CHAPTER 5

RECKLESSNESS AND NEGLIGENCE

"'It's a poor sort of memory that only works backwards,' the Queen remarked."
The White Queen to Alice[1]

5.1. RECKLESSNESS IN THE CRIMINAL LAW

5–001

We learn as a result of experience and instruction, and our learning brings awareness of the dangers of life. We can guess at the probable present even when we cannot directly perceive it, and can project ourselves into the future by foreseeing the probable consequences of our acts. Our memories work forwards. This is the foundation of the notion of recklessness. "Reckless" is a word of condemnation. It normally involves conscious and unreasonable risk-taking, either as to the possibility that a particular undesirable circumstance exists or as to the possibility that some evil will come to pass. The reckless person deliberately "takes a chance." Other things being equal, this is evidently a less culpable mental state than intention, though worse than inadvertent negligence. Recklessness, like negligence, is unjustifiable risk-taking. It differs from simple negligence (or, if you like, objective recklessness) in that the risk is known. The culpability or recklessness depends on a number of factors, including the degree of known risk.

Some crimes can be committed only intentionally. But nearly all crimes requiring *mens rea* (which are, broadly speaking, the more serious crimes) now recognise recklessness as an alternative to intention. This proposition holds for most common law crimes;[2] and parliamentary draftspersons have begun to include it in their formulations of offences, as by making it an offence to do something "knowingly or recklessly." The courts were slow to develop the concept of recklessness of conduct; they tended to think only in terms of intention, negligence and strict liability.[3] Recklessness was accommodated within intention by two lines of reasoning, one now discredited and the other, though still occasionally found in judicial rhetoric, highly suspect:

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[1] Lewis Carroll, *Through the Looking-Glass, and What Alice Found There*, (London: Macmillan and Co., 1872) at 36.

[2] Even where the common law crime has been traditionally stated in terms of intention, the courts may redefine it in terms of intention or recklessness, as they did, with regard to rape, in *D.P.P. v. Morgan* [1976] A.C. 182 at 230, 209, 225.

[3] Dennis J. Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences*, (2016) at Chap. 2 (unpublished manuscript).

- The presumption about intending probable consequences was used to make the notion of intention cover what we now term recklessness (and it covered negligence as well).[4]
- The other technique was to speak of "intentionally creating (or taking) a risk,"[5] or "intending to do something whether or not something else happened or was present." The effect was again to lump recklessness with intention.

In *R. v. G*,[6] the House of Lords clearly differentiated the two ideas. Lord Bingham expounded the following standard:

> "A person acts recklessly … with respect to (i) a circumstance when he is aware of a risk that it exists or will exist; and (ii) a result when he is aware of a risk that it will occur; and it is, in the circumstances known to him, unreasonable to take the risk."[7]

5–002 **Isn't recklessness just extreme negligence? Why not use only the general category of negligence?** The main answer is that even when inadvertent negligence is punishable the law often treats it as a less serious offence than offences of recklessness, because of the lower level of culpability. Moreover, whereas recklessness is recognised as a mode of committing most crimes, many cases of inadvertent negligence are left outside the criminal law as a matter of policy. So we need to have suitable terms to distinguish between (1) recklessness and (2) negligence not necessarily amounting to recklessness.

Although we have general offences of recklessness causing injury to the person or damage to property, we have no general offences of negligence (apart from driving offences[8] and gross negligence manslaughter). The Law Commission decided against having an offence of negligent damage to property when it drafted what is now the *Criminal Damage Act 1971*, and Parliament accepted the decision. The Criminal Law Revision Committee decided against proposing an offence of negligent injury to the person when it considered the law of offences against the person.[9] Some Continental jurisdictions have general penal liability of this kind; but we have not hitherto found it to be necessary. Accepting negligence

[4] See for example, *The Queen v. Pembliton* (1872–75) L.R. 2 C.C.R. 119, particularly the judgment of Blackburn J.

[5] This was used by Lord Hailsham in *D.P.P. v. Morgan* [1976] A.C. 182. The technique does not work well. If "intentionally creating a risk" of a result is equivalent to intending the result, then the doer will be guilty even though the risk was justifiable. So a surgeon who operates with a slim hope in a desperate case, and who, therefore, "intentionally runs a risk," would be guilty in the same way as if she had intended the patient's death if that occurs. If she intended the death when doing what she did, the patient's desperate condition would be no defence. In order to avoid this conclusion Lord Hailsham spoke of "exposing the patient to the risk without lawful excuse." There can indeed be a lawful justification for exposing the patient to a justifiable risk, but not for intentionally killing her (cf. *Re A (Children) (Conjoined Twins: Medical Treatment) (No. 2)* [2001] 1 F.L.R. 267). This shows that the rules of law for risking a result and intending a result are not the same. In fact two of the Lords in Morgan (Hailsham, in one place, and Edmund-Davies) spoke in terms of recklessness, which is obviously the proper word in relation to conscious risk-taking. See further, *R. v. G* [2004] 1 A.C. 1034.

[6] [2004] 1 A.C. 1034.

[7] *R. v. G* [2004] 1 A.C. 1034.

[8] *R. v. Reid* [1992] 1 W.L.R. 793.

[9] Working Paper on *Offences Against the Person* (London: H.M.S.O., 1976) para. 90.

as a general mode of offending would either strain the overworked resources of the penal system or bring about highly selective and indeed capricious enforcement. In general, negligence causing injury or loss is best left to the civil law. If it is to be dealt with criminally, specific provisions dealing with common categories of negligence should be used to do this.

5.2. SUBJECTIVE RECKLESSNESS

The subjective-objective controversy was put to rest by the House of Lords in *R. v. G.*[10] Before that case, the courts had hovered between the idea of recklessness as negligence (the "objective" definition) and the idea of recklessness as subjective recklessness. 5–003

1. The idea of recklessness as objective negligence proposes that recklessness is an extreme departure from the standard of conduct of the prudent person. Often the defendant will have adverted to the risk, but she may not have; and she can (on this view) be accounted grossly negligent whether she adverted to it or not. The tribunal of fact (jury or magistrates) does not attempt to look into her mind, but simply measures the degree of her departure from the proper standard.
2. The subjective definition, on the other hand, attempts to look into the defendant's mind. It asks whether she realised that there was a risk but carried on regardless.

The subjective definition is now fully accepted.

5–004 **It's perfectly true that we sometimes consciously run a risk. But how can it be proved? When the affair is over, whatever realisation the defendant had at the time leaves no trace. If she says she didn't think, who can contradict her?** One must admit that the subjective theory is an ideal imperfectly achievable. Even though it has been accepted in law, we have to use something suspiciously like an objective test. The jury may be instructed that if anyone would have realised the risk involved in the particular conduct, they may infer that the defendant did so. But:

- There is a difference of degree between saying that the risk was so obvious that the defendant must have appreciated it (subjective recklessness), and saying that a reasonable person would have appreciated it but all the same quite a number of people might not have (when, in the absence of additional evidence, subjective recklessness cannot be inferred, though the defendant will be liable if there is a relevant offence of negligence).
- If the jury are applying the doctrine of subjective recklessness they should regard themselves as trying to assess what the defendant must have foreseen (that is to say, did foresee); and if there is something in the particular facts indicating that she may not have appreciated the risk, that

[10] [2004] 1 A.C. 1034.

will be overriding. If the facts show that the defendant was or may have been momentarily careless, not appreciating the risk in what she did, she should be acquitted on the subjective theory.

5–005 **When the subjective definition refers to the defendant realising that there was a risk, what degree of risk are we speaking of?** Under the subjective definition of recklessness, the tribunal of fact would in theory enquire first what degree of risk the defendant foresaw, and would then determine whether that risk was a reasonable/justifiable one for the defendant to run. In practice the enquiry cannot be so fine-tuned. But the tribunal may ask itself whether there was any social justification for the defendant causing more than the usual accepted risks of life. If there was not, then if the tribunal believes that the defendant must at least have foreseen some small risk beyond these accepted risks in what she did, then she can be accounted reckless. In special cases the circumstances may be held to have justified her in running an appreciable degree of risk.[11]

5–006 **Is a person reckless if she intended the result?** Certainly, *a fortiori*. And a person can be convicted of an offence of negligence if she was reckless or acted intentionally. The wider fault element includes the narrower one.

5–007 **Nevertheless I can't help feeling that subjective recklessness is a very narrow concept. A person may properly be punishable although she cannot be proved to have been subjectively reckless.** The concept is narrow, but it is meant to be narrow. If the legislature wishes to create an offence wider in range, it can use the concept of negligence. The fear you have expressed is the main reason why the subjective definition met with resistance in the past.[12] The objective definition, in contrast, enables the jury to express its indignation at the defendant's conduct without bothering about what went on in her mind. But against this it may be said that to ask the jury whether the defendant departed from the reasonable standard leaves them to make a value-judgment with very little assistance.

Part of the trouble arises from the origin of the word "reckless." Etymologically, "recklessness" and "carelessness" mean the same; they refer to the state of mind of not caring, or "recking". In two cases, *Commissioner of Police of the Metropolis v. Caldwell*[13] and *R. v. Lawrence*,[14] Lord Diplock assumed that this meaning still held. Speaking of recklessness, he said: "The popular or dictionary meaning is: careless, regardless, or heedless, of the possible harmful consequences of one's acts;"[15] and assumed that this was also the legal meaning. Lord Diplock's words were unexceptionable if he was using "careless" as well as "reckless" in its literal or etymological sense. The reckless person pursues an object without caring, or without caring very much, whether she is creating danger or not. But it has already been observed that the word "careless"

[11] For a fuller discussion see Glanville Williams, *Textbook of Criminal Law*, (London: Stevens & Sons, 1978) at 72–77.
[12] See *Commissioner of Police of the Metropolis v. Caldwell* [1982] A.C. 341.
[13] [1982] A.C. 341.
[14] [1982] A.C. 510.
[15] *Commissioner of Police of the Metropolis v. Caldwell* [1982] A.C. 341 at 351.

does not now mean this, either in its legal sense or in general use; nor did Lord Diplock suppose that it did. A careless person is one who does not take care, not one who does not care. The careless driver certainly cares about having an accident, but for temperamental or other reasons is unable to drive in such a way as to avoid it. Lord Hailsham in *Lawrence*[16] remarked on this change in the meaning of carelessness and the consequent fallacy of identifying it with recklessness. He said: "Reckless has … almost always … applied to a person or conduct evincing a state of mind stopping short of deliberate intention, and going beyond mere inadvertence, or in its modern, though not its etymological and original sense, mere carelessness." He went on to say that the word retains its dictionary sense (the sense he had just explained) in legal contexts; but he also approved the "lucid legal interpretation" given to it by Lord Diplock—failing to perceive that Lord Diplock had accepted the possibility of finding recklessness without any state of mind. In the drowsy atmosphere of the committee room, the other Lords agreed both with Lord Diplock, that recklessness means carelessness, and with Lord Hailsham, that it does not.

5.3. THE DEFINITION OF NEGLIGENCE

"Taint what men don't know that makes trouble in the world; it's what they know for certain that ain't so."

Josh Billings[17]

5–008 Intention is clearly a mental state, and a type of legal fault. Another type of legal fault, not necessarily involving a mental state, is negligence. Some accidents (or other events) are so unexpected that when they happen we can only say that they were unavoidable—in legal language, "inevitable." We cannot think of anything that a careful person would have done to avoid the evil result, if she had been in the shoes of the defendant. Other accidents happen because of the neglect of some precaution that a reasonable person would have used. (The reasonable person is sometimes, and better, called a prudent person.) Such accidents are the products of what we call negligence, or carelessness. Negligence, then, is failure to conform to the standard of care to which it is the defendant's duty to conform. It is failure to behave like a reasonable prudent person, in the circumstances where the law requires such reasonable behaviour. An employer may for example be negligent as to whether safety precautions are being used by her workpeople.

5–009 **You mean the defendant was thoughtless?** Yes, or incompetent in a job (such as driving a car) in which she should have been competent. Or, worse still, she may actually have seen the danger and "chanced her arm." In the latter case she is advertently negligent, or in other words reckless. If she did not advert to the danger, or in other words realise there was a risk, when she ought to have, she is inadvertently negligent. Negligence means forbidden conduct where the

[16] [1982] A.C. 510 at 520.
[17] Josh Billings, *Everybody's Friend, or; Josh Billing's Encyclopedia and Proverbial Philosophy of Wit and Humour*, (Hartford, CT: American Publishing Company, 1874.) at 82.

defendant's liability depends on the fact that she failed to realise (foresee/know) what she ought to have realised, and failed to conform her conduct accordingly, or, *a fortiori*, that she did realise it and yet failed to conform her conduct as she should.

The test of negligence in terms of the prudent person is called an "objective" standard, because it does not depend upon a finding of what passed in the defendant's mind.

5–010 **Why do you bring in the prudent person in defining negligence? Is it because otherwise the standard would vary for everyone?** There would be no standard at all. Every judgment of a person's conduct implies judgment measured against a standard external to her.

5–011 **Who is this "prudent person"? Is she the person in the street?** The person in the street, that legendary combination of sage and ignoramus, does not quite represent the idea. The "prudent person" or "reasonable person" of the lawyer's imagining is the exemplary person: the cautious, circumspect, anxiously calculating paragon who is held up by the judges as the model of behaviour. Sometimes, it is true, she is described as the ordinary person, or average person.[18] But little effort is made at trials to find how ordinary people behave; and it would not be a cast-iron defence to a charge of negligence to show that other people are prone to do exactly as the defendant did. (At least, that is the position of the law of tort.) *Homo juridicus* is the ideal person, the moral person, the conscientious person—not setting the standard so high that life becomes impossible in ordinary terms, but nevertheless requiring the most careful consideration to be given, so that harm is avoided and the law is obeyed.

5–012 **Why not eliminate talk of a reasonable person by asking simply whether the harm was probable?** Probability is a matter of varying degree. Recklessness and negligence consists in taking a risk of harm with such a degree of probability as to be socially unacceptable. This depends on what it is that is at stake. A surgeon may, if there is no other way of alleviating her patient's suffering or prolonging her life, perform an operation that carries a very high risk of killing her patient, without being adjudged negligent or reckless. An employer who, in order to increase production and profits, takes what is, statistically, a much smaller risk with the lives of her workpeople may well be held to be criminally negligent or criminally reckless.[19]

[18] Michael Vitiello, "Defining the Reasonable Person in the Criminal Law: Fighting the Lernean Hydra," (2010) 14 *Lewis & Clark L. Rev.* 1435; Marsha Levick and Elizabeth-Ann Tierney, "United States Supreme Court Adopts a Reasonable Juvenile Standard in *J.D.B. v. North Carolina* for Purposes of the Miranda Custody Analysis: Can a More Reasoned Justice System for Juveniles Be Far Behind," (2012) 47 *Harv. C.R.-C.L. L. Rev.* 501. See *J.D.B. v. North Carolina* (2011) 131 S.Ct. 2394; and also *U.S. v. IMM* (2014) 747 F.3d 754 at 765 where Reinhardt J. said: "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."

[19] *R. v. Mark* [2004] EWCA Crim. 2490; *R. v. D.P.P. Ex p. Jones (Timothy)* [2000] I.R.L.R. 373.

5–013 **What should a prosecutor do to prove negligence?** In an action in tort for negligence the plaintiff must give particulars of the alleged negligence in her statement of claim. For example, in a running down case she will say that the defendant drove too fast, on the wrong side of the road, without keeping a proper look-out, and so on. There are no similar pleadings in criminal cases, but the prosecutor who alleges negligence must be prepared to say what the defendant could and should have done (or refrained from doing) in order to avoid the accident or other occurrence.

The evidence given on the negligence issue is almost exclusively evidence of what the defendant did (or failed to do).[20] After that, it is for the jury (or magistrates) to say whether the defendant's behaviour showed a lack of due caution. But occasionally experts called on behalf of the prosecution or defence, are allowed to say that a mistake made by the defendant in a technical matter was an understandable one,[21] or that the defendant behaved as people do in the particular occupation.[22] As said before, it is not necessarily a defence to show that the defendant complied with the average standard of conduct, because the tribunal may still say that this average standard was negligent; but the evidence may help the defence all the same.

A person who, otherwise than in an emergency, undertakes a task that can be safely performed only if she has special skill will be negligent if she does not possess that skill.[23] A person can be "careless" even where she cares deeply. A person may take all the care of which she is capable, and yet be accounted "careless" or negligent for failing to reach the objective standard. She may honestly (or, to use another expression, in good faith, *bona fide*[24]) believe that the facts are such that she is not imperilling anyone; but she may be held to have been negligent in arriving at that belief. An incompetent driver may be convicted of driving "without due care and attention" even though she was doing her level best. The careless person is the person who does not *take* the care she ought to take: never mind whether she *felt* careful. She can be held to be negligent in making a perfectly honest mistake.

5–014 Almost the only crime at common law carrying responsibility for negligence, certainly the only one of importance, is manslaughter; and here the courts have developed the restriction that the negligence must be "gross" in order to found

[20] *R. v. Trafalgar Leisure Ltd.* [2009] Env. L.R. 29.

[21] *R. v. Lamb* [1967] 2 Q.B. 981.

[22] The expert evidence given in *R. v. Adomako* [1995] 1 A.C. 171 overwhelmingly suggested that D had not behaved as a reasonable anaesthetist would have acted. With respect to gross negligence manslaughter, cf. *Hines v. State* (2003) 578 S.E.2d 868.

[23] An everyday skill is not a specialist skill merely because it is used by someone in their profession. In *R. v. Bannister* [2010] 1 W.L.R. 870, a police officer argued "that his special training had provided him with the skill to drive safely at high speeds and in adverse conditions and that that was relevant to the question whether he had been driving dangerously." The Court of Appeal held: "that taking into account the driving skills of a *particular driver* in assessing whether his driving had been dangerous was inconsistent with the objective standard of what could be expected of the competent and careful driver set out in s. 2A(1)(3) of the *Road Traffic Act 1988*."

