**Pragmatism Preserved? The Challenges of Accommodating Mercy Killers in the Reformed Diminished Responsibility Plea**

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**Abstract**

This article examines the operation of the reformed English diminished responsibility plea in mercy killer cases. In particular, it makes three claims. First, it predicts that – like its predecessor – the revised doctrine will be stretched, where necessary, to accommodate these offenders. This is because: (i) normative arguments remain for convicting them of manslaughter instead of murder; and (ii) other partial defence routes will usually be unavailable. Secondly, it contends that such pragmatism will now be facilitated by a disconnect between: (i) the defence’s post-reform narrowing; and (ii) its ongoing interpretive flexibility. Thirdly, given that disconnect, it suggests that this pragmatism will be problematic. Notably, it will: (i) compromise the plea’s newfound coherence; and (ii) exacerbate unfair labelling of mercy killers. Ultimately, and more broadly, these difficulties reinforce recent calls for further homicide law reform.

**Keywords**

Homicide, murder, voluntary manslaughter, partial defences, diminished responsibility, mercy killers, law reform, *Homicide Act 1957*, *Coroners and Justice Act 2009*

**Introduction**

Some murders pose exculpatory dilemmas for the criminal law. Partial defences may apply in such instances, permitting conviction and sentencing for ‘voluntary’ manslaughter instead of murder. Throughout England, Wales and Northern Ireland, the *Coroners and Justice Act 2009* (the 2009 Act) implemented major changes to the partial defences of diminished responsibility and provocation, updating the former and replacing the latter with ‘loss of control’. These reforms came into force on 4 October 2010.[[2]](#footnote-2)

This article is exclusively concerned with diminished responsibility. In particular, it examines the operation of the reformulated plea in mercy killer cases. Prior to reform, the defence was infamous for its charitable accommodation of these offenders. Such accommodation prospered because of the doctrine’s inherent flexibility. That flexibility, without which many mercy killers would have failed diminished responsibility, contrasted with the inflexibility of other defences – chiefly provocation. Diminished responsibility thereby became a *pragmatic* plea in these proceedings. Following reform, this article assesses the future of that pragmatism. In doing so, it makes three claims. First, it predicts that diminished responsibility will continue to be stretched, where necessary, to protect these offenders. This is because: (i) normative arguments remain for convicting them of manslaughter instead of murder; and (ii) other partial defence routes will usually be unavailable. Secondly, it contends that such pragmatism will now be facilitated by a disconnect between: (i) the defence’s post-reform narrowing; and (ii) its ongoing interpretive flexibility. Thirdly, given that disconnect, it suggests that this pragmatism will be problematic. Notably, it will: (i) compromise the defence’s newfound coherence; and (ii) exacerbate unfair labelling of mercy killers. Ultimately, and more broadly, these difficulties reinforce recent calls for further homicide law reform.

The focus of the first claim – that diminished responsibility will retain a pragmatic protection role in many of these cases– is neglected in the literature. Various scholars have proposed new domestic partial defences for these individuals. Others have suggested that loss of control might assist such offenders. Nonetheless, few commentators have considered the impact on mercy killers of the *unavailability* of these options. This contextual approach – acknowledging the *existing* partial defences landscape – is important, particularly given normative support for manslaughter verdicts in these proceedings. It reveals why pragmatic use of the new diminished responsibility plea by mercy killers cannot be discounted. Meanwhile, the substance of the second claim – that the defence can *still* be defined so as to maintain pragmatic protection, albeit at the cost of its narrower profile – exposes an undiagnosed disconnect between the plea’s official tightening and its unofficial interpretive scope. That disconnect will have fundamental implications for not only policy makers and law reformers, but also mercy killers themselves. These implications are acknowledged, respectively, in the third claim – that ongoing pragmatic use of diminished responsibility will undermine its new coherence and aggravate unfair labelling of these offenders. Such implications connect with more overarching reform debates about homicide law and its treatment of mercy killers.

The article constructs the first claim over three arguments. Initially, it highlights normative reasons for accommodating mercy killers in voluntary manslaughter.[[3]](#footnote-3) Here, it considers the mitigating functions of partial defences to murder, linking these with the circumstances of mercy killers. Next, under the old plea, it explains how and why diminished responsibility (and not provocation) came to be a *pragmatic* provider of that mitigation. Lastly, against the backdrop of *current* homicide law, it predicts that these defendants will carry on using diminished responsibility to obtain mitigation. As before, this use will regularly be pragmatic: where a mercy killer falls outside the plea, it will be manipulated to accommodate them where other defences – notably loss of control – are inaccessible.

Subsequently, the second claim is split across two arguments. To begin with, it charts the 2009 Act’s narrowing of the defence. It explains that this narrowing stems from a ‘medicalisation’ of the plea, before exploring, in turn, the doctrinal, conceptual and philosophical features of that process. Thereafter, it shows that, *despite* this narrowing, diminished responsibility remains capable of flexible interpretation so as to achieve pragmatic access in practice.

The third claim is also framed over two arguments. At first, it contends that pragmatic use of the new diminished responsibility defence will compromise the defence’s legal integrity in ways not experienced under its predecessor. Then, it argues that such use will continue to label mercy killers unfairly, albeit to a greater degree following the plea’s reform. Finally, it closes by evaluating the link between this third claim and recent calls for fresh homicide law reform, including in mercy killer scenarios.

**Diminished Responsibility and Mercy Killers: Mitigating Murder**

*The Normative Role of Voluntary Manslaughter*

Two factors support the existence of partial defences to murder: sentencing and labelling.[[4]](#footnote-4) In relation to the former, these defences acknowledge the need to protect certain categories of less blameworthy defendants from the mandatory life sentence for murder.[[5]](#footnote-5) Regarding the latter, they address the need to downgrade liability for murder to voluntary manslaughter in appropriate situations. As Ashworth notes, that downgrading reflects ‘different degrees of moral and social heinousness in killings’.[[6]](#footnote-6) Consequently, whilst some call for the abolition of partial defences (such that these matters become relevant only to *sentencing* in murder),[[7]](#footnote-7) those calls should be rejected. This is because the reduction of murder to manslaughter secures a more *accurate* labelling link between conviction and *wrongdoing*. That process better represents to the public the *nature* of a defendant’s (D’s) conduct in the circumstances, addressing concerns about the social stigma of murder.

Numerous commentators relate these sentencing and labelling concerns to mercy killers. Such individuals – usually a family member or friend of the victim (V) – intentionally kill out of pity for V’s physical suffering.[[8]](#footnote-8) That suffering will normally be acute, with D acting out of compassion[[9]](#footnote-9) in the face of V’s desire to die.[[10]](#footnote-10) The act of killing will go beyond merely assisting V’s suicide and constitute murder. In these cases, the mandatory life sentence is a disproportionate punishment. Indeed, the Law Commission has said mercy killers are deserving of ‘lenient treatment’.[[11]](#footnote-11) It has also disagreed with the labelling of mercy killings as ‘murder’.[[12]](#footnote-12) Similarly, others have argued that the ‘murder’ label misrepresents the lower level of dangerousness posed by most mercy killers,[[13]](#footnote-13) whilst also insufficiently acknowledging the ‘moral purpose’ behind their conduct.[[14]](#footnote-14) Popular opinion appears to endorse these attitudes. For instance, research by Mitchell and Roberts suggests that society views mercy killing as a form of ‘mitigated murder’.[[15]](#footnote-15) Separately, Mitchell has found that the public regards mercy killing as one of the least serious forms of homicide.[[16]](#footnote-16) Accordingly, community values seem to reflect recognition by legal experts of reduced homicidal wrongdoing in mercy killer scenarios. Arguably, this strengthens the idea that ‘manslaughter’ is a more fitting label for these defendants. As Duff and Green claim, the capturing of public attitudes in the labelling process enables citizens ‘to recognise [wrongdoing] … in richly normative terms that are at least closely connected to those that structure [their] pre- or extra-legal moral thought’.[[17]](#footnote-17) Inevitably, this is not to say that where legal and societal views on wrongdoing *diverge* public opinion should lead labelling strategy. Nevertheless, where those views *converge* it is helpful for offence labels to mirror such opinion if the legitimacy of those labels – and their efficacy in guiding condemnation of conduct – is to be optimised.[[18]](#footnote-18) Of course, ‘fair’ labelling is not just about achieving the correct conviction (‘manslaughter’) in mercy killer cases. It is also about identifying the correct partial defence – the one which most accurately captures the *features* of a mercy killing – through which that conviction can be attained. As will be seen, mercy killers remain able to secure such convictions, albeit without access to an appropriate partial defence.[[19]](#footnote-19)

*Availability of Partial Defences*

*Pre-2009 Act*. Strikingly, prior to the 2009 Act, nearly all mercy killers chose to plead diminished responsibility *instead* of provocation.[[20]](#footnote-20) Their choice of plea – as contained in s. 2(1) of the Homicide Act 1957 (the 1957 Act) – provided a defence to murder where D killed V whilst suffering from:

(i) an abnormality of mind;

(ii) arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury;

(iii) which substantially impaired his mental responsibility.

No doubt, some mercy killers legitimately fell within diminished responsibility. However, many were at the margins of the doctrine, often displaying a ‘total lack of mental disorder’.[[21]](#footnote-21) They pleaded it because the old defence was notoriously broad and could be interpreted flexibly by medical experts, lawyers, judges and juries. According to Lord Parker CJ in *R* v *Byrne*,[[22]](#footnote-22) ‘abnormality of mind’ was:

wide enough to cover the mind's activities in *all* its aspects, *not only* the [(cognitive)] perception of physical acts and matters, and the ability to form a rational judgment as to whether an act is right or wrong, *but also* the [(volitional)] ability to exercise willpower to control physical acts in accordance with that rational judgment.[[23]](#footnote-23)

Mercy killers regularly claimed a cognitive or volitional defect in combination with a *vaguely* defined medical condition. The task for medical experts therefore became identification of such a condition, this requiring creative interpretation of the ambiguous list of aetiologies (‘a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury’). For example, in *R* v *Webb*,[[24]](#footnote-24) where an elderly man killed his physically and mentally ill wife at her request, the evidence merely suggested that D was under considerable stress, but a ‘benevolent psychiatrist dressed this up as an “adjustment disorder”’.[[25]](#footnote-25) Assuming the mercy killer’s condition substantially impaired their mental responsibility in a way which was ‘more than minimal or trivial’,[[26]](#footnote-26) the defence would be raised successfully. As such, diminished responsibility became the main defence option for these offenders. The success which mercy killers achieved in pleading diminished responsibility shows how the old defence was able to take these highly stressed killers and – using its nebulous legal criteria – ‘pathologise’ their stress successfully.[[27]](#footnote-27)

The malleability of the previous plea thus presented it as a *pragmatic* defence route for many of these offenders. This was especially so where provocation proved unarguable.[[28]](#footnote-28) The first requirement of provocation, that D experience a sudden and temporary loss of self-control,[[29]](#footnote-29) often constructed an *immediately* insurmountable barrier for mercy killers. Paradigmatically, mercy killings seem inconsistent with the idea that D must lose self-control. Mercy killers do not lose their self-control when faced with V’s request(s) to be killed: they deliberately accede to V’s request(s).[[30]](#footnote-30) The ‘sudden and temporary’ rule in provocation was also invoked to rule that premeditation – something which may arise on the facts of some mercy killer cases – negated a loss of self-control.[[31]](#footnote-31) Given these initial hurdles in establishing provocation, it is unsurprising that mercy killers often made pragmatic use of diminished responsibility. Despite the stigmatic effects on them of pleading diminished responsibility,[[32]](#footnote-32) such pragmatism improved their prospects of avoiding a murder conviction and mandatory life sentence.

