EMOTIONS AND CULPABILITY: NAVIGATING THE NEXUS

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Abstract

While law and emotions have traditionally been understood as mutually repugnant ideas, closer inspection reveals that emotions are not entirely absent from the positivist legal framework; and our legal system stresses upon shoring up against its influence thereby skewing response to emotions in the administration of justice. The focus of this paper is to examine where, when, how, and why that most animating psychological concept—emotion—influences culpability. The primary interest is on the emotions of the accused, with particular focus on Indian criminal law and its theories of culpability, which are embedded in statutes, in the reasons and dicta judges give for their decisions, and in the works of legal theorists. This paper asks why, for example, emotions sometimes aggravate a murder,making it so vile and heinous that it warrants the death penalty, whereas atother times emotions mitigate a murder to culpable homicide, or excuse a killing (*e.g.,* unsoundness of mind or insanity[1]) or even justify it (*e.g.,* right of private defense[2]).This paper also briefly illustrates some of the inconsistencies, contradictions, and incoherence among modern criminal law's theories of emotion, as seen through different crimes, defences, and doctrines before concluding that restructuring of the administration of justice to make it more emotionally coherent and accommodative to enable thoughtful response to emotions shall not only be more fulfilling but also serve the ends of justice and equity better.

I Introduction

"Men decide far more problems by hate, love, lust, rage, sorrow, joy, hope, fear, illusion, or some other inward emotion, than by reality, authority, any legal standard, judicial precedent, or statute." - Marcus Tullius Cicero[3]

EMOTIONS AND culpability have been interlinked ever since the beginning of legal development. Certain emotions like "anger" are 'quintessentially judicial' as, once triggered, it generates a desire to affix blame and assign punishment. And yet never paused to ask why, for example, the very same anger when expressed in exceptionally brutal, vile and heinous manner aggravates the offence of murder, making it so exceptionally heinous as to warrant a death penalty,[4] whereas when done in a state of premeditative and collaborative calm gives rise to an additional charge of criminal

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1 Indian Penal Code, 1860, s. 84.

2 *Id.*, s. 96-106.

3 Cicero II *De Oratore*, 178(1942).

4 "Rarest of the rare" doctrine as expounded in *Bacchan Singh* v. *State* (1980) 2 SCC 684.

conspiracy. At other times the same anger when induced by the murderous rage of a grave and sudden provocation results in a compromised verdict of culpable homicide[5] (manslaughter), when caused by insanity, is excused and even justified if done as an act of self-defence.[6] Even within the grave and sudden provocation, the verdict changes again if the cause of "murderous rage" was hatred rather than shame.[7]

Perhaps this is because orthodox legal scholarship understands emotions as dangling, disembodied psychic entities, unrelated to intentions in the interior psyche or provocations in the objective reality. As noted, British legal philosopher, Emma Jones says, "For the law, emotions represent the messy, the subjective, the irrational and the dangerous."[8] In contrast, the law imposes order, objectivity, rationality and reason[9] (or so it says). It seeks to disregard emotions and, when it cannot do so, it works hard to suppress them.[10] Where emotions have to be admitted into the legal arena (for example, with the grave and sudden provocation defence under Indian Penal Code, 1860 they are regularised, contained and (as far as possible) sanitized).

Bandes[11] encapsulates this well when recalling a New Yorker cartoon in which a lawyer advises their client "Make eye contact with the jury, but not homicidal maniac eye contact". This demonstrates that any such encouragement and acknowledgement of emotions is within strictly prescribed limits, reinforcing legal boundaries that are themselves designed to reinforce the contrast between the human frailty of the law's accused and the invulnerability of the law itself.[12]

This disregard and suppression (or at best mistreatment) of emotions is not an approach to law that is tied to one philosophical or legal tradition and it is not one perspective amongst many.[13] Instead, it is the dominant, overriding, mainstream approach taken by law to emotions within both Anglo American as well as Indian jurisprudence. At least traditionally, it has been an approach that has persisted with a relatively little sustained challenge.

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5 *Supra* note 1, s. 299.

6 *Id.*, General Exceptions, Ch. IV, s. 300.

7 Terry Maroney, "Law and Emotion: A Proposed Taxonomy of an Emerging Field" 30 *L. & Hum. Behav.* 119(2006).

8 Emma Jones, *Emotions in Law School: Transforming Legal Education* (Routledge Publications Aug. 2019).

9 P. Schlag, *The Enchantment of Reason*, (Duke University Press, Durham 1998).

10 S. A. Bandes, "Centennial Address: Emotion, Reason, and the Progress of Law"62(4) *DePaul Law Review* 921–929 (2013).

11 C. Sanger "The Role and Reality of Emotions in Law"8(1)*William & Mary Journal of Women and the Law* 107–113 (2001).

12 Emma Jones, *Emotions in Law School: Transforming Legal Education*(Routledge Publications Aug. 2019).

13 M. L. Bailey, K. J. Knight, "Writing Histories of Law and Emotion" 38(2) *The Journal of Legal History* 117–129 (2017).

However, as stated above, this view of emotions and law as two stark contrasts based on "passion" and "reason" is nothing but a false dichotomy in several respects – it is not an accurate indication of the way law is structured and administered,[14] the way emotions work[15] or even the way human beings live.[16] The truth is that law and emotions intersect at various points.

II Emotions and culpability

As *homo sapiens,* we are social creatures, neurologically wired to feel emotions which further social solidarity and cooperation. Our collective well-being is closely associated with many pro juristic emotions like a sense of righteous anger in the face of grave oppression or injustice or the collective horror at abhorrent hate crimes as witnessed with the recent murder of George Floyd in the United States which sparked the global Black Lives Matter movement.[17] These pro-social emotions of human beings which primarily include a sense of justice too is what animates the very concept of law. The existence and usefulness of these emotions is a reality, accessible to reason, and just laws are the reasoned expression of the same values of inclusion, equality, and fairness that arise in all human societies, because of our humanity – and human emotion.[18]

Therefore, it is very unsurprising that theories of emotion and culpability in law are as much psychological as legal because they deal with complexities of human nature and behaviour in theoretical as well as applied form, just as psychology. As Finkle and Parrott explain, "The Law's analysis of human behaviour is neither superficial nor confined to surface acts alone; to the contrary, the Law's analysis plunges into subjectivity, making assumptions and attributions about the mind, malice, emotions, motives, and capacities that underlie and propel acts, much as one would find in psychology."[19]

However, these vast majority of modern criminal law's theories of emotion,[20] which on close analysis, turn out to be psychological theories—for they advance explanatory claims about the emotional side of our human nature as they relate to culpability, are also ridden with some of the inconsistencies, contradictions, and incoherence as seen through different crimes, defences, and doctrines.[21]And the present article aims to

14 K. Abrams, "The Progress of Passion" 100(6) *Michigan Law Review* 1602 (2002).

15 Martha Nussbaum, *Upheavals of Thought: The Intelligence of Emotions* (Cambridge University Press, Cambridge 2001); Robert C. Solomon, *Not Passion's Slave: Emotions and Choice* (Oxford University Press, New York, 2003).

