A Call for Diminished Responsibility in Canada

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ABSTRACT

The defence of diminished responsibility reduces a murder conviction to one of manslaughter where the defendant successfully demonstrates that their actions were impaired by a recognized medical condition. While this partial defence to murder exists in several common law jurisdictions including the United Kingdom, it is not recognized in Canada. This paper explores whether diminished responsibility should find its way into Canadian law. To do so, Part I of this paper contends that the current state of defences applicable to homicide laws is crying out for further reflection and legislative reform. Part II then critically examines diminished responsibility as enacted in the United Kingdom. Part III explores alternatives to the defence of diminished responsibility and concludes that, despite its imperfections, the defence of diminished responsibility ensures that convictions and sentences are commensurate to the level of moral blameworthiness, given that a murder conviction carries the most severe stigma and punishment. Consequently, the defence should be recognized in Canadian criminal law.

Keywords: Partial defence to murder; Criminal Law; Diminished Responsibility; Mental Illness; Mental Disorder

I. INTRODUCTION

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While murder is recognized as one of the most heinous crimes,[1] the interests of justice are not served by "over and under-convicting" individuals, therefore imposing disproportionate sanctions.[2] By the nineteenth century, courts in Scotland understood that mandatory capital punishment was not justified in every murder case given medical advancements. These advancements revealed that "the narrow view of insanity employed within the criminal law began to appear unduly restrictive."[3] Indeed, Lord Deas observed that "there might be men of habits of mind who should not be punished with the capital sentence of death, as they would have been if in full possession of all their faculties."[4] As a result, common law partial defences to murder such as diminished responsibility developed in response to this inflexible sentencing regime.[5] If successfully plead, the defence of diminished responsibility reduces a murder charge to manslaughter, thus sparing the offender from the gallows.

While the underpinnings of criminal responsibility and retribution as a sentencing principle continue to permeate our criminal justice system, there have been significant changes. In Canada and in the United Kingdom, capital punishment is no longer a fixture of the sentencing landscape. Both society and the criminal justice system have recognized scientific developments dispelling the myth that humans are purely autonomous and rational.[6] These changes do not, however, extinguish the need for partial defences to murder as they are critical tools to ensuring that

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1 See *R v Martineau*, [1990] 2 SCR 633 at 646, 58 CCC (3d) 353 [*Martineau*].

2 UK, The Law Commission, *Murder, Manslaughter and Infanticide*, Project 6 of the Ninth Programme of Law Reform: Homicide, Law Com No 304 (London: The Stationery Office, 2006) at 16 [Law Commission].

3 Chloe Kennedy, "Ungovernable Feelings and Passions: Common Sense Philosophy and Mental State Defences in Nineteenth Century Scotland" (2016) 20:3 Ed L Rev 285 at 285 [Kennedy].

4 Robert S Shiels, "The Uncertain Medical Origins of Diminished Responsibility" (2014) 78:6 J Crim L 467 at 475, citing *HM Advocate v Gove* (1882) 4 Couper 598 at 598-9.

5 See Eric Vallillee, "Deconstructing Infanticide" (2015) 5:4 UWO J Leg Stud 1, online: <ir.lib.uwo.ca/uwojls/vol5/iss4/1> at 3 ["Vallilee"]. For instance, Parliament codified infanticide into the *Criminal Code* as a reaction to jury nullifications arising in cases involving sympathetic mothers who took the lives of their newborn children. Juries were reluctant to convict these mothers of murder, even where guilt was evident, as its sentence was capital punishment.

6 See David Wasserman & Josephine Johnston, "Can Neuroimaging Teach Us Anything about Moral and Legal Responsibility?" (2014) 44:2 Hastings Center Report S37 at S38 [Wasserman and Johnston].

offenders are both properly convicted and sentenced. Unlike the United Kingdom, Canada does not have a statutory defence of diminished responsibility. Given that murder convictions attract mandatory life imprisonment and a high level of stigma, the absence of a defence of diminished responsibility bears profound impacts on individuals being convicted and sentenced. As a result, this essay explores whether this partial defence should be introduced into Canadian criminal law.

Part I canvasses complete and partial defences relevant in Canadian homicide laws to argue that the *status quo* is crying out for further reflection and reform. Part II then introduces the defence of diminished responsibility as enacted in the United Kingdom, tracing the origins of the partial defence and culminates with a closer examination of the current defence as revised by s. 52 of the *Coroners and Justice Act*.[7] Part III considers whether the defence should be included in Canadian criminal law. In assessing the merits of the defence of diminished responsibility, two criteria are utilized: first, any criminal legal reform must acknowledge that criminal responsibility lies on a continuum, and second, it must ensure that convictions and sentences are commensurate to the level of moral blameworthiness given that a murder conviction carries the most severe stigma and punishment.[8] Despite its imperfections, the defence of diminished responsibility aligns with and gives effect to the fundamental principle of proportionality in both securing proportionate convictions and sentences. Consequently, the defence should be recognized in Canadian criminal law.

II. A Brief Portrait of Defences to Homicide in Canada

Rational choice and autonomy are the cornerstone of criminal liability.[9] While the law does not expect everyone to have the same capacity

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7 *Coroner's Justice Act 2009* (UK), s 52.

8 The Supreme Court of Canada in *R v Martineau, supra* note 1 at 645 held: "A conviction for murder carries with it the most severe stigma and punishment of any crime in our society. The principles of fundamental justice require, because of the special nature of the stigma attached to a conviction for murder, and the available penalties, a *mens rea* reflecting the particular nature of that crime."

9 See *R v Bouchard-Lebrun*, 2011 SCC 58 at para 48 [*Bouchard-Lebrun*].

to reason, it does expect minimal capacity for reason and control.[10] Criminal liability also depends on the ability to choose and distinguish between right and wrong.[11] As noted by Steven Penney, "[i]f there is at least *some* capacity for control, then criminal responsibility must follow."[12]

Consequently, mental state is a relevant consideration in the determination of criminal liability.[13] An altered mental state can lead to involuntary acts, thereby absolving the person charged from criminal responsibility. Alternatively, an altered state may raise a partial defence. This section will address some of the defences relating to altered mental states. First, this section will begin with a cursory review of complete defences such as automatism and the defence of Not Criminally Responsible on the Account of a Mental Disorder ("NCRMD"). Second, it will turn to partial defences to murder, namely provocation and infanticide. This section will demonstrate that the defence of diminished responsibility could fill the current void among defences to murder.