*Post-2009 Act*. Following the 2009 Act, loss of control – provocation’s successor – remains the only partial defence option other than diminished responsibility in mercy killing cases. Elsewhere, recent proposals for *new* partial defences of ‘compassionate killing’[[33]](#footnote-33) or ‘mercy killing’[[34]](#footnote-34) have not been converted into law. Beyond partial defences, the only relevant complete defence – the common law doctrine of necessity – is not available. Whilst academic commentators have advocated applying necessity to doctors who commit euthanasia,[[35]](#footnote-35) those proposals have not extended to mercy killers. In any event, the domestic courts have rejected the idea that necessity is a defence to murder for either doctors or mercy killers.[[36]](#footnote-36)

As a result, the option of pleading loss of control is significant for the mercy killer. Nonetheless, that defence still poses substantial difficulties for these defendants. Arguably, it appears equally – if not *more* – exclusionary than its predecessor. As with provocation, the first test is that D must lose self-control.[[37]](#footnote-37) Once again, mercy killings may be incompatible with such outbursts. Of course, it is possible that the loss of self-control requirement is now *potentially* more wide-ranging: whilst ‘[a]ngered states … remain [its] leitmotif’,[[38]](#footnote-38) the test could encompass acts associated with grief, despair, moral outrage or depression.[[39]](#footnote-39) Additionally, the loss of self-control no longer needs to be sudden.[[40]](#footnote-40) Nevertheless, despite the potential expansion of this test, premeditation – which is likely to feature in numerous mercy killing cases – still invalidates a loss of self-control.

Even where a mercy killer *is* found to have lost self-control, there may well be conceptual challenges in arguing that they are ‘provoked’ into a mercy killing by a triggering event.[[41]](#footnote-41) This alludes to the plea’s second test: one, or both,[[42]](#footnote-42) of two valid triggers must be present. There must be a thing, or things, said and/or done (or both) which either: (i) induce a fear of serious violence; or (ii) constitute circumstances of an extremely grave character which caused D to have a justifiable sense of being seriously wronged.[[43]](#footnote-43) Clearly, trigger (i) is unlikely to be relevant to the circumstances of a mercy killer. However, Livings claims that the events precipitating a mercy killing, which may accumulate over an extended time period, *could* invoke trigger (ii).[[44]](#footnote-44) Unfortunately, in mercy killing cases the cause of the provocative conduct is *intangible* – it is V’s condition. As Clough states, ‘[t]he symptoms of an illness may be humiliating and distressing, but there are no “things said or done” to direct [a] sense of injustice towards’.[[45]](#footnote-45) Problematically, then, on this reading, V’s ailment is not something ‘said and/or done’ to D. Against this, Livings argues that V’s disease *could* amount to something ‘done’ to D via the visibility of V’s humiliating existence.[[46]](#footnote-46) But this is an unusually abstract interpretation of how D experiences provocative phenomena.[[47]](#footnote-47) Perhaps more realistically, where V pleads with D to be killed it is possible this would amount to a ‘thing said’ which – given the nature of the request – constituted circumstances of an extremely grave character for D.[[48]](#footnote-48) Yet it seems counter-intuitive to say that such a request from V – particularly in the context of a compassionate killing committed out of mercy – engenders in D a sense of being ‘wronged’. The very essence of mercy as a benign emotion appears incompatible with feeling ‘wronged’ as a negative reaction. Clough has suggested the introduction of a further trigger to aid the mercy killer. Here, D’s loss of control would be compassionately motivated and stem from watching a loved one endure a terminal illness or severe disability.[[49]](#footnote-49) Ultimately, *even* if such a trigger were to exist, problems would arise in loss of control’s third test. This requires an assessment of whether a person of D’s sex and age, with a *normal* degree of tolerance and self-restraint, and in the circumstances of D, might have reacted in the same or similar way as D.[[50]](#footnote-50) The overtly objective nature of this test renders it difficult to surmount in all but the most compelling of loss of control cases.

Evidently, loss of control presents challenges for mercy killers. Those challenges are exacerbated by the fact that the 2009 Act now requires ‘*sufficient* evidence’ of all *three* elements of loss of control before the plea can be left to the jury.[[51]](#footnote-51) In contrast, only some ‘evidence’ of any provocation was needed before that defence could be considered by the jury.[[52]](#footnote-52) The stringency of the objective filter in loss of control, along with the subjective – and now more ‘medicalised’ – focus of the new diminished responsibility doctrine (as discussed below[[53]](#footnote-53)), also militates against the possibility of pleading both defences together. Whilst this practice occasionally occurred prior to the 2009 Act (in the hope that the jury would mix the elements of each and thereby return a manslaughter verdict),[[54]](#footnote-54) any overlap now seems improbable given the differences between the two doctrines.[[55]](#footnote-55) Accordingly, given the barriers mercy killers may face in raising loss of control (either independently or in tandem with diminished responsibility), it is likely that they will still resort to pragmatic use of diminished responsibility where required. This strategy appears valid given the lack of planned change to diminished responsibility envisioned by the Law Commission. During the reform process, it stated that there was ‘no evidence to support any contention that the defence should be drawn in such a way as to make it significantly broader or narrower in terms of the outcomes achieved’.[[56]](#footnote-56) As Miles highlights, reform was expected ‘merely to clarify and modernise rather than to change the scope of the defence’.[[57]](#footnote-57) Perhaps unsurprisingly, some scholars have therefore begun to ask whether attempts to squeeze mercy killers in the reframed plea might persist?[[58]](#footnote-58) The remainder of this article answers that question in the affirmative. It suggests that whilst diminished responsibility, like loss of control, does not accurately encapsulate the features of a mercy killing, it still provides the best chance – in *existing* homicide law – of shielding these offenders from the labelling and sentencing effects of a murder conviction.

**Diminished Responsibility and Mercy Killers: Pragmatic Accommodation Preserved?**

In this second claim, the article argues that pragmatic access to diminished responsibility can be retained following the 2009 Act. Whilst reform has *seemingly* restricted diminished responsibility, prima facie curtailing pragmatic access to it by mercy killers, in practice the defence remains adaptable – unlike loss of control. This creates a disconnect between the plea’s narrower profile and its ongoing interpretive flexibility. The article begins by outlining the defence’s revised statutory framework, including its overarching theme: medicalisation. In particular, it assesses doctrinal, conceptual and philosophical features of that medicalisation which suggest that diminished responsibility has contracted. Subsequently, it outlines ways in which the new defence can still be interpreted expansively. This exercise exposes the extent to which pragmatic accommodation of mercy killers may yet be possible in diminished responsibility.

*Medicalising diminished responsibility*

The reformulated diminished responsibility plea is contained in s. 2(1) of the 1957 Act, as amended by s. 52 of the 2009 Act.[[59]](#footnote-59) It provides a partial defence to murder where D kills V whilst suffering from:

(i) an abnormality of mental functioning;

(ii) arising from a recognised medical condition;

(iii) which substantially impaired his ability to:

 (a) understand the nature of his conduct;

 (b) form a rational judgement; or

 (c) exercise self-control;

(iv) and which provides an explanation for his conduct by causing, or being a significant contributory factor in causing, him to carry out that conduct.

Many figures contend that these amendments result in a tighter plea which lacks the flexibility of the original s. 2(1).[[60]](#footnote-60) Consequently, some commentators predict a decrease in availability. For example, Herring notes that, ‘[t]he new definition … may well prove more difficult to establish’.[[61]](#footnote-61) Likewise, Ormerod observes that ‘[t]he practical effects are, it would appear, to narrow the scope of the defence’.[[62]](#footnote-62) Underscoring these comments is the 2009 Act’s creation of a more *medically* precise plea, this catering for the needs and practices of medical experts whose evidence remains a practical necessity in the defence.[[63]](#footnote-63) Such medicalisation surfaces in a range of new requirements, not least the ‘abnormality of mental functioning’ test. This updates the previous ‘abnormality of mind’ criterion, the replacement phrasing being preferred by psychiatrists. The test still encompasses problems of cognition and volition, as originally outlined in *Byrne*, although the language of ‘mental functioning’ indicates a move towards medical/psychiatric definitions that are likely to standardise the application of the test.[[64]](#footnote-64) As a result, the contours of mental functioning may be subject to enhanced medical scrutiny.

Medicalisation is also evident in the stipulation that D’s abnormality must arise from a recognised medical condition. Formerly, the old s. 2(1) provided that the abnormality had to come from ‘a condition of arrested or retarded development of mind or any inherent causes or disease or injury’. The replacement terminology now formalises the idea that the defence should be grounded in various physical, psychiatric or psychological diagnoses.[[65]](#footnote-65) These, in turn, should be informed by reference to either, or both, of the two medically accepted international classifications of mental diseases.[[66]](#footnote-66) The need for a *recognised* medical condition seems to preclude more ambiguous forms of expert evidence, requiring a more scientifically exact approach to the defence. However, even where a specific condition is identified, this will not *always* ensure its legal validity. In *R* v *Dowds*,[[67]](#footnote-67) the court highlighted the ‘imperfect fit’[[68]](#footnote-68) between the range of clinical diagnoses contained in the international classifications and the limits of diminished responsibility. For reasons of policy, Hughes LJ stated that an ailment’s presence on the lists was a ‘necessary, but not always … sufficient condition, to raise the issue of diminished responsibility’.[[69]](#footnote-69) Accordingly, from now on, some writers argue that defendants ‘will be required to prove something beyond a “recognised medical condition”’.[[70]](#footnote-70) Ironically, this signifies a *diminution* in the role of experts under the recast plea.

A final medicalisation feature exists in the new substantial impairment test. Following reform, D’s abnormality of mental functioning must substantially impair his ability to do one (or more) of *three* things: understand the nature of his conduct; form a rational judgement; or exercise self-control. In contrast, the former plea permitted *any* form of ‘mental responsibility’ to be impaired. As a consequence, the 2009 Act now limits valid impairment to the closed set of cognitive and volitional mental abnormalities outlined in *Byrne*, strengthening the plea’s link with the medical realm yet more.

*Medicalising diminished responsibility: doctrinal restrictions*

The medicalisation process poses notable challenges for mercy killers. Some of those challenges are doctrinal in nature – not least, those associated with the new ‘abnormality of mental functioning’ and ‘recognised medical condition’ requirements. Commentators often cite mercy killers as the type of defendant *most* likely to struggle with these tests.[[71]](#footnote-71) Quick and Wells argue that the need for a recognised medical condition may ‘serve to exclude [diminished responsibility] in … mercy killings, where the offender acts out of compassion rather than a medical condition’.[[72]](#footnote-72) This contrasts starkly with the former list of aetiologies within which many mercy killers were able to squeeze loosely defined conditions.[[73]](#footnote-73) If greater scrutiny is placed on D’s medical condition, this may extend to the ‘abnormality of mental functioning’ test. Whilst mercy killers usually exhibit signs of ‘anxiety, despondency, despair, futility and helplessness’,[[74]](#footnote-74) Baker asserts that:

there will be some guesswork at the edges because some medical conditions … do not cause delusions or trances, but something much less measurable such as feelings of sadness and stress. The problem is that the latter states of mind are endured by ordinary people in the normal course of life.[[75]](#footnote-75)

Kennefick also recognises that ‘[t]he original definition had progressed to the point where it was interpreted by the courts to show leniency … Such forms of interpretation … stretched the notion of “abnormality of mind”, to enable a verdict to meet the perceived justice of the case’.[[76]](#footnote-76) The new ‘recognised medical condition’ test is rendered even *more* challenging for mercy killers after *Dowds*. It is now subject to a policy-driven judgement about the types of conditions that will support the defence. That may be a difficulty for mercy killers seeking to rely on mild conditions.