16 Daniel Goleman, *Emotional Intelligence*, (Bloomsbury Publishing Plc, London, 1996).

17 *Available at*: https://www.brookings.edu/blog/up-front/2020/07/10/from-the-george-floyd-moment-to-a-black-lives-matter-movement-in-tweets/(last visited on Sep. 20, 2020).

18 MNS Sellers, *Law, Reason and Emotions* 8 (Cambridge University Press, 2016).

19 Norman J. Finkle, W. G. Parrott, *Emotions and Culpability: How the Law is at Odds with Psychology, Jurors and Itself* 36 (American Psychological Association, Washington DC US, 2006).

20 *Id.* at 5.

21 J. Dressier, *Understanding Criminal Law* (Bender, Danvers, MA, US, 3rd edn. 2001).

showcase such psychological in congruencies in law, not asa guise covering hegemonic intentions but simply to evolve a more psychologically improved version of law's culpability schema.

Denudement of malice in murder

In early criminal law world, culpability was pivoted not simply to an *actus reus* or overt act, nor simply to the *mens rea* or purpose and intent behind that act, but to an insidious, evil mind. As law professor Richard Singer put it in the opening sentence to his paper titled, "The Resurgence of Mens Rea,"[22] before the 19th Century, the criminal law took seriously the requirement that a defendant could not be found guilty of an offence unless he had truly acted in a malicious and malevolent way—that he had not only "the" mental state for the crime, but that, more generally, he manifested a full-blown *mens rea*: an "evil mind".[23]

This was the robust concept of *mens rea* as stated by Dressier,[24] "The common law definition of 'murder' is 'the killing of a human being by another human being with malice aforethought," and then he goes on to state that "manslaughter is an unlawful killing . . . without malice aforethought".[25] Regarding aforethought, Dressier stated that "In very early English history, the word 'aforethought' probably required that a person think about, or premeditate, the homicide long before the time of the killing. It gradually lost this meaning, so ... 'aforethought' is now superfluous".[26]

As for malice, Dressier stated that: "Malice" is a legal term of art with little connection to its non-legal meaning. As the term developed, a person who kills another acts with the requisite "malice" if she possesses any one of four states of mind:[27]

i. the intention to kill a human being;

ii. the intention to inflict grievous bodily injury to another;

iii. an extremely reckless disregard for the value of human life; or

iv. the intention to commit a felony during the commission or attempted commission of which a death results. . . . [E]ach mental state involves an extreme indifference to the value of human life

As Finkle and Parrott note, in this definition of murder, we find, "The evil, ill will, and desire to see another suffer. Here we also find an array of emotions, from deep-seated

22 R. Singer, "The Resurgence of Mens Rea: Provocation, Emotional Disturbance, and the Model penal Code", *Boston College Law Review* 27, 243-322 (1986).

23 *Id*. at 243.

24 *Supra* note 21.

25 *Id*. at 503.

26 *Ibid*.

27 *Ibid*.

and cherished ones to impulsive and passing ones, which include anger, envy, resentment, and hate, along with grudges, dislikes, and antipathies."[28]

In the IPC, on the other hand, the issue in murder is whether the offender kills the victim with:[29]

i. The intention of causing death.

ii. Causing such bodily injury as the offender knows it is likely to cause the death of a person.

iii. Intentionally causing a bodily injury which is sufficient to cause death.

iv. Doing an act with knowledge that it is so imminently dangerous and, in all probability, causes death.

Not only does the common law's malice aforethought vanishes from the Code's definition,[30] but also depraved heart murder, typically considered second-degree murder under the common law, also disappears. This is deeply problematic because as Finkle and Parrott explain, "When Code's defining terms have been "denuded" of the older, moral meanings, the "allusive style"[31] that features motive and emotion, and what is left, in psychological terms, is cognitive—what the actor thought, and how far and deeply the actor thought (or did not think) then along with vanishment of malice (the evil) from the core construct, a host of emotions vanish as well, the evil that motivates the action is also lost, and *mens rea* loses that which makes the criminal act a moral crime, leaving only the cognitive element of intent. And when emotions are removed, what is left is the cold-blooded killer prototype (*e.g.,* Finkel and Groscup;[32] V. L. Smith;[33] V. L. Smith and Studebaker;[34] Stalans[35]) which does not fit many of the worst killers, whose killings are hot and heinous. This new cognitive, intentional act becomes an ill-fitting caricature for many in the "murder group" who are more hot, heinous, and variable. This new picture reflects discredited folk theories that contrast thinking with

28 *Supra* note 19 at 198.

29 *Supra* note 6.

30 *Ibid.*

31 S. H. Pillsbury, Judging evil: Rethinking the law of murder and manslaughter 84 (New York University Press, New York, 1998).

32 N. J. Finkel, J. L. Groscup, "When mistakes happen: Commonsense rules of culpability", Psychology, Public Policy and Law 3, 65-125 (1997b).

33 V. L. Smith, "Prototypes in the courtroom: Lay representations of legal concepts"*Journal of Personality and Social Psychology* 61, 857-872 (1991). See also, "When prior knowledge and law collide: Helping jurors use the law" *Law and Human Behavior* 17, 507-536, (1993).

34 V. L. Smith, C. A. Studebaker, "What do you expect? The influence of people's prior knowledge of crime categories on fact-finding" *Law and Human Behavior* 20, 517-532 (1996).