A. Complete Defences

Automatism is a state of impaired consciousness "in which an individual, though capable of action, has no voluntary control over that action,"[14] There are two recognized forms of automatism: mental automatism and non-mental automatism. Mental automatism falls under falls under the scope of section 16 of the *Criminal Code* and is subsumed within the defence of mental disorder, also known as NCRMD.[15] The NCRMD requirements are satisfied, on a balance of probabilities, where the accused demonstrates that, at the material time, they either possess (a) a mental disorder that renders them incapable of appreciating the nature and quality of their act; or (b) that their mental disorder renders them

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10 See *R v Creighton*, [1993] 3 SCR 3, 105 DLR (4th) 632.

11 See *R v Ruzic*, 2001 SCC 24 at para 45.

12 Steven Penney, "Irresistible Impulse and the Mental Disorder Defence: The Criminal Code, the Charter and the Neuroscience of Control" (2013) 60:2 Crim LQ 207 at 233.

13 See e.g. *More v The Queen*, [1963] SCR 522; *R v Swain*, [1991] 1 SCR 933, [1991] SCJ No 32 at para 41; *R v MacKinnon*, 2021 ONSC 4763 at para 49. Though beyond the scope of this paper, it is important to note that altered mental states, such as intoxication or a mental disorder, may be considered on sentencing – see *R v Priorello*, 2012 ONCA 63.

14 *R v Stone*, [1999] 2 SCR 290 at para 156, 173 DLR (4th) 66 [*Stone*].

15 *Ibid* at para 160.

incapable of knowing that it was wrong.[16] Both branches presume that a mental disorder caused the incapacity.[17] While the determination of a mental disorder draws on medical information, "it remains a legal issue, not a medical one."[18] If successful, the trier of fact presents a special verdict – one of "not criminally responsible." This verdict is neither an acquittal nor a conviction.[19] Instead, it diverts individuals who are found to be NCR into an administrative process aimed to both treat the individual and ensure public safety.[20]

Non-mental automatism refers to involuntary actions that do not stem from a "disease of the mind."[21] A person under a state of automatism cannot perform a voluntary and willful act given that automatism deprives them of their ability to carry out such acts.[22] Courts have found that automatism can be triggered by physical forces (i.e. cranial trauma), hypoglycemia, and in some cases, extreme intoxication.[23] The Supreme Court of Canada ("SCC") in *Daviault* recognized the controversial defence of involuntary intoxication, which may apply to both specific and general intent offences. subject to s 33.1 of the *Criminal Code*.[24] A successful automatism defence will lead to an acquittal.[25]

Both NCRMD and automatism deprives the individual from performing willful acts and appreciating their consequences. Therefore,

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16 *Criminal Code*, RSC 1985, c C-46, s 16 [*Criminal Code*].

17 See *R v Minassian,* 2021 ONSC 1258 at para 26.

18 *Ibid* at para 27.

19 *R v Conway*, 2010 SCC 22 at para 87.

20 *Ibid* at para 88; *Bouchard-Lebrun, supra* note 9 at para 52. Unlike an acquittal, an NCRMD verdict has consequences on the rights and freedoms of the individual. For further reading on NCRMD dispositions see Anne Crocker et al, "Dynamic and Static Factors Associated with Discharge Dispositions: The National Trajectory Project of Individuals Found Not Criminally Responsible on Account of Mental Disorder (NCRMD) in Canada" (2014) 32:5 Behav Sci & L577.

21 *Stone*, *supra* note 14 at para 157.

22 *R v Daviault,* [1994] 3 SCR 63 at para 103, 93 CCC (3d) 21 [*Daviault*].

23 See *Bleta v The Queen*, [1964] SCR 561; *R v Frost*, 2003 BCSC 1930; *Daviault, supra* note 21 at para 101.

24 On May 13, 2022, the Supreme Court of Canada in *R v Brown*, 2022 SCC 18 invalidated s. 33.1 of the *Criminal Code. This provision prohibited an accused from raising* self-induced intoxication akin to automatism as a defence against violent offences identified in s. 33.1(3). See also *R v Sullivan*, 2022 SCC 19.

25 See *R v Parks*, [1992] 2 SCR 871 at 872, 95 DLR (4th) 27.

convicting an individual for their involuntary acts would "undermine the foundations of the criminal law and the integrity of the judicial system."[26] Diminished responsibility, however, differs from both defences as it presumes some degree of volition.[27] Therefore, it is properly a partial defence.

B. Partial Defences to Murder in Canada

Unlike the United Kingdom and other jurisdictions, there are no recognized statutory or common law defences of diminished responsibility in Canada. In fact, the SCC in *Chartrand v the Queen* rejected the existence of diminished responsibility in Canadian law.[28] Similarly, the Court of Appeal for Ontario recently declined to recognize the partial defence at common law on the basis that it can only be properly addressed by Parliament.[29] Yet, some argue the negation of the requisite *mens rea* by way of psychiatric evidence is tantamount to diminished responsibility.[30] The Court of Appeal for Quebec in *R v Lechasseur* confirmed that evidence which falls short of establishing the defence of insanity under s. 16 may "still be sufficiently strong to create a reasonable doubt as to the capacity of the accused to formulate the specific intent that the law requires."[31] Mark Gannage argued that a significant number of cases uphold a principle that resembles diminished responsibility without calling it by that name despite appellate authority to the contrary.[32]

Nevertheless, Canadian legal scholars continued to debate whether diminished responsibility ought to be formally recognized in criminal law. Meanwhile, legislators remained relatively quiet on the issue.[33] Despite

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26 *Minassian, supra* note 16 at para 25; *Bouchard-Lebrun, supra* note 8 at para 51.

27 See Louise Kennefick, "Introducing a New Diminished Responsibility defence for England and Wales" (2011) 74:5 Mod L Rev 750 at 760 [Kennefick,].

28 *Chartrand v the Queen*, [1977] 1 SCR 314 at 148, 1975 CanLII 188 (SCC).

29 *R v Dobson*, 2018 ONCA 589 at para 38 [*Dobson*].

30 See Mark Gannage, "The Defence of Diminished Responsibility in Canadian Criminal Law" (1981) 19:2 Osgoode Hall LJ 301 at 319-20 [Gannage].

31 *Regina v Lechasseur*, 1977 CanLII 2074 (QC CA) at 320; *R c Dufour*, 2010 QCCA 2413 at para 41 [*Dufour*].