*Medicalising diminished responsibility: conceptual restrictions*

Medicalisation also implies a conceptual shift in diminished responsibility. This suggests yet again that pragmatic access to the plea could be curtailed. Under the previous s.2(1), commentators identified two alternative – narrow and broad – conceptual models of diminished responsibility, with the latter gaining currency for its ability to rationalise the breadth of protection available. Both models are outlined below, respectively, before the new plea’s conceptual basis is discussed. Following reform, it is argued that the defence now aligns more closely with the former – narrower – model.

*Model I: Partial Mental Capacity*. Under the old plea, Mackay described diminished responsibility as ‘riddled with … conceptual confusion’.[[77]](#footnote-77) This confusion was also noted by Sparks who contended that the phrase ‘substantial impairment of mental responsibility’ was nonsensical. ‘Responsibility’ simply meant liability to reduced punishment: ‘legal responsibility’.[[78]](#footnote-78) However, legal responsibility was clearly not a *personal* characteristic that could be ‘impaired’.[[79]](#footnote-79) Rather, ‘mental responsibility’ referred to mental *capacity*,[[80]](#footnote-80) which was a *precondition* of legal responsibility.[[81]](#footnote-81) Nonetheless, according to Sparks, basing *partial* legal responsibility on mental capacity was problematic. For him, the connection between capacity and the commission of criminal conduct was clear-cut: D either could, or could not, have avoided committing the crime.[[82]](#footnote-82) Thus, D’s incapacity justified a complete defence, or no defence, but never a partial defence.[[83]](#footnote-83) Effectively, as Mackay confirms, this was a claim that ‘mental abnormality, not amounting to legal insanity, should have *no* effect on criminal responsibility’.[[84]](#footnote-84)

Nevertheless, diminished responsibility *necessarily* tied mental incapacity to partial legal responsibility. This was because measurement of total incapacity was impervious to empirical assessment.[[85]](#footnote-85) For example, as Mackay states in relation to volitional incapacity:

there is no reliable scientific test which can tell us that on any particular occasion an impulse experienced by a mentally abnormal person was one which he could not resist [(‘irresistible impulse’)] … In such cases … the enquiry focuses on the *degree of difficulty* experienced by the mentally abnormal person in controlling his impulses not to behave in a certain manner.[[86]](#footnote-86)

Inevitably, these problems encouraged a re-conceptualisation of diminished responsibility around a different idea.

*Model II: Partial Moral Responsibility*. Prior to the plea’s reform, many scholars argued that the phrase ‘substantial impairment of mental responsibility’ effectively connoted reduced *moral* responsibility. For instance, Horder remarked that:

the ambiguous nature of the link … between ‘substantial impairment’, ‘mental responsibility’, and D’s ‘acts or omissions in doing or being a party to the killing’, permit[ted] … moral consideration of … what D ha[d] done. In other words, the section [could] be read as saying that what matters is whether D’s abnormality of mind substantially reduced his *culpability* respecting his role in the killing, rather than as saying that what matters is simply whether D was suffering from a substantial impairment of mental functioning at the time of the killing.[[87]](#footnote-87)

Such an interpretation prospered because, as Griew noted, ‘Parliament … [had] clumsily compacted two ideas – those of reduced (impaired) capacity and of reduced (diminished) liability. The former presumably justifie[d] the latter by virtue of a third idea – that of reduced culpability’.[[88]](#footnote-88)

The ability to conceptualise responsibility in moral terms became popular in practice, thus widening the ambit of the defence. Accordingly, where offenders possessed only mild mental irregularities this allowed benign medical experts to look *beyond* capacity to the circumstances and motivations surrounding the killing. Connection of these internal *and* external factors allowed experts to use their personal sense of justice in exploiting the nebulous tests under the old scheme – particularly the ‘abnormality of mind’ test and its aetiologies – so as to help mercy killers. These defendants may not have qualified for the defence based on a strict test of mental capacity – stemming from a relevant mental abnormality and medical condition – which ignored the wider situation in which they found themselves.[[89]](#footnote-89) In Mackay’s view, such a conceptualisation shows how ‘the courts and the experts [were] … able to enter into a benevolent conspiracy, thus permitting the psychiatric evidence to be stretched so as to produce a greater range of exemption from liability than its terms really justif[ied]’.[[90]](#footnote-90) Crucially, this pliability *facilitated* the pragmatic means by which mercy killers regularly relied on diminished responsibility as a defence option.

*Model I Revisited*. It is submitted that moral responsibility no longer operates as a conceptual device in the new s.2(1). This change derives from the 2009 Act’s reformulation of the ‘substantial impairment’ test. Critically, the phrase ‘mental responsibility’ has been replaced by a specific list of three cognitive and volitional abilities: understand the nature of one’s conduct; form a rational judgement; and exercise self-control. This redrafting suggests that the plea is now more grounded in Sparks’ capacity-based conception of partial responsibility.[[91]](#footnote-91) Indeed, mental capacity remains integral to the ‘abnormality of mental functioning’ test and coheres with that test’s more medicalised focus – as linked to the need for a recognised medical condition. Moreover, Fortson notes that the ‘substantial impairment’ test ‘no longer involves a value judgement of a defendant’s moral responsibility for the killing but a qualitative assessment of his/her ability to do one of more of the things mentioned in [s.]2(1A) of the [1957 Act]’.[[92]](#footnote-92) Prescription of cognitive and volitional incapacities also ensures that the disputed connection between diminished responsibility and *partial* legal responsibility remains.

 More importantly, any move away from moral responsibility towards mental capacity strengthens the idea that the pragmatism of old plea appears to have gone. Without that flexible conceptual basis, mercy killers are presumed likely to fall outside the parameters of the recast defence. To this end, Baker submits that:

cases like [*Webb*] would be decided differently under the current law … Webb would get a mandatory life sentence, because his … decision was calculated and rational. He was in full control when he made the decision to assist his suicidal wife by killing her. He also understood that he was committing a murder and that it was the wrong thing to do.[[93]](#footnote-93)

The conceptual emphasis on mental capacity challenges Wasik’s idea that [h]omicide covers such a wide moral range that pressure for the recognition of moral and legal subdivision is *bound* to occur’.[[94]](#footnote-94) Indeed, it compounds Livings’ contention that ‘[diminished responsibility] … appears to have moved from being a morally nuanced question … to one of straightforward medical fact’.[[95]](#footnote-95) Overall, this might require greater scrutiny of a mercy killer’s internal *medical* circumstances (as opposed to external *motivating* circumstances), entailing a more mechanical approach to the defence. Such changes seem ironic given retention of the label ‘diminished responsibility’. That label is a legal – not medical – term of art.

The conceptual shift in the defence can be further evidenced by reference to wider debates about mental capacity and the nature of responsibility. In light of the 2009 Act’s reforms, Kennefick, referencing the work of Gardner, has asked: ‘is the responsibility of the diminished responsibility defendant now reduced by reason of their inability to account for their conduct [(‘basic responsibility’)], or rather by virtue of the fact that their mental disorder has meant that they should avoid (in part) the consequence of their wrongdoing [(‘consequential responsibility’)]?’.[[96]](#footnote-96) Gardner defines basic responsibility as ‘the ability to explain oneself, to give an intelligible account of oneself, to answer for oneself, as a rational being. In short, it is exactly what it sounds like: response-ability, an ability to respond’.[[97]](#footnote-97) Contrastingly, in relation to consequential responsibility, he says, ‘I am consequentially responsible if some or all of the unwelcome moral or legal consequences of some wrong or mistake (whether mine or someone else’s) are mine to bear’.[[98]](#footnote-98) Ultimately, otherwise rational defendants may want ‘to avoid responsibility in the consequential sense; they [want] to avoid facing the unwelcome moral or legal consequences of their wrongs. But they [do not] want to do so by denying, or casting doubt on, their responsibility in the basic sense … On the contrary they [want] to assert their responsibility in this basic sense’.[[99]](#footnote-99)

Applying this to the old diminished responsibility plea, the defence evidently protected those whose basic responsibility was impaired by serious mental incapacity. However, it also became a haven for those who wanted to avoid consequential responsibility. This was made possible by the imprecise approach to ‘substantial impairment of mental responsibility’. That test enabled the protection of mercy killers who essentially retained capacity (‘basic responsibility’) but did not deserve to bear full moral (consequential) responsibility for their actions. Their diminished moral blameworthiness meant that they avoided (via voluntary manslaughter rather than murder) some of the legal consequences of their wrongs. In answer to Kennefick, the reformed ‘substantial impairment’ test now formally excludes those such as mercy killers who deny consequential responsibility on moral grounds. It seems to recognise only failures of basic responsibility. This development may have reinstated the stigmatizing link between non-‘response-ability’ and diminished responsibility acclaimed by figures such as Acorn.[[100]](#footnote-100)

*Medicalising diminished responsibility: philosophical restrictions*

The doctrinal and conceptual amendments also imply a change in diminished responsibility’s profile at a more abstract level in the criminal law: notably, its classification within philosophical scholarship on criminal defences. Before the 2009 Act, *multiple* classifications of the plea emerged. Now, a *single* classification prevails, affirming the defence’s presumptive exclusion of mercy killers. The move to this single classification is examined after evaluation of the philosophical framework in which it operates.

*The Orthodox View of Defences*. Legal philosophers frequently analyse criminal defences as ‘justifications’ or ‘excuses’.[[101]](#footnote-101) A third class, known as ‘exemptions’ (also called ‘denials of responsibility’), often supplements these two categories.[[102]](#footnote-102) Whilst this tripartite model has no practical application in court, it speaks more broadly to lawmakers by addressing the moral nature of a defendant’s conduct before identifying an appropriate legal response.[[103]](#footnote-103)

Justifications attach to *acts* and amount to a claim that the reasons in favour of behaving as we did were not all defeated by conflicting reasons, and that our behaviour was performed on the strength of some or all of the undefeated reasons in its favour.[[104]](#footnote-104) As such, there are certain narrow instances when individuals have a right, or at least a permission, to do things which would usually be prohibited because they cause harm or damage.[[105]](#footnote-105) Ashworth notes that ‘[s]elf-defence is the best known of these justifications, but there are others concerned with the prevention of crime, the arrest of suspected offenders, the protection of property and so forth’.[[106]](#footnote-106)

Meanwhile, excuses concede that an act was unjustified. Consequently, they attach to the *actor* and ask whether D lived up to society’s expectations in a normative sense: did D demonstrate as much self-restraint and resilience as we have a right to demand of someone in that situation?[[107]](#footnote-107) Excuses only adjust normative – objective – expectations in limited instances: most commonly to take account of sex or youth. Duress is commonly cited as an example of an excuse.[[108]](#footnote-108) In contrast, exemptions concentrate solely on the effects of a severe mental disorder or deficiency. In such cases, guiding reasons – concerned with how D ought to have behaved – have no moral significance and D’s conduct cannot be assessed via an applicable objective standard.[[109]](#footnote-109)

This tripartite model provides a normative guide to gauging which defences reflect most favourably on the accused. As Gardner explains, if an individual does something wrong, that person ‘wants it to be the case that [those] actions … were at any rate justified, or if they were not justified, that they were at any rate excused. A[n] [exemption] rules all of this out, and that is, accordingly, the line of defence which counts as an admission of defeat for any self-respecting person’.[[110]](#footnote-110) The process of defining these three categories, together with the normative hierarchy it begets, has prompted debate about what circumstances, and which defences, fall under each label. Indeed, some scholars have rejected this categorisation of defences altogether.[[111]](#footnote-111) However, the taxonomy – together with the various theories informing it – remains influential in garnering useful insights about an *individual* defence and its underlying purpose.

