In Defence of Diminished Responsibility: Considering Diminished Responsibility in the New Zealand Context

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> [N]othing defines the quality of life in a community more clearly than people who regard themselves, or whom the consensus chooses to regard, as mentally unwell.[1]

I INTRODUCTION

Diminished responsibility as a substantive defence in criminal law is indicative of the quality of life in a society because of what it acknowledges: the frailty of the human condition and the fact that mental disorder, short of legal insanity, deserves legal recognition in reducing criminal responsibility.[2] Shrouded in controversy, this is an area in danger of not receiving adequate attention in New Zealand.

Currently, mental disorder is only relevant to criminal proceedings in New Zealand as a sentencing factor. Despite being available in many other Commonwealth countries, diminished responsibility is not formally available as a substantive defence. To compensate for a perceived deficiency in this respect, New Zealand courts have demonstrated a tendency to stretch the boundaries of the provocation defence contained in section 169 of the Crimes Act 1961.[3] In order to examine comprehensively whether a diminished responsibility defence is appropriate for New Zealand, this article will consider the origins of the diminished responsibility defence, how the defence operates in other jurisdictions, and the history of diminished responsibility in New Zealand law.

The criticisms of diminished responsibility are manifold and, as such, have set the tone for the New Zealand Law Commission's two most recent publications on the issue. The dominant sentiment among many commentators is one of concern as to the formulation and operation of

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1 Adler, *Toward a Radical Middle: Fourteen Pieces of Reporting and Criticism* (1969) 170.

2 For the purposes of this article, the term 'mental disorder' is used in an all-encompassing manner. It is not confined to any medical definition but instead embraces mental illnesses, impairments, and abnormalities of any kind, including intellectual disabilities, unless such terms are used individually.

3 Note that there is currently a Bill before Parliament proposing the repeal of ss 169 and 170 of the Crimes Act 1961: see Crimes (Provocation Repeal) Amendment Bill 2009 (No 64-1). At the time of publishing, the Bill was before Select Committee. See the author's postscript in Part VI.

the defence, and do not favour its introduction into New Zealand law. However, this article contends that the benefits of a substantive diminished responsibility defence have been either too readily dismissed or overlooked altogether. The defence has much to offer New Zealand criminal law and its absence is an issue of real concern.

Diminished responsibility does not appear destined to be a feature of New Zealand law in the near future. This article assesses the current treatment of mental disorder as a sentencing consideration and looks at ways to improve this process. Even if the legislature does not consider that diminished responsibility is worthy of substantive recognition, there can be no denying that the interrelationship of mental disorder, reduced responsibility, and appropriate sentencing is too complicated and of too great a consequence to be left unaddressed.

II DIMINISHED RESPONSIBILITY

Diminished responsibility is a partial defence to murder, which reduces the offence to manslaughter. A precondition to raising the defence is demonstrating that the defendant would otherwise be liable for murder.[4] Although not always acknowledged, there are two separate models of diminished responsibility: the 'mens rea' model (otherwise known as diminished capacity) and diminished responsibility proper.[5]

Diminished capacity involves assessing whether the mental disorder of a legally sane defendant prevented him or her from possessing the requisite state of mind for an offence (for example, the intent to kill). Medical evidence of the defendant's mental disorder is adduced, relative to the different mens rea categories. Diminished capacity succeeds by showing that the defendant did not in fact form a requisite mens rea. The result is conviction for a lesser offence, usually one that does not require the mens rea at issue (for example, a conviction based on recklessness rather than intent). In theory, diminished capacity does not require legislative approval and can operate within the New Zealand status quo.[6]

As for the second form of diminished responsibility, the jury must make a judgement as to whether or not the mental disorder of a legally sane defendant made him or her less culpable than a "normal counterpart" with the same mens rea.[7] In this way, the diminished responsibility defence

4 The mens rea for murder must therefore be established. Contrast this with insanity and automatism, where mens rea is negated by the circumstances of the offender.

5 Arenella, "The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage" (1977) 77 Colum L Rev 827, 828–830.

6 Wright, "Does New Zealand Need a Diminished Responsibility Defence?" (1998) 2 YBNZ Juris 109, 112 n 15; see eg *R v Gordon* (1993) 10 CRNZ 430, 437, where the Court of Appeal acknowledged that psychiatric evidence may be introduced to negate the inference of intent that would be drawn of a normal person.

7 Arenella, supra note 5, 829.

is a formal mitigation of culpability rather than an informal sentencing factor.[8] Diminished responsibility reduces the defendant's degree of culpability and removes the "offense into a *separate category*".[9] Here, the scope for medical evidence is much wider. Evidence is not limited to the extent it is relevant to mens rea but can include anything that may show the defendant to be less culpable.[10] This article considers only the latter form of diminished responsibility.

Origins and Development

The concept of diminished responsibility originated in Scotland, where juries began including recommendations for sentence mitigation to reflect circumstances of the case, such as a mental disorder.[11] As early as 1867, the Court in *HM Advocate v Dingwall* recognized that weakness of mind could alter the character of criminal offending.[12] The decision of *Advocate (HM) v Savage* cemented the basis of the defence:[13]

> [T]here must be aberration or weakness of mind ... some form of mental unsoundness ... a state of mind which is bordering on, though not amounting to, insanity ... a mind so affected that responsibility is diminished from full responsibility to partial responsibility....

Diminished responsibility continues to be a judicially applied concept in Scotland today.[14]

In England, section 2 of the Homicide Act 1957 introduced diminished responsibility in statutory form.[15] The defence is also available as a statutory defence in many other Commonwealth countries, including Singapore,[16] the Bahamas,[17] Barbados,[18] and Hong Kong,[19] as well as the Australian jurisdictions of New South Wales,[20] Queensland,[21] the Australian

8 Mitigation, which focuses on the degree of criminal liability and punishment, should be contrasted with legal justifications or excuses, which negate criminal responsibility (usually due to a lack of mens rea): ibid 829 n 15.

9 Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (1968) 15 ["*Punishment and Responsibility*"] (emphasis added).

10 Arenella, supra note 5, 829–830.

11 Scottish Law Commission, *Report on Insanity and Diminished Responsibility* (Report 195, 2004) 30.

12 (1867) 5 Irv 466.

13 1923 JC 49, 51 per Lord Alness.

14 Note that the Scottish Law Commission recommended abolishing the common law test and replacing it with a statutory defence: Scottish Law Commission, supra note 11, 32–34.

15 Interestingly, this went against advice in the Report of the Royal Commission on Capital Punishment: O'Doherty, "Provocation and Diminished Responsibility: Sections 2 and 3 of the Homicide Act 1957" (2001) 165 JPN 776.

16 Penal Code 1985 (SG), Exception 7 to s 300.

17 Bahama Islands (Special Defences) Act 1959 (Bahama Islands), s 2(1).

18 Offences Against the Person Amendment Act 1973 (Barbados), s 3.

19 Homicide Ordinance Act 1963 (HK), s 3.

20 Crimes Act 1900 (NSW), s 23A.

21 Criminal Code Act 1899 (Qld), s 304A.

Capital Territory,[22] and the Northern Territory.[23] In Canada, the courts have developed and applied the defence.[24] The focus of this Part is on England and Australia — the English diminished responsibility provision having formed the basis for the development of diminished responsibility in other Commonwealth jurisdictions, and New South Wales and the Northern Territory having recently reformed their statutory provisions.[25]

The English Formulation of Diminished Responsibility

On the English formulation,[26] defence counsel are required to prove, on the balance of probabilities,[27] three elements:[28]

a) That the defendant was suffering from an abnormality of mind;
b) That such arose from one of the specified causes; namely, arrested development, inherent causes, or disease;[29] and
c) That this caused substantial impairment of the defendant's mental responsibility for the killing.[30]

As none of the operative terms above have been legislatively defined, courts have been left to interpret their meanings. The English formulation of diminished responsibility has not been without its critics — both the individual elements of the defence and its overall operation have come under fire.

1 Abnormality of Mind

The abnormality of mind must be "a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal".[31] The phrase has broad scope:[32]

22 Crimes Act 1900 (ACT), s 14.

23 Criminal Code Act 1983 (NT), s 159.

24 See Gannage, "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19 Osgoode Hall LJ 301.

25 See the Criminal Reform Amendment Bill (No 2) 2006 (NT), Explanatory Statement; Northern Territory (31 August 2006) Hansard, Parliamentary Record No 9 (Peter Toyne) <http://notes.nt.gov.au/lant/hansard/hansard10.nsf/WebbyDate/CB9A3612AB44FF5D692571FE000F195C> (at 23 September 2009). Both explicitly cite recommendations of the New South Wales Law Reform Commission as the basis for reform.

26 The diminished responsibility provisions in Queensland and the Australian Capital Territory are substantially similar to the English formulation: see Criminal Code Act 1899 (Qld), s 304A; Crimes Act 1900 (ACT), s 14. Note that the language of the English legislative provision is used in this discussion, but case law is drawn from different jurisdictions, including New South Wales and the Northern Territory before reform.

27 See *R v Dunbar* [1958] 1 QB 1.

28 Homicide Act 1957 (UK), s 2.

29 'Injury' is also listed in the Queensland and Northern Territory legislation: Criminal Code Act 1899 (Qld), s 304A(1); Criminal Code Act 1983 (NT), s 1 (definition of 'abnormality of mind').

30 The Queensland formulation is more like the New South Wales reformulation with regard to this last element in that it requires the abnormality of mind to have impaired the defendant's capacity to understand or control his or her actions, or know that they were wrong: Criminal Code Act 1889 (Qld), s 304A(1).

31 *R v Byrne* [1960] 2 QB 396, 403 per Lord Parker CJ.

32 Ibid.

> It appears ... to be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgment.

Whether an abnormality of mind exists is a matter for the jury. Medical evidence can aid a jury, but the jury is entitled to disagree with it even if such evidence is unanimous. Research in New South Wales released in 1997 showed that the most common abnormalities of mind relied upon in diminished responsibility cases were severe depression, schizophrenia, brain damage, personality disorders, and post-traumatic stress disorders.[33] Other examples that have supported diminished responsibility include psychosis, reactive depression caused by matrimonial difficulties, chronic anxiety, epilepsy, intellectual disability, and organic causes.[34]

Although intoxication alone does not amount to an abnormality of mind,[35] if a mental disorder significantly contributed to the killing, diminished responsibility is available notwithstanding that the defendant was intoxicated.[36] Furthermore, if evidence suggests that repetitious use of alcohol or drugs has resulted in brain damage, then diminished responsibility may be available.[37] Controversially, defendants have relied upon diminished responsibility in cases of battered woman syndrome[38] and euthanasia.[39] Regardless of the merits of these controversial cases, abnormality of mind clearly extends "beyond serious mental illness, intellectual disability and organic brain syndromes".[40]

This breadth of application has attracted criticism. The term 'abnormality' is vague and imprecise, and in the absence of a legislatively defined meaning there is no clear guidance as to what mental disorders suffice. Dell noted in her research that personality disorder and depression diagnoses covered a wide range of conditions, including abnormalities that "were imperceptible to at least some of the examining doctors" and which "would hardly have attracted the label [of personality disorder]" had it not been for the criminal offending.[41]

Furthermore, as an 'abnormality of mind' is neither an established

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33 New South Wales Law Reform Commission, *Partial Defences to Murder: Diminished Responsibility* (Report 82, 1997) para 3.9 n 10. The research was conducted before the New South Wales provision was reformed.