35 L. Stalans, "Citizen's crime stereotypes, biased recall, and punishment preferences in abstract cases: The educative role of interpersonal sources"*Law and Human Behavior* 17, 451-470 (1993).

emotion, see emotion as devoid of cognition, or hold that when there is strong emotion there cannot be deliberation and premeditation."[36]

Thus, it is observed that in the evolution of the offence of murder from common law to culpable homicide amounting to murder in IPC, the law's language is bared of such intense and evocative constructs as malice, emotions, and motive. As a result, the component of *mens rea* not only constricts significantly but becomes more cognitive, leaving the Law with lesser determinative variables in its culpability consideration. In terms of the criminal law's new implicit psychological theory, the law no longer considers the whole of the psyche, but only a part of it, restricting its focus to intentions residing within the head. By ignoring the malevolent, ill will notion of malice, the Code here makes the glaring error of failing to acknowledge that cognitions are driven by emotions[37] and thus becomes completely disconnected with the real psychological basis behind culpability in murder cases.

This becomes problematic because though the Code attempts to give preference to the word intent denoting *mens rea* but in actuality, it has only considered intentions which are thoughts and intentions closest to the surface, while ignoring the wolfs motives and emotions beneath. This dramatic constriction of *mens rea*, to only objective cognitive elements, then forces the courts to attempt to infer the subjective intent of malice in defendant's psyche from the objective framework of deliberation and premeditation, leaving judges with fewer determinative factors in their culpability consideration. Thus, the implicit psychological theory of murder in IPC turns out to be inadequate as it restricts its attention only to the objective rational part of the defendant's psyche and not to its subjective whole.

Culpable homicide and unrestrained subjectivity of emotions

In the previous section, it was discussed how the IPC in its definition of murder has jettisoned the common law's elements of depraved heart, malice, and the emotions, as the Code's subjective *mens rea* analysis narrowed to specific intentions. However, in the Code's treatment of culpable homicide not amounting to murder, there is another contradiction in the subjective direction.[38]

At its earliest inception, when the common law was first distinguishing between manslaughter and murder, Lord Coke[39] held that manslaughter differs from murder in both the objective act and the subjective intent, for the act occurs "of a sudden",[40]

36 Norman J. Finkle, W. G. Parrott, *Emotions and Culpability: How the Law is at Odds with Psychology, Jurors and Itself* 234(American Psychological Association, Washington DC, US 2006).

37 *Id*. at 205.

38 *Id.* at 246.

39 E. Coke, *The first part of the Institutes of the laws of England* (Garland Publishing, New York (Original work published 1628), (1979).

40 *Id*. at 55.

from chance-medley situations, in which the actor's intent, unlike the murderer's, does not involve malice aforethought. By Coke's definition, the nature of the act necessarily constrains the intent, because there was "no time for the defendant to establish hatred or ill will toward the deceased"; thus "a killing done upon chance-medley is by definition not done with malice".[41]

This differentiation was also adopted by the IPC as reflected in its criteria for grave and sudden provocation. Emotions, according to the IPC's definition of a grave and sudden provocation arise *ex nihilo* and become embodied and reified as entities—disconnected from objective provocations in the outer world, and unconnected from thoughts, motives, and control in the inner world. Alone, inside the mind, they brood, fume, and afterwards unexpectedly detonate—as though they have psyches of their own.[42]

As Finkle and Parrott explain, "Culpable homicide not amounting to murder or manslaughter is a compromise verdict. The law mitigates culpability, but it does not exculpate. The law acknowledges our human frailty and lessens culpability, recognizing that we are not at our psychological and legal best when our passions get the best of our thinking and control. However, the law does not go all the way to exculpation, and by not doing so, the Law is claiming that our passions have not overturned our reason and control to the point of insanity and blamelessness. But on what factual basis does that claim rest? Put another way, do the theoretical grounds for granting mitigation (but no more) rest on something substantive? That question, we submit, has not been answered satisfactorily through the common law's rules."[43]

Taken a gander at from the opposite end, this trade-off verdict of murder stays blameworthy judgement. All things considered, the law is stating to such a respondent—mentally and normatively—"you could have, and ought to have, kept a better handle at your emotions". Somewhere, at that point, in the law's folk psychological theory of emotions, just as in its standardizing desires, there is the conviction that controls over one's emotions is mentally conceivable and normatively expected: the Law accepts, at that point, that these defendants could have (and ought to have) adhered to an honest and more law-abiding course, in any event, when hit by physical incitements that stir exceptional emotions. If this is so, then why remit anything from culpability? Whichever way one poses this question, one still finds oneself looking for a good hypothesis of the emotions and their interplay with incitements, thinking, control, motives, provocations and other thought processes.[44]

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41 R. Singer, "The resurgence of mensrea: I. Provocation, emotional disturbance, and the model penal code"*Boston College Law Review* 27, 243-322 (1986).

42 *Supra* note 19 at 55.

43 *Supra* note 34.

44 *Ibid.*

The early common law theorists avoided a subjective, evaluative, and idiothetic approach, fearing, perhaps, that a law so grounded might end up having to grant mitigation to the weakest, vilest, or least controlled of its citizens, just the types the Law most wants to restrain "within the belt of rule" [45] In going in the extreme objective direction, the common law's theory selected and defined variables in such a way that subjectivity and psychology were squeezed out of the picture, but the law's resultant picture became a still-life snapshot rather than a moving flesh-and-blood story, for context and time were limited to an of-a-sudden act that occurs at a moment in time. This creates a false and simplistic framing of the problem. In effect, there was no story to this story.[46]

Examining in detail how subjective breaches occur in this objective story of law by studying in-depth, a common-law case of 17th Century England, called the *Royley* case. In this case, the facts are that a father named John Royley upon hearing that his son, William, is beaten up by another boy, John Derman, flies into a rage and aggressively assaults John, beating him to death.[47]

John Royley[48] was not battered himself, and he did not witness firsthand the beating that the boy John Derman administered to his son William, such that William's "nose bled". In Richard Singer's summary and analysis of the case, what Royley heard were William's words, "telling and complaining to him of that battery".[49]

John Royley, with those informational words in mind and with heated passions propelling him, "goes a mile to find [the young John Derman], and there, in revenge of his son's quarrel, strikes the boy with a little cudgel"[50] killing Derman. The court ruled "it was but manslaughter" as the killing was "upon that sudden occasion".[51] Although mere words had been excluded as an adequate provocation, this court drew a new distinction, and held that "informational words, when aurally delivered about a battery, were an adequate provocation."[52]

Finkle and Parrott explain that, "In moving from a physical and visual provocation to an aural one, Royley ran with an imaginative picture, a subjectively conjured provocation, and the beating he imagined in his mind was no doubt far worse than what the Derman boy delivered to Royley's son. But by finding that this was manslaughter—because the killing occurred "upon that sudden occasion"—this court ends up stretching out time in which provocation was inspired, for it is a fair assumption that it took this father

45 *Supra* note 19 at 58.