[24] Generally, pronounced "bohna fydee." Note that this means "in good faith," if you wish to speak Latin, it is *bona fides* (generally pronounced "bohna fydeez").

criminal responsibility.[25] This means that a small lapse from reasonable conduct does not make a person punishable. Several other offences of negligence have been created by statute.[26] In other circumstances, the legislature seems to prefer to speak of a failure to use care (as in the offence of careless driving)[27] or of a requirement of due diligence[28] or reasonable conduct; but these are only different ways of referring to the concept of negligence in its varying degrees. Statutes creating offences of omission often involve responsibility for negligence, because the purpose of such statutes is that the defendant should move herself to take positive steps to bring about the situations desired by the legislature.

When statutes create new offences of negligence, they do not specify the degree of negligence requisite for penal responsibility; and it might perhaps have been thought that, by analogy with the rule developed in manslaughter, the judges would have required all criminal negligence to be "gross."[29] The rule is proposed in the American Law Institute's Model Penal Code.[30] In England and Wales, lawmakers have not taken this line, so that, with us, criminal negligence in many statutes means any departure, however small, from the standard of the reasonable person.[31] If some courts act more leniently in requiring the negligence to be gross,[32] that is not reflected in the general theory of statutory negligence.

[25] *R. v. Adomako* [1995] 1 A.C. 171; *R. v. Morgan* [2007] EWCA Crim. 3313; *R. v. Evans* [2009] 1 W.L.R. 1999. See also Ken Oliphant, "Manslaughter: Recklessness or Gross Negligence," (1996) 6 *K.C.L.J.* 149.

[26] Some of these are rather serious indeed: see for example, section 5 of the *Domestic Violence, Crime and Victims Act 2004*.

[27] See section 2B and 3 of the *Road Traffic Act 1988*. Section 3ZA of the *Act of 1988* provides: "(2) A person is to be regarded as driving without due care and attention if (and only if) the way he drives *falls below* what would be expected of a competent and careful driver. (3) In determining for the purposes of subsection (2) above what would be expected of a careful and competent driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused..." [Emphasis added].

[28] Colin Manchester, "Knowledge, Due Diligence and Strict Liability in Regulatory Offences," [2006] Crim. L.R. 213.

[29] The dangerous driving offences found in sections 1 and 2 of the *Road Traffic Act 1988*, require D's driving fall far below the standards expect of a reasonable driver. Section 2A of the *Act of 1988* provides: "(1) For the purposes of [sections 1, 1A and 2] 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—(a) the way he drives *falls far below* what would be expected of a competent and careful driver, and (b) it would be obvious to a competent and careful driver that driving in that way would be dangerous. (2) A person is also to be regarded as driving dangerously for the purposes of sections 1, 1A and 2 above if it would be *obvious* to a competent and careful driver that driving the vehicle in its current state would be dangerous." [Emphasis added].

[30] See section 202(2)(*d*).

[31] Cf. section 111 of the *Protection of Freedoms Act 2012* (section 2 of the *Protection from Harassment Act 1997*); section 23 of the *Violent Crime Reduction Act 2006*; sections 1 & 2 of the *Sunbeds Act (Northern Ireland) 2011*; section 5 of the *Bribery Act 2010*; sections 115–116 of the *Armed Forces Act 2006*; section 126 of the *Serious Organised Crime and Police Act 2005*; sections 71 and 78 of the *Sexual Offences Act 2003*; sections 145–146 and 148 of the *Licensing Act 2003*; section 7B of the *Tobacco Advertising and Promotion Act 2002*; section 5 of the *Anti-terrorism, Crime and Security Act 2001*; section 22A of the *Road Traffic Act 1988*; section 1A of the *Crossbows Act 1987*.

[32] *R. v. Adomako* [1995] 1 A.C. 171.

Do I gather that when considering negligence you entirely ignore the defendant's state of mind? That would be going too far. One can imagine circumstances where an ordinary driver would not be careless in running a blind person down, if she did not know[33] she was blind and had no reason to suppose she would proceed as she did. But a driver who knew that the person was blind might on such facts be guilty of one of the negligent driving offences.[34] 5–015

Is negligence a form of *mens rea*? Some judges assume this, but there are substantial arguments the other way: 5–016

- Negligence is not necessarily a state of mind, so it is not properly called *mens rea*.
- The most serious and severely punishable crimes are defined to require intention or recklessness. If it were allowed that negligence is *mens rea*, the judges might extend the concept of recklessness to cover negligence (which some of them have done in the past),[35] and which would result in a great increase in severity of punishment).[36] The argument does *not* involve saying that negligence should not be punished:[37] only that it should not generally be punished on a par with crimes requiring a mental element.[38]

Philosophers have tried all sorts of tricks to present criminal negligence as a form of subjective culpability, but have not managed to succeed.[39] It is said that some people have an "I could not care less" attitude, but an attitude cannot make a person subjectively culpable for risks she did not foresee. Advocates of character theory conflate evidential factors that might be used to infer either objective negligence or alternatively subjective recklessness, with the substantive fault doctrines *per se*. They fall into the trap of assuming that inadvertent negligence can also be advertent, when all they have done is point to factors that would allow a jury to draw an inference of subjective fault. If D's character demonstrates and related behaviour demonstrates she acted with subjective recklessness, then there is no need to refer to negligence at all. Many nasty people might not care less about others, but might be fortunate enough never to have an accident. Meanwhile, many people of exemplary character might be unfortunate enough to make grave slips.

[33] "[R]egard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused." Section 30(3ZA)(3) of the *Road Safety Act 2006*.

[34] See the offences found in section 2A(3) of the *Road Traffic Act 1988*; section 1 of the *Road Traffic Act 1991*; and section 20(1) of the *Road Safety Act 2006*.

[35] *Commissioner of Police of the Metropolis v. Caldwell* [1982] A.C. 341.

[36] See *Elliott v. C (A Minor)* [1983] 1 W.L.R. 939.

[37] Cf. the discussion in Kenneth W. Simons, "Culpability and Retributive Theory: The Problem of Criminal Negligence," (1994) 5 *J. Contemp. Legal Issues* 365.

[38] Cf. George P. Fletcher, *Basic Concepts of Criminal Law*, (New York: Oxford University Press, 1998) at 117; George P. Fletcher, "Theory of Criminal Negligence: A Comparative Analysis," (1970) 119 *U. Pa. L. Rev.* 401.

[39] Cf. discussion in Michael D. Bayles, "Character, Purpose and Criminal Responsibility," (1982) 1 *Law and Phil.* 5 at 10; Kenneth W. Simons, "Dimensions of Negligence in Criminal and Tort Law," (2002) 3 *Theoretical Inq. L.* 283.

It is not clear how the attitude or character of the anaesthetist in *R. v. Adomako* was one of "I could not care less."[40] Nevertheless, he deserved to be punished. Adomako might have been very caring, but he got it wrong on the day in question. A ruthless self-absorbed anaesthetist who attends operations while suffering from hangovers and sleep deprivation might never make a mistake. The leading advocates of the "culpable indifference" theory are Duff and Simons. To the extent subjective choice results in indifference,[41] (*i.e.* D's choice "not to care,") it is covered by the doctrine of subjective recklessness. Culpability is a broad moral term that merely refers to blameworthiness,[42] so the term "culpable indifference" is misleading in that it merely refers to "blameable indifference." The indifference might be blameable either on a subjective or objective theory. If it is under the objective theory, then the defendant lacks a guilty mind. If it is under the subjective theory, then *ex post facto* at the trial, it has to be proved beyond reasonable doubt that the defendant had a guilty mind (i.e., acted with a subjective mental state). If these theorists just mean "indifference,"[43] *simpliciter*, then that is negligence *pure and simple*. Attempts to extend subjective recklessness to cover objective recklessness can only go so far, because there is a conceptual divide between factual subjectivity (factual mental states) and factual objectivity (factual non-mental states) that cannot be fused. Either the wrongdoer had the mental state or she did not. She could not have had both! Similarly, as we will see, wilful indifference or wilful blindness is subjective recklessness. If a person knows there is a risk and deliberately shuts her eyes to avoid having her suspicions confirmed, she can hardly argue she did not realise she was taking a risk.[44]

5.4. THE JUSTIFICATION OF PUNISHMENT FOR NEGLIGENCE

5–017 The reason for punishing negligence is the utilitarian one that we hope thereby to improve people's standards of behaviour.

5–018 **Isn't the question one of moral wrong? It is wrong not to exercise consideration for others.** If inadvertent negligence results from not caring about other people, it is a defect of character and may be regarded as morally wrong. But what lawyers call inadvertent negligence is not always this kind.

[40] [1995] 1 A.C. 171. See also *R. v. Misra* [2005] 1 Cr. App. R. 21.

[41] See for example, Kenneth W. Simons, "Does Punishment for Culpable Indifference Simply Punish for Bad Character," (2002–03) 6 *Buff. Crim. L. Rev.* 219; R. A. Duff, *Intention, Agency and Criminal Liability*, (Oxford: Basil Blackwell, 1990) at 160 *et seq*; Stephen P. Garvey, "What's Wrong with Involuntary Manslaughter," (2007) 85 *Tex. L. Rev.* 333; P. J. T. O'Hearn, "Criminal Negligence: An Analysis in Depth—Part II: Culpable Ignorance," (1964) 7 *Crim. L.Q.* 407.

[42] Cf. Jean Hampton, "Mens Rea," (1990) 7(2) *Social Philosophy and Policy* 1.

[43] That is to say, could not have modified if she had a normal make-up. As Moore notes, "What makes the intentional or reckless wrongdoer so culpable is not unexercised capacity—although that is necessary—but the way such capacity to avoid evil goes unexercised; such wrongdoers are not even trying to get it right. Their capacity goes unexercised because that is what they choose. Choice is essential to their culpability, not one way among others that they could have been seriously culpable." See Michal S. Moore, *Placing Blame*, (Oxford: Clarendon Press, 1997) at 590.

[44] Holly Smith, "Culpable Ignorance," (1983) 192(4) *Philosophical Review* 543.

Negligence may be just a slip by a well-disposed person, and whether that should be accounted as morally wrong is open to debate.

5–019 **Even though the offender did not realise the danger on the occasion in question, she would have realised it if she had taken due precautions. So she was morally to blame.** I do not dissent; but we should keep our eyes open to the facts. Apply what you say to the particular case of the forgetful person. A person with a bad memory can often take steps to remedy her deficiency—by keeping a record of her engagements on her smartphone and consulting frequently, and so on. But her memory may be so bad that one day she forgets to turn on her smartphone, or forgets an item recorded in it. Perhaps, to overcome this risk, she takes additional steps, such as asking her partner to remind her of a particular engagement. But one day she forgets to ask her partner. Is she to think of another device to remind her to look at her smartphone or to ask her partner to remind her? What if she causes a fire by forgetting to turn off the oven or iron? Is it moral fault not to do so? What we are faced with is the plain fact that on the particular occasion the thought to take a particular precaution never comes into her mind. That is a deficiency in her mental make-up which she cannot help. To search back into her past for the purpose of finding some defect in the arrangements made to remedy her failing, and blaming her on that account, often wears the appearance of being an unrewarding exercise in moralism.

It is not only a question of memory. Many studies have been made of accident proneness; and it has been found that large categories of people are more accident-prone than others. Old people are worse than younger people and children worse than adults and so on.[45] But some individuals are particularly accident prone. They are born with conditions that make them particularly clumsy,[46] or become so through their experiences. A person has an innate temperament, which may in the course of time be modified by many circumstances over which she has no control. The result may be that she is impulsive, unable to stop and consider the consequences of what she is doing, or too dull in mind to imagine them; that she is clumsy, unable to control her own movements (or those of a machine she is using) with due precision, or with a slow reaction-time in case of an emergency.

5–020 **If, as you say, the individual is unable to help these aspects of her mind or body, how can she be said to deserve punishment?** This objection to imposing liability for negligence appeals particularly to those who take the "determinist" position, according to which all events (including human acts) are

[45] Knud Knudsen "Accident Risk in Middle Age Years and in Old Age," (1975) 18 *Acta Sociologica* 62. Cf. Liisa Hakamies-Blomqvist *et al.*, "Driver Ageing does not Cause Higher Accident Rates per km," (2002) 5(4) *Transportation Research: Traffic Psychology and Behaviour* 271. See also Frank P. Mckenna, "Accident proneness: A conceptual analysis," (1983) 15(1) *Accident Analysis & Prevention* 65.

[46] For example, those born with Attention Deficit Hyperactivity Disorder tend to be more accident-prone.

CHAPTER 17

COMPLICITY

"For the sin ye do by two and two
ye must pay for by one!"

Joseph Rudyard Kipling[1]

17.1. THE DEGREES OF COMPLICITY: PERPETRATORS

17–001 The criminal law of complicity has a very long heritage in this country.[2] Complicity in crime extends criminal liability beyond the perpetrator to the accessories.[3] Both the perpetrator and the accessories are regarded by law as participants in the crime, and are called accomplices. The perpetrator is an accomplice of the accessories, and they are accomplices of the perpetrator and of each other.[4] An accessory (sometimes called a secondary party) may be either an encourager or an assister. She or he is one who encourages or assists the commission of an offence by the perpetrator.

While this extended notion of "accessories" is acceptable, there is one serious objection to the continued use of the term "principal" to denote the perpetrator. In the civil law (the law of contract and tort), where A directs B to do something on his behalf, A, the commander, is called the principal and B, the doer, his agent. It seems unfortunate to call B the principal in criminal law, when he is the agent in

[1] Joseph Rudyard Kipling, *Tomlinson*, *The Collected Poems of Rudyard Kipling*, (Chatham: Wordsworth Editions Ltd., 1994) (first published in 1891) at 375.

[2] In our own law, it dates back at least 800 years. See the *Principal and Accessory Act 1275* (1275 (3 Edw. 1) C A P. XIV); Andrew Horne, *The Mirrour of Justices*, (London: Imprinted for Matthew Walbanke, 1646), (translated into English by W. H. of Gray's Inn) at Ch. I., Sc. 13. (The Mirrour of Justices was first published in 1328 in old French: the original manuscript is in the Parker Library, Corpus Christi College, Cambridge (manuscript identifier CCCC MS 258)); Sir William Staunford, *Les Plees del Coron*, (London: by Rychard Tottel, 1567) at 41; Bracton recognised the doctrine of complicity before the year 1268. See Henrici de Bracton, *De Legibus et Consuetudinibus Angliae*, (Cambridge MA: Belknap Press of Harvard University Press, 1968) Vol. II at 392.

[3] Glanville Williams, *Criminal Law: The General Part*, (London: Stevens & Sons, 2nd edn., 1961) at Chap. 9. See also Law Com., *General Principles, Parties, Complicity and Liability for the Acts of Another*, Working Paper 43 (London: H.M.S.O. 1972).

[4] The word "accomplice" was used chiefly in relation to the rule of evidence that the judge must warn the jury of the danger of convicting on the uncorroborated evidence of an accomplice. Section 32(1) of the *Criminal Justice and Public Order Act 1994* abolished the "requirement whereby at a trial on indictment it is obligatory for the court to give the jury a warning about convicting the accused on the uncorroborated evidence of a person merely because that person is—(a) an alleged accomplice of the accused…"..

civil law.[5] Let it be known, therefore, that the name "perpetrator" is adopted in the present book.[6] The perpetrator means, and means exclusively the person who in law performs the offence. More precisely, the perpetrator is the person who, being directly struck at by the criminal prohibition, offends against it with the necessary *mens rea* or negligence (if either is required). He or she is normally indicated by the wording of the legal rule: In murder, he or she is the person who kills; in burglary, the person who trespasses with the requisite intent; in forgery, the person who makes or uses the forged document.

The perpetrator may do the deed by his or her own hand, or he or she may procure an innocent agent (or set up an instrumentality)[7] to do it. The modern interpretation given to "procurement" means it is no longer conceptualised as a form of complicity, because it has been extended to cover the innocent agent cases.[8] Innocent agency wrongdoing is personal wrongdoing, not derivative or participatory wrongdoing. It does not involve the procurer participating in the crime of another. It involves the procurer using an innocent other to perpetrate the crime herself. Nonetheless, the procured party might also be liable if she or he has been procured to perform the *actus reus* of a strict liability crime.[9]

17–002 A procurer uses a cat's paw to pull his or her chestnuts from the fire. He or she may, for example, get another to make false representations on his or her behalf by concealing facts from her, or she may (keeping more closely to the fable) train a dog to steal meat. When a non-innocent intermediary provides encouragement or assistance, this will be a normal case of accessorial liability.[10] Also, an employer who is vicariously responsible (that is, responsible for his employee) is a perpetrator if the act amounts to an offence, because he or she is regarded as doing the act through his employee (§8–001). So the full definition offered by the Law Commission Working Party on Codification is as follows. I quote it with an addition of my own in square brackets:

[5] A further reason for abandoning the word "principal" in the criminal law is that it is liable to mislead when the older authorities are read. Before the enactment of section 1 of the *Criminal Law Act 1967* an abettor was a principal in felonies and all parties were principals in misdemeanours; since the misdemeanour rules have been generalised, all parties to all crimes are principals on the old terminology, but they were and are not all principals in the first degree (which is what we are now talking about). To abbreviate to "principals," simply, is capable of producing false reasoning.

[6] An incidental advantage of the word "perpetrator" is that it gives the verb "perpetrate"; the word "principal" yields no verb.

[7] See for example, section 31 of the *Offences against the Person Act 1861*, which makes it an offence to "cause to be set or placed, any spring gun, man trap, or other engine calculated to destroy human life or inflict grievous bodily harm." For examples of human instrumentalities, see *R. v. Bannen* (1844) 1 Car. & K. 295; cf. *R. v. Tyler* (1838) 8 Car. & P. 616; *R. v. Bourne* (1952) 36 Cr. App. R. 125.