34 Mousourakis, *Criminal Responsibility and Partial Excuses* (1998) 168; Dell, *Murder into Manslaughter: The Diminished Responsibility Defence in Practice* (1984) 32–38, 73, Table 3.2 ["*Murder into Manslaughter*"]. Organic causes include recent illness, hypoglycaemia, and concussion: ibid 37.

35 *R v Tandy* [1989] 1 WLR 350; *R v Egan* [1992] 4 All ER 470.

36 *R v Dietschmann* [2003] 1 AC 1209.

37 *R v Tandy*, supra note 35, 356.

38 *R v Hobson* [1998] 1 Cr App R 31.

39 See Fitzpatrick, "*R v Lawson:* Yet Another Plea for the Legal Recognition of 'Mercy Killing' as a Lower Class of Homicide and the Reform of s.2(1) of the Homicide Act 1957?" (2001) 165 JPN 879.

40 Dawson, "Diminished Responsibility: The Difference it Makes" (2003) 11 JLM 103, 104.

41 Dell, *Murder into Manslaughter*, supra note 34, 33.

medical nor a legal term, it is "largely a meaningless expression".[42] Psychiatrists and psychologists disagree over what exactly the 'mind' means and where the line between normal and abnormal should be drawn. With regard to murder in particular, there is an argument that any person who kills is suffering from an abnormality of mind.[43]

2 *Specified Causes: Arrested Development, Inherent Causes, or Disease*

Despite the wide variety of abnormalities of mind that can support a diminished responsibility defence, there is an important restriction: whatever the abnormality relied upon, one must be able to show that it arose from one of the specified causes. The defence excludes abnormalities of mind not induced by such causes.[44] Again, because of a lack of legislative definition and guidance, there have been calls for reform or removal of this element.[45] Problems arise as the "specified aetiologies ... have no defined or agreed psychiatric meaning".[46] Attempts by courts to define these terms have been criticized.[47]

In *R v Byrne*,[48] the Court maintained that expert evidence was to form the basis of the determination as to whether an abnormality falls within one of the specified causes. An inherent problem with this approach is that psychiatrists and psychologists often disagree both in terms of the diagnosis of a particular offender, and as to the aetiology of a particular mental disorder (if the existence of such are agreed upon at all).[49] Research shows that if reports prepared for use in diminished responsibility cases contain any information at all as to the cause of abnormalities, the attribution of such varies from doctor to doctor.[50] Courts seem to have tolerated this phenomenon by taking a lenient approach.[51] An explanation may be that this requirement is intended principally to exclude defendants who were merely angry, jealous, or intoxicated from relying on diminished responsibility. A lenient approach is therefore taken to aetiology because these undeserving cases are easily identifiable by the layperson without the aid of medical evidence.[52] Nonetheless, this explanation is inadequate. If

42 New South Wales Law Reform Commission, supra note 33, para 3.34.

43 Ibid.

44 *R v King* [1965] 1 QB 443, 455.

45 Mackay, "Some Thoughts on Reforming the Law of Insanity and Diminished Responsibility in England" [2003] Jur Rev 57, 72 ["Some Thoughts"].

46 Dell, *Murder into Manslaughter*, supra note 34, 39.

47 See Mackay, "The Abnormality of Mind Factor in Diminished Responsibility" [1999] Crim LR 117, 122.

48 *R v Byrne*, supra note 31.

49 New South Wales Law Reform Commission, supra note 33, para 3.39.

50 In England and Wales, between 1966 and 1977, the majority of cases cited psychosis as the abnormality, and 12 per cent of other cases omitted such information: Dell, *Murder into Manslaughter*, supra note 34, 39; see also Wright, supra note 6, 113.

51 Wright, supra note 6, 113; Jones, *Diminished Responsibility* (LLB(Hons) Dissertation, The University of Auckland, 1995) 8.

52 Wright, supra note 6, 113.

'inherent causes', however defined, bring about anger or jealousy, then the specified cause requirement fails to perform its exclusionary role.[53]

3 Substantial Impairment of Mental Responsibility

The third element of the diminished responsibility defence has been heavily criticized for the use of the terms 'mental responsibility' and 'substantial', as it attempts to link together two very different concepts — one medical, the other legal or ethical.[54]

Aspects of the mind and 'mental' concepts are the area of expertise of psychiatrists and psychologists. In contrast, 'responsibility' is a legal concept that requires a moral judgement. The latter is not an appropriate subject for expert medical evidence. In England, the Butler Report remarked that it was surprising that experts were willing to testify to, and the courts were willing to hear expert evidence relating to, an ethical concept.[55]

As with responsibility, the substantiality measure is not a medical concept: because it utilizes no clinical test that psychiatrists or psychologists can employ, it is outside of their area of expertise.[56] Instead, substantiality is a question of degree. It should be a "value judgement by the jury representing the community (or by a judge where there is no jury)".[57] Lord Parker CJ in *R v Byrne* noted that while medical evidence may be adduced and is perhaps even relevant to this element, a jury's view may legitimately differ from medical experts, particularly concerning substantiality.[58] Nevertheless, the concern remains that medical experts might usurp the role of the jury by giving evidence on this element.[59] Mackay suggests that if a jury hears such evidence it should be made clear that the expert is simply making a value judgement, with which the jury is entitled to disagree.[60]

Further, the idea of being able to measure mental disorder against a scale of responsibility in order to assess whether it is 'substantial' is incoherent.[61] The degree of uncertainty with which directions to the jury have been made regarding what amounts to substantiality demonstrates this. Initially, courts used descriptions such as "partially insane" and "on the border-line of insanity".[62] There was concern that this association with

53 Griew, "The Future of Diminished Responsibility" [1988] Crim LR 75, 78.

54 Dawson, supra note 40, 105.

55 Home Office and Department of Health and Social Security, *Report of the Committee on Mentally Abnormal Offenders* (Cmnd 6244, 1975). The report was chaired by Lord Butler.

56 Mackay, Some Thoughts, supra note 45, 74.

57 *R v Trotter* (1993) 35 NSWLR 428, 431 per Hunt CJ.

58 *R v Byrne*, supra note 31, 404.

59 Wright, supra note 6, 121.

60 Mackay, Some Thoughts, supra note 45, 74.

61 Dawson, supra note 40, 105.

62 *R v Byrne*, supra note 31, 404.

insanity may be confusing.[63] Consequently, *Rose v The Queen*[64] held that, if reference to insanity is made in the context of diminished responsibility, it should be taken in "its broad popular sense" rather than as understood in the McNaghten rules. The English Court of Appeal endorsed this approach in *R v Seers*,[65] which went as far as to say that the comparison to insanity should be avoided altogether, especially when the abnormality of mind relied on bears no resemblance to the insanity defence. Perhaps the most helpful dicta on the meaning of 'substantial' comes from *R v Lloyd*,[66] which indicated that for impairment to be substantial it need not be total, but must be more than minimal or trivial.

4 Pleas in Diminished Responsibility Cases

Initially, all cases involving diminished responsibility had to go before a jury. In the early 1960s, however, the English Court of Appeal held that in cases where the medical evidence clearly supported diminished responsibility, a guilty manslaughter plea based on diminished responsibility was acceptable.[67] Subsequent research shows that guilty pleas account for a significant proportion of diminished responsibility cases.[68]

The legitimacy of accepting pleas in diminished responsibility cases is questionable given that deciding whether a person's mental responsibility was or was not substantially impaired involves a value judgement. Even if a guilty plea is only accepted by the court when medical evidence is clear and unanimous, concern remains regarding the substitution of the community's value judgement (as made by a jury) for that of a few medical and legal professionals. In such pleas, medical experts effectively make the determination as to whether an offender's responsibility is diminished. This magnifies the concern over experts usurping the role of the jury. The number of diminished responsibility cases dealt with via a guilty plea further enhances these concerns.

5 General Assessment of the English Formulation

The English formulation of diminished responsibility has attracted general criticism beyond that directed against its individual elements. Mackay describes the operation of the defence in practice as "pragmatic but unprincipled".[69] The vague wording of the diminished responsibility

63 Mousourakis, supra note 34, 167.

64 [1961] AC 496, 508.

65 (1984) 79 Cr App R 261, 264.

66 [1967] 1 QB 175, 177.

67 *R v Cox* [1968] 1 WLR 308, 310; affd *R v Vinagre* (1979) 69 Cr App R 104, where it was stressed that a plea of diminished responsibility should not be accepted lightly.

68 This was 90 per cent of all successful diminished responsibility cases in England and Wales between 1966 and 1977, and just over 50 per cent of all successful diminished responsibility cases in New South Wales between 1990 and 1993: Dell, *Murder into Manslaughter*, supra note 34, 25–26; Wright, supra note 6, 113.

69 Mackay, Some Thoughts, supra note 45, 71.

provision has made for indeterminacy in its application. Griew acknowledges that it is "doubtful whether all decisions apparently turning on the section can plausibly be explained as guided by a careful reading of its language".[70] When a jury considers the defence, it may appear that jury members judge the person rather than the crime: "'unpleasant psychopaths' get murder, whereas 'family men and unhappy lovers' get shorter sentences".[71] A tendency to stretch the defence to fit 'deserving' cases has emerged.[72] The focus thus becomes the morality of the case rather than legal principles and medical evidence. Nevertheless, psychiatrists, lawyers, and judges vary in their willingness and ability to use the defence innovatively.[73] The net result of such an approach is a degree of unpredictability.

Buxton LJ has gone so far as to say that the defence in its current form is "beyond redemption".[74] Not all commentators agree. Williams admits that, despite its "embarrassing" formulation, the diminished responsibility defence has "in a sense ... 'worked'" and "has highly beneficial results".[75] Despite 'abnormality of mind' lacking precise medical meaning, the New South Wales Law Reform Commission cited numerous submissions presenting the view that "it works reasonably well in practice, having been sufficiently well clarified by case law as not to require replacement by some other ambiguous expression".[76] Medical experts have used their training and expertise to work with and make sense of terminology such as 'mental responsibility' and the specified aetiologies.[77] Moreover, much of the criticism directed at the wording of the defence is exaggerated.[78] Claims that the defence is stretched to accommodate cases that deserve sympathy are also overstated. Tennant analyzed hundreds of cases which, for the most part, indicate that this does not occur.[79] Instead, there is a comprehensive examination of detailed medical evidence and careful consideration of whether such is sufficient for the defence to be successful.[80]

Nevertheless, the purpose of the New South Wales reformulation was to address some of the aforementioned concerns.