*Multiple Classifications of Diminished Responsibility: Exemption and Excuse*. Within a popular stream of criminal law scholarship, diminished responsibility is often considered an exemption – albeit a partial one. Here, according to Horder, the plea constitutes:

a (partial) denial of ethical agency in respect of [a] particular action … [J]udgement … in accordance with ordinary ethical (excusatory) standards is inappropriate, because an abnormality of mind means that the defendants in question cannot come up to the relevant standards in their conduct.[[112]](#footnote-112)

Understood in this way, the defence is only to be pleaded by individuals whose *basic* responsibility was substantially impaired due to mental incapacity. Classification of diminished responsibility as an exemption is supported by others, for example Chalmers and Keating and Bridgeman.[[113]](#footnote-113)

However, prior to the 2009 Act, Horder also argued that diminished responsibility *occasionally* operated like an excuse. He identified a ‘wide’ form of the defence which revealed that, in certain cases, the plea became a hybrid (partial) excuse by combining excusatory and exemption elements. This version operated where an abnormality of mind did not, of itself, substantially impair a defendant’s mental responsibility. Rather, diminished responsibility succeeded in some instances because the concept of moral responsibility – in association with the obscure former terminology – permitted consideration of D’s mental abnormality in the context of *other* background mitigating factors.[[114]](#footnote-114) These factors were exactly the sorts of external motivations that – morally – permitted mercy killers to fit within the plea. Horder described these defendants as ‘short-comers’: people whose ‘mental deficiency made them particularly susceptible to *circumstantial* pressure’.[[115]](#footnote-115) In applying this idea to mercy killers, he explained that ‘most such cases will be successful only on the basis of a mixture of evidence of mental disorder and exceptional pressure of external circumstances’.[[116]](#footnote-116)

These exterior influences were the same as those frequently referred to in the initial *factual* stages of excuses, prior to applying a normative expectations test. For example, in relation to provocation (now loss of control) – a partial excuse – such factors would be relevant in assessing the preliminary investigation (did D *actually* lose self-control due to a thing or things said and/or done, or both?), before determining whether a reasonable person with a normal capacity for restraint – when judged against the defendant’s circumstances – would still have lost self-control and killed in the same way. The courts’ benevolent expansion of diminished responsibility permitted a subjective (moral responsibility) filter in diminished responsibility (so as to offer a hybrid excuse), whilst preserving an objective filter in provocation (as a standard excuse). Horder duly claimed that:

[t]he success of a plea of diminished responsibility … can, and in theory should, turn solely on the cogency of evidence concerning the severity of D’s mental deficiency. When it does, then the plea operates by way of a[n] [exemption], and there is no truly excusatory element to it … However, also sheltering under the theoretical umbrella provided by the current diminished responsibility plea can be what amounts to a partially excusatory claim, based on a combination of evidence of D’s mental deficiency and evidence of circumstantial pressure of some kind (such as threats of loss of self-control due to provocation) – the *factual* element in an excusatory claim – in response to which D acted.[[117]](#footnote-117)

This ability to mix ‘abnormality of mind’ with other mitigating factors revealed how the old diminished responsibility defence could be expanded in tandem with a broad conceptual framework of moral responsibility. Of course, Horder anticipated objections to his wide theory of diminished responsibility

[o]n a stricter view, such pleas should be treated as [exemptions] that have been illegitimately dressed up as excusatory pleas to make them appear more respectable. On such a view, if he or she really wants to be excused, D should be required to meet the objective moral standards that underpin … excuses.[[118]](#footnote-118)

This recalls arguments against self-respecting individuals using exemptions so as to avoid casting doubt on their status as rational human beings. However, Horder argued that the symbolic distinction between murder and voluntary manslaughter supervened over the self-respect imperative: ‘the question whether or not D’s self-respect would be compromised … seems to be of marginal relevance to the question whether it should, in the interests of justice and fair labelling, in fact be run’.[[119]](#footnote-119)

*A Single Classification of Diminished Responsibility: Exemption*. The recent tightening of diminished responsibility, as underpinned by its medicalisation (in particular, its conceptual re-emphasis on mental capacity), has implications for how the plea is perceived at a philosophical level. The barrier to contextualising mental irregularities by reference to circumstantial pressures means that the defence is apparently less able to take account of how social norms exert psychological effects.[[120]](#footnote-120) For mercy killers, this means that the outside influences on them which motivate them to kill must now – formally, at least – be removed from the liability equation. This encourages a narrower view of diminished responsibility which blocks Horder’s hybrid excusatory species of the former defence, recasting the plea solely as an exemption. Such a view of diminished responsibility would find favour with those advocating a stricter interpretation of exemptions so as to apply only to substantially incapacitated individuals who are not responsible agents (in the basic responsibility sense).

As with the earlier doctrinal and conceptual analyses, application of the orthodox model of defences to the new s.2(1) adds weight to concerns about its availability for mercy killers. Identification of the reformed defence as a pure exemption supports the view that the plea’s adaptability has reduced, along with any chance for pragmatic use of it by these offenders. This realises Horder’s concern that ‘such an unyielding moral position fails to show equal concern for the short-comer as someone capable … of “suffering and frustration”’.[[121]](#footnote-121) That position is exacerbated by loss of control’s objective expectations test which ignores personal circumstances. To that end, the division between excuse and exemption across loss of control and diminished responsibility, respectively, is now more clearly demarcated. Unfortunately, this leaves mercy killers in an unenviable position. In attempting to secure a manslaughter conviction, they are faced with a loss of control defence which, in some cases, may be even more restrictive than provocation. Formerly, they may have pursued a diminished responsibility plea. That possibility is now questionable – at least in theory.

*Optimising the new diminished responsibility plea*

The integration of doctrinal, conceptual and philosophical analyses exposes the full medicalisation of the revised diminished responsibility defence. In turn, that medicalisation highlights the supposed inability of the new plea to offer a pragmatic defence route for mercy killers. This is problematic: there will be instances where these individuals cannot fit within loss of control, meaning that the question of access to diminished responsibility becomes significant. In these situations, *despite* its tighter overall framework – and as with its predecessor – it is possible to identify *some* scope for pragmatic accommodation in diminished responsibility. Nonetheless, *unlike* under the old defence, that potential accommodation is now at greater odds with the plea’s more restrictive scheme, creating a disconnect between its narrower profile and ongoing interpretive flexibility.

Due to this, any continuing pragmatism may well place a greater strain on the credibility of D’s medical evidence. However, this may simply require similar levels of benign expert evidence as existed prior to reform. In this way, as Norrie explains, ‘psychiatry operates as a safety valve for the law … [P]sychiatric testimony will often overreach not just the legal criteria … but [also] its own criteria of what constitutes mental disorder or illness where a “compassionate” response to crime is called for'.[[122]](#footnote-122) Indeed, in contested trials under the recast defence, where experts offer un-contradicted and unchallenged evidence – including that which is sympathetically motivated – the jury must accept it.[[123]](#footnote-123) Moreover, juries may still reach a benevolent outcome even where experts disagree – they can simply reject the unfavourable evidence in place of the amenable expert testimony.[[124]](#footnote-124) Unavoidably, expert and jury sympathy is fact-sensitive and may not always be applied consistently across cases. This is a particular risk with juries and their perceptions of defendants. Where a jury is sympathetic to the circumstances of a mercy killer, this also presumes that the trial judge will not direct that such sympathy is to be discounted – as has happened in other cases following the 2009 Act.[[125]](#footnote-125) Of course, even where a jury is so directed, it may still return a ‘not guilty’ verdict to avoid convicting a guilty person towards whom they feel sympathy. Here, the jury effectively ‘nullifies’ a law which it believes operates harshly. Ultimately, whichever way the jury arrives at its decision, it is clear that creative use of diminished responsibility is still achievable.

*Abnormality of Mental Functioning Arising from a Recognised Medical Condition*. It is argued that years of stressful long-term care can induce an abnormality of mental functioning in mercy killers.[[126]](#footnote-126) This may amount to serious emotional upset. Unfortunately, given its more medically precise focus, it is by no means clear that stress or emotion will be deemed sufficiently mentally ‘abnormal’ under the new plea. These mental states are emblematic of the difficulties in gauging where normality ceases and abnormality begins.[[127]](#footnote-127)

Nevertheless, a mercy killer may try to link a stressful and/or emotional state with a recognised medical condition, such as a reactive (situational/adjustment) form of depression, this resulting from their personal circumstances.[[128]](#footnote-128) This approach *might* be enough to satisfy these elements of the new plea,[[129]](#footnote-129) notwithstanding the absence of a concrete abnormality of mental functioning. Rather generously, *R* v *Brown*[[130]](#footnote-130) already indicates that mild adjustment disorders and stressful life events *will* satisfy the ‘recognised medical condition’ and ‘abnormality of mental functioning’ tests, respectively.[[131]](#footnote-131) This flexibility would assist mercy killers such as that in *Webb*. Further, it seems probable that *Dowds* – which stipulates that not all recognised medical conditions are appropriate for recognition under diminished responsibility – still permits reliance on depression. Inevitably, success for mercy killers will still be influenced by the level of the depression and its associated abnormality,[[132]](#footnote-132) together with expert generosity and jury benevolence. A continuing feature of that expert generosity will be the practice of *inferring* that D *must* have had a mental disorder at the time of the mercy killing.[[133]](#footnote-133)

*Substantial Impairment and the Causal Link*. Under the new ‘substantial impairment’ test, the first prescribed ability – to understand the nature of one’s conduct – is unlikely to be relevant to mercy killers. It is restricted to instances where an offender was substantially unaware of the circumstances, consequences or wrongfulness of their actions.[[134]](#footnote-134)

However, the Law Commission claims that the second listed ability – to form a rational judgement – *is* relevant to mercy killers. Here, according to the Law Commission, substantial impairment will be present when ‘a depressed man who has been caring for many years for a terminally ill spouse, kills her, at her request. He says that he had found it progressively more difficult to stop her repeated requests dominating his thoughts to the exclusion of all else, so that “I felt I would never think straight again until I had given her what she wanted”’.[[135]](#footnote-135) As Child and Ormerod note, this example presents mercy killers as experiencing difficulties in rationally being able to *make* a choice due to the effects of mental illness.[[136]](#footnote-136) The focus is on rationality as a *process*. Inevitably, many mercy killers will not have their rationality so compromised – as caring individuals, they may well feel that they formed an *inherently* rational choice to kill out of compassion for V’s plight.[[137]](#footnote-137) However, given the influence of mental illness on human reasoning, favourable medical experts may simply *assert* that the mercy killer’s stress and depression *did* affect the ability to form a rational judgement. Certainly, as a matter of course under the old s. 2(1), ‘the courts appear to have treated irrationality as a feature of *all* cases of diminished responsibility’.[[138]](#footnote-138)

The third substantial impairment ability concerns the exercising of self-control. In *Brown*,evidence suggested that D’s attack on V (his estranged wife) was carefully planned. D had visited V to drop off their children who had been staying with him. He took a hammer concealed in their daughter’s schoolbag. On arrival, D killed V with the hammer before driving her body to a remote place and burying it in a hole he had dug previously. The jury accepted that D’s adjustment disorder, linked to background stress on account of his divorce from V, substantially impaired his ability to exercise self-control when he killed V.[[139]](#footnote-139) Even though D’s self-control was present before the killing (discernible though planning), the exercise of that ability was impeded by his mental state when he attacked V (D struck V on the head with the hammer no less than 14 times) and then concealed her body.[[140]](#footnote-140) This wide approach anticipates the possibility that a person with variable capacity may plan a killing on a ‘good day’ but then perpetrate the killing on another day when their mental condition was very different.[[141]](#footnote-141) It also envisages that some mental disorders may lead to compulsive behaviour with the appearance of planning.[[142]](#footnote-142) Moreover, it shows that a deliberate attack, including the calculated events which follow, is not necessarily inconsistent with a difficulty in exercising self-control.[[143]](#footnote-143) Such broad understandings of self-control and its association with capacity could increase the chances of mercy killers successfully claiming it as a substantially impaired ability – even where the planning of V’s death is clear on the facts.