46 *Supra* note 19 at 336.

47 *Ibid.*

48 Royley's Case, Cro. Jac.296, 79 Eng. Rep. 254 (England 1666).

49 *Supra* note 41.

50 *Id.* at 254.

51 *Id.* at 255.

52 *Ibid.*

some 10 to 15 minutes or so to travel the mile to get to young Derman. This decision also stretches out the cooling-off time, for Royley has both the time and opportunity, during the run, to reflect and realize that this was merely a quarrel between two boys, amounting to no more than a bloody nose, and that a father intervening to revenge this boys-will-be-boys quarrel was an inappropriate escalation.[53]

Had Royley had any of those thoughts, his reason and control might have stopped him in his tracks. Moreover, there is no indication that the court, given the factual provocation time and cooling off time in the case, asked the normative question: Should Royley have asked himself whether his avenging run was appropriate?[54] But when Royley gets there and is standing over the young John Derman, with the disproportionate size difference evident, and with a disproportionate cudgel in his hand, about to have his non-chance medley with Derman— what is he thinking, and what should he be thinking?".[55]

Moreover from the court record it is clear that Derman doesn't truly assault John Royley, so there was no objective physical incitement, saving aside for what was subjectively still in Royley's psyche, which was not freshly of a sudden any longer. For this decision to bode any sense (and numerous treatise authors opine it was flawed on numerous tallies), the members of the jury must have vigorously weighted Royley's subjectivity—subjectivity established in the pictures and emotions those provocative words incited in his mind and in a psyche that could invoke, kindle, and keep the fire burning over a run of time, disregarding a face to face encounter with a lot littler foe that ought to have provided him motivation to an opportunity to stop and think—or possibly motivation to put down the club. These informational words exemption started to show up more now and again in case decisions, until it turned into the standard, however, a conflicting special exception remained for infidelity/adultery cases.[56]

Shifting our attention to an American case from the state of North Carolina, *State* v. *John,*[57] let us see how the defendant tried to introduce evidence that witnesses had aurally told him that his wife was having an adulterous affair, but the court excluded the evidence, claiming that the affair had to be visually witnessed.[58]

Although aural information about a battery (e.g., *Royley's* case[59]) and a sodomy (*e.g., Regina* v. *Fisher*[60]) were judged reliable, aural information about an adultery was not deemed reliable in *John* case. But this adultery exception was soon to crumble.

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53 *Supra* note 19 at 278.

54 *Ibid*

55 *Supra* note 19 at 386.

56 *Supra* note 19 178.

57 30 N.C. (8 Ired.) 330 (1848).

58 *Supra* note 19 at 178.

59 Royley's Case, Cro. Jac.296, 79 Eng. Rep. 254 (England 1666).

60 8 Car. & P 182, 173 Eng. Rep. 452 (1837).

In *Regina* v. *Smith,*[61] William Smith killed his wife after she "violently abused him, taunting him with her preference for Langley", a man with whom she had lived in adultery, but who was now dead. Beyond taunting and using foul language, she may have "spat in her husband's face", although in the next sentence the case record indicates that whether she "actually spat on, or only at him, did not appear".[62]

The ruling in *Regina* case was manslaughter, as the court suggested that words were spoken could aggravate the provocation, as could the spitting, whether the spittle lands or not. This court seemed to be either expanding what could be an adequate provocation or suggesting that a current but inadequate provocation may serve to subjectively trigger an old provocation from the past.[63]

In *Regina* v. *Fisher,*[64] Fisher hears from his 15-year-old son that he was sodomized by a man named Randall, and, like Royley, Fisher takes off to avenge what happened; however, unlike Royley, Fisher takes off the next day, not immediately. When he meets up with Randall, he first beats him with a short stick, and then stabs him to death with a table knife. Justice Park ruled that this was murder, and he cited the cooling factor, for whether "blood had time to cool or not, is rather a question of law"[65] and the Justice ruled that the blood had cooled by the time Fisher confronted Randall. Fisher's run was apparently a day late, according to the Law's theory.[66]

In a Texas case, *Pauline* v. *State,*[67] Pauline gets a letter on January 5 informing him that his wife is having an adulterous relationship with the victim, whom he kills on February 7. The court held that too much time had passed between the provocation and the murder, as a matter of law, with the blood having plenty of time to cool. But on rehearing the case, the Pauline court learns that the letter had actually been dated February 5, not January 5, and this corrected fact changed the verdict to manslaughter, for it "establishes the killing on the first meeting after the appellant had been informed of the adultery of the appellant's wife and the deceased".[68]

III Indian scenario

In Indian law, the case of *K.M. Nanavati* v. *the State of Maharashtra*[69] is a significant judgement on this topic, where Commander Kawas Manekshaw Nanavati, an Indian Naval Commander, was tried for the murder of PremAhuja, his British wife Slyvia's

61 4 Post & F 1066 (1866), 176 Eng. Rep. 910.

62 *Id.* at 910.

63 *Ibid.*

64 *Supra* note 60.

65 *Id.* at 454.

66 *Supra* note 19 at 108.

67 *Pauline* v. *State,* 21 Tex. Grim. 436, 1 S.W. 453 (1886).

68 *Id* at. 464.