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70 Griew, supra note 53, 78.

71 Dell, "The Mandatory Sentence and Section 2" (1986) 12 J Med Ethics 28.

72 The best examples are euthanasia cases. See Fitzpatrick, supra note 39, and Dell, *Murder into Manslaughter*, supra note 34, 35. Research showed that, in some euthanasia cases, medical professionals supported a plea of diminished responsibility because they "inferred from the circumstances of the case that mental abnormality must have been present at the time of the offence": ibid.

73 Griew, supra note 53, 78–79.

74 United Kingdom Law Commission, *Partial Defences to Murder: Final Report* (LC290, 2004) para 5.43.

75 Williams, *Textbook of Criminal Law* (1983) 686.

76 New South Wales Law Reform Commission, supra note 33, para 3.34.

77 Mackay, Some Thoughts, supra note 45, 73.

78 Cato, "Criminal Defences and Battered Defendants" [2002] NZLJ 35, 38 ["Battered Defendants"].

79 Tennant, *The Future of the Diminished Responsibility Defence to Murder* (2001).

80 Harris, "The Utility of the Diminished Responsibility Defence: Can an Accused be 'Half Responsible' for a Murder?" (2002) 60 The Advocate 211, 215.

The New South Wales Reformulation

In 1997, the New South Wales Law Reform Commission recommended retaining the diminished responsibility defence subject to a reform of the test to make its application simpler and more consistent.[81]

The New South Wales legislature labelled the reformed defence "Substantial Impairment by Abnormality of Mind".[82] This requires defence counsel to prove the following elements:

a) That at the time of the killing, there was substantial impairment of the defendant's capacity to:
    i) understand events; or
    ii) judge whether their actions were right or wrong; or
    iii) control himself or herself; and
b) That the impairment arose from an abnormality of mind arising from an underlying condition; and
c) That the impairment was so substantial that it justifies a reduction from murder to manslaughter.[83]

By focusing on the defendant's capacity to understand, judge, and control his or her actions, the new provision explicitly adopts the *R v Byrne* definition of 'abnormality of mind'.[84] This is a way of limiting the ambiguity of the term 'abnormality' and indicating that not just "any behaviour that seems unusual or bizarre" will suffice.[85] Only "seriously disturbed mental processes" that result in the defendant lacking capacity in one of the three listed ways can support a successful defence.[86] This change eliminates the need for experts to make a medical diagnosis, thus removing an area of disagreement. The Law Reform Commission report notes that there may be difficulty in determining whether the defendant could not control his or her actions or merely did not do so. Yet the provision was included based on consultation with forensic psychiatrists and psychologists so as not to exclude sufferers of, for example, brain damage or auditory hallucinations unfairly.[87] It is thus an issue for the jury as to whether a defendant lacks control of his or her actions to such an extent that their culpability should be reduced.[88]

The New South Wales formulation avoids the issues in English law around aetiology by omitting the requirement that an abnormality of mind must arise from specified causes. Instead, the abnormality of mind causing

81 New South Wales Law Reform Commission, supra note 33, para 3.46.
82 Crimes Act 1900 (NSW), s 23A.
83 Ibid s 23A(1)(b).
84 *R v Byrne*, supra note 31.
85 New South Wales Law Reform Commission, supra note 33, para 3.50.
86 Ibid.
87 Ibid para 3.54 n 98.
88 Ibid.

the lack of capacity must arise from an 'underlying condition', defined as "a pre-existing mental or physiological condition, other than a condition of a transitory kind".[89] This grounds the defence by requiring medical evidence of an impairment that existed prior to the offending. The condition does not have to be permanent, but must be more than transitory. For example, the 'underlying condition' requirement will exclude states of mind induced by extreme emotion, such as road rage, but not severe depression.[90]

Medical evidence on whether the impairment was so substantial as to warrant a reduction from murder to manslaughter is inadmissible.[91] This clarifies the respective roles of medical experts and the jury. The explicit reference to the requirement that the jury make a decision — rather than deal with concepts of 'mental responsibility' — means that the reformulation focuses the jury toward making a value judgement about the culpability of the defendant in light of his or her impairment.

Some uncertainty and unpredictability remains in the New South Wales model: the jury retains considerable leeway in making its decisions, and the precise definition of 'underlying condition' still depends on medical experts' application and interpretation of the term.[92] However, this is not necessarily negative. Ambiguity has its advantages, especially in the ever-growing field of mental health. Room for flexibility means that the application of the law can adjust itself to advances in medical knowledge. A heightened role for the jury also ensures that society's ever-changing views and values are accommodated. Furthermore, flexibility allows for greater pragmatism and humanity in the complicated and delicate area of mental disorder.

Even if critics are not satisfied with the improvements made by the New South Wales reformulation, such perceived inadequacies provide insufficient reason to dismiss the idea of a substantive diminished responsibility defence completely. That something is difficult to formulate is no reason that it not be pursued. This is especially so when the concepts written off by such an approach relate to important areas such as mental responsibility and criminal liability. Further improvements are possible, especially if devised in close consultation with medical and mental health experts. Similarly, instigating procedural changes could improve the operation of the defence. For instance, the New South Wales reformulation does not address the legitimacy deficit in accepting diminished responsibility pleas given that a value judgement is involved. This could be dealt with by prohibiting the acceptance of pleas, or limiting them to the most extreme and obvious cases; for example, where a defendant was clearly insane at the time of the offence but refuses to plead insanity.

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89 Crimes Act 1900 (NSW), s 23A(8).

90 New South Wales Law Reform Commission, supra note 33, para 3.51.

91 Crimes Act 1900 (NSW), s 23A(2).

92 Wright, supra note 6, 128.

III DIMINISHED RESPONSIBILITY IN NEW ZEALAND

A Lack of Legislative History

Diminished responsibility has not received legislative approval in New Zealand, despite having been proposed twice, albeit very early on. In 1879, the Criminal Code Commission acknowledged that there should be provision for the punishment of offenders not impaired enough to be irresponsible, but nonetheless with intellects lessened or disordered such that their culpability should be mitigated. The Criminal Code Act 1893 did not, however, enact a provision to address this concern.[93]

A diminished responsibility provision was included in the Crimes Bill 1960. If the jury were "satisfied that at the time of the offence the person charged, though not insane, was suffering from a defect, disorder, or infirmity of mind to such an extent that he should not be held fully responsible", the defence would have been satisfied.[94] This provision did not appear in the Crimes Act 1961. Brookbanks comments that this "suggests a failure by the legislature at the time to understand the wider implications of the doctrine, and an unwillingness to come to grips with the inadequacies of the McNaghten rules".[95]

The legislature again overlooked diminished responsibility in the Crimes Bill 1989, which proposed major amendments to the legislative murder scheme. In the end, the legislature abandoned the Bill due to unprecedented opposition, particularly from within the legal profession.[96] The issue of diminished responsibility did not arise again until the New Zealand Law Commission, in two separate reports published in 2001 and 2007, articulated the view that diminished responsibility should not be introduced in New Zealand.[97] The Law Commission considered that diminished responsibility was too difficult to define and was better suited to consideration in sentencing.[98] Further, the Law Commission was concerned that the introduction of new partial defences would ignite calls to recognize other mitigating factors in the form of partial defences.[99]

Nonetheless, in their report on provocation, the Law Commission acknowledged that, "as a minimum", if the partial defence of provocation

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93 Brookbanks, "Diminished Responsibility: Balm or Bane?" in Legal Research Foundation, *Movements and Markers in Criminal Policy* (1984) 30 ["Balm or Bane?"].

94 Crimes Bill 1960 (No 61-2), cl 180.

95 Brookbanks, Balm or Bane?, supra note 93, 30.

96 Brookbanks, "Insanity in the Criminal Law: Reform in Australia and New Zealand" [2003] Jur Rev 81, 88 ["Insanity in the Criminal Law"].

97 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (NZLC R73, 2001) para 140 ["*Battered Defendants*"]; New Zealand Law Commission, *The Partial Defence of Provocation* (NZLC R98, 2007) para 12 ["*Provocation*"]. It should be noted that in neither report was diminished responsibility the sole issue; only its merits as a defence for battered defendants and as an option within the contemplated reform of the law of provocation were assessed.

98 New Zealand Law Commission, *Battered Defendants*, supra note 97, para 137.

99 New Zealand Law Commission, *Provocation*, supra note 97, paras 161–162.

were to be retained, the introduction of diminished responsibility would need to be "seriously considered".[100] The Commission considered that it would be anomalous to recognize formally the loss of self-control as a substantive mitigating factor, but not the circumstances of "those whose frailty is such that they cannot achieve ordinary self control".[101] Contrary to the position of the Law Commission, the defence of diminished responsibility has support within the legal and medical professions.[102]

Diminished Responsibility 'Dressed Up' As Provocation

Diminished responsibility has not gained explicit judicial approval in New Zealand. Some decisions have been particularly careful not to affirm the existence of such a defence. In *R v Gordon*,[103] the Court recognized that a defence of diminished responsibility would have been applicable had it been available, but "sympathy for the appellant cannot prevail over the current statutory provisions". In *R v McGregor*,[104] the Court of Appeal stated, in obiter dicta, that mere mental deficiency and weak mindedness was insufficient to modify the gravity of the provocation element of the provocation defence. To hold otherwise would go too far "towards the admission of a defence of diminished responsibility without any statutory authority in this country to sanction it".[105] Something 'substantial', such as a phobia, was required to allow reliance on a mental characteristic. These cases indicate an unwillingness to develop a common law diminished responsibility defence without legislative approval.

Yet not all subsequent cases have been supportive of the view in *R v McGregor*. A de facto type of diminished responsibility defence, developing within the defence of provocation, has been implied in some cases. *R v Taaka*[106] "stretched the traditional jurisprudence on provocation to breaking point".[107] The Court in that case held that provocation should have been left to the jury at trial as there was "just enough" evidence.[108] Psychiatric evidence of Taaka's obsessive–compulsive personality was adduced and the Crown accepted that such a condition could be a characteristic relevant to the gravity of provocation under section 169(2) of the Crimes Act. Even if this decision had been appealed, it is likely that the result would have been the same, because *McGregor* leaves room for recognition of other 'substantial' mental peculiarities (apart from phobias)

100 Ibid para 160.

101 Ibid.

102 Brookbanks, Insanity in the Criminal Law, supra note 96, 86.

103 (1993) 10 CRNZ 430, 441 per Hardie Boys J. The case involved a wife contracting another man to murder her husband; there was contested evidence of depression, battered wife syndrome, and post-traumatic stress disorder.

104 [1962] NZLR 1069, 1082 per North J.

105 Ibid.

106 [1982] 2 NZLR 198 (CA).

107 Stanish, "Whither Provocation?" (1993) 7 Auckland U L Rev 381, 391.

108 *R v Taaka*, supra note 106, 202.

so long as they meet the criteria of a characteristic:[109] something significant enough and with sufficient permanence to set the defendant apart from "the ordinary run of mankind".[110] The evidence, at least in this case, suggests that an obsessive–compulsive personality qualifies.