Of course, the potentially wide scope of the rational judgement and self-control abilities may be negated by the revised definition of ‘substantial’ as outlined by the United Kingdom Supreme Court in *R* v *Golds*.[[144]](#footnote-144) Here, it was ruled that impairment must go some way beyond the merely minimal or trivial – for example, it should be ‘significant or appreciable’.[[145]](#footnote-145) This represents a contraction of the ‘more than merely minimal or trivial’ definition,[[146]](#footnote-146) which could make ‘substantial impairment’ more difficult to satisfy in future proceedings. However, in mercy killer cases the interpretation of ‘substantial’ will, as ever, depend on the sympathetic whim of experts and – where a trial is contested – juries. In any event, juries may apply a *less* strenuous definition of ‘substantial’ given that *Golds* only requires a trial judge direction on that definition *if* a jury requires it.[[147]](#footnote-147) Where the ‘substantial impairment’ test is satisfied, D’s abnormality of mental functioning must be a cause, or a significant contributory factor, in V’s death. Whilst this new requirement could narrow access to the defence,[[148]](#footnote-148) Mackay argues that, in practice, ‘the courts [might] interpret this provision so that once it is proved that the “abnormality of mental functioning” substantially impaired [one of] D’s [abilities] … then this of itself should be a sufficient enough explanation so that unless there is evidence to the contrary it will be assumed that the abnormality caused, or was a significant contributing factor in causing, D to carry out that conduct’.[[149]](#footnote-149) This approach seems to have been followed in a number of recent cases,[[150]](#footnote-150) including in *Brown*. Such an approach would help the mercy killer who acts out of compassion. In any case, it is likely that medical experts would be happy to state that a mercy killer’s impairment – of whichever ability – was induced (at least in part) by the stressful and depressive nature of their circumstances. Whilst other feelings, for example compassion, might have played a major role in the killing, D’s stress and depression could be said to be additional relevant factors in bringing about V’s death.

**Diminished Responsibility and Mercy Killers: The Price of Pragmatism**

The preceding claims illuminate a concealed problem in diminished responsibility cases featuring mercy killers. Evidently, the modified plea constitutes a more tightly drafted defence which contains more robust medicalised criteria. However, it also seems sufficiently malleable so as to meet, where necessary, the needs of those mercy killers who do not satisfy the defence on their own merits. Where these defendants successfully pursue a diminished responsibility claim under the new regime, this will create a new disconnect between what the law *says* and what it *does*.

In this third claim, the article identifies two problems which flow from that disconnect. The first problem concerns fundamental challenges to the reformed plea’s legal integrity, these implicating experts, lawyers, judges and juries. Meanwhile, the second problem relates to fair labelling of mercy killers. Ultimately, and more broadly, both problems strengthen existing calls for further homicide law reform, particularly in relation to these types of offender. Admittedly, such calls are embryonic – nevertheless, they should be considered as part of an evolving homicide law reform agenda.

*Diminished Responsibility: Challenges to Legal Integrity*

Under the old s. 2(1), manipulation of diminished responsibility could be rationalised by a flexible conceptual basis orientated around moral responsibility. This assisted mercy killers in claiming the defence. Such protection was also explained by philosophical analysis of criminal defences: here, diminished responsibility acted as a hybrid excuse. Ultimately, experts, lawyers and judges – and, at trial, the jury – were able to shield these defendants from conviction and sentencing for murder where there were moral reasons for doing so.

However, beneath the surface of the defence, this approach reflected a more significant phenomenon. Diminished responsibility – as far as the text of the plea was concerned – did not *mention* moral responsibility. Nonetheless, this concept became influential in understanding how the defence operated as guided by the ambiguous wording of the old ‘substantial impairment’ test. Whilst the idea of moral responsibility may have been neither planned nor envisaged in the defence’s creation, it became an *accepted* interpretation of ‘mental responsibility’ due to deficiencies in the drafting of the original s. 2(1). As such, the plea offered an indirect opportunity for deserving murder cases to be considered favourably, even where there was only evidence of a mild mental irregularity. This mirrors a broader legal practice spotted by Norrie. He observes how the criminal law often finesses moral conflicts under cover of facially formal rules.[[151]](#footnote-151) These rules may appear to be inflexible; nevertheless, their rigidity exists alongside a ‘hidden, morally substantive, informal invitation to go another way’,[[152]](#footnote-152) indicating an ‘underlying ethical-legal relation that is unresolved but always present’.[[153]](#footnote-153) In this way, the criminal law is able to mediate conflicting moral issues *covertly* until such time as it can settle them more transparently. Recognition of moral responsibility, via the vagueness of the old ‘substantial impairment’ test, allowed the former plea to qualify the law on murder by harnessing the motives of mercy killers within an assessment of those individuals’ moral responsibility. This system shifted accommodation of these defendants from murder to voluntary manslaughter, despite their intention to kill.

After the 2009 Act, this explanation of ‘deserving’ access to the plea is impossible to sustain. The new defence is now more doctrinally and conceptually precise. It is concerned with a much more formal – medicalised – view of ‘responsibility’, founded on mental capacity. Thus, it affords *no* indirect way for diminished responsibility to introduce moral concerns at a conceptual level so as to cater pragmatically for mercy killers. Consequently, the informal legal finesse is *beyond* reach. This explains how the defence – by accident or design – now renders the protection of these individuals ‘beyond [its] power of … cunning … and legal form to resolve’.[[154]](#footnote-154) That outcome is highly problematic: protection of mercy killers in diminished responsibility will still be needed in certain instances, compromising the medicalised profile of the plea. Sympathy for such individuals by benign medical experts, lawyers, judges and juries therefore risks undermining the narrower conceptual framework of the revamped s. 2(1) – namely, mental capacity (as guided by the new ‘substantial impairment’ test). Accordingly, that sympathy also clashes with the reformed nature of diminished responsibility as an exemption (orientated around basic responsibility). Whilst the 2009 Act may have formally conceptualised the plea around the idea of mental capacity, the ongoing need to reflect moral responsibility reinforces Howard’s view that, ‘the defence is still torn between the two concepts of culpability and responsibility.[[155]](#footnote-155)

Moral factors also reduce the plea’s doctrinal integrity. Accommodation of mercy killers may require expansive interpretation of the defence’s new terminology by experts. This was not as difficult under the old s. 2(1): its nebulous phraseology encouraged that practice. However, whilst still feasible, flexible interpretation is less valid under the reformed plea. This is due to the tests contained within it, notably the need for an ‘abnormality of mental functioning’, ‘recognised medical condition’ and ‘substantial impairment’ of mental and physical abilities. Any manipulation of these requirements therefore risks diluting, if not *subverting*, the medical emphasis of the revamped defence. This is ironic given that greater medical precision was a distinct goal of diminished responsibility reform. A further irony materialises when it is recalled that such accuracy was intended to aid medical experts in presenting their evidence. The continuation of the benevolent conspiracy requires them to expand the borders of the defence *more* artificially than under the former plea. If one aim of the 2009 Act was to bring the legal and medical professions closer together then this is a perverse prospect. Such an aim will be frustrated.

As a result, the above developments herald a possible existential crisis in the reformed defence. On the one hand, it may carry on (like its precursor) as a defence of convenience, ready and able to protect those wishing to use it and who do not deserve conviction and sentencing for murder. However, on the other hand, it is now a stricter, less accessible, plea, which is more principled in its approach to protecting mentally ill killers. These two positions are incompatible: changes to the internal legal profile of the defence mean protection of mercy killers should no longer be possible. Consequently, any accommodation of these individuals challenges the *raison d’être* of the new defence.

*Mercy Killers: Challenges to Fair Labelling*

An important feature of voluntary manslaughter is its fair labelling function. This acknowledges the normative significance of situating mitigated intentional killings outside the realm of murder.[[156]](#footnote-156) Indeed, the distinction between ‘manslaughter’ and ‘murder’ has far-reaching labelling consequences for defendants post-conviction. These consequences include the effects of stigma and public condemnation; they may also relate to other matters, for instance sentencing and future employment prospects.[[157]](#footnote-157) Of course, the fulfilment of fair labelling in voluntary manslaughter is also dependent upon how *accurately* a defendant’s circumstances are represented in the partial defence claimed – especially its name. In turn, this presupposes the *existence* in the first place of suitable partial defences which are capable of reflecting those circumstances.

The features of mercy killer scenarios – as defined above[[158]](#footnote-158) – warrant a downgrading of liability from murder to manslaughter. However, where loss of control is unavailable, some mercy killers may still resort to diminished responsibility – a defence which remains adaptable despite its post-reform narrowing. Unfortunately, fair labelling difficulties have traditionally arisen where diminished responsibility is stretched to accommodate these offenders. One particular problem is that successful use of the plea can lead to hospitalisation of an offender – something often inappropriate in mercy killer cases where the defendant is usually not mentally unwell.

In addition, another unwelcome challenge is that of stigmatisation. As a mental condition defence, diminished responsibility has a ‘syndromising’ impact on those that use it. In this way, it ‘pathologises’ mercy killers,[[159]](#footnote-159) failing to capture the ‘lived reality’ of their circumstances.[[160]](#footnote-160) Accordingly, where mercy killers continue to use diminished responsibility as a pragmatic route to a manslaughter verdict, they face the ongoing risk of being *over*-stigmatised by society. The population might form blaming judgements about a mercy killer’s reasons for killing (based on a defendant’s supposed mental illness), even though these judgements are misplaced. This process is also liable to have a detrimental post-conviction impact on a mercy killer’s self-perception and self-worth. Such over-stigmatisation by the public, along with its internal emotional effects on these offenders, alludes to the idea of ‘psychological’ stigma. Stanton-Ife explains that this may be projected by others onto an individual and/or felt by that individual, irrespective of whether there is any sound reason for its existence.[[161]](#footnote-161) This form of stigma remains prevalent given the negative attitudes to mental illness which still pervade society.

It is likely that such psychological stigma will be *exacerbated* under the new incarnation of diminished responsibility. Court reports and media coverage already convey the medicalised nature of diminished responsibility – as felt in the language employed by the new defence, such as that relating to ‘abnormality of mental functioning’, ‘recognised medical condition’ and ‘substantial impairment’ of the three cognitive and volitional abilities.[[162]](#footnote-162) This will communicate even more affirmatively to the public and defendants that the plea is not intended for use by those of sound mind who are ‘normal’, ‘response-able’ agents. In doing so, where diminished responsibility is used pragmatically, there is the chance that it will encourage heightened speculation, misleading impressions and false assumptions about a mercy killer’s mental state which are not wholly accurate. The impact of this stigmatisation could be temporary or long-lasting, depending on its degree and how effectively a defendant normalises it.[[163]](#footnote-163)

*Mercy Killers: Reforming Homicide Law*

Given normative arguments for locating mercy killers in voluntary manslaughter, and a lack of alternative partial defences, it is likely that pragmatism in diminished responsibility will, where necessary, have to supervene over legal integrity and labelling principle – at least until the need for such pragmatism is addressed more honestly and openly in domestic homicide law.[[164]](#footnote-164)To this extent, problems of integrity and labelling belie a wider challenge: namely, the policy influences impacting upon homicide law reform. Such reform has avoided directly tackling homicides by mercy killers, entrusting the fate of those offenders to pre-existing partial defences. In this way, the legislature avoids constructing a custom response to these killings, foisting the question of accommodation on those experts, lawyers, juries and judges involved in applying diminished responsibility. Undoubtedly, this is a political strategy, reflecting the fact that the circumstances of mercy killers present legal and moral dilemmas for homicide law reform. In this context, Ashworth comments that:

[t]he tendency is … to leave these difficult cases aside, consigning them to a twilight world in which other doctrines (notably diminished responsibility) are stretched to accommodate such cases but only if sympathetic medical witnesses can be found. This is an unusual face of nominalism: there seems to be less controversy and greater public acceptance to be gained through mislabelling these cases, often as manslaughter by reason of diminished responsibility, than through using a clear and representative label that draws attention to the circumstances.[[165]](#footnote-165)

Emphatically, then, pragmatic use of diminished responsibility by mercy killers engenders a legal fiction. Here, these offenders can be protected from liability for murder, albeit in such a way as to conceal the moral difficulties that would otherwise have to be confronted in tailoring the law (for instance, through bespoke defences) to provide that protection. Cynical as this practice may be, the 2009 Act has done nothing to change it.