69 AIR 1962 SC 605.

lover. According to some reportsyoung Slyvia, feeling dejected by her husband's prolonged absence due to his long term overseas deployment had asked for a divorce from Nanavati so that she could marry the victim, her lover Ahuja. Initially, Nanavati agreed to an unconditional divorce and was even willing to relinquish the custody of their children. However, later on, he sent his wife and kids to a matinee show and decided to go to victim's home to enquire if he was serious in his intention of marrying his wife and accepting the couple's three children, who were too young to be separated from their mother. When Ahuja replied in the negative, the encounter turned into a confrontation and Nanavati fired three shots from his pistol which led to the immediate death of the victim. He then went on to surrender his pistol at the Naval Command Centre before turning himself to the Police Commissioner of Bombay, who was his close, personal friend and even signed a voluntary written confession.[70]

Commander Nanavati, accused under section 302 of IPC for murder, was initially declared not guilty by a jury,[71] but the verdict was dismissed by the High Court of Bombay and the case was retried as a bench trial where he was found guilty of premeditated culpable homicide amounting to murder and sentenced to life imprisonment. On appeal, the conviction was upheld by the Supreme Court of India.[72] However, after immense public support and sympathy, Nanavati was finally pardoned by Vijayalakshmi Pandit, newly appointed Governor of Bombay and sister of then Indian Prime Minister Jawaharlal Nehru, where upon he and his wife reconciled and the couple along with their three children migrated to start a new life in Toronto, Canada.[73]

Examining these homicide cases relating to time., Royley court found 10 to 15 minutes to be sufficient for manslaughter's mitigation, whereas the Fisher court found one day to be too late.[74] Similarly, the initial Nanavati jury found even a few weeks sufficient to exculpate the defendant while the later appellate court disagreed and found this time frame too late and hence declared a guilty verdict of culpable homicide amounting to murder.

However, the Pauline Court found two days to be within manslaughter's (culpable homicide not amounting to murder's) mitigating range, which contradicts the Fisher

70 Aarti Sethi,. "The Honourable Murder: The Trial of Cdr Kawas Maneckshaw Nanavati", In Narula, Monica; Sengupta, Shuddhabrata; Bagchi, Jeebesh; Lovink, Geert (eds.) (Sarai Reader, 2005).

71 *Supra* note 1, 304 reads: Culpable Homicide not amounting to murder can be pleaded, if the homicide is not premeditated and occurs, due to a grave or sudden provocation, or in a sudden confrontation, without taking any undue advantage or acting in a cruel or unusual manner, irrespective of who provoked first.

72 *Available at*: https://web.archive.org/web/20051022191614/http://www.thesouthasian.org/archives/000178.html (last visited on October 30, 2020).

73 *Available at*:http://www.livemint.com/Leisure/OGsgT6hkkniURonylB2uXK/Sylvias-story-beyond-the-scandal.html (last visited on Nov.20, 2020).

74 *Supra* note 19 at 118.

and Nanavati holding. But the Pauline case is not just contradictory, it is revolutionary, for it obliterates objective time: it says, in effect, the clock does not begin to run until the defendant first sees the victim. But this first meeting could come two days later, as it did in the actual case, or it could come five days, 50 days, or five years later, raising the question, does objective time not matter at all? If not, then the underlying theory behind this ruling is not that the defendant's emotions stayed hot for all that time without any cooling (a rather absurd proposition), but rather that Pauline is in actuality a rekindler case, for the first sight of the victim reignites Pauline's dormant (but not dead) emotions, linked with the old adulterous provocation, and this becomes legally sufficient for manslaughter.[75] Put another way, the defendant subjectively connects new and old provocations in psychological time, for only in the psyche can one turn "time past" into "time present"—in an instant—as the poet T. S. Eliot[76] well understood.

This proves that in the law related to culpable homicide not amounting to murder or manslaughter, not only is there a discredited psychological folk theory of heating up and cooling off times when it comes to grave and sudden provocation exception but there is an unrestrained subjectivity of emotions too for if the defendant shows strong emotion, and one can link that emotion to provocation at the time of the act, then, under the IPC, the defendant is likely to be facing the mitigated murder charge of culpable homicide not amounting to murder rather than murder charges;[77] and if strong emotion arises within the defendant at the time of the act, even without linkage to provocation, he or she is still likely to be facing culpable homicide not amounting to murder charges rather than murder charges;[78] so under the Code, emotion seems to negate the crime of culpable homicide amounting to murder to a cold, pristine thought crime, which is not true.

The psychological pitfalls in the defence of grave and sudden provocation

The discredited psychological folk theories, discussed in earlier sections of this article, intertwined in the offence of murder and culpable homicide not amounting to murder, are deeply intertwined in other legal doctrines as well, such as grave and sudden provocation in the common law and IPC, as reflected by a vast literature of case laws and empirical facts which showcases that when it comes to deadly violence, there is great variability among individuals[79] which make the law's underlying psychological theory in the defence of grave and sudden provocation, an untenable one. For example,

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75 *Id.*at 108.

76 T. S. Eliot, The Waste Land And Other Poems (Harcourt, New York, 1934).

77 *K.M. Nanavati* v. *State of Maharashtra*, AIR 1962 SC 605.

78 Stanley M. H. Yeo, 41 (3) "Lessons on Provocation from the Indian Penal Code" *International & Comparative Law Quarterly* 615-631 (July 1992).

79 Melissa Spatz, "A Lesser Crime: A Comparative Study of Legal Defenses for Men Who Kill Their Wives" 24 *Columbia Journal of Law & Social Problems* 597 (1991).

names, words, wry faces, or gestures—whether they be aurally or visually delivered on a playground, in prison, during a road rage incident, or in a family violence episode—can produce intense emotions in some individuals that lead to a sudden killing.[80] We also know that individuals differ in their character and temperament, with some being quick to ignite.[81]

But the law's objective, mechanistic, and nomothetic positions on provocations make a traditional subjective analysis into emotions moot. Once the law knows that an objective provocation is legally adequate, then, by its mechanistic theory, the law also knows that this provocation is sufficient to trigger intense emotions, and by its nomothetic position, the law knows that these intense emotions will occur in "the average individual" as exemplified by the "reasonable person" test of provocation in *K.M. Nanavati* v. *the State of Maharashtra*.[82]

Moreover, there is inconsistency in law's determination of cooling off time too which determines how long did the provocations last. In its quest to avoid a subjective, evaluative, and idiothetic approach, criminal law has gone to the other extreme of false, simplified objectivity which often falls short to adequately measure the accurate psychological profile of the defendant while measuring his culpability.