Despite the obvious overlap of the decision in *R v Taaka* with diminished responsibility, and notwithstanding the cautionary comments on the topic in *R v McGregor*, the Court did not comment on the possibility of provocation harbouring what really is a diminished responsibility defence. This silence could be interpreted as implied approval of the use of provocation in diminished responsibility situations.[111] However, it might also have been the simple omission of an unnecessary discussion. If reliance on a mental characteristic satisfied all of the elements of provocation as set out in section 169 and as interpreted by *R v McGregor*, it could be considered "pettifogging" and a "gross injustice" to deny the defendant use of the defence merely because another defence, not recognized by the New Zealand legislature, might better suit the circumstances.[112]

R v Leilua[113] followed *R v Taaka*'s lead in expanding the mental characteristics that could have been relied upon under section 169(2)(a). Without much discussion or justification, the Court held that "notwithstanding *R v McGregor* ... a chronic disorder of this type [post traumatic stress disorder], if it rendered the sufferer particularly susceptible to certain kinds of provocation, could amount to such a characteristic."[114]

R v Leilua pushes the boundaries of provocation by referring to other unspecified "chronic disorder[s]" rather than limiting its comments to the disorder at hand.[115] "Chronic disorder" is a very general category. This goes against the dicta in *R v McGregor* that subjective characteristics capable of modifying the gravity of provocation must be limited so that the objective test is not redundant. *R v Taaka* and *R v Leilua* indicated that mental characteristics in the realm of diminished responsibility could be viewed as "a discrete exculpatory factor in defining legal provocation",[116] which is a significant move in the direction of diminished responsibility.

Looking at further cases, there has been judicial acceptance of the idea that a de facto diminished responsibility defence under the guise of provocation need not always be implied. The first seed of this was contained in *R v Aston*.[117] Cooke P, as he then was, noted in passing

109 Brown, "Provocation: Characteristics, Diminished Responsibility, and Reform" in Legal Research Foundation, *Movements & Markers in Criminal Policy* (1984) 44.

110 *R v McGregor*, supra note 104, 1081.

111 Brown, supra note 109, 46.

112 Ibid.

113 (20 September 1985) unreported, Court of Appeal, CA19/84.

114 Ibid 4–5. In this case, however, there was insufficient evidence to allow reliance on the disorder.

115 Ibid 5.

116 Brookbanks, "Provocation — Defining the Limits of Characteristics" (1986) 10 Crim LJ 411, 413 ["Provocation"].

117 [1989] 2 NZLR 166 (CA).

that the case was "in substance" manslaughter "on the ground of diminished responsibility".[118]

The Court of Appeal in *R v McCarthy* was less restrained in its observations.[119] The Court criticized the obiter dicta in *R v McGregor* as having "unduly restricted the ambit of... provocation" and adding "needless complexity".[120] Examples in *R v McCarthy* of mental peculiarities that are able to support modification of the gravity of provocation under section 169(2)(a) include mental deficiency and excessive emotionalism as a result of brain injury.[121] These go beyond *R v McGregor.* The Court reasoned that, despite there being no formal legislative recognition of the defence of diminished responsibility, it might be available within provocation as an "inevitable and deliberate effect of the statutory changes embodied in s 169 of the Crimes Act 1961".[122] The basis for such a statement is, however, uncertain, as the text of the provocation defence in section 169 does not imply approval of any type of diminished responsibility, de facto or otherwise.

Conversely, in the Hong Kong case of *Luc Thiet Thuan v R*,[123] Lord Goff interpreted *R v McCarthy* to mean that evidence of mental disorder can be used to modify the objective limb of provocation; that is, to reduce the standard of self-control expected. Lord Goff reasoned that this would recognize Parliament's intention to introduce a partial diminished responsibility defence, and cited *R v Taaka* and *R v Leilua* in support of his view.[124]

With respect, that interpretation cannot be correct. *R v McCarthy* clearly states that any characteristic reducing the defendant's power of self-control below that of the ordinary person is not relevant.[125] Furthermore, such an assertion is inconsistent with debate in the House of Representatives over the Crimes Bill 1960.[126] The author therefore considers that the Court of Appeal in *R v Campbell*[127] correctly disregarded the comments in *Luc Thiet Thuan v R.*

In *R v Rongonui*,[128] New Zealand's leading provocation case, Elias CJ agreed with *R v McCarthy* that the provocation defence in section 169 recognizes diminished responsibility, but only to the extent that the circumstances of a case may fall within the realm of both defences. What is fundamental is that all of the elements of provocation are established. Nevertheless, through expansion of the meaning of 'characteristics'

118 Ibid 170.
119 [1992] 2 NZLR 550.
120 Ibid 558 per Cooke P.
121 Ibid.
122 Ibid.
123 [1997] AC 131 (PC).
124 Ibid 1043–1044.
125 *R v McCarthy*, supra note 119, 552, 558.
126 Orchard, "Provocation — Recharacterisation of 'Characteristics'" (1996) 2 Canta LR 202, 207.
127 [1997] 1 NZLR 16, 25 (CA).
128 [2000] 2 NZLR 385 (CA).

by courts, a picture emerges of a defence that, although still cloaked in provocation, is clearly verging on diminished responsibility.

Issues with 'Dressing Up'

One issue with the development of a de facto diminished responsibility defence is that it is highly questionable whether such was the intention of the legislature in formulating provocation as it stands in section 169. Related to this is the concern that diminished responsibility should not develop without direction from Parliament:[129]

> [D]iminished responsibility has a significant impact on the way mental abnormality has been traditionally perceived in the criminal law. It should not be permitted to evolve by a process of extension of existing defences without an accompanying careful consideration of its theoretical considerations....

Similarly, the absence of a diminished responsibility defence in New Zealand and the concomitant attempt to 'fill the void' are inadequate reasons to take a flexible approach to the admission of psychiatric evidence in provocation. Provocation and diminished responsibility each, in their own right, allow for important issues to be considered in determining a defendant's degree of criminal liability. Provocation, and other defences, should be able to operate in a "'pure' or 'principled' manner ... without being stretched to take in the hard cases".[130]

Discussion about the legitimacy of pleading diminished responsibility and provocation simultaneously highlights a further concern. Although there is an overlap between provocation and diminished responsibility, the two are in some ways incompatible. Provocation, unlike diminished responsibility, is a defence for 'normal' people — this is evident in the fact that it requires an objective standard of self-control. Provocation reduces culpability to manslaughter on the basis that a normal, ordinary person in the defendant's situation may have acted in the same way. In contrast, diminished responsibility is a defence for 'abnormal' people. For the defence to succeed, the defendant must prove an abnormality of mind.

The attempt to introduce diminished responsibility into New Zealand law through provocation is understandable. However, this could only ever be a partial replacement for a legislatively recognized diminished responsibility defence. Diminished responsibility is much broader than provocation could ever be with regard to the different types of mental disorder. Furthermore, no characteristics can alter the objective standard of self-control required for provocation. Most offenders with mental disorders will not be able to avail themselves of the defence because they cannot reach this standard.

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129 Brookbanks, Provocation, supra note 116, 418.

130 Dawson, supra note 40, 106.

The Status Quo: Diminished Responsibility in Sentencing for Murder

One of the reasons that the New Zealand Law Commission has rejected the idea of implementing a formal diminished responsibility defence is its preference that partial defences — like diminished responsibility and provocation — should be dealt with as sentencing considerations rather than as substantive defences.[131]

Under the Sentencing Act 2002, a murder conviction carries a strong presumption of a sentence of life imprisonment. This presumption can only be overcome if, having regard to the circumstances of the offence and the offender, such a sentence would be "manifestly unjust".[132] The courts have taken a conservative approach to interpretation on this point. In *R v Rapira*,[133] the Court noted that a decision as to whether the sentence would be manifestly unjust must be an "overall assessment" conducted in light of the principles and purposes of sentencing contained in sections 7 and 8, and the aggravating and mitigating factors in section 9, of the Sentencing Act 2002. The Court concluded that the presumption should only be rebuttable in "exceptional cases". Examples thereof, noted with reference to Hansard, include mercy killings and killings following a long history of severe abuse.[134]

Mental disorder is obviously a relevant consideration in determining whether a sentence of life imprisonment is manifestly unjust. Six of the ten mandatory principles of sentencing set out in the Act support the position that mental disorder could be given greater weight in the sentencing process.[135] Specifically, diminished intellectual capacity or understanding on the defendant's behalf is recognized as a mitigating factor in section 9(2)(e).

Concerns about the Status Quo

Section 102 of the Sentencing Act 2002 confers a very limited discretion on courts, only exercisable "where the offending is at the lowest end of the range of culpability for murder".[136] This is concerning as it fails to provide adequate room to consider the intricacies of mental disorder. In *R v O'Brien*,[137] the Court of Appeal considered section 102 and noted that a

131 New Zealand Law Commission, *Provocation*, supra note 97; New Zealand Law Commission, *Battered Defendants*, supra note 97.

132 Sentencing Act 2002, s 102. See also Crimes Act 1961, s 172.

133 [2003] 3 NZLR 794, 828 (CA) per Elias CJ.

134 Ibid 828.

135 Sentencing Act 2002, s 8(a) (the gravity of the offending, including the degree of culpability of the offender), s 8(e) (the desirability for consistency of sentencing), s 8(g) (imposing the least restrictive outcome appropriate in the circumstances), s 8(h) (circumstances that would make the sentence disproportionately severe), and s 8(i) (the offender's personal and wider background). With regard to s 8(e), an offender with a mental impairment (especially a serious one) is not similar to an offender who has no mental impairment: neither consistency nor justice would be achieved by sentencing both in the same manner.

136 *R v Smail* [2007] 1 NZLR 411, 413 (CA).

137 (2003) 20 CRNZ 572, 581.

conviction for murder means that mitigating factors such as legal insanity must necessarily have been excluded. This implies that a defendant's mental disorder, where such does not trigger a formal mitigation of culpability by reason of legal insanity, will be unlikely to rebut the presumption of life imprisonment. This is a fallacy. As the insanity defence focuses on cognitive impairment, it excludes a significant number of severely impaired offenders whose reduced culpability deserves, in the absence of a substantive diminished responsibility defence, recognition at sentencing.

Further, *R v Rawiri*[138] held that even in cases where the circumstances of an offender (such as mental disorder) are strongly mitigating, their consideration in the exercise of sentencing discretion might be precluded insofar as section 102 already requires consideration of the circumstances of an offence. In both *R v O'Brien* and *R v Mayes*,[139] the brutality and callous nature of the respective murders saw the Court refuse to displace the presumption of life imprisonment. Although these are legitimate reasons for refusal, especially given sections 8(a) and 9(e),[140] the issue remains that such brutal and callous responses, which imply a disassociation of sorts, can often be caused by elements of mental disorder.