Nonetheless, mercy killing scenarios should not be ignored in the pursuit of future changes to homicide law. In this vein, Horder makes a useful suggestion when he states that, ‘the legislature … should systematically embrace a philosophically ‘pragmatic’ approach to the possibility of legislative change … [This is] a pragmatism that regards the process of moral and political argumentation as partly experimental, as always subject to improvement, revision, and even falsification in the light of experience and further argument’.[[166]](#footnote-166) Certainly, a commitment to periodic review of homicide law would enrich debate as to how specific types of killer should be treated. This could link with the government’s plans for reforming homicide law on a ‘staged basis’.[[167]](#footnote-167) Otherwise, in Horder’s words, the alternative ‘is to accept that there can (should?) be an under-class of … “doomed losers” in political and moral debate, even on matters of high principle about which reasonable people disagree. Showing proper respect to fellow citizens demands that we do not tolerate such a situation’.[[168]](#footnote-168) This might permit a more refined vision of the protective role of diminished responsibility to develop,[[169]](#footnote-169) coupled with a separate – and more principled – approach to protection of those mercy killers who fall outside diminished responsibility.

Public opinion may yet be significant in revisiting these matters. Society already displays a favourable outlook towards treatment of these defendants by the criminal justice system, this mirroring the views of lawyers and law reformers.[[170]](#footnote-170) Exploration and recognition of popular opinion is important in bridging the legitimacy gap between that system and the public,[[171]](#footnote-171) particularly given that the latter – far from acting as a repressive force in its hatred of killers – turns out to hold not only nuanced but also quite liberal-progressive views about criminal law and punishment.[[172]](#footnote-172) Harnessing those public attitudes and reflecting them via new partial defences to murder is a natural part of rendering that law accountable as part of a community’s ‘moral domain’.[[173]](#footnote-173) It is also indicative of a legal order which takes seriously attempts to label as precisely as possible mercy killers. Such engagement with the public is not automatically to privilege one view of homicidal liability for these defendants over another; rather, it is to acknowledge that as views develop over time, the criminal law should be given the chance to be formulated with a suitable degree of clarity. This sort of procedure, capturing Horder’s call for regular review of homicide law to reflect shifting community norms, may help better inform legal responses to mercy killers where diminished responsibility is unsuitable. Inevitably, this approach also requires a coherent vision of the role of partial defences to murder.[[174]](#footnote-174) Nevertheless, given the ideas that some scholars have proposed for accommodating mercy killers in voluntary manslaughter,[[175]](#footnote-175) it is clear that potential reform options can be developed. To be sure, unless such further debate takes place, pragmatic use of diminished responsibility in these cases will continue to blight the defence via a now unsustainable ‘benevolent conspiracy’.

**Conclusion**

This article has evaluated the functioning of the recast diminished responsibility plea in mercy killer cases. In particular, it has made three distinct claims. First, it suggested that diminished responsibility will remain a pragmatic defence ally of these defendants. This is due to normative imperatives locating such individuals within voluntary manslaughter and the lack of other partial defence options. Notably, loss of control has narrowed considerably, leaving diminished responsibility – with its ongoing potential for malleability – sometimes the only route to mitigation for mercy killers. This malleability is important given that a number of those defendants will not fall legitimately within the limits of the new diminished responsibility doctrine. Secondly, it asserted that this pragmatism will now be facilitated by a disconnect between the defence’s post-reform narrowing and its ongoing interpretive flexibility. That narrowing takes hold at doctrinal, conceptual and philosophical levels, although this does not preclude continued stretching of the plea in practice – albeit only with the continued benevolence of experts, lawyers, judges and juries. Thirdly, it contended that, due to this disconnect, any future attempts at pragmatism will be problematic. This is because those attempts will prejudice the newfound integrity of the defence and perpetuate unfair labelling of mercy killers.

Further reform of the partial defences, together with the introduction of other new (partial) defences for mercy killers, is unlikely in the short term. However, whilst the practice of pragmatically accommodating these offenders in the now narrower diminished responsibility plea persists – and there is reason to think that it will – then challenges of legal coherence and fair labelling will arise where these defendants use the recast defence. To avoid making a mockery of diminished responsibility’s new medicalised basis, and ensure accurate criminalisation of mercy killers, additional reform of legal responses to these offenders is necessary. This would reinforce a clearer view of how diminished responsibility should be used, whilst also encouraging the creation of more targeted solutions to the moral dilemmas presented by those mercy killer cases not truly fitting within the doctrine. That would not only help diminished responsibility delimit its true purpose, but also ensure that many mercy killers were criminalised more appropriately within voluntary manslaughter. These are challenges which, unsurprisingly, the criminal law is yet to confront more openly. It cannot, and should not, shirk them indefinitely.

