

<b>Institution: University of Oxford</b>
<b>Unit of Assessment: 20 - Law</b>
<b>Title of case study:</b>  <b>Reforming the law of provoked killing: the gist of excuses</b>
<b>1. Summary of the impact</b>  <p>In 2009, the Law Commission adopted a new approach to the defence of ‘provocation’ that allowed a manslaughter conviction to be substituted for a murder conviction. This new approach was based on a model proposed by Professor John Gardner, and is now reflected in English law ensuring more stable convictions in certain difficult cases of angry killing.</p> <p>Gardner demonstrated that there is space for a third model between the two traditional views of ‘provocation’. Traditionally the ‘provoked defence’ was based on a person reasonably retaliating; or a person being temporarily deranged. Gardner’s research persuasively argues acceptance for his new model: of a person whose reasonable anger drives him or her to unreasonable retaliation.</p> <p>Thanks to Gardner’s research, the law now focuses not just on whether the accused was murderously angry, but on the causes of this anger. It allows a defence (now called ‘loss of self-control’) only if the anger came of her ‘justifiable sense of being seriously wronged’.</p>
<b>2. Underpinning research</b>  <p>The impact in this case study derived directly from a body of theoretical work undertaken by John Gardner (Professor of Jurisprudence, formerly Fellow and Tutor in Law) in the period 1994 to 2004. Virtually all of the research and writing was done while Gardner was working for the University of Oxford (October 1991-September 1996, then October 2000 onwards). Research post-2001 was carried out in collaboration with Professor Timothy Macklem of King’s College London.</p> <p>The breakthrough paper, ‘The Gist of Excuses’ [R2] (to which the impact is most directly owed) was based on research from 1994, and was prepared and written in the summer of 1996, and submitted for publication in August of that year (although it did not appear in print until 1997, after Gardner had moved to King’s College London). Three of the later papers (post-2000) were co-written with Professor Timothy Macklem (King’s, London) [R3, R4, R6]. Collaborative work with Macklem (50:50) began in January 2001, after Gardner had left King’s to return to Oxford. These papers apply the underlying approach to various more specific legal problems. However the Law Commission placed its emphasis, in framing its reform, on Gardner’s earlier sole-authored work [R1, R2].</p> <p>A familiar classification of exculpatory criminal law defences was traditionally bipartite: justification or excuse. Excuse, in this broad sense, is a residual category covering all exculpatory defences that are not justificatory. Gardner has defended a replacement tripartite classification, without any residual category [R1, R2]. There are justifications (the defendant’s offending action was reasonable) and denials of responsibility (the defendant should not be held to standards of reasonableness). In between are excuses in the strict sense. The defendant’s offending action was not reasonable, yet it was committed on the</p>

strength of reasonable beliefs or emotions. Gardner's theoretical research has devoted a good deal of attention to establishing not just the logical possibility but also the moral, legal and political importance of unreasonable action issuing from a reasonable belief or emotion (i.e. reasonable mistake and reasonable overreaction).

The application of this idea to provocation is particularly interesting, both legally and philosophically, and that is why Gardner devoted special attention to it in this body of research. To understand the idea of a reasonable emotion one needs to understand that emotions have objects which govern their appropriateness. Anger may be caused by the weather, or by a screaming baby; but neither of these is in itself an object of appropriate anger. Someone else's wrongdoing (or similar error) is the only object of appropriate anger. Inasmuch as provocation is an excuse based on reasonable overreaction through anger, it should be available only to those who reasonably take themselves to have been wronged. Mistakenly assimilating provocation to 'diminished responsibility', the law had trouble resisting the implication that people can be murderously provoked by the weather or by screaming babies. Gardner's work establishes why this would be an incorrect inference. Not all of those who are 'driven crazy' are reasonably angry.

### 3. References to the research

- [R1] Gardner, J, 'Justifications and Reasons', in Andrew Simester and A.T.H. Smith (eds), *Harm and Culpability* (Oxford: Clarendon Press 1996), 103-129
- [R2] Gardner, J, 'The Gist of Excuses', *Buffalo Criminal Law Review* 1, (1997) 575-598
- [R3] Gardner, J and Macklem, T, 'Compassion without Respect? Nine Fallacies in *R v Smith*' [2001] *Criminal Law Review* 623-635
- [R4] Macklem, T and Gardner, J, 'Provocation and Pluralism', *Modern Law Review* 64 (2001), 815
- [R5] Gardner, J, 'The Mark of Responsibility', *Oxford Journal of Legal Studies* 23, (2003) 157-171
- [R6] Gardner, J, and Macklem, T, 'No Provocation without Responsibility: A Reply to Mackay and Mitchell', [2004] *Criminal Law Review* 213-218

Research on item 1 was supported by a British Academy Research Leave Award (untitled) to John Gardner for the period January-March 1995.

Items 1-6 were all peer-reviewed. Items 1, 2, 4 and 5 have been included in previous RAE output submissions. Items 1, 2, 4 and 5 were also republished in Gardner, J, *Offences and Defences* (Oxford: Oxford University Press 2007), extremely positive reviews of which appeared in the *Oxford Journal of Legal Studies*, *Ethics*, the *Modern Law Review*, the *Law Quarterly Review*, the *Criminal Law Review* and several other leading journals.