The need to protect the public is another reason often cited in refusals to displace the presumption.[141] It seems that courts will only rebut the presumption in the absence of a future risk to the public, despite the presence of a significant mental disorder.[142] This sets a high threshold, as it is hard to think of a sufficiently mitigating impairment, other than one of a transitory nature, which does not pose any future threat to the community.[143]

Admittedly, it is important to balance the principles, purposes, and factors favouring rebuttal of the presumption in cases of mental disorder with those that speak against rebuttal; namely, the seriousness of the type of offence and the need to protect the community if an offender poses a risk of reoffending. For this reason it is preferable to have diminished responsibility as a substantive defence rather than a consideration in sentencing. A substantive defence would acknowledge the offender's mental disorder and diminished responsibility whilst still providing for life imprisonment as a sentence for manslaughter if required. It would also

138 (16 September 2002) unreported, High Court, Auckland Registry, T014047, [27]–[30]; affd *R v Rapira*, supra note 133.

139 [2004] 1 NZLR 71 (CA).

140 Sentencing Act 2002, ss 8(a), 9(e): respectively, the gravity of offending must be taken into account as a principle of sentencing, and particular cruelty in the commission of an offence is considered an aggravating factor.

141 See eg *R v Mayes*, supra note 139; *R v Mikaele* (30 August 2002) unreported, High Court, Auckland Registry, T013638 per Harrison J. The latter is clearly a case where diminished responsibility would have benefited the offender. Although there were many references to the defendant's mental impairments in the judgment, he was sentenced to life imprisonment due to overriding concerns about future violence.

142 "There may be cases where the ... mental or intellectual impairment of the offender may be so mitigating of moral culpability that, *absent issues of future risk to public safety*, it would be manifestly unjust to impose a sentence of life imprisonment": *R v O'Brien*, supra note 137, 581–582 (emphasis added).

143 Note that voluntary consumption of alcohol, drugs, or other substances are excluded from consideration as mitigating factors.

address the Law Society of South Australia Human Rights Committee's reason for opposing the introduction of a similar provision in South Australia.[144] The Committee felt that, given the "wide range of offences of widely varying degrees of criminal culpability" that murder embraces, such a restricted sentencing provision would result in judges being required to impose unjust and disproportionate sentences of imprisonment.[145]

Although the Sentencing Act 2002 ostensibly provides for greater flexibility in sentencing, this does not seem to have been achieved for murder cases. In fact, in *R v O'Brien*, the trial judge stated that "[f]or murder Parliament has provided a mandatory penalty".[146] If the conviction is one of manslaughter then the sentence may still be life imprisonment,[147] though the sentencing judge is free to determine the length of the sentence in accordance with the provisions of the Sentencing Act 2002. Unless the jury accepts a plea of provocation, or decides that the defendant's mental disorder negated the requisite intent for murder, this more flexible sentencing option will not be available to many defendants who could have benefited from, and deserve the protection of, a diminished responsibility defence.

The fact that the New Zealand status quo relegates diminished responsibility considerations to sentencing raises broader issues than those relevant only to the construction of section 102 and sentencing for murder. These include the considerably greater stigma attached to a murder conviction over one for manslaughter, the absence of a community value judgement in relation to whether the mental disorder did, in fact, reduce culpability, and the fact that this absence results in a lack of guidance for the sentencing judge. As these concerns are also arguments for the introduction of a substantive diminished responsibility defence, they are discussed in the following Part.

IV SUBSTANTIVE DIMINISHED RESPONSIBILITY: AN OPTION FOR NEW ZEALAND?

It is obviously undesirable to have a de facto diminished responsibility defence developing without statutory approval or constraints. Nonetheless, the very fact that the courts have stretched the provocation defence in such a way indicates a need — if not a desire — for its application. The New Zealand Law Commission's dismissal of diminished responsibility is, in

144 Criminal Law (Sentencing) (Dangerous Offenders) Amendment Bill 2007 (SA), cls 5, 8. This introduces a minimum 20-year term "unless the court is of the opinion that some lesser period is appropriate because of the exceptional circumstances surrounding the offence".

145 Niarchos, "Murder: The Principle of Proportionality and 'Mandatory' Sentencing" (2007) 29 Bulletin (Law Society of South Australia) 27.

146 *R v O'Brien*, supra note 137, 580.

147 Crimes Act 1961, s 177.

the author's opinion, both worrying and regrettable. The Law Commission has considered the defence only in the contexts of battered defendants and provocation.[148] In doing so, it has deprived the diminished responsibility defence of full consideration — in highlighting its pitfalls, many of its benefits have been brushed over and too readily dismissed.

Unjustified Due to Sentencing 'Flexibility'?

Diminished responsibility is often justified with reference to harsh sentencing regimes for murder, as its use in reducing murder to manslaughter is considered a legitimate way of circumventing the mandatory death penalty or, if capital punishment has been abolished, mandatory life imprisonment. In response to this point, an oft-cited argument against diminished responsibility is that it is unnecessary in the New Zealand context given the discretionary sentencing regime for murder. However, the statutory presumption in favour of life imprisonment is strong, and the threshold one must reach in order to rebut this presumption is high. The sentence for murder may be discretionary, but this discretion is tightly controlled and does not allow for, or recognize the impact of, the many different types of mental disorders. Therefore, it is highly questionable whether this sentencing discretion has in fact alleviated the situation and removed the need for a diminished responsibility defence. More importantly, this view lacks insight as it overlooks other justifications for diminished responsibility and the greater merits of the defence.

The Interplay between Insanity and Provocation

The way diminished responsibility alleviates the restrictiveness of the insanity defence — one of the most often criticized shortcomings of criminal law — is another justification for its implementation. Critics describe the operation of the insanity defence, based on the McNaghten rules, as "woefully inadequate".[149] Because of its focus on cognitive understanding, many seriously impaired offenders do not gain any protection from the insanity defence as they fall outside of its scope. Although courts have generously interpreted the defence in order to ease its harshness in some cases,[150] such should not be necessary.

In 1981, the then Minister of Justice, the Honourable Jim McLay, recognized that one problem with the insanity defence is that it has failed to keep up with developments in medical knowledge.[151] Instead, it still reflects an

148 New Zealand Law Commission, *Provocation*, supra note 97; New Zealand Law Commission, *Battered Defendants*, supra note 97.

149 Ablett-Kerr, "A Licence to Kill or an Overdue Reform?: The Case of Diminished Responsibility" (1997) 9 Otago L Rev 1, 2.

150 Simester and Brookbanks, *Principles of Criminal Law* (3 ed, 2007) 296.

151 McLay, cited in Black, "Criminal Defenders and the Psychiatrically Disturbed" [1981] NZLJ 113, 114.

early nineteenth century view of mental disorder.[152] In contrast, diminished responsibility acknowledges that there is a wide variety and degree of mental disorder. In this way, it reflects current medical understanding and acts as the "missing link" between an acquittal on the grounds of insanity and an unqualified conviction in spite of mental disorder.[153]

Some commentators fear that the introduction of diminished responsibility will make the insanity defence redundant.[154] Mentally disordered defendants, who would otherwise have fallen within the scope of the insanity defence, may instruct their lawyers to raise diminished responsibility in order to avoid the consequences that flow from a not guilty by reason of insanity verdict. Dell's research supports this possibility: in six per cent of diminished responsibility cases, there was medical evidence that indicated insanity.[155]

Together, two procedural rules could work towards preventing this potential issue. First, if there is evidence of legal insanity, the consideration of this defence could be a court-imposed prerequisite to the raising of diminished responsibility. This is consistent with the idea that a defendant must be otherwise guilty of murder before raising diminished responsibility. If a defendant is insane, then he or she is not guilty of murder.[156] Secondly, sentencing options available for diminished responsibility could include those available for a verdict of not guilty by reason of insanity, thus removing some of the incentive.

Rather than supplanting the operation of other defences, the introduction of diminished responsibility is likely to preserve their purity — especially provocation and insanity. These defences should be left to develop in a principled manner, instead of being stretched and twisted to compensate for shortcomings in the law when faced with difficult and deserving cases.[157] In *R v Timoti*,[158] the Court of Appeal opined that, in practice, when a jury returns a verdict of manslaughter due to provocation in a case involving mental disorder, it is likely to be due to the concept of diminished responsibility. Providing juries with the option of diminished responsibility would allow them to recognize "shades of culpability" legitimately.[159] Both public and professional confidence in the legal system is higher when it produces fair decisions while maintaining the integrity of the law. We should thus engage in a "constant search for the pure verdict (the goal of course will never be achieved but striving for the same is essential to the integrity of the law)".[160]

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152 Wright, supra note 6, 15.

153 Ablett-Kerr, supra note 149, 2.

154 Arenella, supra note 5, 854.

155 Dell, *Murder into Manslaughter*, supra note 34, 30.

156 Mackay, Some Thoughts, supra note 45, 79.

157 Dawson, supra note 40, 106.

158 [2005] 1 NZLR 466, 480.

159 Brookbanks, Insanity and the Criminal Law, supra note 96, 100.

160 Ablett-Kerr, supra note 149, 9.

The Continuum of Legal Responsibility and the Proportionality Principle

The legal recognition that sanity, and as a corollary, responsibility, exist on a continuum rather than as all-or-nothing principles is perhaps one of the greatest virtues of the diminished responsibility defence. The insanity defence operating alone, without the assistance of diminished responsibility, creates a black and white approach. A person is either sane or insane; either responsible and culpable or not responsible and blameless; either guilty and convicted or not guilty and acquitted. Diminished responsibility recognizes the expansive middle ground between these endpoints. Logically, if the law considers that mental disorder amounting to legal insanity results in a person being not responsible or blameworthy, then mental disorder, serious yet falling short of legal insanity, must result in a person being only partially responsible and "blameworthy only within limits".[161] This does not mean that the offender "could only 'partially' perceive the wrongful character of his act, or that he could only 'partially' control his actions".[162] Instead, diminished responsibility recognizes a deviation from the norm: a person's mental disorder may mean that they find controlling or understanding their actions more difficult than "normal people normally placed".[163] This lack of capacity, although not complete, is what justifies a reduction in both culpability and liability, and makes such a reduction desirable.

The proportionality principle is fundamental to criminal law. The seriousness of an offence must reflect a person's culpability.[164] One way in which this principle manifests is in the gradation of offences relative to different mens rea. If a defendant suffers from a mental disorder that reduces his or her responsibility, it would be consistent with the proportionality principle that the law recognize this substantively at the conviction stage rather than by a mere reduction in sentence. Just as the difference between recklessness and negligence is one of degree, so too is the difference between insanity and diminished responsibility. Therefore, "no principled reason exists for ignoring gradations here".[165]

The Stigma Debate

Substantive recognition of gradations in responsibility caused by mental disorder is also important because of the considerable stigma attached to a murder conviction. The construction of diminished responsibility as formal mitigation takes heed of the difference in social stigma attached to murder and manslaughter convictions respectively. Critics of diminished

161 Brookbanks, Balm or Bane?, supra note 93, 31.

162 Mousourakis, supra note 34, 169.

163 Hart, supra note 9, 15.

164 Harris, supra note 80, 211.

165 Dressler, "Commentary: Reaffirming the Moral Legitimacy of the Doctrine of Diminished Capacity: A Brief Reply to Professor Morse" (1984) 75 J Crim L & Criminology 953, 960.

responsibility often downplay this difference. The New Zealand Law Commission contended that the circumstances of the case, rather than the name attached to the crime, determines the amount of stigma a particular homicide conviction attracts.[166] Indeed, as suggested by the Law Commission, members of society may sympathize more with someone convicted of murder in a euthanasia case than with someone convicted of manslaughter in abhorrent circumstances.