32 Gannage, *supra* note 30 at 314.

33 A search of legislative debates revealed that it has only been discussed peripherally. In 1956, the Report of the Royal Commission on the Law of Insanity as a Defence in Criminal Cases revealed that diminished responsibility was superficially examined and outright rejected the inclusion of the defence in Canadian law. "Report of the Royal

legislative inertia vis-à-vis diminished responsibility, Parliament legislated two other statutory offences, infanticide and provocation, to recognize some form of diminished responsibility. As partial defences, both infanticide[34] and provocation – if successfully plead – can spare offenders from murder convictions. Similar to the United Kingdom, murder convictions are followed by mandatory life sentences and lengthy periods of parole ineligibility. As well, the repeal of section 745 (the faint hope clause) means there is no longer a review mechanism for those whose parole ineligibility is greater than 15 years.[35] Consequently, the sentencing landscape provides very little flexibility to ensure that sentencing embodies and gives effect to the principle of proportionality. Therefore, partial defences to murder are critical in ensuring that offenders are properly convicted and sentenced.

In this section, both partial defences – provocation and infanticide– will be briefly described to demonstrate that the current absence of a broader defence of diminished responsibility in Canadian criminal law does not result in proportional conviction and sentencing of those unable to avail themselves of a partial defence.

1. Ontario

A murder charge can be reduced to manslaughter if the accused committed the offence in the "heat of passion caused by sudden provocation."[36] Put differently, the impairment in judgement is caused by emotion rather than a mental illness or disturbance. Justice Renke described provocation as relying on an extension of legal realism, or "what might be called the 'correspondence theory' implicit in the criminal law."[37] Provocation recognizes the diminished blameworthiness of a provoked

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Commission on the Law of Insanity as a Defence in Criminal Cases" (1956) at 46 & 64, online (pdf): <www.lareau-legal.ca/CommissionInsanity.pdf> [perma.cc/L2PE-67FP]. The defence of Diminished Responsibility was re-examined in 1984 by the Department of Justice and raised once more in 1992 at the Subcommittee regarding the recodification of the General part of the *Criminal Code*.

34 For the purposes of this essay, infanticide is referred to as a partial defence. However, it also operates as a stand-alone offence. See *R v Borowiec*, 2016 SCC 11 at para 15.

35 Isabel Grant, "Rethinking the Sentencing Regime for Murder" (2001), 39 Osgoode Hall LJ 655 at 661-63 [Grant].

36 *Criminal Code*, *supra* note 16, s 232.

37 Wayne Renke, "Calm like a Bomb: An Assessment of the Partial Defence of Provocation" (2010) 47:3 Alta L Rev 729 at 761 [Renke].

killer: while the provoked killer intended to kill, they did not "have the same degree of freedom of choice as the unprovoked killer."[38]

While provocation recognizes the "human frailties which sometimes lead people to act irrationally and impulsively," it is a deeply controversial defence.[39] For instance, provocation has been historically relied upon by men and reinforces the conception – or justification– of women as men's property.[40] As well, the qualifying conditions for the partial defence have been substantially narrowed since the amendments provided in the *Zero Tolerance for Barbaric Cultural Practices Act*.[41] Since 2015, provocation arises from conduct of the victim that would both constitute an indictable offence and "deprive an ordinary person of the power of self-control."[42] Previously, the victim's provoking actions did not need to amount to an indictable offence. Instead, it required "a wrongful act or an insult that is of such a nature as to be sufficient to deprive an ordinary person of self-control … if the accused acted on it on the sudden and before there was time for his passion to cool." Both Isabel Grant and Debra Parkes argue these amendments fail to confront provocation's central weakness: provocation privileges male rage often arising in domestic contexts or same-sex advances.[43]

While it is beyond the scope of this essay, it is worth noting that the *Coroners and Justice Act* replaced the defence of provocation in the United Kingdom with a new defence, one of "loss of self-control," in response to similar critiques.[44]

2. Infanticide

Infanticide occurs when the accused causes the death of her newly born child, if at the time of the act or omission she is not fully recovered from

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38 *Ibid*.

39 *R v Thibert*, [1996] 1 SCR 37 at para 4, 131 DLR (4th) 675.

40 See Renke, *supra* note 37 at 755; *R v Simard*, 2019 BCSC 531 at para 21.

41 *Zero Tolerance for Barbaric Cultural Practices Act*, SC 2015, c 29.

42 *Criminal Code*, *supra* note 16, s 232(2).

43 Isabel Grant & Debra Parkes, "Equality and the Defence of Provocation: Irreconcilable Differences" (2017) 40:2 Dal L Rev 455 at 458. In *R v Simard*, 2019 BCSC 531, the Court found that s 232(2) as amended in 2015 infringes s 7 of the *Canadian Charter of Rights and Freedoms*.

44 R D Mackay, "The Coroners and Justice Act 2009—Partial Defences to Murder (2) The New Diminished Responsibility Plea" (2010) Crim L Rev 290 at 295. [Mackay]. See also *Coroners and Justice Act* 2009 (UK), c 25, s 54-56.

childbirth and "by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed."[45] Unlike a conviction for manslaughter, the maximum sentence for an infanticide conviction is five years imprisonment.[46]

Nearly forty years after promulgation, the Law Reform Commission recommended the repeal of section 233 given its legal redundancy and absence of robust medical evidence supporting the underlying rationale for the offence. Instead of retaining the infanticide offence, the Law Reform Commission suggested that mothers experiencing postpartum psychosis may advance the defence of mental disorder and seek diversion.[47]

While the Law Reform Commission's call for reform have gone unanswered, the issues raised are still live: there is little evidence supporting the current form of section 233, that is, that childbirth and lactation cause a disturbed mind. It appears that postpartum disorders are exacerbated by socioeconomic factors, stress, and other psychological factors rather than hormonal changes.[48] Noted by Sanjeev Anand, infanticides are primarily committed in response to the stresses of childrearing rather than the effects of childbirth or lactation.[49] As a result, the offence should not be limited to women. Additionally, the combination of the low maximum penalty with the broad definition of disturbed mind arguably trivializes the killing of newborn children. The problematic features of the infanticide offence could be resolved by subsuming it into the defence of diminished responsibility.[50] As a result, the defence would allow for flexible sentencing while ensuring that the loss of newborn life is not trivialized. [51]

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45 *Criminal Code*, *supra* note 16, s 232.

46 *Criminal Code*, *supra* note 16, s 236(b)–237(a).

47 See Vallillee, *supra* note 5 at 10.

48 See Sanjeev Anand, "Rationalizing Infanticide: A Medico-Legal Assessment of the Criminal Code's Child Homicide Offence" (2010) 47:3 Alta L Rev 705 at 722.

49 *Ibid.*

50 See Sanjeev Anand & Kent Roach, "Inertia, Uncertainty, and Canadian Homicide Law: An Introduction to the Special Issue" (2010) 47:3 Alta L Rev 643 at 643 [Anand & Roach].