[8] See *R. v. Millward* (1994) 158 J.P. 1091, where it was held that the procurer was liable as a perpetrator as long as the innocent agent has performed the *actus reus* of the target offence. Since the offence was one requiring *mens rea*, the factual perpetrator of the *actus reus* (the innocent agent) was liable of no offence. The procurer's liability rested on his personal fault and the innocent agent's personal (innocent) acting. *N.B.* Derivative liability hinges on the accessory's participation in the crime of another, not on his or her use of an innocent agent.

[9] *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773.

[10] See *Earl of Somerset's Case* (1616) 14 Jac. 1; 1 St. Tr. 334; *R. v. Cooper* (1835) 5 Car. & P. 533; *State v. Ives* (1995) 37 Conn.App. 40. See also section 66 of the *Serious Crime Act 2007*.

> "(1) A [perpetrator] in an offence is one who, with any necessary fault element, [and possessing any qualification required for the offence,] does the acts constituting the external elements of the offence.
>
> (2) A person does such an act not only when he does it himself but also when he—
>
> (a) acts through an innocent agent; or
>
> (b) is otherwise responsible for the act of another which constitutes an external element of an offence."[11]

Innocent agency will be studied later. At present we are concerned only with the sub-rule (1). The sub-rule as worded by the Working Party did not say, as it should have, that a person cannot be a perpetrator unless she possesses a qualification required for the offence. Bigamy, for example, can be perpetrated only by a married person ("Whosoever, being married, shall marry …"),[12] so if a married man goes through a bigamous ceremony of marriage with a spinster, the spinster cannot be guilty of bigamy as perpetrator, even if she knows of the bigamous character of the ceremony. (In the latter event she is guilty as accessory.)

Two persons may be guilty as joint perpetrators.[13] A part of a crime might be perpetrated by perpetrator A with another part of the crime might be perpetrated by perpetrator B. Thus, in robbery, which involves the two elements of theft and threat, one person might steal while his companion makes the threat of force, and the two are co-perpetrators.[14] Furthermore, an accessory can be liable for a lessor included crime such as where she intentionally assists the perpetrator to perpetrate a theft without knowing the perpetrator is armed and intends to perpetrate a robbery. On these facts, the perpetrator would be liable for robbery and the accessory for theft. The most common form of co-perpetration is where two join in committing an offence so that their respective contributions are indistinguishable. If two ruffians belabour a person about the head and she dies as a result of the combined blows, both are perpetrators of murder/manslaughter. Similarly, if D1 and D2 commit the *actus reus* of an offence jointly and simultaneously they will be joint perpetrators. For example, if D1 grabs V's feet and D2 grabs her hands so that they can jointly and simultaneously cause her death by throwing her over a cliff, they are joint perpetrators of the murder/manslaughter.

17–003 **Suppose Dirk stabs a person while his companion Dastard pinions the person's arms so as to prevent her from defending herself. Are they joint perpetrators of the stabbing?** A perpetrator must herself do the criminal act, apart from the exceptional cases involving an innocent agent. In your hypothetical the criminal act, the act of killing, is the stabbing. Dastard is an accessory.[15] As another example, if D gives V a lethal pill to help V kill herself, V

[11] *Working Paper 43*, *supra*, note 3.

[12] Section 57 of the *Offences against the Person Act 1861*.

[13] *R. v. Bingley* (1821) 168 E.R. 890; *R. v. Kirkwood* (1831) 168 E.R. 1281; *Tyler v. Whatmore* [1976] R.T.R. 83.

[14] Cf. *R. v. Handlen* (2011) 247 F.L.R. 261; *People v. McCoy* (2001) 25 Cal.4th 1111.

[15] A tendency to inflate the category of perpetrators, perhaps because of confusion arising from the old law, is visible in some judicial *dicta*, and is encouraged by Fletcher, who argues that all conspirators become co-perpetrators when the crime is committed. George P. Fletcher, *Rethinking Criminal Law*, (Boston: Little, Brown, 1978) at 634 *et seq*. In many cases where "common purpose"

on taking the pill and dying commits suicide, but D is not guilty as perpetrator of a murder, because she did not do the act of killing. She is an accessory to the self-killing (suicide) by V, and commits a special statutory offence.[16] If on the other hand D stabs V at V's request, and so kills her, she is guilty of murder, as consent is no defence to murder.[17]

17.2. ACCESSORIES

17–004 The courts made accessories liable as a matter of common law, and this was put on a statutory footing by section 8 of the *Accessories and Abettors Act 1861*:

> "Whosoever shall aid, abet, counsel, or procure the commission of any indictable offence, whether the same be an offence at common law or by virtue of any *Act* passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender."

The four verbs used at the beginning of this section are the traditional way of expressing acts of accessoryship, and are still used in indictments (though there is no law compelling them to be used). Any one of the four verbs may be charged,[18]

complicity is made out, there will be an underlying conspiracy, but the conspiracy will not always extend to the collateral crimes perpetrated by a joint perpetrator of the underlying joint criminal enterprise. A person cannot be liable under the "common purpose/joint enterprise" complicity doctrine for the unintended and unauthorised collateral crimes of her co-perpetrator simply because she chose to jointly perpetrate the underlying joint criminal enterprise. Cf. the discussion in *R. v. Handlen* (2011) 247 F.L.R. 261 at 280; *R. v. Anderson* [1986] A.C. 27. See further Dennis J. Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences*, (2016) at Chap. 2 (unpublished manuscript). Furthermore, many cases of standard complicity will not involve any prior conspiracy. *R. v. Kupferberg* (1919) 13 Cr. App. R. 166; *Mohan v. R.* [1967] 2 A.C. 187. See also David Lanham, "Complicity, Concert and Conspiracy," [1980] 4 Crim. L.J. 276 at 286–288.

[16] Section 2 of the *Suicide Act 1961*. In some jurisdictions "justifiable" physician assisted euthanasia has been decriminalised, see *Baxter v. State*, 224 P.3d 1211 (2009); see also *State v. Melcher-Dukel* (2015) 844 N.W.2d 13, where in the Supreme Court of Minnesota, Anderson J. held, *inter alia*, that: (1) "a statute prohibiting person from advising or encouraging another in committing suicide was unconstitutionally overbroad content-based restriction on speech; and (2) the unconstitutional portion of statute prohibiting person from advising or encouraging another in committing suicide was severable from non-offending portion of statute prohibiting person from assisting another in committing suicide." See also section 2 of the *Female Genital Mutilation Act 2003*, which contains an offence of assisting a girl to mutilate her own genitalia (a non-fatal offence against the person). In *Carter v. Canada (Attorney-General)* [2015] S.C.C 5 at para. 126, the Supreme Court of Canada held: "We have concluded that the laws *prohibiting a physician's assistance in terminating life* (*Criminal Code*, s. 241 (b) and s. 14) infringe Ms. Taylor's s. 7 rights to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice, and that the infringement is not justified under s. 1 of the Charter. To the extent that the impugned laws deny the s. 7 rights of people like Ms. Taylor they are void by operation of s. 52 of the *Constitution Act, 1982*. " [Emphasis added].

[17] See *People v. Minor* (2010) 898 N.Y.S.2d 440, where D was convicted of murder because he "actively participated in an act causing the victim's death by allegedly holding the butt of a knife against a steering wheel while the victim repeatedly lunged himself forward onto the knife". On the limits of consent, see Dennis J. Baker, "The Moral Limits of Consent as a Defence in the Criminal Law," (2009) 12 *New Crim. L.R.* 93.

[18] Each word was said in *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773 at 779 to have a different meaning. In *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. 653 at 678 "aid" and "abet" were said to be synonymous; but see *id.* at 698.

or all four may be charged together (with the conjunctive "and") in the same count. Charging all four is the safest thing to do, because the shades of difference between them are far from clear.[19]

17–005 **Will I be liable as an accessory, if I counsel someone to commit a crime and she does not do it?** You will not be an accessory, because the law of complicity requires the anticipated target crime to be perpetrated or attempted.[20] However, depending on your culpability, you might be guilty of an inchoate crime for trying to encourage another to commit a crime.[21]

17–006 **Can the accessory be tried by herself?** Yes, but as a practical matter, it is highly desirable that all the alleged parties to a crime should be indicted and tried together, as they can be.[22] When they are jointly charged, a court is rarely well advised to consent to an application for separate trials. Still, if it is only possible to charge the accessory (*e.g.*, because the perpetrator has escaped), there is no legal objection to it.[23] Of course, the prosecution must establish the commission of the crime just as if the perpetrator were before the court.[24]

Let us consider a few details of evidence. Suppose the perpetrator has already been convicted. The conviction is not evidence against the alleged accessory to show that the offence was committed. It is *res inter alias acta*.[25]

17–007 **Can the accessory be tried by herself, if the alleged perpetrator has already been acquitted?** The acquittal will probably not bar the subsequent trial of the accessory, if the prosecution's acquittal was merely the result of a lack of evidence against the perpetrator, or some other special ground which does not apply when the accessory comes to be charged.[26]

17–008 **Suppose that D2 counsels D1 to commit a crime, and D1 complies. D2 confesses but D1 does not.** D2's confession is admissible in evidence against her but not against D1; consequently, the case against D1 may break down for

[19] J.C. Smith, "Aid, Abet, Counsel or Procure," in P. R. Glazebrook (ed.), *Reshaping the Criminal Law: Essays in Honour of Glanville Williams*, (London: Stevens, 1978) at 120 *et seq.*

[20] *R. v. Dunnington* [1984] Q.B. 472. Cf. *Franze v. The Queen* [2014] V.S.C.A. 352.

[21] See sections 44–46 of the *Serious Crime Act 2007*.

[22] *R. v. Sanghera* [2012] 2 Cr. App. R. 197 at 209. See also section 5 of the *Indictments Act 1915*.

[23] *R. v. Gnango* [2012] 1 A.C. 827.

[24] Cf. *Dick v. R.* [1958] 1 W.L.R. 1050.

[25] *R. v. Gregory* (1846) 8 Q.B. 508 at 511; *Turner's Case* (1832) 1 Lewin 119; *Hui Chi-Ming v. R.* [1992] 1 A.C. 34; *R. v. Hassan* [1970] 1 Q.B. 423 at 426. The Latin expression means "a thing done between others". See also *Commonwealth v. Shrope* (1919) 107 A. 729 at 730; *Blakeley v. Bradley* (1955) 281 S.W.2d 835 at 839.

[26] *R. v. Hughes* (1860) Bell 242; *R. v. Cooper* (1909) 1 Cr. App. R. 88; *R. v. Burke* [2006] EWCA Crim. 3122; *R. v. Humphreys* (1966) 130 J.P. 45; *R. v. Andrews Weatherfoil Ltd.* [1972] 1 W.L.R. 118; *R. v. Davis* [1977] Crim.L.R. 542; *Remillard v. R.* (1921) 62 S.C.R. 21; *Warren v. The Queen* [1987] W.A.R. 314; *R. v. Tyler* (1838) 8 Car. & P. 616; *R. v. Bourne* (1952) 36 Cr. App. R. 125; *R. v. Manley* (1844) 1 Cox C.C. 104; *People v. Hallett* (1979) 419 NYS2d 397; *State v. Lord* (1938) 42 N.M. 638, 84 P.2d 80; *State v. McAllister* (1978) 366 So. 2d 1340. See also Sir Matthew Hale, *The History of the Pleas of the Crown*, (London: Printed by E. and R. Nutt *et al.*, 1736) Vol. 1 at 334; William Hawkins, *A Treatise of the Pleas of the Crown*, (London: Printed by E and R Nutt, *et al*, 1734) at Chap. 29, Sect. 11. Cf. *Eden v. Whally's Case* (1553) 1 Dyer 88.

lack of evidence, but that is no reason why D2 should not be convicted on her confession.[27] Similarly, if D1 is acquitted on some procedural ground, it is still possible to convict D2.[28]

The distinction between perpetrator and accessories does not, in law, control the punishment. Accessories are subject to the same maximum as that laid down by law for the perpetrator. On conviction of murder they are subject to the mandatory life sentence.[29] Except in murder, the court may of course differentiate between the accomplices in sentencing.[30] The accessory may get more punishment than the perpetrator, as when she is the mastermind behind the crime; or she may get less, as when a stupid youth plays a subordinate part in a scheme initiated by another.[31] That is a matter for the judge or magistrates. But the sentencing judges will be constrained by the tariffs for the given offence, remember if you assist a robbery, you will be convicted and sentenced as a robber, so a judge's sentencing discretion does not allow him or her to label the offence as something it is not, or impose a sentence which is below the absolute minimum for robbery and so on.[32] (One of the objections to the fixed penalty for murder is that the judge is not allowed to differentiate the sentence in this case.)

17–009 **What if the prosecutor cannot be certain before the trial, or the jury cannot be certain at the trial, which of several people who were in cahoots with one another was the perpetrator and which were the accessories?** If the Crown is only able to demonstrate that either D1 or D2 committed the offence, then both have to be acquitted.[33] In this situation, the Crown is unable to prove that D was actually assisted or encouraged. But, if it can be proved that one of them had to be the perpetrator and the other the accessory, and *vice versa*, then they will both

[27] Cf. *R. v. Fuller* [1998] Crim. L.R. 61.

[28] This is borne out by certain old authorities and now seems clear since the decision of the House of Lords in the conspiracy case of *D.P.P. v. Shannon* [1975] A.C. 717. See also *R. v. Zaman* [2010] 1 W.L.R. 1304. It has been held in other cases that a person can be convicted as accessory although the alleged perpetrator is shown to have a personal defence. See the cases in the preceding footnote.

[29] The sentencing judge would have some discretion if the accessory were charged with one of the new inchoate offences of "encouraging" and "assisting" found in sections 44–46 of the *Serious Crime Act 2007*, but not if the prosecution uses its discretion to charge under *Accessories and Abettors Act 1861*. See Dennis J. Baker, "Complicity, Proportionality and the Serious Crime Act", (2011) 14(3) *New Crim. L.R.* 403.

[30] *R. v. Height* [2009] 1 Cr. App. R. (S.) 117.

[31] *R. v. Fisher* [2012] EWCA Crim. 794.

[32] Section 8 of the *Act of 1861* provides that the assister/encourager is "liable to be … punished as a principal offender". The sentence for robbery may vary depending on the facts, but it does have a minimum threshold. See *R. v. Roe* [2010] All E.R. (D) 228.

[33] *King v. The Queen* [1962] A.C. 199; *R. v. Abbott* [1955] 3 W.L.R. 369; *R. v. Richardson* (1785) 168 E.R. 296; *R. v. Luck* (1862) 176 E.R. 217. So, if it is only known that one or other of two people perpetrated the offence, and it is not clear that the other (whichever it was) helped her, neither can be convicted. (But they might be charged with an alternative offence if there is one available. see *R. v. Hopkinson* [2014] 1 Cr. App. R. 22. But *Marsh v. Hodgson* [1974] Crim. L.R. 35 holds that in some cases an evidential burden lies on each person present to negative complicity (husband and wife jointly in charge of a child who was intentionally injured by one or the other of them). Cf. section 5 of the *Domestic Violence, Crime and Victims Act 2004*. See also *R. v. Lane* (1986) 82 Cr. App. R. 5; *R. v. Ikram* [2009] 1 W.L.R. 1419; *Collins v. Chief Constable of Merseyside* [1988] Crim. L.R. 247.

be liable.[34] In contemplation of law, both the perpetrator and the accessories "commit" the offence, and thus accessories can be charged and convicted as perpetrators and *vice versa*—because the law deems them all to be perpetrators.[35]

An indictment may allege that the defendant D2 on the blank day of blank *murdered* V, instead of alleging (as the fact is) that he or she counselled and procured D1 to murder V, or aided and abetted D1 to murder V. This saves the prosecution and the jury from embarrassment if it is not clear who perpetrated the offence and who incited or helped.[36]

Are you telling me that the legal distinctions between perpetrator and accessories have been wiped out? That is a tempting view, but it is not quite right. One can "commit" an offence as a perpetrator or "commit" it as an accessory, but the two forms of legal commission remain distinct. 17–010

- The chief distinction is that, as will be shown, the mental element for the accessory is not necessarily the same as for the perpetrator.
- Someone must be proved to have been the perpetrator; there cannot be an accessory without a perpetrator. This rule seems to have been qualified (17–018), but it has not been entirely abolished.
- The distinction is also relevant to the problem on self-manslaughter[37] discussed in 26–013.

You said that a husband can be an accessory to a rape on his wife.[38] Can a woman commit rape, as accessory to rape by a man? Certainly.[39] A person can be guilty as accessory although she could not commit the crime as perpetrator. Where a woman uses a male "innocent agent" to rape a women (*i.e.*, in the forced prostitution cases),[40] she will be charged under section 4 of the *Sexual Offences Act 2003* for causing a person to engage in sexual activity without consent. 17–011

Reverting to the procedural point, although the wording of the charge generally does not matter; it is customary and wise for the prosecution to charge the perpetrator and accessories in appropriate terms where the evidence is clear.[41]

[34] *R. v. Montague* [2013] EWCA Crim. 1781; *R. v. Giannetto* [1997] 1 Cr. App. R. 1; *Mohan v. R.* [1967] 2 A.C. 187; *Smith v. Mellors* (1987) 84 Cr. App. R. 279; *R. v. Swindall* (1864) 175 E.R. 95; *R. v. Towle* (1816) Russ. & Ry. 314; *R. v. Moore* (1784) 1 Leach 314; *Salisbury's Case* (1553) 1 Plow. 97; see also Glanville Williams, "Which of You Did It," (1989) 52 *Mod. L. Rev.* 179.

[35] Section 8 of the *Accessories and Abettors Act 1861*; section 44 of the *Magistrates' Courts Act 1980*.