Not just that, as seen in the judicial interpretation[83] of exception 1 to section 300, IPC despite all its claims to objectivity, the actual determination of the reasonable person's test is happening from the defendant's vantage point, which is extremely subjective. Emotion thus becomes a psychological entity within the mind of the defendant, disconnected from any interpersonal context or objective provocation in the external reality, having a nexus with nothing; yet, this disembodied interior entity can rear up, at any time, for any or no reason, and can reach out into the external world and produce mayhem, murder, or homicide. There is nothing, theoretically, to explain how such a disembodied and disconnected entity has come into being or comes to affect other human beings. Neither folk nor academic theories of emotion treat emotions in such a subjective manner. Nor is there any theory to explain where and how this free-floating entity is situated within the intra-psychic nexus of cognitions, motives, malice, judgment, and control; rather, it seems that this entity is isolated from the rest of the psyche, with a will and mind of its own.

Thus, even though the cases falling under grave and sudden provocation exception are colloquially labelled as "crimes of passion" yet it seems law's psychological surrogate theories in the drafting of this offence and exception, did not explain how and why

80 *Supra* note 78.

81 *B.D.Khunte* v. *Union of India*, Criminal Appeal No. 242 of 2012.

82 *Supra* note 77.

83 *Jamtu Majhi* v. *State of Orissa* 1989 Cri.L 753.

reason did not, would not, or could not insert control and quell the emotional heat short of homicide.

Though the Indian courts went much further than their Western counterparts in subjectivizing the *mens rea* in the ordinary reasonable person test, yet they erred on the other side of this extreme, in the domain of unrestrained subjectivity.

Especially relevant in this regard is this observation from Indian Supreme Court in the *Nanavati* case, "Is there any standard of a reasonable man for the application of the doctrine of "grave and sudden" provocation? No abstract standard of reasonableness can be laid down. What a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional values *etc*., in short, the cultural, social and *emotional background* of the society to which an accused belongs."

By "emotional background" the court was discussing the normal level of self-control present in the class of society to which the accused was a member of. The High Court of Orissa [84] cited the above passage from *Nanavati* as authority for recognising the accused's ethnic background to assess the power of self-control of an ordinary person of the same background. The court then noted that the accused belonged to the "Adivasis" who "are a class, comparatively more volatile and more prone to lose their self-control on the slightest provocation."

It should be observed that the Indian courts recognise only the level of self-control of a whole class of ordinary people of a particular ethnicity. This envisages that there may be individuals whose powers of self-control are regarded as abnormal within their class. In such cases, their peculiar temperaments will be precluded from affecting the ordinary person test. Accordingly, while the ordinary person test under Indian law permits a greater amount of subjectivity, it still retains the quality of objectivity by requiring the characteristic in question to be commonly shared by a whole group of ordinary people.

Yet despite the use of words such as "emotional background", there is not even the pretext of a supportive psychological theory to back it up. As a result, even though the Indian criminal law has swung from the extreme of objectivity to subjectivity, it has still failed to realize that culpable homicide/manslaughter is not just a crime of passion, as it has been advertised, for it involves a partial failure of reason.[85]

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84 *Ibid*, (per Patnaik J). For other cases where classes with lower levels of self-control have been recognised, see *Karrik Bag* v. *State of Orissa*, 1985 Cri.L.J. 888; *Gandaram Taria* v. *State of Orissa*, 1982 Cri.L. J. 1229: *Matsa Ramn* v. *State of Uttar Pradesh* 1975 Cri.L.J. 1772: *Madi Adma* v. *State of Orissa* 1969 35 Cuttack L.T. 337: *Noukar Moulediio* v. *Emperor,* AIR 1937 Sind 212: *Nga Paw Yin* v. *Emperor*, AIR 1936 Rang. 40.

85 N. J. Finkel, "Achilles fuming, Odysseus stewing, and Hamlet brooding: On the story of the murder/manslaughter distinction"*University of Nebraska Law Review* 74, 201-262 (1995a).

The psychological fallacies in the law of grave and sudden provocations gets even more prominent when one examines more Indian cases like *Dinesh Borthakur* v. *State of Assam,*[86] where simply lack of emotions and a remark by the accused to the effect, "She shouldn't have done that", upon discovering the dead bodies of his wife and daughter were regarded as sufficient basis during investigation and even trial at sessions court stage to prove that the homicide was committed under extreme provocative anger.

In *Kandaswamy Ramaraj* v. *The State by Inspector of Police, CBID*[87] court even diverted from its earlier precedents and noted that, "Short-temperedness of a person as a decisive factor while ascertaining whether that person is entitled to the benefit of grave and sudden provocation i.e. exception 1 to Section 300 of the Indian Penal Code, 1860."

Another criticism levied against the doctrine of grave and sudden provocation is that it ignores the feminist perspective of Battered Woman Syndrome and its associated symptoms of depression and learned helplessness.[88] Another neurological study indicates that the defence of "grave and sudden provocation" resulting in crimes of "heat of passion" is essentially a male oriented phenomenon.[89] Men are generally more prone to respond to external stimulus with such murderous rage than their female counterparts.

As the law stands today, to avail the exception, the provocation must be sudden and immediate.[90] The loss of control which caused the defendant to kill must be the result of that provocation.[91] If sufficient time passes between the provocation and the murder, this exception cannot be taken.[92] As ProfessorVed Kumari argues, "The apparent initial tolerance by the victim and the failure to respond immediately is contrary to the 'heat of the moment' standard laid down by several judgements such as Nanavati.[93] The gap between trigger and action is taken to be a sign of premeditation.[94]

The requirement of 'sudden' provocation is thus unfair to the situation of battered women since provocation works very differently in cases of battering. In most cases,

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86 AIR 2008 SC 657.

87 AIR 2015 SC 890

88 *Supra* note 19 at 296.

89 Katherine K. Baker , "Gender and Emotion in Criminal Law" 80 *N.C.L. Rev.* 465, 519–20, 523–24 (2002).

90 *B.D. Khunte* v. *Union of India* (2015) 1 SCC 286, 293.