51 See Scott Mair, "Challenging Infanticide: Why Section 233 of Canada's Criminal Code is Unconstitutional" (2018) 41:3 Man LJ 241; see also H Archibald Kaiser, "Borowiec: Exploring Infanticide, 'a particularly dark corner' and Providing Another Reminder of the Need for Reforming Homicide Sentencing" (2017) 65 CLQ 242 at 8.

In sum, the purpose of this section is to provide a glimpse, rather than a thorough assessment, of the maelstrom of issues engendered by both defences. As well, this section illustrates how these partial defences only capture a narrow pool of individuals, thereby excluding a larger population of accused individuals with medical conditions that may have substantially impaired impulse control, ability to think through consequences, or form alternative courses of action.[52] Consequently, it follows that the limited scope of application and the pitfalls of the defence of infanticide could be avoided entirely if Parliament turned its mind to alternatives, such as enacting a defence of diminished responsibility.

III. DIMINISHED RESPONSIBILITY IN ENGLISH LAW: FROM INCEPTION TO REFORM

This section traces the origins of the defence of diminished responsibility and culminates with a critical examination of the current defence.

Prior to the advent of the defence of diminished responsibility, the law dichotomized the "sane or insane; responsible or not responsible, bad and mad."[53] Described as an anomaly in English law, the defence of diminished responsibility arose from judicial creation.[54] Acknowledging the difficulty in defining diminished responsibility, the court in *HM Advocate v Savage* described the concept to the jury as:

"[An] aberration or weakness of mind; that there must be some form of mental unsoundness; that there must be a state of mind which is bordering on, though not amounting to, insanity; that there must be a mind so affected that responsibility is diminished from full responsibility to partial responsibility—in other words, the prisoner in question must be only partially accountable for his actions."[55]

While there were references to incarnations of diminished responsibility in case law as early as 1704, *HM Advocate v Dingwall* is often

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52 See Wasserman & Johnston, *supra* note 6 at S47.

53 Alan Reed & Michael Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Burlington Ashgate Pub, 2011) at184.

54 See Gannage, *supra* note 30 at 302.

55 *HM Advocate v Savage*, [1923] JC 49 (HCJ Scot) at para 51 [emphasis added].

associated as the herald of this defence into Scottish law.[56] Mr. Dingwall was charged with the death of his wife following an episode of *delirium tremens*. Though his condition did not constitute insanity, Lord Deas instructed the jury that he "could not say that it was beyond the province of the jury to find a verdict of culpable homicide if they thought that was the nature of the offence," and that Mr. Dingwall's condition – his weakness of mind – could be considered in arriving at their decision.[57] The jury returned a verdict of culpable homicide (manslaughter) rather than one of murder. Given that the defence recognized the complexity of criminal responsibility and the need to divert some offenders away from mandatory capital punishment, the defence gained traction and continued to develop among Scottish courts.

Nearly a century later, the defence of diminished responsibility was introduced into English law by way of section 2 of the *Homicide Act 1957* .[58] It was intended as a new defence for those who could not avail themselves of the insanity defence but regarded as "insane in the medical sense and those who are not insane in either sense, are seriously abnormal, whether through mental deficiency, inherent causes, disease or injury." [59]

To raise the diminished responsibility defence, two requirements must be satisfied on a balance of probabilities. First, the accused must have suffered from an "abnormality of the mind" and second, this abnormality must have substantially impaired the accused's mental responsibility for the killing.[60] Unlike its common law predecessor, the defence of diminished responsibility under the *Homicide Act* only applied to murder cases. A successful defence translated into the reduction of a murder charge to a manslaughter rather than an acquittal. This remedy originally arose out of apparent necessity given that a manslaughter conviction avoided the

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56 *HM Advocate v Dingwall*, (1867) 5 Irv 466. See also Louise Kennefick, "Diminished responsibility in Ireland: historical reflections on the doctrine and present-day analysis of the law" (2011), 62:3 N Ir Leg Q 269 at 270; Kennedy, *supra* note 3at 307.

57 Kennedy, *supra* note 3 at 307.

58 *Homicide Act 1957* (UK), 5 & 6 Eliz 2, c 11, s 2.

59 Rudi Fortson, "The Modern Partial Defence of Diminished Responsibility" in Alan Reed & Michael Bohlander, *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Burlington, VT: Ashgate Pub, 2011) at 22 [Fortson].

60 Kennefick, *supra* note 27 at 755.

imposition of capital punishment. As well, the sentence reduction results in wider sentencing options and flexibility.[61]

The original wording of section 2 of the *Homicide Act* 1957 defined diminished responsibility as:

Such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.[62]

A. *Coroners and Justice Act 2009*: A Revised Defence of Diminished Responsibility

Several high-profile cases in the United Kingdom prompted the government to order the Law Commission to examine its homicide laws. [63] In 2006, the Law Commission published its report "Murder, Manslaughter and Infanticide," which called for several legislative reforms. While the Law Commission found that diminished responsibility should be retained, its definition required clarification and modernization to "accommodate developments in expert diagnostic practice." [64] Two problematic features arose with respect to the original definition of section 2 of the *Homicide Act*. First, it failed to describe how the effect of an abnormality of mind can reduce culpability for an intentional killing as it says nothing about what is involved in a substantial impairment of mental responsibility.[65] This ambiguity arguably resulted in inconsistent outcomes in interpretations and applications of the defence. Second, the definition did not align with medical science: "abnormality of mind" is not a psychiatric term and thus its meaning has been developed by the courts, rather than the medical community.[66] In addition to the two challenges raised by the Law Commission, section 2 of the *Homicide Act* also attracted criticism due to its generous catchment. The defence of diminished responsibility was judicially interpreted to include a wide range of mental conditions such as

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61 See Gannage, *supra* note 30 at 303.

62 Fortson, *supra* note 59 at 22.

63 See Anand & Roach, *supra* note 50 at 633.

64 Law Commission, *supra* note 2 at paras 5.107, 5.83-5.84.

65 *Ibid* at para 5.110.

66 *Ibid* at para 5.111.

alcoholism, volitional insanity, psychopathy, and even mercy-killing.[67] This liberal interpretation resulted in accusations of permitting "benign conspiracies" wherein psychiatric evidence was stretched "so as to produce a greater range of exemption from liability for murder than its terms really justify."[68]As a result, the Law Commission formulated a new definition of diminished responsibility. The Government accepted some of the Law Commission's proposals, such as a revised definition of diminished responsibility.[69] Section 52 of the *Coroners and Justice Act* 2009 ("CJA") now redefines diminished responsibility as:

> **52 Persons suffering from diminished responsibility (England and Wales)**
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> (1) In section 2 of the Homicide Act 1957 (c. 11) (persons suffering from diminished responsibility), for subsection (1) substitute—
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> "(1) A person ("D") who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of mental functioning which—
>
> (a) arose from a recognised medical condition,
>
> (b) substantially impaired D's ability to do one or more of the things mentioned in subsection (1A), and
>
> (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
>
> (1A) Those things are—
>
> (a) to understand the nature of D's conduct;
>
> (b) to form a rational judgment;
>
> (c) to exercise self-control.
>
> (1B) For the purposes of subsection (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct."