[36] Cf. the approach taken in *Alston v. State* (1994) 662 A. 2d 247.

[37] It is no longer a crime to commit suicide. The abrogated crime of suicide was summed up in the Latin term *Felonia de se* or *felo de se*: "felon of himself". In our ancient common law, an adult who committed suicide was deemed to be a felon, and the crime was punishable by forfeiture of property to the king. See *Lady Margaret Hales v. Petit* (1561) 1 Plow. 253 at 258–260; *Foxley's Case* (1600) 5 Co. Rep. 109 at 110b; *Anonymous Case* (1397) Jenk. 65; *R. v. Russell* (1832) 1 Mood. 356.

[38] *R. v. Lord Audley* (1631) 3 St. Tr. 401.

[39] *R. v. Ram* (1893) 17 Cox C.C. 609; *Lord Baltimore* (1768) 98 E.R. 136; *D.P.P. v. K* [1997] 1 Cr. App. R. 36; cf. *R. v. Eldershaw* (1828) 172 E.R. 472.

[40] Cf. *R. v. LM* [2011] 1 Cr. App. R. 136.

[41] The high desirability of this was emphasised in *D.P.P. of Northern Ireland v. Maxwell* [1978] 1 W.L.R. 1350.

The statement of the offence will give the name of the crime, but the particulars of the offence should, when possible, state that the defendant is charged with having aided, abetted, counselled or procured the crime, if such be the fact. In bigamy, for example, where a married man has married a spinster who knows the bigamous nature of the ceremony, the spinster is an accessory and can be convicted of "bigamy," but it would be absurd for the particulars of the offence to charge her of that, being married, she has married again. In a case like this the accessory should be charged in express terms as accessory.[42]

Although the four traditional verbs are still used, the language is antiquated. This might be simplified into two words. "Aiding and abetting"[43] could be interpreted as "assisting", and "counselling and procuring" could be interpreted as "encouraging". This simplified language will be used in the present book. However, the concept of "procure" has been given an extended meaning; it has been used to hold a person responsible for "causing" another to commit the *actus reus* of an offence. In cases requiring fault, the "procurer" has been held to be the "perpetrator".[44]

17–012 **Does the rule that ignorance of the criminal law is no defence apply to accessories?** Yes.[45] In this application the rule is very severe. The perpetrator of one of the innumerable offences in relation to business or some other specialised activity such as driving can reasonably be expected to acquaint herself with the law relating to it. But she may use the services of many other people: suppliers, repairers, carriers, consultants, accountants, and so on. It is remarkable that they, too, are expected to learn the specialised law of all their customers and clients.

Before we start to examine the substantive fault and conduct elements in the law of complicity, it is worth pointing out that the courts have developed two doctrines of complicity. There is the standard case of complicity, which rests on simply factual encouragement and/or assistance only. In addition, there is common purpose/joint enterprise complicity, which rests on implied or express encouragement. Common purpose complicity differs from standard complicity, because it is only made out where the factual encouragement results from the accessory recklessly or intentionally authorising the perpetrator's collateral crimes for the purpose of making an underlying joint criminal enterprise succeed. The first part of this Chapter will consider the general principles of complicity liability in relation to "standards complicity". In the latter part of this Chapter, I shall apply those principals to common purpose complicity.

[42] But even if the indictment was glaringly at fault a conviction may be upheld on appeal. See *R. v. Cogan* [1976] Q.B. 217 at 224.

[43] The word "abet" comes from Old French abeter, meaning to lure on, entice; from beter to bait. Thus, in the older authorities it was used to refer to encouragement. However, in recent times courts have tended to use abet and aid interchangeably.

[44] *R. v. Millward* (1994) 158 J.P. 1091. Cf. the position when the offence is a no fault (strict liability) offence. *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773. In the case of strict liability, there is still derivative liability since the perpetrator's innocence is of no relevance in a strict liability offence. Thus, the perpetrator is a guilty agent, not an innocent agent, because she is strictly liable for the strict liability offence, which means the procurer will be liable as an accessory.

[45] *Johnson v. Youden* [1950] 1 K.B. 544. See also *R. v. Sterecki* [2002] EWCA Crim. 1662.

17.3. ENCOURAGEMENT AS THE CONDUCT ELEMENT IN STANDARD COMPLICITY

The word "encouragement" generally speaks for itself, but includes express encouragement and advice, general incitement, implied or express authorisation[46] and persuasion by threats.[47] (The phrase used in the old books was "counsel, procure or command".)[48] Encouragement may be given expressly or may be implied from conduct.[49] So if a gang of rowdies proceed along a street, some members of it damaging property as they go, the others will very likely be found to have encouraged them by remaining part of the mob and moving with it.[50] They will therefore be accessories, and all the mob can be charged with the offence without the prosecution being under the necessity of identifying the perpetrators.[51] 17–013

Suppose D3 encourages D2 to procure D1 to commit a crime, and all works out according to plan. Is D3 a party to the crime? Certainly. She has encouraged at one remove. Encouraging another to encourage a third person to commit an offence also will be caught by section 66 of the *Serious Crime Act* 17–014

[46] For authorisation see *Derrick v. Cornhill* [1970] R.T.R. 341. Encouragement by implied authorisation of a crime that is collateral to some underlying joint criminal enterprise has been the basis of complicity liability in a long line of "common purpose/joint enterprise" complicity cases. See for example, *R. v. Macklin* (1838) 2 Lewin C. C. 225; *R. v. Betts and Ridley* (1931) 22 Cr. App. R. 148 at 153–156; *R. v. Appleby* (1943) 28 Cr. App. R. 1; *R. v. Grant* (1954) 38 Cr. App. R. 107; *The Three Soldiers Case* (1697) Fost. 353; *R. v. Short* (1932) 23 Cr. App. R. 170 *per* Lord Chief Justice Hewart, MacKinnon and Hawke J.J.; *R. v. Spraggett* [1960] Crim. L.R. 840; *R. v. Smith* [1963] 1 W.L.R. 1200 at 1203 *per* Slade J. (Hilbery, Ashworth, Melford Stevenson and Veale J.J. concurring); *R. v. Cramp* (1880) 14 Cox C.C. 390 at 393 *per* Denman J.; *R. v. Surridge*(1942) 42 S.R. (N.S.W.) 278 at 282 *per* Jordan C.J.; *R. v. Dunn* (1930) 30 S.R. (N.S.W.) 210 at 214 *per* Ferguson J. (Street, C.J. concurred in a separate judgment) (James J. also concurred); *R. v. Dorrey & Gage* [1970] 3 N.S.W.L.R. 351 at 353; *R. v. Adams* (1932) V.L.R. 222 at 223–224 *per*Mann J.; *R. v. Kalinowski* (1930) 31 S.R. (N.S.W.) 377 at 380-381 *per* Davidson J.; *R. v. Dowdle* (1901) 26 V.L.R. 637 at 639-641 *per* Williams J.; *R. v. Surridge* (1942) 42 S.R. (N.S.W.) 278 at 282-283 *per* Jordan C.J.; *R. v. Grand* (1903) 3 S.R. (N.S.W.) 216 *per* Stephen, A.C.J., Owen and Simpson J.J.

[47] In *R. v. Gnango* [2012] 1 A.C. 827, the accessory encouraged the perpetrator by is conduct of attempting to kill the perpetrator. See also *Race Relations Board v. Applin*[1973] Q.B. 815 at 825; Sir Edward Coke, *Second Part of the Institutes of the Laws of England*, (London: W. Rawlins, 1681) at 182.

[48] Some of the older statutes use the verb "move" instead of the verb "encourage," see section 3 of the *Treason Felony Act 1848*, which makes it an offence "to move or stir any foreigner or stranger with force to invade the United Kingdom …" Dalton uses the word "mover" with respect to encourager. Dalton writes that a person is an accessory to a crime "if he were either a Procurer, or Mover or Aider, Comforter or Consenter thereto." He goes on to use the words: "command, procure, move, aid, or consent thereto." See Michael Dalton, *The Country Justice*, (London: Printed by William Rawlins et al., 1697) at 396. *It is arguable that the concept of* "move" *requires the encouragement to be a factual motivator. It need not be the sole motivator, but it must be a more than negligible motivator.*

[49] An example of implied encouragement was suggested in *Drake v. Morgan* [1978] I.C.R. 56 (agreeing to indemnify against a fine for a future offence). Cf. *State v. Conde*, (2001) 787 A.2d 571.

[50] See *R. v. Gnango* [2012] 1 A.C. 827, where D2 by his conduct encouraged D1 to try to kill him. See also *R. v. Young* (1838) 8 Car. & P. 644; *R. v. Swindall* (1846) 2 Car. & K. 230 *per* Pollock C.B. and the cases discussed in Dennis J. Baker, "Liability For Encouraging One's Own Murder, Victims, and Other Exempt Parties," (2012) 23(3) *King's L.J.* 256.

[51] Cf. *Macklin and Murphy's Case* (1838) 168 E.R. 1136.

2007. Furthermore, if the third party fails to even attempt to perpetrate the anticipated target crime, section 66 will still apply.[52] If the third party at least attempts[53] to perpetrate the anticipated target crime, it could be prosecuted under either the *Accessories and Abettors Act 1861* or *the Serious Crime Act 2007*.

17–015 **Can a person encourage an indefinite series of crimes?** A person who exhorts another to commit a series of crimes will become an accessory to all of them when they are committed; but common sense is needed in applying this rule. If D2 persuades D1 to commit a series of murders for a political object, D2 will be inculpated in each of them. However, the position is surely different if D2 merely encourages D1 in his or her general criminal tendencies,[54] or even in the commission of crimes of a particular kind—as if he or she advises D1 that burglary affords a good opening. It would be too severe to say that such general encouragement makes D2 a participant in every crime that is thereafter committed by D1 within the terms of the encouraging words. There must be an element of particularity in the crime that is counselled in order to make the counsellor a party.[55]

17–016 **Need there be an element of particularity in the people who are encouraged? What about an appeal to the general public to murder all members of the Cabinet?** Presumably the putative accessory must have communicated with an individual (or group of nameable individuals). She will not be an accessory to crimes committed by random members of the public. A person who incites the public generally to commit a particular crime such as murder is guilty of encouragement of murder as an inchoate crime,[56] but no case decides that he or she becomes an accessory to random murders that might or might not have been carried out in consequence of his or her encouragement. In common sense, there is a difference between "encouragement" as an inchoate crime (which is fully committed as soon as the encouragement is uttered as long as the encouragement was capable of encouraging someone within the target audience[57]) and encouragement as making a person accessory to crime when it is committed or attempted.

17–017 **Does the defendant's conduct have to in fact encourage the perpetrator to perpetrate the anticipated target crime?** There must be factual encouragement,[58] because complicity liability is derivative liability. The accessory's

[52] Cf. *R. v. Bodin* [1979] Crim. L.R. 176; *R. v. Sirat* (1986) 83 Cr. App. R. 41; *The King v. Macdaniel* (1755) 168 E.R. 60 at 62; *Earl of Somerset's Case* (1616) 14 Jac. 1; 1 St. Tr. 334; *State v. Ives* (1995) 37 Conn.App. 40.

[53] *R. v. Dunnington* [1984] Q.B. 472. Cf. *Franze v. The Queen* [2014] V.S.C.A. 352.

[54] *R. v. Bainbridge* [1960] 1 Q.B. 129.

[55] Cf. *R. v. Bainbridge* [1960] 1 Q.B. 129; *Sadique v. R.* [2013] EWCA Crim. 1150; *D.P.P. of Northern Ireland v. Maxwell* [1978] 1 W.L.R. 1350; *R. v. Yanover (No. 1)* (1985) 20 C.C.C. (3d) 300.

[56] See generally, sections 44–46 of the *Serious Crime Act 2007*.

[57] Baker, *op. cit. supra*, note 15 Chap. 4.

[58] *R. v. Atkinson* (1869) 11 Cox C.C. 330; *R. v. Stally* [1959] 3 All E.R. 814; *The Queen v. Coney* (1881–82) L.R. 8 Q.B.D. 534, *per* Denman J., Huddleston B., Manisty, Hawkins, Lopes, Stephen, Cave, and North JJ. (Lord Coleridge C.J., Pollock B., and Mathew J., dissenting); *R. v. Allen* [1965] 1 Q.B. 130 *per* Edmund Davies J. (Marshall and Lawton J.J. concurring); *R. v. Clarkson* [1971] 1

liability does not merely hinge on the fact that someone she has associated with perpetrates a crime, but on the fact that she has factually participated in that crime. The accessory can only be liable in a derivative sense when she has in fact participated in the perpetrator's crime. If there is no factual participation, then the accessory is not liable under the *Accessories and Abettors Act 1861*.[59] Attempted participation is criminalised under sections 44–46 of the *Serious Crime Act 2007*. Under the *Act of 1861*, an accessory can be liable for factually participating in the perpetrator's criminal attempts,[60] but she cannot be liable where the perpetrator does not even attempt to perpetrate the anticipated target crime, because there is nothing for her liability to derive from. Under the *Serious Crime Act 2007*, the perpetrator is liable if her act was capable of encouraging the perpetrator to perpetrate the anticipated target crime. Thus, if a person uses social media to encourage the world at large to riot,[61] she would liable under the *Act of 2007* on the basis that such encouragement is "capable" of encouraging a likeminded person in the general population to riot.[62]

17–018 **Is the accessory's mere presence at the scene of the crime sufficient for a jury to infer encouragement by conduct?** Factual encouragement cannot be inferred from the putative accessory's mere presence at the scene of the crime; but mere presence considered along with the putative accessory's relation to the perpetrator[63] and the putative accessory's actions before, during, and after the commission of the crime, might be enough to allow the jury to infer factual encouragement.[64] Furthermore, as we will see below, a passive bystander can be liable where she has a duty to act and her omission is aimed at encouraging the perpetrator to perpetrate the anticipated target offence.[65]

W.L.R. 1402 *per* Megaw L.J. (Geoffrey Lane and Kilner Brown J.J. concurring); *R. v. Jones* (1977) 65 Cr. App. R. 250 at 252; *R. v. Bryce* [2004] 2 Cr. App. R. 592 at 611 *per* Potter L.J (Hooper and Astill J.J. concurring). In *Hutt v. R.* [1989] T.A.S.S.C. 27 at para. 53, Cox J. (Underwood, Crawford J.J. concurring) said: "In the circumstances of this case an error of law occurred by reason of the omission to tell the jury that … there had to be proof to the requisite degree that the *principal offender was in fact encouraged* by the conduct of the accused to commit the crime." In *Re Lingam Ramanna* (1880) I.L.R. 2 Mad. 137 it was said: "The supplying of food to a person about to commit a crime is not necessarily an abetment of the crime. Abetment [involves] intentional aid in the doing of a thing; and a person is said to aid the doing of an act, who either prior to, or at the time of, the commission of the act does anything in order to facilitate the commission of that act and thereby facilitates it."

[59] Baker, *op. cit. supra*, note 15 at Chap. 4.

[60] *R. v. Dunnington* [1984] Q.B. 472; *R. v. Hapgood* (1870) L.R. 1 C.C.R. 221; *R. v. Clayton* (1843) 1 Car. & K. 128; *R. v. Williams* (1844) 1 Car. & K. 589. Cf. *Franze v. The Queen* [2014] V.S.C.A. 352.

[61] *R. v. Blackshaw* [2012] 1 W.L.R. 1126.

[62] Baker, *loc. cit. supra*, note 50.

[63] However, a prior friendship or relationship between the perpetrator and the putative accessory alone is not enough to ground complicity liability. See *People v. Peterson* (1995) 652 N.E.2d 1252 at 1260; *Carter v. United States* (2008) 957 A.2d 9.

[64] *The Queen v. Coney* (1881–82) L.R. 8 Q.B.D. 534; *R. v. Allen* [1965] 1 Q.B. 130; *R. v. Clarkson* [1971] 1 W.L.R. 1402. In *Diggs v. State* (2013) 213 Md.App. 28 at 83 Kehoe J. said: "The mere presence of the defendant at the time and place of the commission of the crime is not enough to prove the defendant aided and abetted. But if presence is proven, it is a fact that may be considered, along with all the surrounding circumstances."

[65] See *R. v. Russell* [1933] V.L.R. 59; cf. *State v. Conde* (2001) 787 A.2d 571.

17–019 **What about spectators who supply the demand for a particular illegal performance?** Few performances with spectators are illegal. The most likely instance of illegality is an obscene performance, which is primarily the responsibility of the producer and performers. The question arises whether members of the audience are liable as accessories if they knew the nature of the performance beforehand. This is not a case of mere omission, since the spectators would have knowingly come. Nor is it a case where the illegality would take place independently of the audience. There would be no spectacle if there were no spectators (whether the spectators pay for admission or not). It may therefore seem logical to hold that the spectators are accomplices, just as one who knowingly buys from an illegal seller is potentially an accomplice in the sale.[66] Evidence of acts of encouragement during the performance would not, on this view, be necessary for liability, since in the nature of the case the mere presence of the audience is not only an encouragement but a determining factor.

But this conclusion involves absurdities and would fall afoul of the constraint against remote harms criminalisation.[67] It would be akin to criminalising prostitution use on the rationale that it creates the demand for people to become prostitutes.[68] The courts have held that a spectator does not become an accessory merely by being present with knowledge of what is proceeding;[69] but, the clarity of this rule is marred by judicial expressions of willingness to accept presence as "evidence" of encouragement.[70] In one case it was suggested that spectators of an illegal prizefight would become implicated if they applauded.[71] In *R. v. Giannetto*[72] the Court of Appeal said: "Any involvement from mere encouragement upwards would suffice." Nevertheless, it may be strongly doubted whether either applause or laughter by a *spectator* ought to be taken as extending liability beyond those who put on the performances, however disgusting the affair may be to the right-minded citizen.[73]

A law that seems to require, or at any rate to allow, the police to charge hundreds or even thousands of people as spectators of an event, or as an audience at a seditious lecture, would be unworkable.[74] Moreover, each individual member of the audience may quite reasonably feel that the show does not depend on her;

[66] The incidental party rule would most likely exempt the purchaser. See the discussion *infra*. Cf. *Sayce v. Coupe* [1953] 1 Q.B. 1 at 7–8.