91 Halsbury's Laws of England, 11, 619 (4th edn., 2006).

92 *B.D. Khunte* v. *Union of India*, (2015) 1 SCC 286, 296.

93 Ved Kumari, "Gender Analysis of the Indian Penal Code" in *Engendering Law: Essays in Honour of Lotika Sarkar* 15 (Amita Dhanda and Archana Parashar, Jan. 1999).

94 *Supra* note 77; *B.D. Khunte* v. *Union of India* (2015) 1 SCC 286, 295.

the battering is continuous and long-term which means that it is not possible to point to a specific trigger for the loss of self-control. More importantly, due to the feeling of isolation caused by the prolongedbattering, a woman does not immediately lose self-control after being battered. The provocation is thus sustained over a considerable period of time.[95] This gradual and 'slow-burn' nature of provocation in battered women justifies the need to include 'sustained provocation' as a valid exception."[96]

Psychological incongruities in insanity

Even though insanity defendants share with many murderers and culpable homicide defendants, the same culpable acts and heated emotions, but they are exempted from their *mens rea*.[97]However, not only passionate heinous acts but also planfulness,[98] has been reported by many actors of law enforcement when investigating such crimes caused by unsoundness of mind, which begs the question that if heated emotions are present and degree of insanity is similar in both culpable homicide and murder then what exactly leads to exculpation in cases of insanity? To clarify the debate on legal insanity, the primary challenge is to answer the basic question: What is it about the influence of a mental disorder on human behaviour that explains why we may excuse that person, in particular in a court of law?[99] Is the influence special because, for example, the disorder affects the defendant's rationality,[100] or his free will, or his capacity for autonomous decision-making[101]? Since, nowadays, many diagnoses of some form of mental disorder, such as depression, autism, and ADHD,[102] are more common, the question that is becoming increasingly relevant is: How do mental disorders affect people's responsibility for their actions?

Unfortunately, the most widely accepted legal test for insanity or unsoundness of mind,[103] the McNaughton's Rules, fails to satisfactorily answer this question because

95 Katherine O' Donovan, "Defences for Battered Women Who Kill" 18 (2) *Journal of Law and Society* 219-240, 224 (1991).

96 Ved Kumari, "Gender Analysis of the Indian Penal Code" in *Engendering Law: Essays in Honour of Lotika Sarkar* 15 (ed. Amita Dhanda and Archana Parashar, January 1999)

97 *Bapu Alias Gujraj Singh* v. *State of Rajasthan* 2007(2) Bom. C.R.(Cri.) 11(S.C.C.)

98 *Surendra Mishra* v. *State of Jharkhand* 11 SCC 495 (2011).

99 *Supra* note 19 at 208.

100 S. J. Morse, "Diminished rationality, diminished responsibility", *Ohio State Journal of Criminal Law* 289–308, (2003).

101 N. Juth, F. Lorentzon, "The concept of free will and forensic psychiatry"33(1) *International Journal of Law and Psychiatry* 1–6 (2010).

102 For instance, the estimated lifetime prevalence in the United States is 47.4 % for any mental disorder, according to Kessler *et al.* (2007). (Kessler, R. C., Angermeyer, M., Anthony, J. C., De Graaf, R., Demyttenaere, K., Gasquet, I. … Ustün, T. B. (2007). Lifetime prevalence and age-of-onset distributions of mental disorders in the World Health Organization's World Mental Health Survey Initiative. 6(3) World Psychiatry 168–176.)

103 *Supra* note 1, s. 84

the way this standard has been formulated does not straightforwardly reflect how knowledge of wrongfulness is actually affected by psychopathology, as a considerable majority of psychotic people usually know the nature and quality of the act they are performing (at least in a narrow sense). Meanwhile, the act is often motivated by a distorted perception of the context. Consequently, "not knowing the nature or quality of the act" may be a somewhat redundant element of this standard.

Also as demonstrated in several landmark judgements like *Queen Empress* v. *Kader Nasyer Shah*[104]and *Surendra Mishra* v. *State of Jharkhand,*[105]the judges insist on maintaining a distinction between legal and medical standards of insanity which demonstrates an unwillingness to accommodate psychiatric, medical perspectives when it comes to unsoundness of mind leading once again to a disconnect between empirical "is" and normative "ought" in the legal domain.

IV Conclusion

This paper has attempted to demonstrate some of the psychological fallacies in the emotional theories of criminal law. However, the analysis in the above sections is in no way, a comprehensive one. There are numerous other examples of inconsistencies, biases and psychologically incongruent prejudices which have crept into our legal domain and must be rooted out. This leads one to the conclusion that criminal law's theory of emotion and culpability, likethe ether alleged to have filled the regions of space, exists nowhere and everywhere.In fact, there is no single theory of emotion and culpability, letalone a grand unified theory. Rather, multiple theories exist, which, problematically,fail to cohere, and often times contradict.[106]

These inconsistent emotion theories appear to rest on an underlying psychological theory that has been characterized[107] as "psychological individualism",[108] which was rooted in 19th Century notions that are "markedly at odds with the approach of contemporary psychology",[109] which "now embraces a largely social contextual model of human nature".[110] This factual and theoretical gap between the disciplines of law and psychology has become more pronounced, and problematic, in our time[111]. Still, these discredited folk theories remain the bedrock of the law's normative culpability

104 (1896) ILR 23 CAL 604.

105 *Surendra Mishra* v. *State of Jharkhand* (2011) 11 SCC 495.

106 *Supra* note 19 at 18.

107 C.Haney, "Making law modern: Toward a contextual model of justice" *Psychology, Public Policy, and Law* 8, 3-63 (2002).

108 *Id.* at 5.

109 *Id.* at 7

110 *Id* at.4.

111 *Supra* note 107.

schema, raising troubling questions about the validity of some of the Law's normative conclusions.