This observation, however, only addresses extreme cases. Furthermore, media coverage of the circumstances of a case can sometimes be selective and inadequate, or full coverage may be impossible due to the intricacies of a case, the mere volume of information, or a suppression order. Therefore, the murder–manslaughter distinction, which has developed in the common law for important reasons, is still an important guide for society. It indicates the seriousness of the offence and demarcates the extent of culpability.[167] It should not be dismissed too readily.

The Importance of Societal Involvement and Understanding

Hypothesizing as to which cases will receive more sympathy from society involves a degree of speculation. Diminished responsibility, on the other hand, provides for the inclusion of society's views without conjecture. The availability of partial defences allows for the community, as represented by a jury, to determine the culpability of the defendant in accordance with their values and standards. The New South Wales Law Reform Commission cited this as a fundamental reason for retaining the diminished responsibility defence in its jurisdiction.[168]

A counter-argument runs that members of the judiciary are more qualified to determine whether culpability is diminished, as such an assessment implicitly involves a comparison and judges have more experience and knowledge in this area.[169] However, due to "shared common experience",[170] a jury may be a more legitimate social voice on matters that require community judgement. It is this important community input that is lost if consideration of mental disorder is relegated to the sentencing stage. Generally, the involvement of a jury in deciding issues of responsibility and culpability should be encouraged[171] — "[t]he jury is the great leveller", and its historical importance as arbiter should be given due weight.[172]

Together, the murder–manslaughter distinction and the presence of community involvement via a jury enhance the community's confidence in the criminal justice system. When a sole judge considers the issue of

166 New Zealand Law Commission, *Provocation*, supra note 97, para 105.

167 Harris, supra note 80, 212–213.

168 New South Wales Law Reform Commission, supra note 33, para 3.12.

169 Arenella, supra note 5, 864.

170 Cato, "Violent Offending and the Crimes Bill" [1989] NZLJ 246, 248 ["Violent Offending"].

171 Ibid 249; Cato, Battered Defendants, supra note 78, 35–36.

172 Cato, Battered Defendants, supra note 78, 40.

mental disorder during sentencing, courts and the criminal justice system are opened to controversy and thus risk falling into disrepute.[173] The community is more likely to understand and accept a reduction in charge due to mental disorder if they have been involved in deciding that the impairment was, in fact, sufficient to reduce the defendant's culpability.[174] Similarly, a jury verdict of manslaughter due to diminished responsibility provides a sentencing judge with good reason to return a considerably lower sentence than would have been laid down for murder.[175]

The relevance of the argument that a community value judgement is necessary is not exclusive to mental disorder. The same argument can be made for other mitigating factors, thus creating scope for a broader range of partial defences.[176] Nevertheless, there is a strong argument that diminished responsibility is a deserving candidate for a substantive defence over and above other mitigating factors.

A Deserving Candidate

The diminished responsibility defence has had a long history in many Commonwealth jurisdictions, which is in itself recognition that mental disorder warrants substantive consideration. Nevertheless, tradition for tradition's sake is not an adequate justification. Diminished responsibility is based on medical knowledge and evidence, and the presence of a mental disorder is often beyond the offender's control. In these respects, mental disorder is significantly different to other mitigating factors listed in the Sentencing Act 2002, such as a guilty plea,[177] the offender's previous good character,[178] and remorse shown.[179] The diminished responsibility offender thus deserves to be "protected by law and not simply the 'rightmindedness' of the sentencing judge".[180] A conviction for manslaughter rather than murder offers this. Furthermore, the inclusion of a community value judgement is of particular importance where diminished responsibility is concerned, given the variety and nuances of mental disorder. A jury is the best means by which to determine what circumstances warrant a reduction in responsibility.

Indeed, diminished responsibility is arguably more morally defensible than the partial defence of provocation.[181] Provocation "stems from an era when it was culturally acceptable to exercise physical violence in defence

173 Ibid 35; New South Wales Law Reform Commission, supra note 33, para 3.12.

174 New South Wales Law Reform Commission, supra note 33, para 3.12.

175 Cato, Battered Defendants, supra note 78, 35.

176 New Zealand Law Commission, *Provocation*, supra note 97, para 104.

177 Sentencing Act 2002, s 9(2)(b).

178 Ibid s 9(2)(g).

179 Ibid s 9(2)(f).

180 Brookbanks, Balm or Bane?, supra note 93, 29 n 2.

181 Morse, "Undiminished Confusion in Diminished Responsibility" (1984) 75 J Crim L & Criminology 1, 30. This is consistent with the reasons put forward for the repeal of the provocation defence. See the author's postscript in Part VI for a summary of these.

of one's honour — an era of 'pistols at dawn'".[182] In today's social context, resorting to violence has become less socially acceptable. The provocation defence assumes that there is such a phenomenon as 'loss of self-control', a point that is highly questionable and the subject of debate.[183] Furthermore, the fundamental basis of the provocation defence is that when faced with severe provocation, the ordinary person's reaction is to lose self-control to such an extent that they resort to homicidal violence.[184] Surely, this is not an ordinary but an extraordinary response.

Arenella defends provocation by pointing out that, unlike diminished responsibility, the defence contains an objective element. Therefore, the use of provocation in formal mitigation does not weaken the social control function of criminal law because only those defendants able to establish objectively that they are "not only less culpable but less dangerous than the unprovoked killer" can make use of the defence.[185] In contrast, diminished responsibility weakens the social control function because it relies purely on a subjective element — mental disorder — and thus reduces an offender's culpability despite indications that the reason for doing so may also make him or her more dangerous.[186] In the New Zealand context, this is not a persuasive argument against the introduction of diminished responsibility. While a jury may, despite aggravating factors, be obligated to reduce a charge to manslaughter due to diminished responsibility, such factors can adequately be taken into account at the sentencing stage.

Only a Defence to Murder?

Justifiably, some commentators ask why diminished responsibility is available only in murder cases. Undoubtedly, murder is different to other crimes in that it is commonly considered the most heinous of crimes and thus carries considerably greater social stigma.[187] However, if substantive recognition of reduced culpability and the role of the jury in determining whether responsibility should be reduced are as important as suggested, then the defence should also be available for other offences. If the defence of diminished responsibility were to be introduced in New Zealand, its application could be expanded beyond murder.

A common objection to this wider application is that, for crimes other than murder, convicting a defendant of a lesser offence would be illogical, the distinction between murder and manslaughter being relatively unique. To overcome this, a finding of diminished responsibility could result in a limitation in sentencing, either in the choice of sentence or severity, instead

182 New Zealand Law Commission, *Provocation*, supra note 97, para 91.

183 Ibid para 88.

184 Ibid para 89.

185 Arenella, supra note 5, 853.

186 Ibid.

187 Cato, Violent Offending, supra note 170, 249.

of in a reduced conviction.[188] This occurs, for example, in the Netherlands, which varies punishment according to an offender's mental disorder. In Italy, the maximum available prison sentence is reduced if a partial defect of mind is found.[189] This may not seem much different to the status quo in New Zealand where mental disorder is taken into account as a mitigating factor in sentencing. However, the potential benefits are numerous: the offender is protected by law rather than having to rely on the sentencing judge's discretion; the sentencing judge is given direct guidance; reduction in sentences may gain greater acceptance by the community due to the involvement of a jury; and a conviction qualified by a substantive finding of diminished responsibility might result in less social stigma.[190]

V WORKING WITH THE STATUS QUO IN NEW ZEALAND: DIMINISHED RESPONSIBILITY AS A FACTOR IN SENTENCING GENERALLY

Although there are good reasons for a substantive diminished responsibility defence in New Zealand, it is unlikely to become a feature of our law in the near future given the position of the Law Commission, the current political climate, and the 'get tough on crime' attitude in society.[191] With that in mind, this Part considers the issues surrounding sentencing mentally disordered offenders and the current New Zealand approach to dealing with diminished responsibility in sentencing. Some ways in which the latter could be improved are also suggested.[192]

Sentencing Mentally Disordered Offenders: A Precarious Exercise

The consideration of diminished responsibility in sentencing is a matter of discretion. Mental disorder is relevant to sentencing where an offender was mentally disordered at the time of offending or is at the point when sentencing occurs. Often both will be manifest in an offender but this is

188 Walker, "Butler v. The CLRC and Others" [1981] Crim LR 596, 597.

189 Ibid; Jones, supra note 51, 46.

190 Brookbanks, Balm or Bane?, supra note 93, 38; Walker, supra note 188, 597.

191 In 1999, New Zealand held a criminal justice referendum asking, "[s]hould there be a reform of our justice system placing greater emphasis on the needs of victims, providing restitution and compensation for them and imposing minimum sentences and hard labour for all serious violent offences?" Ninety-two per cent of the population responded affirmatively. Despite the obvious problem with the way the question was phrased (one could not support a greater focus on victims without also endorsing a punitive approach toward serious offenders), political parties aligned themselves with the public response advocating tougher sentencing. Courts have also displayed an increasingly punitive approach: the increase in the average length of sentences of imprisonment has been justified by, among other factors, community concern about serious crime. See Roberts, "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) 3 ANZJ Crim 249, 251, 253.

192 If New Zealand enacts a substantive diminished responsibility defence in the future, this discussion will be relevant to sentencing offenders who successfully employ the defence because of the explicit recognition of mental impairment this involves.

not always the case. Despite the presence of mental disorder when a crime is committed, an offender might not be mentally disordered at the time of sentencing. Likewise, an offender who committed a crime while not mentally disordered may have become so by the time of sentencing. In the latter instance, concerns do not mirror those addressed by diminished responsibility, namely responsibility and culpability. Rather, the issue that arises is whether it is legitimate to subject an offender to punishment if he or she cannot comprehend such treatment.[193]

Sentencing mentally disordered offenders is a complex and demanding task. Not only does it "occupy an uncertain ground between a judicial finding of full responsibility and exculpatory non-responsibility",[194] but the process is also permeated with tension. Largely, sympathy prevails: there is a general consensus that mentally disordered offenders should be dealt with differently and given mitigation at sentencing.[195] However, the mere presence of a mental disorder is rarely reason enough to treat an offender differently from his or her counterpart. There seems to be a need to establish a causal connection between the offender's mental disorder and the offence.[196] The Criminal Court of Appeal of South Australia in *R v Wiskich* distilled the following general principle:[197]

> The existence of a mental disorder is always a relevant factor in the sentencing process, but its impact ... will vary considerably according to the circumstances of the individual case. An assessment of the severity of the disorder is required ... [and] the impact of the disorder upon both the offender's thought processes and capacity of the offender to appreciate the significance of the criminal conduct.... The gravity of the criminal conduct is also an important consideration.

