in exceptional circumstances, amount to lawful provocation, Section 3 leaves to the jury the question whether the provocation* was enough to make a reasonable man do as the accused did, "and in determining that question the jury shall take into account everything done and said according to the effect, which, in their opinion, it would have on a reasonable man."

Prior to the Act the judge could rule that no reasonable man would have been provoked* to lose his self-control on the evidence before the court. This led to considerable hardship and a good deal of conflict within the doctrine.

Now it appears that where there is some evidence that the accused was actually provoked* to lose his self-control the judge must leave two questions to the jury: (1) was the accused in fact so provoked* as to lose his self-control? and (2) would a reasonable man in his position have been so provoked* ?

This much appears from *R.* v. *Simpson* (1957) [58] where a husband strangled his wife and successfully relied on her "threats and nagging" to reduce his offence from non-capital murder to manslaughter. It is submitted that prior to the Homicide Act the question of provocation* in this case would have been withheld from the jury.

However, by insisting that provocation* be judged by reference to the standard of the reasonable man, the English law has elected to continue to run the gauntlet of self-contradiction. The very fact that a man has a hump upon his back causes him to give way the more readily to passion when "twitted" about it. It is, after all, highly improbable that the appellation "Quasimodo"[59] would ever provoke* the straight-backed reasonable man to heated retaliation. Again, where the essence of the defence lies in the accused's deprivation of reasoned action, how (except by sheer coincidence) can he react to the provocation* in a rational manner without asserting his self-control? If his resentment (by chance) were contained within the limit of blow-for-blow he would do well to forget all about his passion and concentrate on the defence of justification.

58. [1957] *Crim. L.R.* 815.

59. The Hunchback of Notre Dame.

Dr. Glanville Williams recently criticised the objective standard as "a compromise, neither conceding the propriety of the act nor exacting the full penalty for it. This being so, how can it be admitted that the paragon of virtue, the reasonable man, gives way to provocation * ?"[60]

Is the common law's acknowledgment of exemplary behaviour doomed to an indefinite location in the conviction and punishment of the reasonable man for manslaughter? Or does it regard provoked manslaughter as a reasonable crime?

Despite the general dissatisfaction with the objective standard in provocation it would be unduly optimistic to expect its abrogation within the immediate future. The one (and it seems the only) spark of hope for an accelerated dethronement of the reasonable man and his replacement by an entirely subjective test is the recent setting-up in England of a Criminal Law Revision Committee under the chairmanship of Lord Justice Sellars.[61] Although English criminal law is fraught with "defects, fictions and technicalities" [62] all crying out for the attention of such a body, one trusts the doctrine of provocation will not be too long denied another much needed overhaul.

B. J. BROWN.†

60. [1954] *Crim. L.R.* 742.

61. See the White Paper, *Penal Practice in a Changing Society* (Cmd. 645), February 1959. The Committee's terms of reference are stated (p. 4) as follows: "to examine such aspects of the criminal law as the Home Secretary may from time to time refer to the Committee, to consider whether the law requires revision, and to make recommendations."

62. Edwards, p. 18 *ante*.

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