B. A Closer Look at the Revised Defence of Diminished Responsibility

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67 See Kennefick, *supra* note 27 at 755. See also Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law* (Oxford: Oxford University Press, 2012) at 236 [Loughnan].

68 Mackay, *supra* note 44 at 295.

69 See Fortson, *supra* note 59 at 24. Predictability, perhaps, the Government declined the graduated system for homicide offences or to abolish mandatory life sentences.

While the objectives of modernizing diminished responsibility are laudable, a closer examination of the revised defence will reveal its strengths, ambiguities, and shortcomings.

1. Section (1)(a) – The abnormality of mental functioning arose from a medical condition

Contrary to its previous incarnation, diminished responsibility requires evidence of a recognized medical condition and encourages expert evidence, including diagnosis per the DSM-5 or ICD10.[70] Consequently, the defence no longer applies to cases such as highly stressed killers and mercy-killings.[71] While it narrows the scope of application, it also provides clarity for other conditions. For instance, it may extinguish any doubts that alcoholism or alcohol dependent syndrome is distinct from intoxication and could fall within the ambit of diminished responsibility. The definition also encompasses post-traumatic stress disorder, including those arising from domestic violence.[72]

2. Section (1)(b) – Substantial impairment due to abnormality of mental functioning

Jurisprudence shaped and defined "substantial impairment" to signify an impairment that is not necessarily "total," but rather more than trivial or minimal.[73] In *Golds*, the United Kingdom Supreme Court held that "substantial impairment" should be understood in its ordinary meaning.[74] If the jury seeks clarification on the meaning of substantial, the trial judge "should explain that whilst the impairment must indeed pass the merely trivial before it need be considered, it is not the law that any impairment beyond the trivial will suffice."[75]

3. Section (1)(c) – A causal link between the abnormality of mental functioning and the killing

Unlike its predecessor, the revised definition of diminished responsibility now requires a causal link. The expression "provides an

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70 See Law Commission, *supra* note 2 at para 5.114.

71 See Mackay, *supra* note 44 at 295. See also Kennefick, *supra* note 27at 750.

72 See Law Commission, *supra* note 2 at para 5.116.

73 Kennefick, *supra* note 27 at 760.

74 *R v Golds*, [2016] UKSC 61 (BAILII) [*Golds*] at para 43.

75 *Ibid* at para 43.

explanation" suggests that this is a low threshold and is arguably self-evident; perhaps even a temporal connection.[76] This may be helpful in situations where a medical condition may impair cognition even though it may not be the sole contributory factor. However, the requirement for causation raises some concerns. Nicholas Hallett criticized the new provisions as an anomaly given that no other jurisdiction with a defence of diminished responsibility requires such a link.[77] In fact, the M'Nagthen Rules – the United Kingdom's equivalent of the Canadian defence of NCRMD – do not require a causal connection.[78] While the requirement for an explanation is a lower threshold than strict causation, this approach may narrow the scope of the defence of diminished responsibility.[79] Given the differences between diminished responsibility and NCRMD, it is arguably appropriate to expect that some causation be required to successfully plead diminished responsibility. Indeed, this requirement aligns well with current sentencing principles in Canada: while a mental condition may lessen the offender's moral blameworthiness, mitigation requires a causal link between the condition and the offender's conduct.[80]

4. Section 2(1A)(a) – The accused's ability to understand the nature of their conduct

There is little to no guidance to interpret the meaning of section 2(1A)(a): the accused's "ability to understand the nature of their conduct." The Law Commission provided only one example as an interpretative, but non-exhaustive, aid in their report. They cited the example of a ten-year-old boy who was essentially raised on violent video games. One day, the child lost his temper and killed another child. It was evident from the interview that the child does not understand that when someone is killed they cannot be revived as it happens in video games.[81] This example would be unhelpful in the Canadian context given that a ten-year-old child would not be

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76 Loughnan, *supra* note 67 at 243.

77 Nicolas Hallett, "Psychiatric evidence in Diminished Responsibility" (2018) 82:6 J Crim L 442 at 455 [Hallett]. In Canada, for instance, the infanticide provision merely requires a temporal association between the mental disturbance and the infant's death. (*R v Borowiec*, [2016] 1 SCR 80 at para 35).

78 See Mackay, "*The Coroners and Justice Act*", *supra* note 44 at 298.

79 See Loughnan, *supra* note 67 at 244.

80 See e.g. *R v Prioriello*, 2012 ONCA 63 at para 11.

81 See Law Commission, *supra* note 2 at para 5.121(1)(a).

criminally responsible in any event. Assuming the example involved an adult, it appears that a lifetime of violent video games, combined with one or more underlying conditions affecting cognition, substantially impaired the accused's capacity to understand the nature and consequences of his actions. This first prong hearkens back to both section 16(1) of the *Criminal Code* (NCRMD) and the M'Naghten Rules. Fortson remarks that this definition is wide enough to include a normative element akin to the outdated definition of insanity, whereby the accused by way of his condition either failed to appreciate the quality and nature of their actions or did not know it was wrong.[82]

Despite its similarity, section 2(1A)(a) is neither a reproduction nor a more "stringent" version of the M'Naghten rules. Involuntary acts cannot attract punishment: either the defect of reason means that the accused could "not to know the nature or quality of his or her act, or that the act was wrong, or the defect of reason did not have that effect."[83] In contrast, diminished responsibility presumes some degree of volition.[84] Therefore, a conviction and sentence commensurate to the degree of responsibility is justified.

5. Section 2(1A)(b) – The accused's ability to form a rational judgement

This second prong of the revised defence requires that the accused's ability to form a rational judgment is substantially impaired. The Law Commission provided some examples to illustrate how the abnormality of mental functioning might manifest itself such that a successful plea of diminished responsibility could succeed under section 2(1A)(b). The first example relates to a woman experiencing post-traumatic stress disorder as a result from intimate partner violence who "comes to believe that only burning her husband to death will rid the world of his sins."[85] The final example involves a man with depression who cared for his spouse. The man's spouse has a terminal illness and the man killed his spouse upon her request. While the man found it more difficult to stop his spouse's requests from "dominating his thoughts to the exclusion of all else," the man took his wife's life because he felt that he could never think straight until he

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82 Fortson, *supra* note 59 at 32.