These elements "are guideposts to the appropriate sentence but sometimes they point in different directions".[198] It is here that conflicts arise. Particularly troublesome is the tension between proportionality of sentence and community protection. An offender's mental disorder may make him or her less responsible, and therefore less blameworthy, suggesting that a reduction in sentence is appropriate. At the same time, mental disorder

193 Slobogin states that the answer is no. Instead, he considers the correct approach to be "treatment in a nonpunitive environment until the person is restored": Slobogin, *Minding Justice: Laws That Deprive People with Mental Disability of Life and Liberty* (2006) 97.

194 Brookbanks, "The Sentencing and Disposition of Mentally Disordered Offenders" in Brookbanks (ed), *Psychiatry and the Law* (2007) 199 ["Sentencing and Disposition"].

195 Ibid 198–199.

196 Note that authority on whether this is necessary for sentence mitigation is not uniform across the jurisdictions of Australia: Traynor, "Sentencing Mentally Disordered Offenders: The Causal Link" in Potas (ed), *Sentencing Trends: An Analysis of New South Wales Sentencing Statistics and Related Issues* (Judicial Commission of New South Wales, 2002) <http://www.judcom.nsw.gov.au/publications/st/st23/index.html> (at 8 July 2009) para 6.

197 [2000] SASC 64 [62].

198 *Veen v The Queen (No 2)* (1988) 164 CLR 465, 476 (HCA) per Mason CJ, Brennan, Dawson, and Toohey JJ ["*Veen*"].

may make the offender less able to control his or her actions, thus creating a greater danger to society and providing a basis for an increase in sentence. Hence, mental disorder can be viewed as both a mitigating and aggravating factor.

Another related issue in this area is deciding whether rehabilitation should be the main objective when sentencing mentally disordered offenders. Arguably, rehabilitation (as opposed to imprisonment) is the better approach as it involves a focus on treatment and support for the offender in order to address causes contributing to the offending (for example, mental disorder).[199] Nevertheless, this is a contentious view as it risks subjecting offenders to longer periods of detainment than would otherwise be appropriate in order to achieve therapeutic aims.[200] It is clear that a sentence must not increase beyond a length that is proportionate to the crime. Nor should a court issue a sentence greater than it would in the absence of mental disorder.[201] In general, courts have recognized that rehabilitative aims must be balanced against, and at times be surmounted by, other sentencing aims.[202]

Finding the balance in sentencing a mentally disordered offender is problematic in that it involves consideration of such variables as amenability to treatment and future risk. Conclusions made in these areas are at best educated hypotheses and at worst mere guesswork. The wide variety and degree of mental illnesses and impairments further complicates the process. For example, the needs of intellectually disabled offenders are distinctly different to the needs of persons who suffer from a mental illness or impairment, especially in the long term.[203]

Sentencing mentally disordered offenders raises special concerns in the area of human rights. The imprisonment of mentally disordered offenders who pose a risk to their own health and safety is arguably inhumane and legally questionable vis-à-vis national and international human rights law.[204] Section 9 of the New Zealand Bill of Rights Act 1990 prohibits "cruel or disproportionately severe" punishment unless it is demonstrably justifiable in a free and democratic society.[205] In *R v P*, the High Court considered that the imprisonment of a moderately intellectually disabled offender for sexual violation by rape would contravene section 9.[206] This demonstrates a willingness to subject sentencing practices to human rights considerations.[207]

At the international level, the International Covenant on Civil and

199 Brookbanks, Sentencing and Disposition, supra note 194, 207–208; Traynor, supra note 196, para 2.2.

200 Traynor, supra note 196, para 2.2.

201 *Veen*, supra note 198, 472–473.

202 See *R v Wright* [2001] 3 NZLR 22 (CA): a balancing exercise must be undertaken; *R v Aston* [1989] 2 NZLR 166 (CA): the retributive aims here seemed to counter rehabilitative concerns completely.

203 Brookbanks, Sentencing and Disposition, supra note 194, 210.

204 Ibid 213.

205 New Zealand Bill of Rights Act 1990, s 5.

206 (1993) 10 CRNZ 250, 255.

207 Brookbanks, Sentencing and Disposition, supra note 194, 214.

Political Rights 1966, which New Zealand ratified in 1979, is relevant in that it recognizes an individual's right to freedom from cruel, inhumane, and degrading punishment,[208] liberty and security of the person,[209] and equality before the courts.[210] Two other relevant international documents have recommendatory force in New Zealand.[211] The *Declaration of the Rights of Disabled Persons* outlines, among other rights, the rights of disabled persons to be treated with dignity and to have the benefit of legal procedures that fully consider their physical and mental condition.[212] The *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care* proclaims that all persons with mental illness have the right to be treated with humanity and respect, and the right to have access to mental health care even whilst progressing through the criminal justice system or while detained in prison.[213] National and international human rights standards are likely to become increasingly important in this area.

The Exercise of Sentencing Mentally Disordered Offenders in New Zealand

New Zealand has inadvertently adopted a harsh and punitive approach towards sentencing mentally disordered offenders by failing to provide for them adequately in its sentencing scheme.[214] The only reference to mental health considerations in the Sentencing Act 2002 is in section 9(2)(e): "that the offender has, or had at the time the offence was committed, diminished intellectual capacity or understanding" is a mitigating factor that courts must take into account in sentencing. Although the provision covers the presence of "diminished intellectual capacity or understanding" at either the time of the offence, or the time of sentence, or both,[215] it is insufficient to cover diminished responsibility due to mental disorder. While a court can consider whatever other mitigating factors it deems necessary, these factors are not protected by the mandate of legislation. Judges may choose not to exercise their discretion to consider other forms of diminished responsibility. Where sentencing judges have considered diminished

208 International Covenant on Civil and Political Rights, opened for signature 19 December 1966, 999 UNTS 171, art 7 (entered into force 23 March 1976) ["ICCPR"].

209 Ibid art 9.

210 Ibid art 14.

211 Brookbanks, Sentencing and Disposition, supra note 194, 214.

212 *Declaration of the Rights of Disabled Persons*, GA Res 30/3447, UN GAOR, 30th sess, 2433rd plen mtg, UN Doc A/Res/30/3447 (1975) paras 3, 11.

213 *Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care*, GA Res 46/119, UN GAOR, 46th sess, 75th plen mtg, UN Doc A/Res/46/119 (1991), principles 1.1, 1.2, 20.

214 Brookbanks, Sentencing and Disposition, supra note 194, 201.

215 It uses the phrase "*has, or had* at the time of the offence" (emphasis added). For a different interpretation of the section, see ibid 202: the provision "appears to limit consideration of the relevant impairment to the time of the offence and not the point of sentencing". This distinction is important, as the European Court of Human Rights has stated that assessment of an offender's mental health must be current and not solely based on historical events in order to justify detention: *Varbanov v Bulgaria* [2000] ECHR 31365/96 [47].

responsibility due to mental disorder as a mitigating factor, it has often only been mentioned in passing, without further expansion.[216]

There have been instances where mental disorder has received proper consideration in courts. From these cases, some principles and examples are distillable. Intellectual impairment and mental disability have clearly been mitigating factors in sentencing. *R v Adams*[217] saw limited intellectual capacity contribute to a reduction in sentence from imprisonment to a non-custodial order. In *R v Craw*,[218] the length of the offender's sentence was halved due to his paranoid schizophrenia, obsessive–compulsive disorder, and guilty plea. *R v Walker*[219] demonstrates that severe depression can result in a lower term of imprisonment even in cases of serious violent offending. Nevertheless, New Zealand courts have identified the conflicting nature of sentencing principles relevant to mentally disordered offenders. The Court of Appeal has warned that "any suggestion of diminished responsibility by reason of psychiatric or behavioural disorder [should be treated with] caution" as such disorders are "a part only of the picture the sentencing judge [must] consider".[220] In *R v Wright*, the Court further commented on mental disorder in sentencing:[221]

> It is a factor which will inform a just sentence having regard to the character of the disorder and the weight it ought to carry when balancing sentencing objectives. Its character may indicate a lesser degree of moral culpability or a greater subjective impact of penalty ... [and] a more or a less risk of repetition of offending, so as to direct particular attention to issues of personal deterrence or public protection.... [T]hese considerations must be synthesised with the sentencing elements of denouncing the fact of violence in our society and acknowledging grievous effects on victims.

Thus, in *R v McGee*,[222] preventive detention was imposed despite the offender's intellectual disability and brain damage because he was regarded as a real risk to public safety. Similarly, in *R v Abraham*,[223] the combination of mental disorder and a drug dependency did not result in a reduced sentence due to the increased risk of reoffending. A constructive comparison to this is *R v Bridger*,[224] where a reduction in sentence was granted because the offender had responded to treatment for a previously undiagnosed mental illness and was therefore not considered as presenting a high risk of reoffending.

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216 See eg *R v Smail*, supra note 136; *R v Mayes*, supra note 139, where mental disorder as a mitigating factor was dismissed with little explanation.

217 [1989] 1 NZLR 656 (CA).

218 (7 June 2006) unreported, High Court, Auckland Registry, CRI-2005-057-018 per Harrison J.

219 (23 September 1993) unreported, High Court, Auckland Registry, T149/93.

220 *R v Clarke* (3 September 1998) unreported, Court of Appeal, CA225/98.

221 [2001] 3 NZLR 22, 26 (CA).

222 (1995) 13 CRNZ 108, 112–113 (CA).

223 (1993) 10 CRNZ 446, 449 (CA).

224 [2003] 1 NZLR 636, 647 (CA).

R v Tsiaras,[225] a judgment of the Court of Appeal of Victoria, sets out five points on the relationship between serious mental disorder and sentencing. The New Zealand Court of Appeal, in *R v Tapueluelu*,[226] has approved this formulation as a guide.[227] The *Tsiaras* principles are:

- That mental disorder may reduce an offender's moral culpability, thus affecting the appropriateness of different forms of punishment, and making denunciation of an offender's conduct a less relevant sentencing objective;
- That mental disorder may influence the type and extent of the sentence imposed, as well as the conditions thereof;
- That general deterrence is not an appropriate sentencing aim where serious mental disorder is involved;
- That specific deterrence may not be worth pursuing as it might be difficult to achieve; and
- That a sentence may have a disproportionately severe effect on mentally disordered defendants compared to people of normal mental health.