This raises a pertinent question as to the cause behind this disentanglement of law's culpability schema from congruent theories of emotions. This blame can be pinned on a number of suspects as enumerated below:

Firstly, the discipline of law itself. The Indian criminal law which evolved from the British Common Law and Anglo-American Jurisprudence is part descriptive and part normative. Each of these parts developed in different times, perspectives and directions resulted in a potpourri of "avowed or unconscious"[112] legal and folk psychological theories which were not supported by empirical facts of human nature and hence became inconsistent when applied to different cases of same criminal doctrine or defense.[113]

Secondly, emotions have been cast in the legal culpability narrative as side characters as the top billing goes to *actus reus* and mensrea, the two lead actors, which must conjoin at centre stage to enact the tale of how culpability is determined in the moment-of-the-act. However, this proves to be a fictitious narrative as it doesn't match with the real like culpability actions where the emotions arise from a complex interpersonal context, which the character construed and interpreted, andthe emotions evolve over time and within psychological time, rather than being provoked mechanistically at some snapshot of time.[114]

Thirdly, this moment of the act, legal narrative insists and focuses on the way the culpability saga must be fractionated into a number of smaller elements which must be proved in a trial. This faulty flaming and fissuring deviates from academic psychology's explainers and theories of emotions as well as from how ordinary citizensrelate their narratives of crime and blame.[115]

This is problematic because as explained by Finkle and Parott, "Several empirical studies with different methodologies (*e.g.,* archival research, opinion polls and surveys, studies and experiments) have shown that the disjunction between black-letter law and common-sense justice is not only real but also has serious consequences.[116] Disjuncts between the law's theories and those held by citizens and psychologists raises the following question: How and why did the law create this kind of story?"[117]

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112 O. W.Holmes, *The common law* (M. D. Howe, ed.), (Cambridge, MA: Harvard University Press, (1963). (Original work published 1881)

113 *Supra* note 19 at 28.

114 *Id*. at 32.

115 N. J.Finkel, C. Slobogin, "Insanity, justification, and culpability: Toward a unifying schema" *Law and Human Behavior* 19, 447-464 (1995).

116 *Supra* note 19.

117 *Id*. at 208.

The answer to this question, Finkle and Parrott suggest lies in the fact that law rather than following one consistent course of defining emotions, followed a puzzling quagmire of multiple channels, "sometimes tacking to port in one criminal law area, contradictorily tacking to starboard in another area, and ambivalently coming about in yet anotherarea, with its forward movement slowed, stalled, or sidetracked into inlets without outlets. This lack of progress results not from lack of rules but from piecemeal changes in the rules—sometimes a modification of the rules, and sometimes the creation of entirely new rules. These rules grew more variant from one another, in part because heated battles were fought between proponents of an objective approach and proponents of a subjective approach;these battles were fought over centuries, crime-by-crime and defense-by-defense, with often times flip-flopping results. The result has been both a lack of theoretical integration and coherence (*i.e.,* no development of a grandunifying theory) and an avoidance of the empirical issues of validity and generalizability."[118]

Lastly, the fault lies in criminal law's core construct of *mens rea.* In deciding culpability, the obvious criminal act (*actusreus*) is rarely the issue; rather, the issue is, generally, with the inconspicuous reasons that compel the offender to do the said act. For instance, when somebody ends a life, is it a grievous mishap or a criminal homicide? What's more, in the event that it is a homicide (manslaughter), did it result from malice,mistake, or insanity? Answers to these inquiries require an investigation into certain subjective, abstract elements, for example, the considerations, feelings, and thought processes of the defendant.[119]

At the inception of modern criminal law, *mens rea* (*i.e.,*malicious/evil mind) was a strong idea, enveloping the considerations in the psyche as well as the dark motives and latent emotions that lay underneath. Yet, after some time, many scholarly hands came to see the idea as falling flat and needing fixing, although a few diehards held that *mens rea* could carry the freight.[120] One noteworthy fix was that malice, which gave mensrea its profundity, was cut from the idea's core. But since emotions were attached to malice in specific ways, discarding the last debilitated the emotions' association with this new, cognitive, rational *mens rea.*[121] Deprived of malice, *mens rea* was reduced to a general intent, which made *mens rea* even less emotional. Still later, general intent would fractionate and compartmentalize into specific intent (*mens rea*). The net effect of these transformations, in terms of our disjuncture problem, was that the emotions

118 *Id.* at 243.

119 *Id.* at 218.

120 N.Morris, *Madness and the Criminal Law*, (Chicago: The University of Chicago Press, 1982).

121 *Supra* note 19 at 308.

and motive lost their connectedness to *mens rea*, as literary and legal storytelling about culpability parted company more dramatically.[122]

What's more, with the appearance of the IPC in 1862, *mens rea* fragmented into intentions that did not appear to be conjoined in the psyche as a whole. Concerning the characters' emotions, they would be considered however an enthusiastic aggravation inside the code, as cognitive intentionality secured the all-important focal point.[123]

If legal theories of emotion and culpability are, psychological theories about the emotional nature of human nature, then psychology must be in the legal game, so to speak. Academic psychology can inform the law about emotion's place within the nature of our human nature, and its findings can address the processing of emotions in this provocative, interpersonal, and intrapsychic context, in which objective and subjective perspectives and emotions, thoughts, and motives all intermix and interact. From its factual findings and theories, psychology can inform the law about howand why deadly actions may sometimes result, despite one's assumed control, and it can challenge the law's questionable assumptions and folk theories with hard facts.

Common grounds between the disciplines of law and psychology have been observed, for both, in their own way, are concerned with the nature of human nature. Still, an is-ought divide, generally separates psychology and the law, and on this topic, that divide occurs at culpability. Psychologists have traditionally been hesitant to jump into the realm of value judgments, a normative realm in which the law is at home and quite comfortable.

Culpability is generally regarded as a normative judgment regarding an individual offender's guilt and blame worthiness, however, it cannot be regarded as completely normative as it concerns itself with the underlying psychological theory of human psyche and emotions. As Finkle and Parrott conclude, "The normative standard of culpability, about how men ought to be is groundedin part on men as they are. Therefore, the normative "ought" depends, to somedegree, on the empirical "is". Regarding this empirical ground, psychology and common-sense justice can inform the law, for both perspectives offer substantive theories of emotions and culpability that are important for the law to note, thus setting a new course on emotions and culpability."[124]

122 R. Singer, "The resurgence of mensrea: I. Provocation, emotional disturbance, and the model penal code" *Boston College Law Review* 27, 243-322 (1986).

123 *Supra* note 19 at 218.

124 *Id* at. 220.