[67] See Dennis J. Baker, "Collective Criminalization and the Constitutional Right to Endanger Others," (2009) 28 *Crim. Just. Ethics* 168.

[68] Some academics favour this sort of remote harm criminalisation. See Michelle M. Dempsey, "Rethinking Wolfenden: Prostitute-use, Criminal Law, and Remote Harm," [2005] Crim. L.R. 444.

[69] *R. v. Coney* (1881–82) 8 Q.B.D. 534; *R. v. Clarkson* [1971] 1 W.L.R. 1402; *R. v. Tait* [1993] Crim. L.R. 538.

[70] In *Wilcox v. Jeffery* [1951] 1 All E.R. 464, there was evidence beyond that of mere attendance.

[71] *R. v. Coney* (1881–82) 8 Q.B.D. 534 at 557 ("actions intended to signify approval").

[72] [1997] 1 Cr. App. R. 1 at 13. The Court of Appeal referred to the following hypothetical: "Supposing somebody came up to D and said, 'I am going to kill your wife', if he played any part, either in encouragement, as little as patting him on the back, nodding, saying, 'Oh goody', that would be sufficient to involve him in the murder, to make him guilty, because he is encouraging the murder." Cf. *R. v. Stringer* [2012] Q.B. 160.

[73] A technical reason for exempting spectators may sometimes be found by attaching a particular construction to the statute under which they are charged. Cf. *Jenks v. Turpin* (1884) 13 Q.B.D. 505. But the question should also be dealt with by a suitable refinement of the law of complicity.

[74] Cf. *Re A.C.S.* (1969) 7 C.R.N.S. 42 at pp. 59–60.

if she does not attend, many others will, and it will still take place. Some members of the audience may attend disapprovingly, to satisfy themselves of the full heinousness of what is being done, or perhaps to get evidence for a prosecution. If attendance at a seditious lecture (*e.g.*, a lecture inciting terrorism and intolerance) involves the audience, then buying a seditious publication would involve the purchaser. The conclusion is intolerable. So the only wise course for the courts is to rule that, as a matter of law, members of the audience are not accomplices by reason of being there, and that neither payment nor applause by them makes them accomplices. The "Incidental Party" defence, discussed at the end of this Chapter, should be invoked in such cases. It should be shown that the accessory's personal act of encouragement alone provided the perpetrator with a more than negligible reason for perpetrating the anticipated target crime. It is not enough to assert that the accessory was a member of a collective that supplied the demand for an illegal performance. This sort of remote encouragement should not be criminalised. Such a law would be too great extension of criminal liability and too great a restriction on individual liberty.[75]

17–020 **Does that also mean that trivial encouragement made from an individual directly to another individual is not sufficient for satisfying the conduct element in complicity?** If the encouragement, when judged objectively in all the circumstances, is too trivial to have been capable of influencing the perpetrator's decision to offend, the jury should not infer that it did in fact influence the perpetrator's decision to offend or that it was capable of influencing the perpetrator's decision to offend.[76] The evidence should be such that a reasonable jury can infer that the encouragement did in fact influence the perpetrator's decision to perpetrate the target crime.[77] In *R. v. Giannetto*, Kennedy L.J. observed: "Supposing somebody came up to [D] and said, 'I am going to kill your wife', if [D] played any part, either in encouragement, as little as patting [P] on the back, nodding, saying, 'Oh goody', that would be sufficient to involve him in the murder, to make him guilty, because he is encouraging the murder." It is doubtful that this sort of trivial encouragement would be capable of

[75] Dennis J. Baker, *The Right Not to be Criminalized: Demarcating Criminal Law's Authority*, (Farnham: Ashgate, 2011) at Chap. 4.

[76] Glanville Williams writes: "[I]s it necessary to show that the words of the accessory really had an effect on the mind of the principal, and played a part in bringing about the crime? … Usually the words directing another to commit a crime can, where the other actually commits the crime, be presumed to have had some effect upon his mind." Glanville Williams, *Criminal Law: The General Part*, (London: Stevens & Sons, 2nd edn., 1961) at 382. Williams suggests that in cases where the evidence is categorical, factual encouragement might be presumed. But this is just another way of saying that it would be pointless for defence counsel to contest the point where the evidence is very strong, because the jury will ultimately infer factual encouragement where the evidence of its existence is very strong. Nonetheless, we need to be careful not to conflate evidential maxims that are used for inferring factual encouragement with the substantive requirement that it be proved beyond reasonable doubt that the encourager's conduct did in fact influence the perpetrator's decision to offend.

[77] *R. v. Bryce* [2004] 2 Cr. App. R. 592 at 611 *per* Potter L.J (Hooper and Astill J.J. concurring.); *R. v. Anderson* [1966] 2 Q.B. 110; *Benford v. Sims* [1898] 2 Q.B. 641 at 642; *R. v. Fretwell* (1862) Le. & Ca. 161. See also the reasoning in *The Vryheid (Admiral De Winter)* (1799) 2 C. Rob. 16.

influencing a person to perpetrate a very serious crime such as murder. If it is not capable of having any factual impact, then a reasonable jury could not infer that it did.

The jury would have to consider all the circumstances. If a person is already intent on committing murder or on committing suicide, then very trivial encouragement could be the tipping point. If "Oh goody" is uttered to someone who is already intending to perpetrate a murder, the jury might infer that it did in fact tip the balance and therefore did in fact play on the perpetrator's mind. The jury might infer that it influenced the perpetrator's final decision in a more than negligible way, but there would have to be firm evidence demonstrating that such an inference was one that a reasonable jury could infer.[78] The better view is that a reasonable jury is likely to infer that this sort of trivial comment made to a person *who is already intent on killing* is not likely to have any additional factual influence. Nor is it likely to be an act of encouragement that is capable of making a difference for the purposes of establishing attempted participation under the *Serious Crime Act 2007*.

17–021 **Need the accessory's factual encouragement be the sole consideration motivating the perpetrator to perpetrate the anticipated target crime?** No, it need only provide the perpetrator with a more than negligible reason for perpetrating the target crime. For example, in *People v. Duffy*,[79] the encourager encouraged the perpetrator[80] to kill himself. A person of normal sensibility would not be persuaded to kill herself merely because someone tells her to kill herself. But in *People v. Duffy*, the perpetrator's circumstances were that he "had been drinking heavily and was in an extremely depressed and suicidal state." It was in these circumstances that the encourager taunted the perpetrator to "put the gun in his mouth and blow his head off." The encourager also knew full well that the perpetrator was intoxicated, depressed and suicidal. A jury would have no difficulty inferring that a person inciting a suicidal person to kill himself is an act that provides the suicidal perpetrator with a more than negligible reason for killing himself.

In *People v. Duffy*, the encourager's encouragement was not the only reason why the perpetrator committed suicide, but it was enough to tip the perpetrator over the edge. Consequently, it was an act that provided the perpetrator with a more than negligible reason for acting as he did. Suicide itself is not a crime, but section 2 of the *Suicide Act 1961* provides: "(1) A person ("D") commits an offence if—(a) D does an act capable of encouraging or assisting the suicide or attempted suicide of another person, and (b) D's act was intended to encourage or

[78] A lot will depend on the circumstances. If a gang member is enraged and is minded to assault rival gangster, then yelling: "Go for it" would be enough to have some factual influence. See *Anonymous*(1829) 1 Lewin 17. At least a jury could infer as much. For a clear case of factual encouragement, see *R. v. Couzins* 1849) 13 J.P. 254.

[79] (1992) 79 N.Y.2d 611. See also *State v. Melchert–Dinkel*(2014) 844 N.W.2d 13; *State v. Lassiter* (1984) 484 A.2d 13; *Ex p. Minister of Justice; in re S. v. Grotjohn* [1970] 2 S.A.L.R. 355; cf. *Vaux's Case* (1592) 4 Co. Rep. 44a.

[80] Suicide is not an offence, so technically it is better to think of the victim as the doer, rather than as a criminal perpetrator.

assist suicide or an attempt at suicide." Notably, section 2 of the *Act of 1961* requires nothing less than direct intention.

17.4. ASSISTANCE

17–022 The accessory's assistance may be given before or during the crime. Examples of assistance given before the crime are supplying tools or materials of crime, imparting the "know-how", driving the get-away car from a robbery, keeping a look-out at a robbery, and opening a bank account in a false name in expectation that a forger will pay into it the proceeds of forged cheques.[81]

Assistance also includes co-operation. So, as was said before, the other party to a bigamous ceremony is an accessory.[82] If a statute forbids the selling of something, a person who buys the thing might be liable as accessory, since there can be no seller without a buyer.[83] However, these sorts of bilateral transactions are almost certainly exempt under the incidental party rule (§17–017). The Law Commission Working Party[84] proposed a partial definition in order to extend "assisting" to cases that clearly need to be covered. (The primary purpose of the Working Party's propositions was to form the foundation of a code, but the propositions are sufficiently close to the present law to make them a useful basis of discussion.) The partial definition is as follows:

Assists includes—

(a) "[A]ssistance given which the perpetrator was unaware;[85] and
(b) conduct of a person which leads the perpetrator to believe when committing the offence that she is being helped or will be helped if necessary, by that person in its commission."

Paragraph (b) (to start with that) is declaratory of the present law.

17–023 Examples are:

- Acting as a look-out. The look-out person is an accessory even though the gang are not in fact disturbed; she is ready to give a warning if necessary, and her presence is a comfort to them.[86]

[81] On the bank account see *Thambiah v. The Queen* [1966] A.C. 37. Contrast, *R. v. Scott* (1979) 68 Cr. App. R. 164; *R. v. Farr* [1982] Crim. L.R. 745, supplying premises for producing drugs, is not in accord with principle. See also *R. v. Brown* [2001] EWCA Crim. 1771.

[82] *R. v. Wheat* [1921] 2 K.B. 119.

[83] *Sayce v. Coupe* [1953] 1 Q.B. 1 at 7–8.

[84] *Working Paper 43*, *supra*, note 3. See also, Law Com., *Assisting and Encouraging Crime*, Consultation Paper No. 131 (London: H.M.S.O., 1993).

[85] And, it may be added, assistance given to a person of whose identity the assister is unaware. On the question whether D2 is an accessory by reason of assistance intended to be given to X but actually used by Y, see J. C. Smith, "Secondary Participation and Inchoate Offences," in C. Tapper (ed.) *Crime, Proof and Punishment*, (London: Butterworths, 1981). See also *State v. Tally*, 15 So. 722 (1894).

[86] *S v. D.P.P.* [2003] E.W.H.C. 2717.

- Manning a get-away car. Here again the driver gives encouragement and psychological assistance even though all the accomplices are arrested before the car can be used.

There is no need to demonstrate that the perpetrator was aware of the accessory's act of assistance, if the assistance has in fact assisted the perpetrator to perpetrate the anticipated target crime. To the extent that McClellan J. suggests, in his judgment in *State v. Tally*,[87] that unused assistance is sufficient, his opinion is wrong. For the putative accessory to be said to have factually participated in the perpetrator's crime, the perpetrator must use the putative accessory's assistance.[88] It is true that the perpetrator need not be aware of factual assistance for accessory to factually participate, but unused assistance is no participation at all. The dissenting opinion of Head J. in *State v. Tally* is the correct view as far as ineffectual assistance is concerned. Attempted assistance has to be prosecuted under one of the offences found in sections 44–46 of the *Serious Crime Act 2007*. It cannot be treated as consummated participation under the *Accessories and Abettors Act 1861*, because there is no factual involvement for the purposes of establishing a factual derivative link. Where the accessory has physically assisted the perpetrator, factual participation will not be an issue; the focus will be on whether accessory acted with the requisite *mens rea*.

It is necessary to establish only that the accessory had the requisite fault for complicity liability when she in fact assisted the perpetrator. The case is different when the putative accessory attempts to *encourage* the perpetrator, because factual encouragement cannot be present when the perpetrator is unaware of it.[89] "There must be an intention to encourage; and there must also be encouragement in fact."[90] Acts of encouragement cannot be encouragement in fact, unless the perpetrator is aware of them and has been partially or fully influenced by them. A person cannot be encouraged by encouragement that never reaches her mind. Attempted encouragement is not consummated encouragement.

17–024 **When is the assistance too trivial to count?** The law of complicity constantly threatens to expand beyond reasonable bounds. One reason for this is the tendency of the courts to apply the rules mechanically, without considering the need to resolve the conflict between the necessary protection of society and the freedom of ordinary people to live their lives without harassment from the criminal law. This happened in *National Coal Board v. Gamble*.[91] The decision, shortly to be stated, was that when the seller of goods knew that the goods would

[87] (1894) 102 Ala. 25 Cf. *R. v. Fred* [2001] Q.C.A. 561, where there was no factual assistance, even though A knew that P planned to kill V. A also hoped P would kill V, but she did nothing to assist or encourage P. See also *Way v. State* (1908) 46 So. 273; *Commonwealth v. Kern* (1867) 1 Brewst. 350.

[88] In *R. v. Bryce* [2004] 2 Cr. App. R. 592 at 611 *per* Potter L.J (Hooper and Astill J.J. concurring) said: "the prosecution must prove: an act done by D which *in fact* assisted the later commission of the offence." [Emphasis added.]

[89] *Hall v. Com.* (1906) 29 Ky. L. Rep. 485, *per contra Bast v. Com.* (1907) 99 S.W. 978.

[90] *R. v. Clarkson* [1971] 1 W.L.R. 1402 at 1407 *per* Megaw L.J. (Geoffrey Lane and Kilner Brown J.J. concurring.)

[91] [1959] 1 Q.B. 11.

overload a lorry in which the buyer intended to drive them away, the seller became a party to the buyer's offence of driving an overloaded lorry.

A literal application of the law of complicity would mean that a filling attendant who fills up a car that she sees has worn tyres or is otherwise unfit for the road becomes a party to the offence of using an unfit car when the customer drives off. If she knows that the driver has no licence or insurance, she is a party to the offence of driving without a licence or insurance. If you help to pull a friend's car out of a ditch so as to put it on the road again, after noticing that it is decrepit to the point of illegality, you too will become a criminal by reason of your friendly act. A barman who supplies a customer 'til she is "over the limit", knowing that she intends to drive home, becomes an accessory to driving with excess alcohol. But is this all really so? Will not, should not, a point be reached at which assistance is too minor, or too much a matter of ordinary business or social practice, to be counted?[92]

17–025 **Couldn't all these assisters be regarded as encouragers, and therefore as encouragers, so that the category of assisters is not needed?** Many assisters can be regarded as encouragers as well, but some cannot be. If D1 goes to D2 and asks for the loan of D2's gun for a robbery, and D2 complies, it is unrealistic to say that D2 has incited or encouraged D1. D2 said nothing by way of incitement or encouragement, but she assisted, and she is an accessory. Again, one who, knowing that a person is going to be murdered, off her own bat lulls the victim's suspicions and directs her to the spot planned for the murder is an accomplice although she did not communicate with the actual murderer.[93] She has purposely assisted.

Another illustration of the same point is *Attorney-General's Reference (No. 1 of 1975)*.[94] A driver was convicted of having an excess of alcohol in his blood, and in order to persuade the court that there were "special reasons" for not disqualifying him from driving he offered evidence that his drink had been surreptitiously "laced" with spirits by a friend. Probably (although the report does not say so) the story was corroborated by his friend; at any rate the friend was then indicted for aiding and abetting the offence, on the basis that he knew that the driver would shortly be driving the car home. (One does not need to be told that the object of the prosecution was to reduce the popularity of the "spiked drink" excuse.) The judge ruled that there was no case to answer, and the Attorney-General referred the question to the Court of Appeal under section 36 of the *Criminal Justice Act 1972*. (Although the prosecution cannot appeal from an

[92] These minor reckless (non-purposive) contributions to the crimes of others should be dealt with, if at all, under sections 44–46 of the *Serious Crime Act 2007*. This would allow for fair labelling and proportionate punishment. Baker, *op. cit. supra*, note 15 at Chap. 6. Surely, if conduct such as kerb-crawling and prostitution is sufficiently harmful to warrant criminalisation, which is doubtful, there is no need to also criminalise the car hire firm for letting the kerb-crawler hire a car for such a purpose; or those who dry clean the prostitute's dress. These activities are so trivial that there is no need for secondary liability. Cf. *R. v. Shaw* [1962] A.C. 220; *Bowry v. Bennet* (1808) 170 E.R. 981; *Lloyd v. Johnson* (1798) 126 E.R. 939. See also Joshua Dressler, "Reforming Complicity Law: Trivial Assistance as a Lesser Offense", (2008) 5 *Ohio St. J. Crim. L.* 427; Robert Weisberg, "Reappraising Complicity", (2001) 4 *Buff. Crim. L. Rev.* 217.

[93] *People v. Delgado* (2013) 56 Cal.4th 480 at 487; *R. v. Deemal-Hall* [2005] Q.C.A. 206.

[94] [1975] Q.B. 773.

acquittal on indictment, this procedure allows them to obtain a decision of the Court of Appeal that the acquittal was wrong in law, so that the error is not perpetuated in future cases.) It was held that the ruling was wrong, the friend being an accessory because, in the words of the indictment, he "procured" the offence by reason of having caused it.[95]

On its face the decision implies that a person can procure an offence by another when the other is unaware of the procurement; but this may be questioned. "Counsel or procure" in the *Accessories and Abettors Act 1861* and in the indictment should be taken to mean what is here called encouragement, and should presuppose that the counselling or procuring comes to the knowledge of the perpetrator.[96] The indictment in this case had charged the friend in the usual blunderbuss language with aiding and abetting, counselling and procuring the offence, and the proper basis of the decision was surely that the friend had aided and abetted it, not that he had procured it. It was an offence that could be aided, because it was a strict liability offence. If it had not been a strict liability offence, then the law of complicity should not have been applied, as the doer was an innocent agent. Instead, the innocent agency doctrine should have been used to deem that the procurer was the sole perpetrator. Lord Widgery C.J. said:[97]

> "It may very well be … difficult to think of a case of aiding, abetting or counselling when the parties have not met and have not discussed in some respects the terms of the offence which they have in mind."