#### 4. Details of the impact

The key impact of Gardner's research is on the law of homicide in England and Wales, as reformed by the Coroners and Justice Act 2009, ss. 54-56 ('the 2009 reform'). The 2009 reform clarifies the basis and narrows the scope of the provocation defence, a 'partial' defence to murder which, if successfully pleaded, allows and requires the substitution of a manslaughter conviction. Gardner's contribution is restricted to the narrowing of this provocation variant.

Gardner's ideas reached the statute book by the following route. As explained in Parliament (Hansard, 3 March 2009, col 422-447; <http://bit.ly/18KRxa5>) section 54 of the Coroners and Justice Act 2009 implements, with some drafting changes and some additions, a recommendation of the Law Commission made in the report [C1]. The Commission makes the case for this recommendation in paras 5.1 to 5.82 of that report. The reliance on Gardner's research in preferring the 'reasonable emotional response' model to the 'temporary derangement' model comes at para 5.42 where Gardner [R2] is quoted approvingly and at length. This marks a definite shift from the more hesitant positions taken in the earlier Law Commission report *Partial Defences to Murder* [C6] but no more general adoption of the Gardner model of provocation. The pathway to that shift may have involved informal discussions in Oxford instigated by the then Chairman of the Law Commission, Mr Justice Toulson, at which Gardner attempted to reassure Toulson of the intellectual coherence of what he, and the Commission, was already inclined to think. However the impact does not depend for its verification on this element of dissemination, since it appears on the face of the Law Commission's 2006 report itself.

The estimated **reach** of the 2009 reform is to about half of all recorded homicides in England and Wales, namely all those arising out of 'quarrel, revenge, or loss of temper' as classified in Home Office Statistical Bulletin 01/11 (<http://bit.ly/pMI6W0>, page 34), equating to about two-thirds of recorded 'acquaintance' homicides (ibid). This amounts to something in the order of 300 homicide cases a year in which the facts raise a question of whether the accused was provoked. The impact extends not only to the cases where a provocation (now 'loss of self-control') defence is pleaded and argued but also to decisions by defence counsel as to whether it should be pleaded, decisions by prosecutors as to what plea to accept, and in rare cases possibly whether to prosecute at all. Research reported in 2006 (in Law Commission, *Murder, Manslaughter and Infanticide*, Law Com 304, 2006, appendix C) suggested that the old provocation defence was pleaded in about a quarter of homicide trials.

The **significance** of the reform, inasmuch as it is based on Gardner's work, is that (a) it clarifies and narrows the law about which triggers for homicidal action are capable of qualifying as provocations, so as to exclude triggers such as crying babies and thunderstorms (which nobody could reasonably regard as wrongdoings) and (b) it more generally clarifies the doctrinal basis of the provocation defence so as to remove an historic judicial vacillation between the 'reasonable emotional response' model and the 'temporary derangement' model (a vacillation which came to a head in *R v Smith (Morgan)* [2001] 1 A.C. 146). The reform remains contentious and attracts both critical and approving responses. This testifies to its significance. On 14 January 2009, for example, the Daily Mail reported: 'Jealousy no defence for killer husbands, but abused wives can escape a murder charge' [C9]. A more sober 'impact assessment' was provided by the Ministry of Justice, who pointed out that 'the narrower partial defence would lead to some defendants who are currently convicted of manslaughter being convicted of murder instead. We estimate that there might be an additional 10-20 murder convictions a year'

(<http://bit.ly/12oIW4x>).

The provisions came into force in October 2010. Technical aspects of the relevant provision have received judicial attention in *R v Clinton* [C7] *R v Dawes* [C8]. The 2009 reforms, arising out the use made by the Law Commissioners of Gardner's research in the theory of criminal law, remain the law and have improved judicial and professional understanding of provocation.

#### 5. Sources to corroborate the impact

[C1] Law Commission for England and Wales, *Murder, Manslaughter and Infanticide*, Law Com 304, 2006, para 5.42 (<http://bit.ly/1a8K7eG>): direct reliance on Gardner's words, quoted at length, in advocating the approach to the reform of the law of provocation that was adopted in the Commission's recommendations.

[C2] Coroners and Justice Bill Deb, 3 March 2009, col 422-447 (<http://bit.ly/18KRxa5>). *Hansard* report of Public Bill Committee debate on clause 41 of the Coroners and Justice Bill, which later became ss 54-6 of the Coroners and Justice Act 2009. Debate makes extensive reference (including ministerial reference) to position of the Law Commission in the report *Murder, Manslaughter and Infanticide*, above, including position taken in para 5.42 of the report.

[C3] Coroners and Justice Act 2009, ss54-6 (<http://bit.ly/16npZkW>). The enacted reform.

[C4] Alan Norrie, 'The Coroners and Justice Act 2009 – Partial Defences to Murder (1) Loss of Self-Control', [2010] *Criminal Law Review* 275 at 284 (explains the Law Commission's approach by quoting Gardner's words, noting that the words were relied upon by the Commission; also explains how ss 54-6 of the 2009 Act adopt in turn the Commission's approach).

[C6] Law Commission for England and Wales, *Partial Defences to Murder* Law Com. 290, 2004, paras 3.164, 5.98, 5.100.

[C7] *R v Clinton (Jon-Jacques)* [2012] EWCA Crim 2.

[C8] *R v Dawes (Carlos)* [2013] EWCA Crim 322.

[C9] *The Daily Mail*, 'Jealousy no defence for killer husbands, but abused wives can escape a murder charge' (14 January 2009) (<http://dailym.ai/14GqQ25>).