83 Law Commission, *supra* note 2 at para 5.142.

84 See Kennefick, *supra* note 27 at 760.

85 Law Commission, *supra* note 2 at para 5.121(2)(a).

acceded to her requests.[86] As noted by Ronnie Mackay, judgement implies a weighing of options before arriving at a particular decision.[87] As a result, this section calls upon the trier of fact to consider the accused's thought process rather than limiting their deliberations on the actual outcome. While expert evidence may assist the trier of fact in their assessment of whether the medical condition substantially impaired the accused's ability to form a rational judgement, this determination is legal rather than medical.

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86 *Ibid* at para 5.121(2)(c).

87 Ronnie Mackay, "The Impairment Factors in the New Diminished Responsibility Plea" (2018) 6 Crim L Rev 462 at 468.

88 Law Commission, *supra* note 2 at para 5.121(2)(a).

89 *Ibid* at para 5.121(2)(c).

90 Ronnie Mackay, "The Impairment Factors in the New Diminished Responsibility Plea", (2018) 6 Crim L Rev 462 at 468.

6. Section 2(1A)(c) – The accused's impaired ability to exercise self-control

Unlike the defence of loss of control (previously known as provocation), section 2(1A)(c) is concerned with the degree to which the accused's medical condition impaired their ability to control their conduct. The Law Commission illustrated the third prong, the accused's impaired ability to exercise self-control, by way of the following example: "a man says the devil takes control of him and implants in him a desire to kill, a desire that must be acted on before the devil will go away."[91] This brief example, similarly to those preceding it, raises several issues. First, Hallett noted that this example was strange given that it was more similar to delusion than impulsivity.[92] Second, the example evokes an individual who could be experiencing psychosis or symptoms related to schizophrenia or schizoaffective disorder.[93] Assuming that, at the material time, the man did not appreciate the nature of his actions or did not know that his actions were morally wrong, it appears at first glance this example aligns best with the NCRMD defence rather than diminished responsibility. However, the example suggests that the motivation to kill appears to be under some control, in contrast with other cases including those where the NCRMD defence is invoked.

It is curious that the Law Commission chose this example rather than the more commonplace occurrence of individuals whose organic brain damage impaired their ability to control their impulses. In any event, it does illustrate one of the challenges faced by the trier of fact: distinguishing between cases where the accused's medical condition indeed impaired their ability to control their conduct versus those who chose not to attempt to control their conduct.[94]

C. The Role of Diminished Responsibility Post-Conviction

Once a court finds the accused's responsibility diminished, the murder charge will be reduced to a manslaughter conviction. The offence reduction translates into a greater range of sentencing options. Sentencing judges in

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91 Law Commission, *supra* note 2 at para 5.121(3)(a).

92 Hallett, *supra* note 77 at 453.

93 Similarly, to cases such as *R v Onochie,* 2015 ONSC 7928, where the accused, who would hear a voice associated with God, thought his father was possessed by the devil. He believed killing the snake, who took over his father's body, would liberate his father and restore him to his normal state.

94 See Fortson, *supra* note 59 at 34.

the United Kingdom may impose a hospital order pursuant to s. 37 of the *Mental Health Act* 1983.[95] The Law Commission noted that roughly half of those who plead diminished responsibility will be subject to a hospital order, often coupled with restriction orders to tighten conditions for release. Offenders typically spend nine years in hospital before their release. Meanwhile, offenders who are sentenced to prison will typically receive sentences up to 10 years.[96] In contrast, Canadian judges cannot impose hospital orders as a sentencing disposition despite calls from the Law Reform Commission of Canada in 1976 to introduce hospital orders.[97]

IV. Discussion: Should Canada Embrace the Defence of Diminished Responsibility

At this juncture, this essay will examine whether the defence of diminished responsibility should find its way into Canadian law. In doing so, it will use the following two premises as evaluating criteria. First, any criminal reform must acknowledge the complexity of criminal responsibility and respond properly to those who do not fall under the purview of s. 16 of the *Criminal Code*. Second, any amendment must ensure that individuals are convicted and sentenced in a manner that reflects their blameworthiness. As noted by Andrew Ashworth, "fairness demands that offenders be labelled and punished in proportion to their wrongdoing."[98] In arriving at the conclusion that there should be some recognition of diminished responsibility, this essay will proceed in three parts. First, it will reflect on whether the defence of diminished responsibility should be codified as a partial defence. Second, it will assess whether repealing mandatory life imprisonment constitutes an appropriate alternative which satisfies the twin objectives of proportionate conviction and sentencing. Finally, this essay will culminate by advancing a compromise: diminished

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95 *Mental Health Act* 1983 (UK), c 20.

96 Law Commission, *supra* note 2 at 96.

97 See Aman Patel, "Landing in the Cuckoo's Nest: The Hospital Disposition of Guilty Mentally Ill Offenders – Lessons from the United Kingdom" (2002) 39:4 Alta L Rev 810 at 816 [Patel].

98 Andrew Ashworth, *The Elasticity of Mens Rea* in C F H Tapper ed, *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London: Butterworth, 1981) at 53-54 [Ashworth].

responsibility can be subsumed as a statutory exception in sentencing only in relation to mandatory life imprisonment.

A. In Defence of Diminished Responsibility in Canada

The partial defence of diminished responsibility represents an attractive solution. First, the defence recognizes that criminal, legal, and moral responsibility is a question of degree rather than an absolute binary. Second, its recognition of the continuum of responsibility translates into both the reduction of the degree of the offence and the reduction of sentence. As noted by Professor Ferguson, this is significant since the "name attributed to an offence inherently indicates the seriousness and/or culpability of the person convicted – e.g. murder versus manslaughter."[99] Put differently, diminished responsibility does more than simply shield from mandatory life imprisonment. In *R v Dobson,* the appellant raised the principle of "fair labelling" in seeking the recognition of the partial defence of diminished responsibility in Canadian common law. The outcome of the defence, "a manslaughter verdict, coupled with the broad sentencing discretion available for that offence, would properly reflect the different levels of culpability."[100] Fair labelling contends that an offence should fairly represent the nature of the criminalized act.[101]

Importing the defence of diminished responsibility into Canadian law would also require the introduction of hospital orders. These orders are intended for individuals who are found criminally responsible for their actions and have been diagnosed with a mental disorder.[102] While hospital orders are intended to be therapeutic, they are also detention orders. Without the introduction of hospital orders, Canadian courts would continue to be ill-suited to provide a meaningful disposition for individuals with mental illness, as sentencing judges should not rely on correctional

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99 Gerry Ferguson, "Submission to the Parliamentary Committee on Recodification of the Criminal Law: Mental Disorder, Diminished responsibility and automatism" to the Standing Committee on Justice and the Solicitor General (Ottawa: House of Commons, 18 November 1992) at 5A: 199, at para 45 [Ferguson].