17–026 That is partly true for encouraging (though an actual meeting is not necessary);[98] but is it at all true for assisting? D1 and V are fighting; D2, without prior agreement, holds V for D1 to punch or kick him. Is this not a clear case of assisting? And did not the defendant before the court in *Attorney-General's Reference (No. 1 of 1975)*[99] also assist the offence by supplying the "material" by which it came to be committed? The offence was one of "strict liability" for the driver, but alcohol was necessary for its commission and the friend supplied the alcohol. It is settled law that a person who supplies the tools or materials of crime can be a party to it.

On the other hand, encouragement means words or conduct operating on the mind of another person and intended to persuade her to adopt a line of conduct. There can be no encouragement that does not come to the knowledge of the person encouraged. The same should be true of "procuring" at any rate where the procuring takes the form of encouraging. If one calls every assisting a "procuring", then it need not come to the perpetrator's knowledge, but such a use of language is not correct.

In *Attorney-General's Reference (No. 1 of 1975)* the defendant gave assistance and so made a factual contribution to the *actus reus* of the offence. (The only special feature of the case was that the assistance caused the person assisted to

[95] Cf. *Blakely v. D.P.P.* [1991] R.T.R. 405; *R. v. Millward* (1994) 158 J.P. 1091.
[96] *R. v. Coney* (1881–82) 8 Q.B.D. 534 at 557–558 *per* Hawkins J; *R. v. Allan* [1965] 1 Q.B. 130; *Hutt v. R.* [1989] T.A.S.S.C. 27 at para. 53.
[97] *Attorney-General's Reference (No. 1 of 1975)* [1975] Q.B. 773 at 779.
[98] *State v. Melchert-Dinkel* (2012) 816 N.W.2d 703; *Miller v. The Queen* (1980) 32 A.L.R. 321.
[99] [1975] Q.B. 773.

commit an offence of strict liability and he was unaware of the fact that he was innocently perpetrating the *actus reus* of that offence.) But no authority holds that the law of complicity extends to a person who causes an offence without encouraging it or assisting in its commission. In so far as *Attorney-General's Reference (No. 1 of 1975)* purports to decide that merely causing an offence can be said to be a procuring of it, it should be regarded as too incautious a generalisation. The decision is supportable, and supportable only, on the ground that the materials of the strict liability offence had been provided, so that its commission had been assisted.

But the drink lacer did not merely provide the materials of the offence. He concealed the fact that what he did caused the offence. If he had not concealed it, he would not have been liable. If I throw a party with plenty of liquid refreshment, I am not my guest's keeper. All I do is to give a party. I am not responsible if my bibulous friends choose to drive home. That is a reasonable view, but it is hard to see how you can avoid responsibility under the law as it stands. Your guests commit an offence in driving home, and you have intentionally supplied the materials for it, and you believed they were going to commit it.[100] In *Blakely v. D.P.P.*,[101] McCullough J. took the view that the *mens rea* of procuring the commission of an offence is made out when the accessory has "an intention to do the act which in fact causes, to a significant extent at least, the commission of the offence by the principal offender, and I do not understand the contrary to be suggested even where the substantive offence is one of absolute liability, as is so here." **17–027**

In *Attorney-General's Reference (No. 1 of 1975)* the Court of Appeal struggled with this question because it sensed the danger of extending the law too widely. Reasons were offered why the ordinary host could not be convicted, but they were somewhat obscure and unconvincing. It was suggested that where the host does not act surreptitiously she may properly leave the guest to make her own decision. But what if the host knows for a fact that the guest is becoming "tiddley" and yet does not withdraw the bottles, as she could legally do? In *The Queen v. Coney*,[102] Hawkins J. said: "Encouragement does not of necessity amount to aiding and abetting, it may be intentional or unintentional, a man may unwittingly encourage another in fact by his presence, by misinterpreted words, or gestures, or by his silence, on non-interference, or he may encourage intentionally by expressions, gestures, or actions intended to signify approval. In the latter case he aids and abets, in the former he does not." But as we will see below, the removal of direct intention/oblique intention as the mental element in complicity means this constraint no longer guards against over-criminalisation in such cases. The Court of Appeal now takes the view that recklessness is sufficient for establishing fault for complicity.[103]

[100] In *Blakely v. D.P.P.* [1991] R.T.R. 405 at 415 McCullough J. said: "It must, at the least, be shown that the accused contemplated that his act would or might bring about or assist the commission of the principal offence: he must have been prepared nevertheless to do his own act, and he must have done that act intentionally."
[101] [1991] R.T.R. 405 at 410.
[102] (1881-82) L.R. 8 Q.B.D. 534 at 557.
[103] *R. v. Bryce* [2004] 2 Cr. App. R. 592; *O'Neil v. Gale* [2013] E.W.C.A Civ. 1554.

CHAPTER 25

LOSS OF CONTROL

"Reason only controls individuals after emotion and impulse have lost their impetus."

Carlton Simon

"Or thus, there is one manner of ignorance which one may overcome, and such excuseth not; and there is another kind of ignorance which one cannot vanquish, and such excuseth whether it come by nature, or by too much passion, or sickness, as of rage."

Andrew Horne[1]

"Passion also may bring it about that deliberation is *skewed*, and so, typically, do obsessions. What is often vaguely discussed under the general heading of *akrasia* is an example, in its most spectacular form, of something different again, deliberation being *decoupled*: the agent deliberates, arrives firmly at a practical conclusion, and straight off intentionally does something different."

Bernard Williams[2]

25.1. THE SCOPE AND RATIONALE FOR THE DEFENCE

Under the ancient doctrine of provocation,[3] when D perpetrated a murder under the influence of provocation, the murder was deemed to be no more than **25–001**

[1] Andrew Horne, *The Booke Called, The Mirrour of Justices*, (London: Matthew Walbancke, 1646) at 198. The *Mirrour of Justices* was first published in 1328 in old French: the original manuscript is in the Parker Library, Corpus Christi College, Cambridge (manuscript identifier CCCC MS 258)).

[2] Bernard Williams, "Voluntary Acts and Responsible Agents," (1990) 10 *Oxford J. Legal Stud.* 1 at 2. [Emphasis in original.]

[3] See Harold A. Snelling, "Manslaughter Upon Provocation," (1958) 31 *Australian L.J.* 790; Glanville Williams, "Provocation and the Reasonable Man," [1954] Crim. L.R. 740; James Fitzjames Stephen, *A History of the Criminal Law of England*, (London: Macmillan, 1883) Vol. III, 63 *et seq.* Cf. Edward Coke, *The Institutes of the Laws of England: Third Part*, (London: W. Lee, 1648) at 55, where Coke said: "There is no difference between murder and manslaughter, but that the one is upon malice aforethought, and the other upon a sudden occasion; and therefore is called Chance-Medley." Chance-medley and provocation operated on the principle that the killing was not murder because there was no premeditation. See Dennis J. Baker, *Reinterpreting Criminal Complicity and Inchoate Participation Offences*, (2016) at Chap. 3 (unpublished manuscript); see also William Lambarde, *Eirenarcha*, (London: Printed by Ralph Newbery, 1588) at 239.

manslaughter only. The old partial defence of "provocation"[4] has been replaced with a new variation of the partial defence named "loss of control."[5] Section 56(7) of the *Coroners and Justice Act 2009* holds that: "A person who, but for [the partial defence of loss of control], would be liable to be convicted of murder is liable instead to be convicted of manslaughter."

The *Coroners and Justice Act 2009* recast the law, largely as a result of recommendations made by the Law Commission.[6] (All references in this Chapter are to this *Act*, unless the contrary is expressed or clearly implied.) If the defence is made out, the killing will be treated as a case of voluntary manslaughter. It is *voluntary* manslaughter because the killer intends to kill or cause grievous bodily harm. Her act of killing is autonomous and intentional. The partial defence is available only after all the elements of the offence of murder are made out.

25–002 **This sounds like a very indulgent defence. What is the rationale for partially excusing provoked killers?** The lawmakers take the view that an enraged or extremely fearful human might be too weak to reflect on her decision to kill. The provoked killer knows she is killing another human being, intends to kill another human being and knows that she is perpetrating a very serious offence, but her severe emotional disturbance supposedly prevents her from reflecting carefully about her choice to kill. The argument is that proper reflection and deliberation would allow her to resist losing control and that in hindsight her decision might be one not to kill. If in hindsight her decision would be one not to kill, then she is not as dangerous as a person who in hindsight would still kill. Nonetheless, it is arguable that those who are prone to lose control at the whiff of provocation pose a greater danger to society and thus should not be excused. In an old case, Tindal C.J. rationalised the defence as follows:

> "[T]he remaining and principal question for … consideration [is] whether the mortal wound was given by the prisoner while smarting under a provocation … so strong, that the prisoner might not be considered at the moment the *master of his own understanding*; in which case, the law, in compassion to *human infirmity*, would hold the offence to amount to manslaughter only: *or whether there had been time for the blood to cool, and for reason to resume its seat*, before the mortal wound was given; in which case the crime would amount to wilful murder."[7] [Emphasis added.]

A person who kills whilst in a state of extreme emotional disturbance as a result of anger or immense fear is not taken to be as blameworthy as a person who murders whilst in a calm state of mind. A lack of careful reflection and deliberation caused by anger or fear has to have a causal connection with D's loss of control. Hence, the rationale for excusing a defendant who has been exposed to

[4] For a detailed study of the former partial defence of provocation see Glanville Williams, *Textbook of Criminal Law*, (Stevens & Sons, 1983) at 524 *et seq*. For its history, see Michael Foster, *Crown Law*, (London: Printed by W. Strahan and M. Woodfall, 1776) at 256; J. Ll. J. Edwards, "The Doctrine of Provocation," (1953) 69 *L.Q.R.* 547; see also *Watts v. Brains* (1599) Cro. Eliz. 778; *R. v. Mawgridge* (1706) Kel. 119. For a discussion of the defence's rationale, see Joshua Dressler, "Rethinking Heat of Passion: A Defence in Search of a Rationale," (1982) 73(2) *J. Crim. L. & Criminology* 421.

[5] Section 56 of the *Coroners and Justice Act 2009*.

[6] Law Commission, *Partial Defences to Murder*, (London: H.M.S.O, Law Com. No. 290 2004); Law Commission, *Murder, Manslaughter and Infanticide*, (London: H.M.S.O., Law Com. No. 304, 2006).

[7] *R. v. Hayward* (1833) 6 Car. & P. 157 at 159.

objective provocation is that the provocation clouds her reasoning and weakens her willpower.[8] She intends to kill and knows it is wrong to kill, but her anger or fear prevents her choices from being fully unfettered.[9] "[I]n the tumult of the passions the voice of reason is not heard."[10] For such a defendant the loss of control "involves an 'emotional state of mind . . . of such a degree as would cause an ordinary [person] to act on impulse without reflection."[11] Conceptually, the partial defence seems to rest on a form of psychological (or normative) involuntarism similar to that which underwrites the defence of duress. The defence is not invoked to assert that D did not intend to kill or cause grievous bodily harm. Nor is it invoked to assert that D's act of killing was a physically involuntary act as it might have been had she operated as an automaton.[12] Rather, it seems to be invoked on the basis that D's act of killing or causing grievous bodily harm was intentional and autonomous, but not fully voluntary because her "will" was weakened.[13] On reflection the defendant might regret acting on impulse. With respect to the moral involuntariness involved in duress, Lord Morris said: "In the calm of the court room measures of fortitude or of heroic behaviour are surely not to be demanded when they could not in moments for decision reasonably have been expected even of the resolute and well disposed."[14]

25–003 Objective provocation does not involve the defendant being forced to perpetrate the murder, but it is a powerful incentive/trigger. When this incentive is combined with the provoked party's immense anger or fear, it is held to be enough to cause her *powers of reflection to diminish*. Nonetheless, there is no science to demonstrate that anger or fear reduce a person's capacity for reflection sufficiently to excuse extreme losses of control,[15] even though it is clear that objective provocation motivates provoked killers. It gives them a reason for killing.

[8] *State v. Hannon* (2005) 703 N.W.2d 498 at 510 *per* Anderson J.

[9] Patricia Greenspan, "Unfreedom and Responsibility," in Ferdinand Schoeman (ed.), *Responsibility, Character and the Emotions*, (Cambridge: Cambridge University Press, 1987) at 63–80. In a wider sense, weakness of will seems to be a defeasible excuse. Cf. David Wiggins, "Weakness of Will Commensurability, and the Objects of Deliberation and Desire," (1979) 79 *Proceedings of the Aristotelian Society* 251; John Bigelow *et al.*, "Temptation and The Will," (1990) 27(1) *American Phil. Q.* 39. More generally, see Ian P. Farrell and Justice E. Marceau, "Taking Voluntariness Seriously," (2013) 54 *B.C. L. Rev.* 1545.

[10] *The Case of Richard Curtis* (1746) 168 E.R. 67 at 68.

[11] *State v. Engelhardt* (2005) 119 P.3d 1148 at 1166.

[12] Cf. *People v. Wu* (1991) 286 Cal.Rptr. 868 at 879.

[13] Compare moral involuntariness in the context of duress. "In using the expression 'moral involuntariness,' we mean that the accused had *no 'real' choice* but to commit the offence. This recognizes that there was indeed an alternative to breaking the law, although in the case of duress that choice may be even more unpalatable—to be killed or physically harmed." [Emphasis added.] *R. v. Ruzic* (2001) 153 C.C.C. (3d) 1 at para. 39 *per* Lebel J.

[14] *D.P.P. for Northern Ireland v. Lynch* [1975] A.C. 653 at 670. Cf. Ronald L. Berger, "Provocation and the Involuntary Act," (1966) 12 *McGill L. J.* 202.

[15] Eric Y. Drogin and Ryan Martin, "Extreme Emotional Disturbance (EED), Heat of Passion, and Provocation: A Jurisprudent Science Perspective," (2008) 36 *J. Psychiatry & L.* 133.

Many intentional killings of are in rage or quarrel, in jealously and revenge. The core emotions involved are anger and fear. Anger[16] clearly comes within the domain of the law of "loss of control," but fear seems to fall in the domain of the law of self-defence or duress. There might be rare cases where fear could cause a person to lose control.[17] For example, a women suffering from battered woman's syndrome[18] might lose control because she is terrified about the prospect of facing a further beating.[19] The new partial defence pays more attention to fear than the old defence of provocation did. A loss of control that results from "anger" provides the defendant with a partial excuse, because she might not have acted as she did if the anger had not prevented her from reflecting properly on her choice to kill. A loss of control that results from "fear" might provide the defendant with an excuse for the same reason, but it might also provide a justification.[20] It is justifiable to the extent that it is *necessary* for the battered woman to kill to prevent herself from being killed or seriously injured.

25–004 **Is loss of control a partial defence when the defendant actually intended to kill?** It has sometimes been thought not.[21] But the law is now clear that the answer is yes.[22] Therefore, the starting point is to establish that the defendant intended to kill the victim or killed the victim as a result of intentionally inflicting grievous bodily harm upon her. Not to start from this premise would be to deem *loss of control* as a special category of manslaughter, rather than to treat it as a partial defence. Defences apply after it has been established that the defendant perpetrated the particular offence. Sometimes it is thought that there is some

[16] See generally, James R. Averill, *Anger and Aggression: An Essay on Emotion*, (New York: Springer-Verlag, 2013) at 104 *et passim*.

[17] *R. v. Jewell* [2014] EWCA Crim. 414, where D was unsuccessful in producing credible evidence to support his claim that fear provoked him to kill. Cf. *Williams v. State* (1996) 675 So.2d 537; *People v. Otwell* (1967) 61 Cal. Rptr. 427.

[18] "Battered woman syndrome was invoked for the first time in a New York case in 1980. See *People v. Powell* (1980) 102 Misc.2d 775.

[19] Elizabeth Sheehy *et al.*, "Defences to Homicide Battered Women: A Comparative Analysis of Laws in Australia, Canada and New Zealand," (2012) 34 *Sydney L. Rev.* 467.

[20] See *People v. Powell* (1980) 102 Misc.2d 775 at 782, where Bruce J. said: "The prospective newly discovered evidence testimony of Dr. Walker would appear to be the defence of justification. It may be that she is asserting the battered woman syndrome under the need for more lenient laws of self-defence where battered women are concerned, such as a jury charge of women's perspective of her perception of danger."

[21] See the confused *dictum* in *Holmes v. D.P.P.* [1946] A.C. 588 at 598 *per* Viscount Simon L.C. Some jurisdictions still hold that: "The evidence must 'reasonably suggest that [the accused] committed the murder in the heat of passion and without an intent to kill." See *Eizember v. State* (2007) 164 P.3d 208 at 236 *per* Limpkin P.J. Similarly, see *United States v. Witt* (2014) 73 M.J. 738 at 764 where it was said: "'An accused cannot be found guilty of premeditated murder if, at the time of the killing, his mind was so confused by anger, rage, sudden resentment or fear that he could not or did not premeditate.'" Often these interpretations turn on the statutory provisions being interpreted by the given court. But in some cases, the courts simply conflate diminished reflective capacity with a negation of *mens rea*.