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2. The Coroners and Justice Act 2009 (Commencement No. 4, Transitional and Saving Provisions) Order 2010 (SI 2010/816). [↑](#footnote-ref-2)
3. The article does not make the bolder normative claim that mercy killers deserve *complete* protection in the criminal law. Nevertheless, it acknowledges this idea below: see ‘(b) Post-2009 Act’. [↑](#footnote-ref-3)
4. For example, see M. Wasik, ‘Partial Excuses in the Criminal Law’ (1982) 45 MLR. 516, 521; and A. Norrie, *Crime, Reason and History*, 3rd edn (Cambridge: Cambridge University Press, 2014), 257. [↑](#footnote-ref-4)
5. On sentencing flexibility in voluntary manslaughter cases, see A. Ashworth, *Sentencing and Criminal Justice*, 5th edn (Cambridge: Cambridge University Press, 2010), 120 – 124. [↑](#footnote-ref-5)
6. A. Ashworth, ‘Reforming the Law of Murder’ [1990] Crim LR 75, 80. See also R. Taylor, ‘The Nature of “Partial Defences” and the Coherence of (Second Degree) Murder’ [2007] Crim LR 345, 346; A. Cornford, ‘The Architecture of Homicide’ (2014) 34 OJLS 819, 835 – 837; and A. Cornford, ‘Mitigating Murder’ (2016) 10 *Criminal Law and Philosophy* 31, 43. [↑](#footnote-ref-6)
7. For instance, see J. Horder, *Homicide and the Politics of Law Reform* (Oxford: Oxford University Press, 2012), 233 – 235. [↑](#footnote-ref-7)
8. See M. Otlowski, *Voluntary Euthanasia and the Common Law* (Oxford: Oxford University Press, 2000), 5. Note also R. Huxtable, *Euthanasia, Ethics and the Law: From Conflict to Compromise* (Abingdon: Routledge, 2007), 48. [↑](#footnote-ref-8)
9. On this feature of mercy killings, see H. Keating and J. Bridgeman, ‘Compassionate Killings: The Case for a Partial Defence’ (2012) 75 MLR 697. [↑](#footnote-ref-9)
10. The courts may still be content to use the label ‘mercy killing’ even where there is no evidence of V’s desire to die: see *Inglis* [2011] 2 Cr App R (S) 13. [↑](#footnote-ref-10)
11. Law Commission, *Murder,Manslaughter and Infanticide* (2006), Law Com No 304, para. 5.98. [↑](#footnote-ref-11)
12. Law Commission, *A New Homicide Act for England and Wales?* (2005) Law Com No 177, para. 8.51. See also Huxtable, above n. 7 at 165. [↑](#footnote-ref-12)
13. Eg. T. Cotton, ‘The Mandatory Life Sentence for Murder: Is it Time for Discretion?’ (2008) 72 J Crim L 288, 296. [↑](#footnote-ref-13)
14. Eg. A. Norrie, ‘Legal Form and Moral Judgement: Euthanasia and Assisted Suicide’, in A. Duff, L. Farmer, S. Marshall, M. Renzo and V. Tadros (eds), *The Structures of the Criminal Law* (Oxford: Oxford University Press, 2011), 140, 150. [↑](#footnote-ref-14)
15. B. Mitchell and J. Roberts, *Exploring the Mandatory Life Sentence for Murder* (Oxford: Hart Publishing, 2012), 95 – 96. [↑](#footnote-ref-15)
16. Law Commission, above n. 10 at para. 7.17. [↑](#footnote-ref-16)
17. A. Duff and S. Green, ‘Introduction’, in A. Duff and S. Green (eds), *Defining Crimes: Essays on the Special Part of the Criminal Law* (New York: Oxford University Press, 2005), 14. [↑](#footnote-ref-17)
18. See N. Lacey, ‘Principles, Policies and Politics of Criminal Law’, in L. Zedner and J. Roberts, *Principles and Values in Criminal Law and Criminal Justice* (Oxford: Oxford University Press, 2012), 26, 29; and, generally, V. Tadros, ‘Fair Labelling and Social Solidarity’, in Zedner and Roberts (eds). [↑](#footnote-ref-18)
19. This point is explored further below: see ‘Mercy Killers: Challenges to Fair Labelling’. [↑](#footnote-ref-19)
20. Home Office figures show that between 1982 and 1991 there were 22 homicides described as ‘mercy killings’, with only a single murder verdict being returned in those cases: House of Lords, *Report of the Select Committee on Medical Ethics* (HL Paper 21-1 of 1993-4), para. 128. It is suspected that *R* v *Cocker* [1989] Crim LR 740, where D relied on provocation instead of diminished responsibility, accounts for the one case of murder in this period: R. Mackay, ‘Diminished Responsibility and Mentally Disordered Killers’, in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (Oxford: Oxford University Press, 2000), 79. In a later study by Mackay of 157 diminished responsibility cases under the old scheme, three were described as ‘mercy killings’. In each of these cases the prosecution accepted a diminished responsibility plea: Law Commission, *Partial Defences to Murder* (2004), Law Com No 290, para. 5.40 [↑](#footnote-ref-20)
21. S. Dell, ‘The Mandatory Sentence and Section 2’ (1986) 12 *Journal of Medical Ethics* 28, 30. [↑](#footnote-ref-21)
22. (1960) 44 Cr App R 246. [↑](#footnote-ref-22)
23. At 252 (emphases added). [↑](#footnote-ref-23)
24. [2011] 2 Cr App R (S) 61. As the facts took place before the new diminished responsibility defence came into effect, judgment was made under the old plea. [↑](#footnote-ref-24)
25. As described in D. Baker, *Glanville Williams Textbook of Criminal Law*, 3rd edn (London: Sweet and Maxwell, 2012), 954, fn 29. [↑](#footnote-ref-25)
26. *R* v *Lloyd* (1966) 50 Cr App R 61 at 65 – 67. [↑](#footnote-ref-26)
27. L. Kennefick, ‘Introducing a New Diminished Responsibility Defence for England and Wales’ (2011) 74 MLR 750, 758. [↑](#footnote-ref-27)
28. Originally a common law doctrine, provocation was given statutory form by s. 3 of the 1957 Act. [↑](#footnote-ref-28)
29. *R* v *Ibrams* (1982) 74 Cr App R 154 at 160. [↑](#footnote-ref-29)
30. *Cocker*, above n. 19 at 741. See also *Inglis*, above n. 9. Here, D, a mercy killer, showed no loss of self-control. Instead, her actions ‘were deliberate and premeditated’ – at [57]. [↑](#footnote-ref-30)
31. *Ibrams*, above n. 28 at 160. [↑](#footnote-ref-31)
32. These effects are discussed further below: see ‘Mercy Killers: Challenges to Fair Labelling’. [↑](#footnote-ref-32)
33. See Keating and Bridgeman, above n. 8. [↑](#footnote-ref-33)
34. For example, see Huxtable, above n. 7 at 165 – 174; J. Rogers, ‘The Law Commission’s Proposed Restructuring of Homicide’ (2006) 70 J Crim L 223, 233 – 238; and V. Tadros, ‘The Limits of Manslaughter’, in C. Clarkson and S. Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (Aldershot: Ashgate, 2008), 58 – 60. [↑](#footnote-ref-34)
35. For instance, see P. Lewis, ‘The Failure of the Defence of Necessity as a Mechanism of Legal Change on Assisted Dying in the Common Law World’, in D. Baker and J. Horder (eds), *The Sanctity of Life and the Criminal Law: The Legacy of Glanville Williams* (New York: Cambridge University Press, 2013); and S. Ost, ‘Euthanasia and the Defence of Necessity: Advocating a More Appropriate Legal Response’ [2005] Crim LR 355. [↑](#footnote-ref-35)
36. See *R (Nicklinson)* v *Ministry of Justice* [2013] EWCA Civ 961. For discussion, see F. Stark, ‘Necessity and Nicklinson’ [2013] Crim LR 949. [↑](#footnote-ref-36)
37. S. 54(1)(a) of the 2009 Act. [↑](#footnote-ref-37)
38. S. Edwards, ‘Anger and Fear as Justifiable Preludes for Loss of Self-Control’ (2010) 74 J Crim L 223, 224. [↑](#footnote-ref-38)
39. See J. Herring, *Criminal Law: Text, Cases and Materials*, 6th edn (Oxford: Oxford University Press, 2014), 241. [↑](#footnote-ref-39)
40. S. 54(2) of the 2009 Act. [↑](#footnote-ref-40)
41. See Huxtable, above n. 7 at 38, fn1. [↑](#footnote-ref-41)
42. S. 55(5) of the 2009 Act. [↑](#footnote-ref-42)
43. See ss. 55(3) and (4) of the 2009 Act, respectively. [↑](#footnote-ref-43)
44. B. Livings, ‘A New Partial Defence for the Mercy Killer: Revisiting Loss of Control’ (2014) 65 NILQ 187, 198 – 200. [↑](#footnote-ref-44)
45. A. Clough, ‘Mercy Killing: Three’s a Crowd?’ (2015) 79 J Crim L 358, 363 – 364. [↑](#footnote-ref-45)
46. As argued by Livings, above n. 43 at 199. [↑](#footnote-ref-46)
47. Livings does not cite any loss of control cases in support of this idea. Rather, he draws assistance from anti-discrimination law where the courts have described individuals as having been ‘wronged’ in circumstances where they have not been afforded equal treatment: above n. 43 at 199 – 200. [↑](#footnote-ref-47)
48. Ibid. [↑](#footnote-ref-48)
49. Clough, above n. 44 at 371. [↑](#footnote-ref-49)
50. S. 54(1)(c) of the 2009 Act. [↑](#footnote-ref-50)
51. See ss.54(5) and (6) of the 2009 Act; and *R* v *Gurpinar* [2015] 1 Cr App R 31 at [12] and [22]. [↑](#footnote-ref-51)
52. S. 3 of the 1957 Act. [↑](#footnote-ref-52)
53. See below, ‘Diminished Responsibility and Mercy Killers: Pragmatic Accommodation Preserved?’. [↑](#footnote-ref-53)
54. See R. Mackay, ‘Pleading Provocation and Diminished Responsibility Together’ [1988] Crim LR 411. [↑](#footnote-ref-54)
55. R. Mackay, ‘The Coroners and Justice Act 2009 – Partial Defences to Murder (2) The New Diminished Responsibility Plea’ [2010] Crim LR 290, 295. See also A. Ashworth and J. Horder, *Principles of Criminal Law*, 7th edn (Oxford: Oxford University Press, 2013), 274. [↑](#footnote-ref-55)
56. Law Commission, above n. 19 at paras 5.84 and 5.86. [↑](#footnote-ref-56)
57. J. Miles, ‘The Coroners and Justice Act 2009: A “Dog’s Breakfast” of Homicide Reform’ (2009) 10 Archbold News 6, 8. [↑](#footnote-ref-57)
58. For instance, see R. Fortson, ‘The Modern Partial Defence of Diminished Responsibility’, in Reed and Bohlander (eds), 27; and Kennefick, above n. 26 at 759. [↑](#footnote-ref-58)
59. In Northern Ireland, the new version of diminished responsibility is contained in s. 5 of the Criminal Justice Act (Northern Ireland) 1966, as amended by s. 53 of the 2009 Act. [↑](#footnote-ref-59)
60. See Fortson, above n. 57 at 27; Livings, above n. 43 at 188; Mackay, above n. 54 at 295; and judicial comments in *R* v *Brennan* [2015] 1 Cr App R 14 at [49]. [↑](#footnote-ref-60)
61. Above n. 38 at 256. [↑](#footnote-ref-61)
62. D. Ormerod, *Smith and Hogan’s Criminal Law*, 13th edn (Oxford: Oxford University Press, 2011), 529. [↑](#footnote-ref-62)
63. *Brennan*, above n. 59 at [51]. See also *R* v *Bunch* [2013] EWCA Crim 2498 at [11]. [↑](#footnote-ref-63)
64. See J. Child and D. Ormerod, *Smith and Hogan’s Essentials of Criminal Law* 1st edn (Oxford: Oxford University Press, 2015), 177. [↑](#footnote-ref-64)
65. See Mackay, above n. 54 at 295. [↑](#footnote-ref-65)
66. The World Health Organisation: Statistical Classification of Diseases and Related Health Problems (ICD-10) and the American Psychiatric Association: Diagnostic and Statistical Manual of Mental Disorders (DSM-5). These classificatory systems are not expressly written into the plea, but reference to them in satisfying the ‘recognised medical condition’ test is encouraged: Fortson, above n. 57 at 29. [↑](#footnote-ref-66)
67. [2012] 1 Cr App R 34. [↑](#footnote-ref-67)
68. As expressed in the introductory pages of DSM-IV and highlighted in *Dowds* at [30]-[32]. [↑](#footnote-ref-68)
69. At [40]. [↑](#footnote-ref-69)
70. N. Wake, ‘Diminished Responsibility and Acute Intoxication: Raising the Bar?’ (2012) 76 J Crim L 197, 201. [↑](#footnote-ref-70)
71. For instance, see Livings, above n. 43 at 187, 191 – 194; and Mackay, above n. 54 at 294 – 295. [↑](#footnote-ref-71)
72. O. Quick and C. Wells, ‘Partial Reform of Partial Defences: Developments in England and Wales’ (2012) 45 *Australian & New Zealand Journal of Criminology* 337, 347. [↑](#footnote-ref-72)
73. See discussion of *Webb* above: ‘(a) Pre-2009 Act’. [↑](#footnote-ref-73)
74. As described by G. Williams, ‘Provocation and Killing with Compassion’ (2001) 65 J Crim L 149, 149. [↑](#footnote-ref-74)
75. Above n. 24 at.950. [↑](#footnote-ref-75)
76. Kennefick, above n. 26 at 758. [↑](#footnote-ref-76)
77. Mackay, above n. 19 at 64. [↑](#footnote-ref-77)
78. R. Sparks, ‘“Diminished Responsibility” in Theory and Practice’ (1964) 27 MLR 9, 9 – 10, 13. [↑](#footnote-ref-78)
79. Ibid. at 13. [↑](#footnote-ref-79)
80. Ibid. at 14. See also F. McAuley, *Insanity, Psychiatry and Criminal Responsibility* (Dublin: Round Hall Press, 1993), 168 – 169. [↑](#footnote-ref-80)
81. Sparks, above n. 77 at 14 – 15. [↑](#footnote-ref-81)
82. Ibid. at 9, 16. [↑](#footnote-ref-82)
83. Ibid. at 16. [↑](#footnote-ref-83)
84. Mackay, above n. 19 at 70 (emphasis added). [↑](#footnote-ref-84)
85. Ibid. at 70. [↑](#footnote-ref-85)
86. Mackay, above n 19 at 71 (emphasis added). [↑](#footnote-ref-86)
87. J. Horder, *Excusing Crime* (Oxford: Oxford University Press, 2004), 155 – 156 (original emphasis). See also A. Loughnan, *Manifest Madness: Mental Incapacity in Criminal Law* (Oxford: Oxford University Press, 2012), 241, 254; and A. Reed and N. Wake, ‘Anglo-American Perspectives on Partial Defences: Something Old, Something Borrowed and Something New’, in Reed and Bohlander (eds), 184. [↑](#footnote-ref-87)
88. E. Griew, ‘The Future of Diminished Responsibility’ [1988] Crim LR 75, 81 – 82. The idea that the defence reflected moral responsibility was sometimes stretched. In *R* v *Vinagre* (1979) 69 Cr App R 104, D successfully claimed diminished responsibility on account of his ‘Othello syndrome’ (morbid jealousy) after he stabbed and killed V, his wife, in a frenzied attack. D believed V was having an extra-marital affair. [↑](#footnote-ref-88)
89. See discussion above of *Webb*: ‘(a) Pre-2009 Act’. [↑](#footnote-ref-89)
90. Mackay, above n. 54 at 294 – 295. [↑](#footnote-ref-90)
91. This is also implied by Ormerod and Laird who argue the new ‘substantial impairment’ test is now simply a matter of psychiatry: D. Ormerod and K. Laird, *Smith and Hogan’s Criminal Law*, 14th edn (Oxford: Oxford University Press, 2015), 614. [↑](#footnote-ref-91)
92. Fortson, above n. 57 at 37. See also Baker, above n. 54 at 951. [↑](#footnote-ref-92)
93. Baker, above n. 54 at p.956. [↑](#footnote-ref-93)
94. Above n. 3 at 530 (emphasis added). [↑](#footnote-ref-94)
95. Above n. 43 at 193. [↑](#footnote-ref-95)
96. Above n. 26 at 765. [↑](#footnote-ref-96)
97. J. Gardner, ‘The Mark of Responsibility’ (2003) 23 OJLS 157, 161. [↑](#footnote-ref-97)
98. Ibid. at 157. [↑](#footnote-ref-98)
99. Ibid. at 161. [↑](#footnote-ref-99)
100. A. Acorn, ‘Responsibility, Self-Respect and the Ethics of Self-Pathologization’ in F. Tanguay-Renaud and J. Stribopoulos, *Rethinking Criminal Law Theory: New Canadian Perspectives in the Philosophy of Domestic, Transnational and International Criminal Law* (Oxford: Hart Publishing, 2012). [↑](#footnote-ref-100)
101. This distinction has particularly emerged in Anglo-American scholarship and the literature on it is considerable. For example, see G. Fletcher, *Rethinking Criminal Law* (Boston: Little Brown, 1978); P. Robinson, ‘Criminal Law Defences: A Systematic Analysis’ (1982) 82 *Columbia Law Review* 199; K. Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ (1984) 84 *Columbia Law Review* 1897; J. Dressler, ‘Justifications and Excuses: a Brief Review of the Concept and the Literature’ (1987) 33 *Wayne Law Review* 1155; and J. Smith, *Justification and Excuse in the Criminal Law* (London: Stevens & Sons, 1989). [↑](#footnote-ref-101)
102. Not all theorists distinguish between excuses and exemptions. Some claim that excuses simply deny responsibility: for example, see W. Wilson, *Central Issues in Criminal Law Theory* (Oxford: Hart Publishing, 2002), chapters nine and 11. [↑](#footnote-ref-102)
103. For example, see K. Ferzan, ‘Justification and Excuse’ in J. Deigh and D. Dolinko (eds), *The Oxford Handbook of Philosophy of Criminal Law* (Oxford: Oxford University Press, 2011), 239 – 240. [↑](#footnote-ref-103)
104. As outlined by Gardner, above n. 96 at 158. [↑](#footnote-ref-104)
105. As described by A. Ashworth: *Principles of Criminal Law*, 6th edn (Oxford: Oxford University Press, 2009), 114. [↑](#footnote-ref-105)
106. Ibid. at 113. [↑](#footnote-ref-106)
107. See A. Ashworth, *Positive Obligations in Criminal Law* (Oxford: Hart Publishing, 2013), 179. See also J. Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press, 2007), chapter 6. [↑](#footnote-ref-107)
108. Ashworth, above n. 106 at 196. Arguably, duress may amount to a justification depending on the strength of the threat to D: A. Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford: Hart Publishing, 2009), 288 and 288, fn.90. [↑](#footnote-ref-108)
109. See Horder, above n. 86 at 10. [↑](#footnote-ref-109)
110. Ashworth, above n. 106 at 133. [↑](#footnote-ref-110)
111. For example, see A. Simester and G. Sullivan et al, *Simester and Sullivan’s Criminal Law*, 5th edn (Oxford: Hart Publishing, 2013), 677, fn.53. For criticism of the tripartite categorization in the context of partial defences, see N. Lacey: ‘Partial Defences to Homicide: Questions of Power and Principle in Imperfect and Less Imperfect Worlds’, in Ashworth and Mitchell (eds). [↑](#footnote-ref-111)
112. J. Horder, ‘Between Provocation and Diminished Responsibility’ (1999) 10 KCLJ 143, 144. [↑](#footnote-ref-112)
113. J. Chalmers, ‘Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism’ [2004] Crim LR 198, 202; and Keating and Bridgeman, above n. 8 at 705, fn 56. [↑](#footnote-ref-113)
114. Horder, above n. 111 at 148 – 149. [↑](#footnote-ref-114)
115. Above n. 86 at 140 (emphasis added). [↑](#footnote-ref-115)
116. Ibid. at 157. [↑](#footnote-ref-116)
117. Ibid. at 139 – 140 (original emphasis). On accommodating mixed cases within provocation *instead* of diminished responsibility – following the short-lived precedent in *R* v *Smith (Morgan)* [2001] 1 AC 146 – see A. Simester, ‘On Justifications and Excuses’, in Zedner and Roberts (eds), 111. [↑](#footnote-ref-117)
118. Horder, above n. 86 at 105. [↑](#footnote-ref-118)
119. Ibid. at 165. [↑](#footnote-ref-119)
120. G. Schneebaum and S. Lavi, ‘Criminal Law and Sociology’ in M. Dubber and T. Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford: Oxford University Press, 2014), 160 – 161. See also Loughnan, above n. 86 at 340, 361 – 362. [↑](#footnote-ref-120)
121. Above n. 86 at 163. [↑](#footnote-ref-121)
122. Above n. 3 at 263. [↑](#footnote-ref-122)
123. *Brennan*, above n. 59 at [44]. [↑](#footnote-ref-123)
124. This possibility is left open by the decision in *Brennan*. Here, Davis LJ said that where there is a dispute concerning expert evidence the jury determines that dispute: at [44]. See also Kennefick, above n. 26 at 763; and Ashworth and Horder, above n. 54 at 269. [↑](#footnote-ref-124)
125. In *R* v *Edgington* [2014] 1 Cr App R 24, Green J approved the trial judge’s direction to the jury that it should avoid basing its decision on sympathy: at [31]. [↑](#footnote-ref-125)
126. See Ashworth and Horder, above n. 54 at 271. [↑](#footnote-ref-126)
127. See S. Dell, *Murder Into Manslaughter* (Oxford: Oxford University Press, 1984), 29, 35. In addition, see discussion above: ‘Medicalising Diminished Responsibility: Doctrinal Restrictions’. [↑](#footnote-ref-127)
128. Such depression is common to mercy killers: Huxtable, above n. 7 at 39. It is a recognised medical condition: for example, the WHO’s ICD-10 lists reactive depression and adjustment disorder in Chapter V, F.32 and F.43, respectively. [↑](#footnote-ref-128)
129. See comments by Ormerod, above n. 61 at 530; Herring, above n. 38 at 317; and Huxtable, above n. 7 at 38. See also *R* v *Mungall* (2011, unreported), discussed in Norrie, above n. 3 at 254 and detailed at:

 <http://www.bbc.co.uk/news/uk-england-london-15034881>, accessed 3 July 2016. [↑](#footnote-ref-129)
130. [2012] 2 Cr App R (S) 27. [↑](#footnote-ref-130)
131. At [14] – [16]. An adjustment disorder was also accepted in *R* v *Beaver* (unreported, Court of Appeal (Criminal Division), 24 March 2015), a case not dissimilar to a mercy killing. [↑](#footnote-ref-131)
132. As intimated by the Law Commission, above n. 11 at paras 8.56, 8.66 and 8.88. See also Huxtable, above n. 7 at 39. [↑](#footnote-ref-132)
133. This was a feature of mercy killing cases under the old defence: Dell, above n. 126 at 36. [↑](#footnote-ref-133)
134. See Fortson, above n. 57 at 32 – 34. [↑](#footnote-ref-134)
135. Above n. 10 at para 5.121. [↑](#footnote-ref-135)
136. Above n. 63 at 179. [↑](#footnote-ref-136)
137. See Huxtable, above n. 7 at 40; and Norrie, above n. 3 at 254. [↑](#footnote-ref-137)
138. Fortson, above n. 57 at 25 (original emphasis). [↑](#footnote-ref-138)
139. At [14]. [↑](#footnote-ref-139)
140. This appears more flexible than the approach under the old defence. For example, in *R* v *Osborne* [2010] EWCA Crim 547, evidence of ‘calculation and deliberation’ precluded a substantial impairment finding: at [36]. [↑](#footnote-ref-140)
141. See C. de Than and J. Elvin, ‘How Should the Law Deal with People Who Have “Partial Capacity”?’ in B. Livings, A. Reed and N. Wake (eds), *Mental Condition Defences and the Criminal Justice System* (Newcastle: Cambridge Scholars Publishing, 2015), 304. See further *Brennan*, above n. 59 at [31]. [↑](#footnote-ref-141)
142. de Than and Elvin, above n. 140 at 304. [↑](#footnote-ref-142)
143. Similarly, in *R* v *Janiszewski* [2012] EWCA Crim 2556, D was found to have lost self-control despite his infliction of multiple blows on V in a ‘savage’ attack: at [8] and [15]. [↑](#footnote-ref-143)
144. [2016] UKSC 61. [↑](#footnote-ref-144)
145. At [40]. [↑](#footnote-ref-145)
146. *Lloyd*, above n. 25. [↑](#footnote-ref-146)
147. At [43]. [↑](#footnote-ref-147)
148. Simester and Sullivan et al, above n. 110 at 734. See also Mackay, above n. 54 at 300; and Loughnan, above n. 86 at 244. [↑](#footnote-ref-148)
149. R. Mackay, ‘The New Diminished Responsibility Plea: More than Mere Modernisation?’, in Reed and Bohlander (eds), 19. [↑](#footnote-ref-149)
150. See R. Mackay and B. Mitchell, ‘The New Diminished Responsibility Plea in Operation: Some Initial Findings’ [2017] Crim LR 18, 34. [↑](#footnote-ref-150)
151. Norrie, above n. 13 at 146. [↑](#footnote-ref-151)
152. Ibid. at 148. [↑](#footnote-ref-152)
153. Ibid. [↑](#footnote-ref-153)
154. Ibid. at 155. [↑](#footnote-ref-154)
155. H. Howard, ‘Diminished Responsibility, Culpability and Moral Agency: The Importance of Distinguishing the Terms’, in Livings, Reed and Wake (eds), 324. [↑](#footnote-ref-155)
156. See discussion above: ‘The Normative Role of Voluntary Manslaughter’. [↑](#footnote-ref-156)
157. As considered by J. Chalmers and F. Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 MLR 217, 224 – 239. [↑](#footnote-ref-157)
158. See discussion above: ‘The Normative Role of Voluntary Manslaughter’. [↑](#footnote-ref-158)
159. Ashworth and Mitchell, ‘Introduction’, in Ashworth and Mitchell (eds), 12. [↑](#footnote-ref-159)
160. Huxtable, above n. 7 at 53. [↑](#footnote-ref-160)
161. J. Stanton-Ife, ‘Strict Liability: Stigma and Regret’ (2007) 27 OJLS 151, 156 – 157. [↑](#footnote-ref-161)
162. See recent diminished responsibility cases reported in the media where the medicalised tests have been routinely referenced: eg. <http://www.independent.co.uk/news/uk/crime/care-home-shooting-death-ronald-king-rita-87-year-old-man-shot-dead-wife-sentenced-psychiatric-a7207341.html>, accessed 24 October 2016. [↑](#footnote-ref-162)
163. For example, see discussion by G. Becker and R. Arnold, ‘Stigma as a Social and Cultural Construct’, in S. Ainley, G. Becker and L. Coleman (eds), *The Dilemma of Difference: A Multidisciplinary View of Stigma* (New York: Plenum Press, 1986), 48 – 51. [↑](#footnote-ref-163)
164. Law Commission, above n. 19 at para 5.94. See also Ashworth and Horder, above n. 54 at 270. [↑](#footnote-ref-164)
165. A. Ashworth, ‘“Manslaughter”: Generic or Nominate Offences?’, in Clarkson and Cunningham (eds), 247. [↑](#footnote-ref-165)
166. Above n. 6 at 61 – 62. [↑](#footnote-ref-166)
167. Ministry of Justice, *Murder, Manslaughter and Infanticide: Proposals for Reform of the Law, Summary of Responses and Government Position* (2009), para 120. [↑](#footnote-ref-167)
168. Above n. 6 at 64. [↑](#footnote-ref-168)
169. This may require further revision of diminished responsibility: for discussion, see Howard, above n. 154. [↑](#footnote-ref-169)
170. See above: ‘The Normative Role of Voluntary Manslaughter’. [↑](#footnote-ref-170)
171. Horder, above n. 6 at 55. [↑](#footnote-ref-171)
172. Ibid. at 55 – 56. [↑](#footnote-ref-172)
173. Ibid. at 59. See also P. Robinson, *Intuitions of Justice and the Utility of Desert* (Oxford: Oxford University Press, 2013), in particular chapters nine, 10 and 11. [↑](#footnote-ref-173)
174. On a theory of partial defences, including the circumstances which should fall within those defences, see D. Husak, ‘Partial Defenses’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 167. [↑](#footnote-ref-174)
175. See above for discussion: ‘Post-2009 Act’. [↑](#footnote-ref-175)