In order to gather information that may be relevant to sentencing, courts have the power to request a pre-sentence report from a probation officer[228] or an assessment report from a health assessor.[229] These reports are only recommendatory in nature. The final decision rests with the judge, who must balance numerous sentencing factors.[230]

In addition to the standard sentencing options, courts also have specific therapeutic orders available when sentencing mentally disordered offenders. A new standard sentencing option, intensive supervision,[231] introduced by the Sentencing Amendment Act 2007,[232] could be a suitable way of dealing with some mentally disordered offenders at the lower end of the scale. This sentence provides the means to impose greater restrictions and supervision for a longer period than the previously available community-based sentences.[233] Courts can require, for example, that the offender undergo counselling, attend a wide range of programmes, or take prescription medication if there is a significant risk of further offending.[234] These requirements could help offenders deal with and manage their disorders or disabilities.

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225 [1996] 1 VR 398, 400.

226 (29 July 1999) unreported, Court of Appeal, CA172/99.

227 Hall, *Sentencing: 2007 Reforms in Context* (2007) 126.

228 Sentencing Act 2002, s 26(1).

229 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 38(1). "Health assessor" is defined as a registered, practicing psychiatrist, a psychologist, or a specialist assessor: Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003, s 2.

230 *R v Lindeman* [1973] 1 NZLR 97, 98 (CA).

231 Sentencing Act 2002, s 54B.

232 Sentencing Amendment Act 2007, s 24 (inserting Sentencing Act 2002, ss 54B–54L).

233 Ibid; Brookbanks, Sentencing and Disposition, supra note 194, 215–216.

234 Sentencing Act 2002, ss 54G–54I.

Hospital or care orders are sentencing options specifically available in cases where mental disorder is a factor. A court can impose a hospital treatment order on an offender convicted of an imprisonable offence where the court is satisfied that the offender has a mental disorder or an intellectual disability, and that compulsory treatment of the impairment is required for the offender's interests or for public safety.[235] The court can impose a hospital order alongside, or in substitution of, a term of imprisonment.[236]

Reform: Past and Future

From the above discussion, it appears that there are sufficient mechanisms available in New Zealand to effectively and humanely deal with mentally disordered offenders. What judges lack, however, is sufficient guidance in sentencing. This absence is unsatisfactory in such a nuanced, abstruse, and important area. A more systematic approach is needed. New Zealand judges need guidelines and greater assistance as to when, how, and to what extent mental disorder should affect sentencing.

Comprehensive sentencing reform in New Zealand resulted in the Sentencing Act 2002. The aim of this legislation, according to the then Minister of Justice, the Honourable Phil Goff, was to "establish a fair, firm and rational sentencing framework that delivers clarity and consistency to sentencing in New Zealand".[237] Due to a lack of specific provisions, however, this has not been the result in respect of sentencing offenders with mental disorders. In fact, it is doubtful that the Sentencing Act 2002 has had any substantial effect on sentencing in general as the statutory purposes and principles contained in sections 7 and 8 largely reaffirm previously accepted judicial practices.[238] The fact that wide judicial discretion remains is positive. This is especially pertinent with regard to the sentencing of mentally disordered offenders, as individualized judgments should be preferred,[239] if not required, in this field due to the wide range and variability of mental disorders. However, further guidance is necessary to ensure that there is comprehensive consideration of mental disorders at sentencing and to promote consistency in the area.

The recommendations of the New Zealand Law Commission, published in their recent report *Sentencing Guidelines and Parole Reform*,[240] resulted in the Sentencing Council Act 2007, which provides a possible vehicle to implement the necessary changes to the status quo. The Act established the Sentencing Council, an independent statutory body, the main function of which is to produce guidelines relating to sentencing

235 Criminal Procedure (Mentally Impaired Persons) Act 2003, s 34.

236 Ibid s 34(1)(a)–(b).

237 Goff, cited in Roberts, supra note 191, 256–257.

238 Ibid 257, 267; Ip, "Sentencing Reform" [2007] NZLJ 9, 10.

239 Brookbanks, Sentencing and Disposition, supra note 194, 202.

240 New Zealand Law Commission, *Sentencing Guidelines and Parole Reform* (NZLC R94, 2006).

principles, levels, and other matters related to sentencing, including grounds for departure from the guidelines.[241]

As indicated above, the availability of discretion is important when sentencing mentally disordered offenders. Establishing guidelines in this area will not remove discretion in sentencing but will change the criteria for its allocation. In creating guidelines, some discretion is conferred to the Sentencing Council insofar as it sets the boundaries within which judges' discretion operates. This is a positive change as the Sentencing Council will have greater time and resources when creating the guidelines, enabling wide consultation. Any guidelines relating to the sentencing of mentally disordered offenders could, and should, therefore be prepared in close consultation with psychiatrists, psychologists, and other mental and medical health professionals.

Ideally, these guidelines would set out general principles addressing the issues identified above, such as the proportionality–public protection conflict. The guidelines should outline the sentences and dispositions appropriate for mentally disordered offenders, and a means to determine the suitability of a sentence for a specific offender. They should also provide ways to ensure that mental health professionals play a greater role in the sentencing process, whether through expanded use of the assessment reports provided for in the Criminal Procedure (Mentally Impaired Persons) Act 2003, or through measures that have a greater influential force on the final sentence. Separate guidelines should be created for mentally disordered and intellectually impaired offenders to reflect the different issues and distinct needs that arise from each.

If such sentencing guidelines are properly created they will go a long way to improving the way in which New Zealand deals with sentencing mentally disordered offenders. However, the author contends that a wider and more multi-faceted approach would be even more beneficial.

Minimum standards of due process procedures for mentally disordered offenders progressing through the criminal justice system should be defined to reflect the special considerations that arise in such circumstances.[242] Similarly, minimum standards for the treatment of mentally disordered offenders in prison should be set out. The circumstances in which a detained offender may refuse treatment also need to be addressed.[243]

Shortcomings in the mental health field need to be remedied. In order for therapeutic sentences to be effective, or even available to the courts, there needs to be an adequate number and variety of suitable, high quality mental health institutions, programmes, and facilitators. A proactive (rather than reactive) approach is imperative in order to ensure that facilities are available as and when demand arises.

Finally, public education is key. It is reassuring to see that this is

241 Sentencing Council Act 2007, ss 8(a), 9(1)(a).

242 Brookbanks, Sentencing and Disposition, supra note 194, 215.

243 Ibid.

one of the purposes of the new Sentencing Council.[244] As a society, we need to promote greater knowledge and understanding of mental disorders and their effect on human behaviour and criminal culpability. Ignorance risks public outcry over a perceived leniency in sentencing. This could in turn lead to a reflex reaction from the legislature and courts — something that is unlikely to benefit any section of society, least of all one of its most vulnerable.

VI CONCLUSION

The diminished responsibility debate involves some of the most controversial, vital, and emotive elements of criminal law: murder, culpability, rehabilitation, retribution, and public protection. It is natural for society to fear those who commit murder and take steps to ensure their own protection. However, "[r]eason fades as fear deprives us of any concern or compassion for others. When fear turns our concern entirely to self-protection ... [it] can destroy our desire for justice itself."[245] No formulaic calculation will ever aid us in achieving a just balance in this increasingly complex area. A substantive diminished responsibility defence may not bring society to a utopian outcome but it would be a significant step in the right direction.

Although the need is apparent, diminished responsibility is not yet a substantive defence in New Zealand. Regrettable as this is, courts should refrain from giving in to temptation and distorting the law in order to make up for its inadequacies. It is up to the legislature to introduce and define a substantive diminished responsibility defence in New Zealand. In the meantime, legal professionals must work within the current boundaries of the law and implore judges to devote sufficient time and weight to mental disorder in sentencing. Most of all, continued debate over diminished responsibility should be actively encouraged.

Author's Postscript

Since writing this article, the defence of provocation has returned to the limelight with the introduction of the Crimes (Provocation Repeal) Amendment Bill 2009. At the time of publishing, the Bill was before the Justice and Electoral Committee, which will report to Parliament after hearing public submissions on or before 19 October 2009.

The Bill proposes the repeal of sections 169 and 170 of the Crimes Act 1969, removing the defence of provocation from New Zealand law. No amendments are proposed to the Sentencing Act 2002. A sentencing

244 Sentencing Council Act 2007, s 8(d).

245 Clark, *Crime in America* (1970) 19.

judge will still be able to consider provocation when exercising his or her discretion under section 102.[246]

The Law Commission recommended repealing the defence in two reports on provocation, the first in 2001[247] and the second in 2007.[248] The justifications put forward for the Bill largely mirror those set out by the Law Commission.[249] Supporters of reform see the defence of provocation as fundamentally flawed. The defence is based on a number of questionable concepts and is difficult to apply in practice. Provocation presupposes a bifurcation between certain characteristics of an offender, which can affect the gravity of provocation and an offender's capacity for self-control, which is objectively assessed. Furthermore, it assumes the existence of the notion of 'loss of self-control', and that, when provoked, an ordinary person is capable of losing self-control to such an extent that he or she resorts to homicidal violence (and that this is an acceptable response). Absent from the Law Commission's reports is one prominent concern cited by proponents of the Bill. This is the fact that, in raising provocation, an offender can question a victim's character, without the victim being able to defend his or her reputation.[250] This causes the victim's family significant distress.

Proponents of the Bill have taken care to highlight that the proposed law change is not a 'knee-jerk' reaction to recent, high profile cases involving the defence of provocation.[251] Yet it is difficult to separate the Bill's introduction from this context and the associated public outcry. The Law Commission recommended the repeal of provocation in 2007 following comprehensive consideration of the defence over a four-year period. The Commission also recommended sentencing guidelines to assist judges in exercising their sentencing discretion in cases involving alleged provocation. It is only now, in late-2009, that the legislature is taking steps to give effect to the first recommendation. It also appears that the embryonic Sentencing Council (the means by which sentencing guidelines in respect of provocation, mental disorder, and other sentencing considerations were to be created) will be abolished.[252]

The repeal of the defence of provocation is imminent. Regardless of the merits of such a course of action, it does not detract from the need for a defence of diminished responsibility or, at the very least, greater

246 Sentencing Act 2002, s 102(1). This provides that "an offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust".

247 New Zealand Law Commission, *Battered Defendants*, supra note 97, 31–32.

248 New Zealand Law Commission, *Provocation*, supra note 97, 13.

249 See Crimes (Provocation Repeal) Amendment Bill 2009 (No 64-1), Explanatory note, 3; (18 August 2009) 656 NZPD 5646 (Simon Power).

250 Crimes (Provocation Repeal) Amendment Bill 2009 (No 64-1), Explanatory note, 2.

251 See eg *R v Weatherston* (15 September 2009) unreported, High Court, Christchurch Registry, CRI-2008-012-137.

252 This is mentioned in Members speeches relating to the Bill. See eg (18 August 2009) 656 NZPD 5652 (Charles Chauvel).

guidance in sentencing. If provocation is repealed, and particularly if the Sentencing Council is abolished, the need for a diminished responsibility defence becomes greater. Mental disorder is a distinct consideration from that of provocation. It is arguably more worthy of recognition through the introduction of a substantive diminished responsibility defence.