[22] *R. v. Martindale* [1966] 1 W.L.R. 1564; *Attorney-General of Ceylon v. Perera* [1953] A.C. 200 at 205–206; *Lee Chun Chuen v. The Queen* [1963] A.C. 220; *R. v. Ellis* [2003] EWCA Crim. 3556.

overlap between offences and defences when an excuse blots out or negates the defendant's *mens rea*, but such a theory is conceptually problematic.[23]

25–005 **I can see no case for keeping this defence. It simply excuses hot-blooded intentional killing. If it does not negate intention (even intoxication has to blot out D's specific intention for D to be able to receive a conviction for a lesser basic intention crime),[24] then why not abolish this defence?** It is an anachronism; it belongs in the 17th century. The defence should have been abrogated, but unfortunately it was merely truncated.[25] The great majority of cases show that provoked defendants' losses of mental reflection is not sufficient to warrant a partial defence, because they intend to kill at the moment when they kill and they desire that their victims be killed there and then. In most cases the objectively provoked defendant also intends and desires revenge at the point in time when she kills. However, the cases show that such defendants know full well that they are perpetrating the serious crime of murder when they kill. *Arguably, the gravity of a decision to kill another human being is so great that it would heighten a person's focus and reflection sufficiently to override any loss of reflection flowing from anger and/or fear*. The graver the decision the greater a human reflects and deliberates. A person in a state of anger or fear might not reflect too much before smashing another person's smartphone, but she would reflect (even if that reflection is formed in a matter of minutes or mere seconds) intensely before perpetrating murder.

The graver the decision the greater influence of the *reasons* for restraint.[26] In life there are some areas where we have little discipline, but normally when a

[23] Cf. the diminished capacity cases in the United States. Notably, diminished capacity in the United States covers a wide range of offences and is not merely a partial defence to murder. In extreme cases, D's diminished capacity is such that she lacks *mens rea*. Thus, there is no overlap in such cases as there is a missing offence element. See *State v. Bedford* (2010) 702 S.E.2d 522; *United States v. Rusin* (1995) 889 F.Supp. 1036. For a compendious and compelling discussion of the distinction between offence and defence, see Kenneth Campbell, "Offences and Defences," in Ian Dennis (ed.) *Criminal Law and Justice: Essays from the W.G. Hart Workshop*, (London: Sweet & Maxwell, 1987) at 73 *et passim*; John Gardner, *Offences and Defences*, (Oxford: Oxford University Press, 2007) at 143 *et seq.*

[24] *D.P.P. v. Majewski* [1977] A.C. 443. However, intoxication is a doctrine of inculpation, not one of exculpation. The intoxication blots out D's *mens rea*: it prevents her from forming specific intention, but the doctrine of voluntary intoxication is a doctrine constructive recklessness. When it applies D will be liable for any available basic intention crime.

[25] A number of Australian states have abolished the partial defence, as has New Zealand. For a detailed discussion of those reforms, see Andrew Hemming, "Provocation: A Totally Flawed Defence that has No Place in Australian Criminal Law Irrespective of Sentencing Regime," (2010) 14(1) *U.W.S. Law Rev.* 1; Carolyn B. Ramsey, "Provoking Change: Comparative Insights on Feminist Homicide Law Reform Criminal Law," (2010) 100 *J. Crim. L. & Criminology* 33 at 57 *et seq.*

[26] Long ago, East wrote: "For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect: of a brutal and diabolical malignity than of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation." Edward Hyde East, *A Treatise of the Pleas of the Crown*, (London: printed by A. Strahan, 1803) Vol. I., at 234. Cf. *R. v. Keite* (1696) 1 Ld. Raym. 138. Similarly, Garvey writes: "[t]he akrasia [weakness of will theory: *i.e.* the state of acting against one's better judgment] theory denies the defence to the inadequately provoked actor . . . because his claim to have lost self-control is incredible." Stephen P. Garvey, "Passion's Puzzle," (2005) 90 *Iowa L. Rev.* 1677 at 1735. The High Court of Australia has observed: "it is now well established that the

decision is a major one people reflect carefully and exercise greater discipline. A person might purchase handbags on impulse, but she or he would not purchase a house on impulse. Therefore, it is doubtful that anger and fear could override a person's powers of reasoning *sufficiently* to warrant partially excusing a murder. The common sense of such a proposition seems to have influenced the old authorities on the obsolete "reasonable relationship rule." Generally, that rule influenced determinations of the seriousness of the given provocation, but the authorities suggest judges also thought that no one could possibly lose control and kill where there was no proportionality between the provocation and the act of murder,[27] especially if the victim had been killed in an unnecessarily brutal way.[28] Hence, a brutal killing when measured against rather trivial objective provocation was evidence for allowing the inference that there was no factual loss of control,[29] even though there was objective provocation. In other words, the trivialness of the objective provocation might allow a jury to infer that D's capacity for reflective judgment was not sufficiently impacted to excuse her act of murder.[30]

Hannen J. expounded the old proportionality (reasonable relationship) rule in simple terms when he said: "It must not be a light provocation; it must be a grave provocation; and undoubtably a blow is regarded by law as such grave provocation."[31] A radical change of judicial opinion occurred with the judgments of the House of Lords in *Mancini v. D.P.P*[32] and *Holmes v. D.P.P.*[33] In both these cases Viscount Simon L.C., speaking for the Appellate Committee, stated the requirement of "reasonable relationship" between the provocation and the response. In one sense that had always been the law, but previously it had merely excluded certain affronts from the categories of objective provocation, for example trivial non-insulting insults.[34] Since loss of control is an excuse, the act of killing in loss of control need not be justifiable, it need be excusable only. Therefore, a lack of a reasonable relationship between the provocation and D's act of killing was simply an evidential factor for inferring that trivial forms of provocation could not have in fact caused D to lose control. Most forms of objective provocation would not be sufficient to rob a person of sufficient reflective judgement to impact her decision to kill.[35] *The gravity of a decision to*

question of whether the retaliation is proportionate to the provocation has been absorbed into the application of the ordinary person test." *Pollock v. R.* [2010] H.C.A. 35 at paras. 60–61. Under modern sentencing law, the mode of killing can be considered as an aggravating factor for the purpose of awarding a harsher sentence. See *R. v. Davies-Jones* [2013] EWCA Crim. 2809.

[27] This idea also appears in our ancient law. See *Watts v. Brains* (1599) Cro. Eliz. 778.

[28] East, *loc. cit. supra*, note 26.

[29] Turner asserts it was a maxim "to help the jury to measure the significance of the available circumstantial evidence in their task of deciding whether the killing was or was not" the factual result of provocation. J. W. C. Turner, *Russell on Crime*, (London: Stevens & Sons, 1958) Vol. I at 610.

[30] Cf. *R. v. Ayes* (1810) Russ. & Ry. 166; *R. v. Cobbett* (1943) 28 Cr. App. R. 11.

[31] *R. v. Selten* (1871) 11 Cox. C.C. 674.

[32] [1942] A.C. 1.

[33] [1946] A.C. 588.

[34] Cf. *Bedder v. D.P.P.* [1954] 1 W.L.R. 1119.

[35] *R. v. Workman* [2014] EWCA Crim 575; *R. v. Barnsdale-Quean* [2014] EWCA Crim. 1418.

kill another human being allows the jury to infer that killer must have reflected sufficiently to make her decision to kill fully inexcusable, notwithstanding her loss of control.

25–006 The old reasonable relationship rule was invoked often to draw attention to the methods used to kill. A decision to kill is a decision to kill regardless of the way V is killed.[36] It is true that where the mode of killing is particularly horrific a jury might infer greater deliberation, reflection or planning, but it might also be said that such a killing was so horrific that the defendant clearly lost control. Thus, it adds little to consider the *way* in which the victim was killed. Consider the person who, having gone berserk, kills her tormentor with seventeen stab wounds when one would have been enough. Assuming that one would have mitigated, even though it resulted in death, should a judge direct a jury that they may find seventeen wounds to have been the result of *sufficiently reflective judgement* (non-excusable judgement) for the purposes of denying the defence of loss of control? To the extent that the reasonable relationship rule focused on the way V was killed, its application was criticised by commentators on the grounds that it was inconsistent with the foundation of the defence of provocation, namely that the defendant has lost her self-control. If a person has lost her self-control it may seem inconsistent to require her to have kept her self-control to the extent of being able to *discriminate in the measures she uses to kill*. In contemporary times the old proportionality cases are useful for drawing our attention to the fact that because murdering another human being is grossly disproportionate to most forms of objective provocation,[37] it is arguable that provoked killers, notwithstanding that they kill whilst in a state of lost control, do not in fact lose a sufficiently measurable degree of capacity for reflective judgement to provide them with a partial excuse for murder.[38] Such a theory supports the case for abolishing the partial defence in its entirety.

25–007 **Are you telling me that you are a supporter of abolishing this partial defence?** There is no empirical evidence to support the claim that anger and fear robs person of sufficient capacity for reflective judgement to excuse a decision as grave as one to kill another human. Instead, the evidence suggests that provoked murders are intentional and controlled decisions, even if they become regretted decisions in hindsight. The rationale that the provoked killer could not

[36] The old proportionality cases focused on the way in which D killed V. If the killing was perpetrated in a particularly brutal way, then this was also taken into consideration under the proportionality analysis. For an example of a particularly brutal case where the provocation defence succeeded, see the Australia case of *R. v. Singh* [2012] N.S.W.S.C. 637. In that case, sexual infidelity was accepted as objective provocation and D had his murder conviction reduced to voluntary manslaughter, even though he not only strangled his wife, but also cut her throat at least eight times with a box cutter. Singh received a sentence of 6 years imprisonment only.

[37] It would not be disproportionate where an attacker (V) intends to kill or inflict serious bodily harm upon the provocateur, but the killer (D) could invoke necessary and proportionate self-defence to justify her conduct and thus would not be convicted of any crime.

[38] For powerful arguments for abolition, see Stephen J. Morse, "Undiminished Confusion in Diminished Capacity," (1984) 75 *J. Crim. L. & Criminology* 1 at 33 *et passim*.

control him or herself from *intending* seems rather circular.[39] If you intend to do X and do X intentionally, then you were in full control of doing X.

Most criminality can be linked to a loss of control.[40] The kleptomaniac cannot control herself, nor can the greedy thief who is not a kleptomaniac. The majority of violent offending results from a loss of control: how many criminals regret their criminal violence with the benefit of hindsight? Many I suspect. Coupled with this, the great majority of people are able to control themselves even when they are extremely angry. Many victims of adultery, theft, criminal vandalism, slander, and violence might be very angry when they discover they have been wronged, but they manage to control themselves from inflicting disproportionate harm on their provokers. Hence the defence ought to have been abrogated, because anger/fear and the subsequent absence of cool reflection only deprives the objectively provoked killer of a minute fraction of the mental control to be expected of a normal person. The partial defence of diminished responsibility is more than enough to protect those who lose control because of mental illness. The criminal law should not offer a concession to those who are unable to control themselves from killing simply because they are unable to manage their anger or fear, because they pose a great threat to others. These people are more dangerous than others and the aim of the criminal law is to target these sorts of characters.[41]

25–008 **I agree with your analysis, but the focus is never on the act of killing, it is on the loss of control. So it is not a question of whether the objective provocation would have provoked a normal person to kill, but simply whether it would have provoked a normal person to lose control. Is that not correct?** Yes that is correct, but the focus has also to be on how that loss of control affects D's decision to kill. The current law assumes the loss of control results in D operating with a reduced capacity for reflective judgement and that this has some impact on her decision to kill and thus provides a partial excuse. If we accept that as a sound rationale for the partial defence, then the residual controversy concerns using the normal person test. The use of the person of a normal degree of tolerance and self-restraint in the law of loss of control is problematic. Elsewhere the "reasonable person" test is used to indicate a standard of care required by law. The normal person (or reasonable person) is careful, moral, prudent, calculating and law-abiding. How absurd, then, to imagine that she is capable of losing all control of herself and thereby commits a crime punishable with imprisonment for life! To say that a "normal" person would commit this crime in the same circumstances is hardly less inapt. The reason why provoked homicide is punished is to deter people from committing the offence,

[39] Some states in the U.S. do not recognise this defence: see Wash.Rev.Code § 9A.32.060. Likewise, it has been abrogated in some Australian states. Hemming, *op. cit. supra*, note 25.

[40] Michael Gottfredson and Travis Hirschi, *A General Theory of Crime*, (Chicago, IL: Stanford University Press, 1990); Travis Hirschi, "Self-control and Crime," in Roy F. Baumeister and Kathleen D. Vohs (eds.), *Handbook of Self-regulation: Research, Theory, and Applications*, (New York, N.Y.: Guilford Press, 2004) at 537–552).

[41] Sonja B. Starr, "Evidence-Based Sentencing and the Scientific Rationalization of Discrimination," (2014) 66 *Stan. L. Rev.* 803; Christopher Slobogin, "Empirical Desert and Preventative Justice: A Comment," (2014) 17 *New Crim. L.R.* 376; George R. Wright, "Criminal Law and Sentencing: What Goes with Free Will," (2013) 5 *Drexel L. Rev.* 1.

and it is a curious (and erroneous) forecast of failure for the law to assume that, notwithstanding the possibility of heavy punishment, any normal person will commit it.

25–009 **But the law does not ask: Was it reasonable for the defendant to kill given the gravity of the objective provocation?**[42] A reasonable and normal person does not kill another unless her act of killing is lawfully and morally justifiable as it would be where she acts in self-defence. If a person is raped and is no longer in danger, a reasonable and justifiable response, as measured against our contemporary social norms, is for the victim to call the police. If it were reasonable (and justifiable) for objectively provoked killers to kill their provocateurs or third parties, then we would not be holding them liable for voluntary manslaughter. The law holds that it was unreasonable for the defendant to kill even though it was not unreasonable for her to lose control. Since a partially excused murder is unreasonable and unjustifiable, the killer must be punished for it, and that is why her murder is not reduced *below* voluntary manslaughter.

25.2. GRADUAL LOSS OF CONTROL: ACCUMULATIVE PROVOCATION

25–010 The partial defence would have been abrogated in its entirety, if academics had not drawn attention to the plight of battered women who kill out of desperation. It was argued that a partial defence was needed to cover battered women because they might not be objectively provoked by a single event, but rather by a series of provocative acts which culminate in objective provocation (an objective qualifying trigger).[43] It also was argued that the sudden loss of control requirement disadvantaged women. The sudden loss of control requirement has been removed from the new law, but its removal is not likely to have much impact in practice since factual losses of control will be rather sudden. There is a conceptual difference between a sequence of continuing provocative event(s)

[42] Cf. the confused reasoning in the decision of the High Court of Australia in *Pollock v. The Queen* [2010] H.C.A. 35 at paras. 60–61, where the court focuses on whether the provocation was sufficient for incentivising the provoked party to kill or cause grievous bodily harm. The majority (Brennan, Deane, Dawson and Gaudron J.J.) in *Masciantonio v. R.* (1995) 183 C.L.R. 58 at 69 said: "the question is whether the provocation, measured in gravity by reference to the personal situation of the accused, could have caused an ordinary person to form an intention to kill or do grievous bodily harm and to act upon that intention, as the accused did, so as to give effect to it." Perhaps this was the justices way for conceptualising the factual question: that is, whether D in fact lost control.

[43] In *R. v. Dawes* [2014] 1 W.L.R. 947 at 961, Lord Judge C.J., said: "Provided there was a loss of control, it does not matter whether the loss was sudden or not. A reaction to circumstances of extreme gravity may be delayed. Different individuals in different situations do not react identically, nor respond immediately. Thus, for the purposes of the new defence, the loss of control may follow from the cumulative impact of earlier events. " In *Com. v. Stonehouse* (1989) 521 Pa. 41 at 60-61, it was said: "the ultimate test for adequate provocation remains whether a reasonable [person], confronted with this series of events, became impassioned to the extent that his mind was 'incapable of cool reflection.' … [S]erious provocation could be based upon cumulative effect of a series of related events." See also John W. Roberts, "Between the Heat of Passion and Cold Blood: Battered Woman's Syndrome as an Excuse for Self-Defense in Non-Confrontational Homicides," (2003) 27 *Law & Psychol. Rev.* 135; Martin Wasik, "Cumulative Provocation and Domestic Killing," [1982] Crim. L.R. 29.

culminating in objective provocation and a person losing control over a long period of time. A person is not going to lose control over months, weeks or even days. She is going to brew for months, weeks and days and then eventually snap; but that seems a very different thing from being exposed to cumulative provocation. Slow burning anger or fear culminates in a factual loss of control and that loss of control is normally fairly sudden. The removal of the sudden loss of control requirement is not likely to help battered women greatly, but it might help men who brew for hours of days before snapping. The main advantage for women will be that it will help battered women establish objective provocation by referring to a sequence of smaller provocative acts. The introduction of "fear of violence" as a qualifying trigger is also likely to advantage battered women.

25–011 **Once the sudden loss of control requirement is removed, it is hard to distinguish the loss of control involved from the general lack of control that criminals have for controlling themselves from perpetrating crimes.** The removal of the "sudden loss of control" requirement and the addition of the "fear of violence" trigger was thought to be needed because society has failed to find a way to protect battered women who normally are provoked over a long period and might snap without being exposed to a final act of objective provocation.[44] The reality is that the old law was not fit for excusing battered women who were effectively left with no option but to kill their abuser. I am not convinced that the new defence provides an apt solution. Battered women kill to avoid further violence, not necessarily because they have lost control. "Continuing fear" is more likely to result in reflective controlled defensive action rather unreflective violence. The reality is that in most cases killing by battered women is the product of desperation in intolerable circumstances—not the product of a loss of control! It would have been better to reform the defence of self-defence to allow such women a full defence (where appropriate), because the loss of control defence does not provide an apt solution.[45]

Even though the law no longer requires a sudden loss of control, the defence is more likely to be successful in cases where the loss of control was sudden.[46] The excusatory rationale for the defence is that D's fear or anger has resulted in a loss of control that has reduced her mental ability to reflect properly about her decision to kill.[47] It is difficult to see this state of mind lasting for days or months, unless the defendant is suffering from some kind of mental illness. If the latter is the case, then the partial defence of diminished responsibility or defence of insanity might be more appropriate. Any advantage gained by removing the

[44] See Alan Norrie, "The Coroners and Justice Act 2009—Partial Defences to Murder (1) Loss of Control," [2010] Crim. L.R. 275.