100 *Dobson, supra* note 29at para 36.

101 Ashworth, *supra* note 98 at 53.

102 See Marilyn Pilon, "Mental Disorder and Canadian Criminal Law" (22 January 1999) at 8, online (pdf): *Government of Canada* <publications.gc.ca/site/eng/299888/publication.html> at 8.

institutions to provide adequate mental health services.[103] Hospital orders achieve several sentencing objectives simultaneously: protecting society by separating offenders from the community, while also providing rehabilitative opportunities that offenders would otherwise have been unable to access in prison. Moreover, hospital orders also contain a punitive component given the liberty restrictions against the offender. A conditional sentence, crafted to turn into a de facto hospital order, may also be an unsuitable substitute. For instance, Aman Patel noted that an accused could decline this form of disposition and serve their sentence in jail.[104] As well, conditional sentences are still unavailable for a series of offences including manslaughter as a result of the *Safe Streets and Community Act*.[105] Just as finite resources cannot justify delay in criminal proceedings,[106] lack of funding should not deter Parliament from introducing hospital orders and ensuring that all patients – including forensic patients – have access to treatment through adequate funding from both levels of government. [107]

However, there are several issues that must be resolved before accepting the defence of diminished responsibility as it is framed in the United Kingdom. The two principal objections relate to the overreliance on expert evidence and ambiguities related to both the defence's form and substance. First, the defence of diminished responsibility calls for expert evidence to substantiate the accused's medical condition, which substantially impairs the accused's ability to do one or more of the following: understand the nature of their conduct; form rational judgement; and/or exercise self-control. The new provisions attempt to depart from a moral assessment to embrace a more "medicalized" offence. In Nicholas Hallet's view, however,

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103 Patel, *supra* note 97 at 815.

104 *Ibid* at 819.

105 Although the Court of Appeal in *R v Sharma*, 2020 ONCA 478 found that section 471(c) contravened sections 7 and 15 of the *Charter*.

106 See *R v Jordan*, 2016 SCC 27.

107 For instance, the 2016 Annual Report of the Office of the Auditor General of Ontario remarked that limited funding translated into the net reduction of 134 long-term psychiatric beds across the province; see "2016 Annual Report" (19 January 2022), online: *Office of the Auditor General of Ontario* <www.auditor.on.ca/en/content/annualreports/arbyyear/ar2016.html> [perma.cc/YS8C-WCUD] at 623.

the new provisions have given psychiatric evidence too much authority.[108] Empirical studies demonstrate that expert evidence is critical in diminished responsibility cases and, as a result, Loughnan posits "expert evidence is a de facto requirement, placing expert knowledge at its heart."[109] Despite the central role of expert evidence, the determination of whether an accused's condition substantially impaired their abilities under ss. 2(1A)(a)-(c) does, and ought to, remain with the trier of fact. This risk can be mitigated in the Canadian context given it is trite law that experts cannot usurp the function of the trier of fact. As gatekeepers, judges must assess the costs and benefits of admitting expert evidence.[110] It is entirely possible that medical experts testify on similar hypothetical scenarios and the accused's disorder's likely effects while restraining themselves from opining on the ultimate issue: whether the disorder amounts to a substantial impairment of mental responsibility.[111] Nonetheless, these concerns should not deter Parliament from studying and eventually incorporating this defence into Canadian law.

Second, issues have been raised surrounding the defence's current model in the United Kingdom. While the defence was revised to modernize and recognize scientific developments, the new defence arguably resulted in unintended consequences. For instance, Mackay and Mitchell found the revised defence has resulted in "more contested pleas with convictions for murder being returned in 34.4% of these cases compared to a murder conviction rate of 14% under the old plea."[112] Therefore, the revised definition is more restrictive than its previous incarnation. The previous version of diminished responsibility may have facilitated flexible interpretation which developed "developed beyond identification of the narrow range of causes of an abnormality of mind." [113] While the revised definition was intentionally crafted to preclude rational mercy killing cases

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108 Hallett, *supra* note 77 at 456. Hallett argues that legislators "have been mistaken in thinking that psychiatry can answer these questions definitively and have encouraged psychiatrists to step outside their area of expertise and usurp the function of the jury."

109 Loughnan, *supra* note 67 at 248.

110 See *R v Lucas*, 2014 ONCA 561 at para 271. The Court of Appeal added that "[t]he closer the opinion evidence comes to the ultimate question the jury must answer, the more this risk may be heightened" [emphasis added].

111 See Law Commission, *supra* note 2at para 5.118.

112 Ronnie Mackay & Barry Mitchell, "The New Diminished Responsibility Plea in Operation: Some Initial Findings" (2017) Crim L Rev 18 at 35.

113 See Kennefick, *supra* note 27 at 757.

and cases where "any killer suffer[s] from depression;" the defence may have been narrowed too much to preclude its use by accused. [114]

While there are challenges inherent to the defence of diminished responsibility, these challenges do not diminish its attractiveness. Given the areas of contention identified, Parliament cannot simply import the United Kingdom's defence into Canadian law. Instead, Parliament must study, consult with stakeholders, and reflect on how the defence ought to take shape in the Canadian context in such a way that it aligns with our objectives and interests. Parliament ought to consider the following: whether diminished responsibility in Canada be limited to murder charges; whether it should apply to specific intent offences, lesser and included offences; [115] and should it apply to all cases where convictions attract mandatory minimums and/or mandatory life imprisonment.

B. Abolition of Mandatory Life Sentences

The second alternative to the defence of diminished responsibility is repealing mandatory life sentences. Given the current inflexible sentencing regime in both Canada and the United Kingdom, several academics and stakeholders have advocated for the removal of mandatory life sentences for murder. The abolition of mandatory life sentences would translate into greater flexibility in sentencing, thus resulting in fairer and more proportionate sentences having regard to the circumstances of the offence and those of the offender. As a result, it achieves the same goals as diminished responsibility, without engendering the challenges brought on by applying the partial defence. The Law Commission remarked that medical experts commonly suggest the defence of diminished responsibility should be abolished as a trial matter.[116] Instead, the Royal College of Psychiatrists recommended that discretion should rest with the sentencing judge to determine the appropriate sentence if they find the accused had diminished responsibility. This view aligns with other jurisdictions where

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114 Law Commission, *supra* note 2 at para 7.53.