[45] Cf. section 9AD of the *Crimes (Homicide) Act of 2005* (Vic.). See also Joshua Dressler, "Battered Women Who Kill their Sleeping Tormenters: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters," in Stephen Shute and A. P. Simester, *Criminal Law Theory: Doctrines of the General Part*, (Oxford: Oxford University Press, 2002) at 258. See also Patricia J. Falk, "Novel Theories of Criminal Defence Based Upon the Toxicity of the Social Environment: Urban Psychosis, Television Intoxication and Black Rage," (1996) 74 *N.C. L. Rev.* 731.

[46] For example, see *R. v. Ellis* [2003] EWCA Crim. 3556.

[47] Cf. *R. v. Jewell* [2014] EWCA Crim. 414, where D was unsuccessful in producing credible evidence to support his claim that fear provoked him to kill. Cf. *Williams v. State* (1996) 675 So.2d 537; *People v. Otwell* (1967) 61 Cal. Rptr. 427.

sudden loss of control requirement from the new defence is undercut by the fact that there must be a factual loss of control.

25.3. OTHER CRIMES, SENTENCING, PROCEDURE AND ATTEMPTS

25–012 **How does loss of control affect crimes other than murder?** For crimes in general, loss of control is a matter of mitigation, to be considered by the judge in her discretion after conviction.[48] There are no limiting rules. (Even a person who takes umbrage and assaults someone when under the influence of alcohol may receive some consideration on account of loss of control).

Murder is an exception. Loss of control is a legal defence, but not one that necessarily allows the defendant to go free. If the jury accept the defence they are directed to return a verdict of manslaughter (which, as usual, is regarded as an included offence on a charge of murder). This is the form known as voluntary manslaughter, because the defendant intended to kill or otherwise had the mental element for murder. The judge has the usual wide range of discretion for manslaughter.

The life sentence is never given for a killing that results from the defendant losing control, even though it is theoretically possible. "If evidence sufficient to raise an issue in relation to all three ingredients is adduced, the prosecution must disprove the defence. But the evidence is not sufficient for this purpose unless, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply. If so the defence must be left to the jury and the prosecution must disprove it."[49] If the evidence is sufficient for a reasonable jury to conclude that the partial defence might apply, the courts take the view that if the jury have accepted the defence of loss of control, or if the defendant to a murder charge has been allowed to plead guilty to manslaughter, the judge must accept the view of the facts implicit in the conviction, notwithstanding that she herself thinks there was no sufficient loss of control. She must give a discount—generally a substantial discount—on what would have been the term served for murder. With rare exceptions the sentence is now likely to be between four and nine years.[50]

25–013 **If the defendant was obviously provoked, and severely provoked at that, will the prosecution ever reduce the charge to manslaughter off their own bat?** The prosecution do not indict for voluntary manslaughter. The indictment is for murder, the jury being left to convict of manslaughter if they think fit. Under the old law of provocation, occasionally, however, magistrates took the merciful

[48] See for example, *Attorney-General's Reference (No. 95 of 2009)* [2010] 2 Cr. App. R. (S.) 83, where it was held that: "A suspended sentence of two years' imprisonment imposed on an offender for wounding with intent was not unduly lenient where the offender, who had been attacked in his home by the victim with an axe, stabbed the victim once under serious provocation." However, the sentence in that case was unlawful for other reasons.

[49] *R. v. Dawes* [2014] 1 W.L.R. 947at 960 *per* Lord Judge C.J.

[50] *R. v. Ward* [2013] 2 Cr. App. R. (S.) 35; *R. v. Daley* [2008] 2 Cr. App. R. (S.) 534; see also the *Sentencing Guidelines Council: Manslaughter by Reason of Provocation Guideline*, (London: Sentencing Council, 2005).

course of committing for trial on the manslaughter charge only.[51] The defendant when charged with murder may offer a plea of guilty to manslaughter, and if this is accepted there will of course be no trial. The Crown often accepts a plea to voluntary manslaughter when the case does not fall within the rules for "loss of control" to be studied in the following pages.

25–014 **Why do we need this law of loss of control in murder? If we allowed the judge to have discretion in sentencing for murders, would there then be any point in having a defence of loss of control?** It is sometimes said that even then the judge would derive help from the verdict of the jury. In other crimes loss of control can reduce punishment, but only in murder does it regularly have a dramatic effect. So the jury relieve the judge of some responsibility.

25–015 **Yes, but you say that on a verdict of voluntary manslaughter the judge may in practice give anything from nine years to a full discharge. So the verdict of the jury does not really afford the sentencing judge much assistance. The punishment she actually metes out must depend on her own view of the facts as given in the evidence. So I still don't see the point of taking the verdict of the jury. Why not let the judge decide on loss of control herself?** I have given you the orthodox answers. My own answer would be twofold. First, the conviction of manslaughter instead of murder explains to the public the leniency of the sentence. It avoids the headline: "Murderer gets suspended sentence."

Secondly, the defence of loss of control resulting in a conviction of manslaughter serves the same function as other "included offences": it allows the jury to participate to a limited extent in sentencing. For most crimes they are expected to trust the judge to give the right sentence, but for a crime as serious as intentional homicide, where there are circumstances that appeal strongly to the sense of sympathy, it would impose a strain on the jury if they were not allowed to express a finding of mitigation.

25–016 **But loss of control is not the only point that may appeal strongly to the sense of sympathy. What about mercy killing? If it is a question of sympathy, why not allow a defence in all cases of murder (reducing it to manslaughter) where the jury think there are strong grounds of mitigation?** A partial answer is that the law does allow the defence of diminished responsibility in murder, which has the same effect as the defence of loss of control. Diminished responsibility is supposed to be confined to circumstances of mental malfunctioning,[52] but in practice it has been stretched to cover some other circumstances calling strongly for compassion, such as killing by a battered woman and mercy killers.[53]

[51] A rare example is *R. v. Symondson* (1896) 60 J.P. 645.

[52] The defence of diminished responsibility is available only if D's abnormality of mental functioning arose from a recognised medical condition: section 2 of the *Homicide Act 1957*.

[53] Cf. *R. v. Ahluwalia* (1993) 96 Cr. App. R. 133; *R. v. Thornton (No. 2)* [1996] 1 W.L.R. 1174. In *R. v. Webb* [2011] EWCA Crim. 152, the old form of the diminished responsibility defence was stretched to cover a mercy killing, but the post-2009 version of that partial defence will make it harder for those sorts of cases to succeed. See also *R. v. Cocker* [1989] Crim. L.R. 740, where the alleged provocateur "suffered from an incurable disease, had become severely incapacitated and repeatedly begged [D] to kill her." The defence was not available, because he calmly killed her as an act of mercy. Cf. *People v. Stuart* (2007) 156 Cal.App.4th 165 at 185, where D argued that she was provoked into perpetrating a mercy killing because "she was raised in a family in which 'the family ethic of taking responsibility for end-of-life decisions added to her compulsion to take such drastic action.'" Her claims were rejected. Similarly, in *Boyle v. State* (2005) 363 Ark. 356 at 363, D euthanised V who had severe health problems and asked the "court to establish a 'mercy-killing' exception to the provocation requirement for extreme-emotional-disturbance manslaughter," but D's request was rejected. In *Edinburgh v. State* (1995) 896 P.2d 1176 at 1180 it was held that the fact that the putative provocateur was terminally ill, in immense pain and was begging D to kill him, was not objective provocation.

It is true, however, that we have no general defence of mitigating circumstances in murder. There would be much to be said for allowing the jury a general discretion to return a verdict of murder with mitigating circumstances, if it were not for the fact that this would enable terrorists and others when put on trial to protract the proceedings with evidence of their supposed grievances. Mitigating circumstances can of course be taken into account by the parole board in deciding when to recommend parole.

25–017 **You say that loss of control is a defence to murder. In that case, isn't it also a defence to attempted murder?** The short answer to your question is that it has not yet called for consideration by the courts in England and Wales. But a defendant might get a lighter sentence if her sentence were for attempted voluntary manslaughter, rather than voluntary manslaughter. A form of the offence of attempted voluntary manslaughter has been recognised in some jurisdictions.[54] The point is puzzling because logic gives conflicting answers. The logic of legal rules is this: if the crime intended had been committed it would not have been murder, so failure cannot amount to attempted murder and thus it should be treated as attempted voluntary manslaughter. You will recall, that it was mentioned above that in England and Wales the partial defence is applicable only where the defendant intended to kill or cause g.b.h.[55] In the case of attempted murder, it has to be shown that the defendant intended to kill V, not that she merely intended to inflict grievous bodily harm upon V. A person can attempt a crime only if she would be guilty of the crime if she succeeded. Logically, the case should be one of attempted voluntary manslaughter,[56] and there is no reason why there should not be a conviction of this, though the point has never been brought before the courts in England and Wales. Sometimes the courts have expressly stated that the provocation defence is available only when the defendant's anger or fear is so great it negates her specific intention to kill.[57] However, a person cannot attempt recklessly, so when the court has held that the objective provocation has negated D's specific intention to kill, it would not be possible to find that D perpetrated attempted voluntary manslaughter.

[54] See *People v. Speight* (2014) 227 Cal.App.4th 1229; *State v. Daniels* (2014) 326 P.3d 1089; *State v. Beard* (2013) 313 P.3d 105.

[55] *R. v. Martindale* [1966] 1 W.L.R. 1564; *Attorney-General of Ceylon v. Perera* [1953] A.C. 200 at 205–206; *Lee Chun Chuen v. The Queen* [1963] A.C. 220; *R. v. Ellis* [2003] EWCA Crim. 3556.

[56] It hardly needs to be stated, but it is conceptually and logically impossible to have an offence of attempted "*in*voluntary" manslaughter.

[57] *Holmes v. D.P.P.* [1946] A.C. 588 at 598 *per* Viscount Simon L.C.; *Eizember v. State* (2007) 164 P.3d 208 at 236 *per* Limpkin P.J.; *State v. Rewolinski* (1990) 464 N.W.2d 401 at 412; *R. v. Maddy* (1670) 2 Keb. 829; *Parker v. R.* [1964] A.C. 1369. Compare *People v. Gutierrez* (2003) 112 Cal.App.4th 704 at 708–709; *People v. Rios* (2000) 2 P.3d 1066 at 1081.

Ah, but there is an opposing logic. This rests not on the legal rules but on the reasons for them. Loss of control is allowed as a defence in murder (it is said) only because murder carries a fixed sentence.[58] Attempted murder does not carry a fixed sentence, so that the loss of control may be allowed for in the punishment. There is no more reason for having the defence of loss of control for attempted murder than to any other crime not carrying a fixed sentence. Therefore, the killer in the case under discussion is guilty of attempted murder. It is true that attempts receive lighter sentences, but that can be taken into account even when an attempted voluntary manslaughter is labelled as attempted murder.[59] The sentencing judge could take both the objective provocation and the inchoateness of D's act into account when determining her sentence.

A possible answer to the latter argument is that not only murder but also attempted murder is so serious a crime that it is right that the existence of the loss of control as well as the attempt should be registered in the verdict, reducing the crime to attempted voluntary manslaughter. (Or, of course, if the defendant wounded the other party she could be convicted of wounding).

25–018 Formerly, the law was clear that the case was not one of attempted murder,[60] but in recent years trial judges have assumed the contrary, the older authorities not having been brought to their attention.[61] As said before, the question has not been decided at the appellate level; but the Criminal Law Revision Committee has recommended the legislative reinstatement of the old rule.[62] Parliament overlooked this matter when it replaced the law of provocation in 2009.

25–019 **Is the defence automatically available to joint-perpetrators and accomplices?** No. Section 54(8) of the of the *Coroners and Justice Act 2009* provides: "The fact that one party to a killing is by virtue of this section not liable to be convicted of murder does not affect the question whether the killing amounted to murder in the case of any other party to it." Consequently, the accomplice or joint perpetrator

[58] This is the general opinion: *sed quaere*. The development of the defence was influenced by a desire on the part of judges to counter the harshness of mandatory capital punishment. See Dressler, *op. cit. supra*, note 4 at 422–423.

[59] See generally, Douglas N. Husak, "Why Punish Attempts at All: Yaffe on the Transfer Principle," (2012) 6 *Crim. L. & Phil.* 399; Anthony N. Dillof, "Modal Retribution: A Theory of Sanctions for Attempts and other Criminal Wrongs," (2011) 45 *U. Rich. L. Rev.* 647.

[60] *R. v. Thompson* (1825) 168 E.R. 1193; *R. v. Bourne* (1831) 5 Car. & P. 120; *R. v. Beeson* (1835) 173 E.R. 63; *R. v. Thomas* (1837) 7 Car. & P. 817; *R. v. Hagan* (1837) 173 E.R. 445. The cases were decided on the special offence of wounding with intent to murder, which is now merged in the general crime of attempt to murder (section 15 of the *Offences against the Person Act 1861* having been repealed by Schedule 3 of the *Criminal Law Act 1967*).

[61] *R. v. Bruzas* [1972] Crim. L.R. 367. In *R. v. Peck* (*The Times*, 5 December 1975), a man who stabbed his wife after he had caught her in her nightdress with his friend was convicted of attempted murder and sentenced to 12 years' imprisonment. It is very doubtful, on the authorities, whether the conviction was right, the question of provocation presumably not having been left to the jury. In any case, 12 years would be out of line with normal sentencing practice on a conviction of manslaughter by reason of loss of control due to provocation. It is anomalous if the judges regard killing more indulgently than an attempt to kill. Cf. *D.P.P. (Vic.) v. McAllister* (2007) 177 A. Crim. R. 467 (confirming that self-defence applies to charges of attempted murder, which is something that is so obvious it need not be stated); *R. v. Pepper* (2007) 177 A. Crim. R. 456.

[62] Criminal Law Revision Committee, *Offences Against the Person (Report 14)* (London: H.M.S.O., Cmnd. 7844, 1980).

will have to show that she also lost control at the same time. (There may be cases where two people lose control at the same time and thus jointly perpetrate murder. Such cases are likely to be extremely rare, but might include a mother and daughter who act together to kill an abusive husband/father.)[63]

25.4. TRANSFERRED INTENTION AND TRANSFERRED PROVOCATION (QUALIFYING TRIGGERS)

25–020 **Is the defence available where D is provoked to kill V1 but accidentally kills V2?** Yes,[64] because the same rationale applies for allowing the defence in transferred intention cases as applies for allowing it in direct intention cases. Transferred provocation provides the defendant with a partial excuse because her extreme emotional disturbance means that her act of killing is not the product of full reflective judgement.[65] It has long been held that in cases of transferred intention that provocation is transferred with the intention.[66] The transferred provocation doctrine is also applicable under the *Coroners and Justice Act 2009*, if all the elements of the partial defence are made out. In such a case, the defendant is unable exercise reflective judgement because of objectively wrongful provocation of a serious kind, so it does not matter that she accidentally kills the wrong person. Her excused state of mind transfers to the unintended victim.

In *R. v. Kenney*, Brooking J. said:[67]

> "[O]nce it is suggested that the real concern of the law is with human frailty and not with some notion of tit for tat, one might ask why there should be any general rule that provocation must emanate from the victim and some qualification relating to mistake. On this view, why should not provocation by any person be available in respect of any victim, given that there is the necessary causal connection between the provocation and the act causing death and given, of course, that the other requirements are satisfied?"

Suppose D arrives home to find a babysitter, V1, sitting near the doorway between her kitchen and drawing room. V1 is sitting just inside the open doorway

[63] *R. v. Maw* (1980)130 N.L.J. 1163; *R. v. Pearson* [1992] Crim. L.R. 193.

[64] See *R. v. Davies* [1975] Q.B. 691 at 700 *per* Lord Widgery C.J.; see also *R. v. Twine* [1967] Crim. L.R. 710; *State v. Stewart* (2001) 624 N.W.2d 585 at 590 where Stinger J. said: "the victim and the provocateur need not be the same person and that the mitigating consequences of [serious provocation], provoked by one party, may be transferred to assaultive conduct toward someone other than the provocateur." In *State v. Coffin* (1999) 128 991 P.2d 477 at 489, the Supreme Court of New Mexico accepted the existence of the transferred provocation doctrine, but did not apply it in that case because there was no evidence to support D's claim that his shooting of V was accidental. See also *Hayes v. State* (1991) 261 Ga. 439; *Rowland v. State* (1904) 83 Miss. 483.

[65] Similarly, if a person kills an innocent third party while acting justifiably in defending her own life. See *People v. Vallejo*(2013) 214 Cal.App.4th 1033; *State v. Bellinger*(2012) 47 Kan.App.2d 776.

[66] *R. v. Gross* (1913) 23 Cox C.C. 455; *R. v. Porritt* [1961] 1 W.L.R. 1372; *R. v. Mawgridge* (1706) Kel. 119 at 131–132; *Bostick v. United States* (1992) 605 A.2d 916. See also *R. v. Davies* [1975] Q.B. 691; *R. v. Viro*(1978) 141 C.L.R. 88; *State v. Mauricio* (1990) 568 A.2d 879; *R. v. Scriva No. 2* [1951] V.L.R. 298; *contra R. v. Simpson* (1916) 11 Cr. App. R. 218 at 220. Cf. *Jabarula v. Poore & Bell* [1989] 68 N.T.R. 26, where the issue was one of *indirect provocation*, rather than an unintended victim.

[67] [1983] 2 V.R. 470 citing R. S. O'Regan, "Indirect Provocation and Misdirected Retaliation," [1968] Crim. L.R. 319 at 322–323.