115 See Robert C Topp, "Concept of Diminished Responsibility for Canadian Criminal Law" (1975) 33:2 UT Fac L Rev 205 at 205. Prior to the legislation of the defence of diminished responsibility into the *Homicide Act,* the defence had been previously applied to lesser crimes such as housebreaking.

116 Law Commission, *supra* note 2at para 5.94.

diminished responsibility is viewed purely as a sentencing matter.[117] As well, the abolition of mandatory life imprisonment would mean there would be no risk of a "benign conspiracy" wherein psychiatric evidence is manipulated to achieve a desired outcome. Similarly, repealing mandatory life sentences would also obviate the need for some problematic defences identified previously, such as provocation and infanticide. [118]

While the abolition of life imprisonment is appealing, there are two main weaknesses to this position. First, repealing mandatory life imprisonment does not address offence reduction but simply sentence reduction. Conversely, a more flexible sentencing regime would benefit a larger population of offenders than introducing the defence of diminished. Moreover, the abolition of mandatory life imprisonment arguably impacts offenders in a much more significant way than the type of offence registered as a conviction. [119] Any conviction, especially one involving the loss of life, is highly prejudicial and life altering to the offender. Consequently, proportionate sentencing, which accounts for the offender's degree of moral blameworthiness, may outweigh the need for "fair labelling." While fair labelling – reducing the offence from murder to manslaughter – is laudable, the Canadian justice system does not appear to be entirely concerned by it. For instance, the regime under the *Youth Criminal Justice Act* ("*YCJA*") recognizes that young persons' capacities and, therefore, responsibility are diminished.[120] This recognition translates into a separate sentencing scheme and other provisions protecting procedural fairness. This recognition of diminished moral blameworthiness does not preclude young persons from being convicted for murder. Under this lens, moral blameworthiness ought to remain under the ambit of sentencing.

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117 *Ibid* at paras 5.89-5.94. These jurisdictions include Germany and France.

118 See Fortson, *supra* note 59at 23. Fortson and other academics have noted that the problems associated with the defence of diminished responsibility could be avoided if the life sentences were abolished.

119 It may be entirely possible that "fair labelling" is a secondary issue to those who are charged with murder. I am unaware of any research identifying benefits of offence reduction from murder to manslaughter for reasons other than sentencing. Further research could focus on the perceptions and lived experience of those who have been convicted of murder and/or manslaughter.

120 *Youth Criminal Justice Act*, SC 2002, c 1. See also *R v DB*, [2008] 2 SCR 3 at para 41, 293 DLR (4th) 278: "young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment. This entitles them to a *presumption* of diminished moral blameworthiness or culpability."

Second, absolute and unfettered judicial discretion in sentencing risks "trivializing some murders and treating them on par with attempted murder (in which no life is taken) and manslaughter in which a life is taken unintentionally."[121] The perception of the public as well is an important consideration at this stage. While it is unlikely that sentencing courts would abuse their absolute judicial discretion, the perception of such risk may endanger the public's confidence in the administration of justice.

C. The Compromise: Recognizing Diminished Responsibility as an Exception to Life Imprisonment

Both the abolition of mandatory life imprisonment and the implementation of diminished responsibility as a partial defence to murder appear unlikely. Cognizant that Parliament is constrained by several competing interests including public opinion, Isabel Grant proposed a compelling compromise: a life sentence would be the "starting point" in which the sentencing judge is empowered to reduce the sentence in cases where the presumptive penalty "would constitute a miscarriage of justice."[122] This compromise bears resemblance to other sentencing provisions in other jurisdictions. For instance, per the Northern Territory *Sentencing Act* of Australia, there is a presumptive parole ineligibility period of 20 years. However, s. 53A(6) of the *Sentencing Act* provides that the court may fix a shorter "non-parole period" if the Court is satisfied there are exceptional circumstances that justify fixing a shorter non-parole period.[123] Exceptional circumstances arise when the Court is satisfied of the following matters: (a) the offender is otherwise a person of good character, unlikely to re-offend; and (b) the victim's conduct, or conduct and condition, substantially mitigate the conduct of the offender. While it is beyond the scope of this essay to examine and argue that the exceptional circumstances as set out in s. 53A(6) ought to be imported into the Canadian context, it highlights the possibilities and permutations of sentencing in homicide cases.

Building upon Grant's proposed alternative, the defence of diminished responsibility could be subsumed as an exception to the presumptive life sentence for homicide convictions. This exception should be codified into

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121 Grant, *supra* note 35 at 697.

122 *Ibid* at 695.

123 *Sentencing Act 1995* (NT), 1995, s 53A(6)

the *Criminal Code* to assist the court in determining whether the presumption of life imprisonment amounts to a miscarriage of justice or exceptional circumstances. Drawing from the United Kingdom's defence of diminished responsibility, the statutory defence could be drafted as follows:

> - whether the offender's capacity to understand the nature of their conduct; form a rational judgement; and/or exercise self-control was substantially impaired by a medical condition at the time of the commission of the offence.

While this compromise does not achieve "fair-labelling," it mitigates the risks and challenges associated to diminished responsibility as a partial defence to murder all while achieving proportionate sentencing.

V. CONCLUSION

Guided by the fundamental principle of proportionality, the current state of homicide laws, including its partial defences and inflexible sentencing regime, cannot properly and proportionately convict and sentence offenders.

As a potential remedy, legislators should draw inspiration from the United Kingdom's defence of diminished responsibility. This defence ensures both proportionate convictions and sentences in homicide cases. First, it offers offence reduction, which reduces the stigma associated with a murder conviction and recognizes diminished moral blameworthiness in the appropriate circumstances. Second, it translates into a wider range of sentencing options, including hospital orders. Granted, the defence is not immune to criticism. For instance, there are concerns associated with the defence's application and scope, including its overreliance on expert evidence. Alternatively, the abolition of mandatory life sentences arguably achieves more proportionate sentencing. Yet, the abolition of mandatory life sentences is unlikely. Consequently, the defence of diminished responsibility could be subsumed as a statutory exception of mandatory life sentences as it is both desirable and achievable.

While no single proposal is a panacea in ensuring proportionate convictions and sentencing, it is in the interests of justice that Parliament revisit homicide laws in Canada. The partial defences of infanticide and provocation are a testament to the fact that not all murderers resemble another, and thus, do not merit the same sanction. Recognizing the defence

of diminished responsibility, either as a partial defence or incorporation into a sentencing factor, would strengthen, not shake, the public's conscience and confidence in the administration of justice.