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Utah's Manslaughter Statute: Walking the Tightrope Between Social Utility and Fair Culpability Assessment

I. INTRODUCTION

Model Penal Code section 210.3(1)(b) classifies as manslaughter a homicide that would be murder were it not for the fact that the killer acted "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."[1] Utah is one of fifteen states that have adopted this provision.[2]

The Model Penal Code greatly enlarges the class of killings that would be characterized as manslaughter by reference to the common law. However, the history of the provision in Utah demonstrates judicial and legislative unwillingness to go beyond the pre-existing manslaughter rule, which embodied the common law provocation doctrine.[3] This unwillingness is an expression of the tension between the criminal law's normative social purpose and its objective to achieve fairness in assessing the individual offender's culpability.

The Utah legislature and courts significantly favor the law's normative function, as is illustrated by an examination of *State v. Bishop*,[4] a recent Utah district court decision interpreting Utah Code Annotated section 76-5-205(1)(b).[5] Since Utah's approach is at variance with the

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1. MODEL PENAL CODE § 210.3(1)(b) (1985).

2. *Id.* comment & n.24 at 51.

3. Provocation is a common law defense to murder if the provocation alleged by the defendant would have provoked a reasonable man. The provocation and the killing may not be separated by an appreciable "cooling period." *See* 1 P. ROBINSON, CRIMINAL LAW DEFENSES § 102(b) (1984).

4. No. 19907 (Utah Dist. Ct. Oct. 3, 1985) (Trial Record).

5. The Model Penal Code provision was adopted verbatim in 1973; explicitly subjective language was deleted in 1975. *See* UTAH CODE ANN. § 76-5-205(1)(b) and note (1978). The legislature further amended the statute by adding explicitly objective language in 1985. UTAH CODE ANN. § 76-5-205 (Supp. 1985). *See infra* note 19 and accompanying

Model Penal Code formulation, this comment recommends that the legislature adopt a manslaughter statute embodying the common law rule of provocation.

II. Expanding Manslaughter Through Adoption of the Model Penal Code

A. *Provocation Under the Common Law*

Utah's pre-1973 manslaughter statute classified a homicide committed "upon a sudden quarrel or in the heat of passion" as manslaughter.[6] Through this embodiment of common law provocation, Utah recognized a category of killings in which the malice aforethought required for murder was negated by reasonable passion.[7] The law permitted indulgence of "the frailty of human nature" when provocation was extreme[8] and the killer's passion was virtually "irresistible"[9] as measured by applicable community standards. But if the provocation would not have invoked passion in the reasonable man in the community sufficient to cause him to act rashly and without due deliberation, it was irrelevant that the provocation may have induced such passion in the accused.[10]

B. *Model Penal Code § 210.3(1)(b)*

In 1973, the Utah State Legislature abandoned the provocation-based manslaughter statute and replaced it with the Model Penal Code's radically different formulation. The new statute defined manslaughter as a criminal homicide committed "under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."[11] The reasonableness of such explanation or excuse was to be determined "from the viewpoint of a person in the actor's situation under the circumstances as he believe[d] them to be."[12]

These requirements contrast starkly with Utah's prior stat-

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text.

6. Utah Code Ann. § 76-30-5 (1953).

7. State v. Ross, 28 Utah 2d 279, 282, 501 P.2d 632, 635 (1972).

8. *Id.* (quoting State v. Jones, 241 Or. 142, ___, 405 P.2d 514, 516 (1965)).

9. Territory v. Catton, 5 Utah 451, 466, 16 P. 902, 907 (1888), *rev'd on other grounds sub nom.* Calton v. Utah, 130 U.S. 83 (1889).

10. State v. Ross, 28 Utah 2d 279, 282, 501 P.2d 632, 635 (1972).

11. Utah Code Ann. § 76-5-205(1)(b) (1978).

12. *Id.* note.

ute. The traditional voluntary manslaughter standard required the provocation to be both sudden and external.[13] The Model Penal Code, on the other hand, does not preclude the possibility of offering mental or emotional disturbances of long standing in mitigation of the defendant's crime, so as to avoid what the drafters considered the "arbitrary exclusion of some circumstances that may justify reducing murder to manslaughter."[14]

This allowance for a broad range of cognizable disturbances does not change the essentially objective nature of the standard.[15] But the Model Penal Code provision also takes into account a potentially broad range of subjective considerations. The reasonableness of the defendant's disturbance is to be "determined from the viewpoint of a person in the actor's situation." The jury is invited to consider the peculiar characteristics of the accused, the reasonableness of the explanation for his disturbance, and whether he killed "under the influence" of his disturbance. Of course, there must be a cognizable link between his disturbance and his crime; judges and juries must determine on a case-by-case basis how far to indulge a defendant's idiosyncratic qualities.[16]

III. Utah's Reaction to the Model Penal Code

A. *Discerning the Legislative Intent*

Given the copious commentary accompanying the Model Penal Code provisions, it would be fair to assume that the Utah legislature intended for courts to consider subjective elements and thereby increase the number of homicide cases classified as manslaughter. However, in 1975 the legislature modified the statute by eliminating language requiring that the reasonableness of the defendant's explanation be determined from the per-

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13. *See supra* notes 6-10.

14. Model Penal Code § 210.3 comment 5(a) at 61 (1985). Although the section number of the MPC manslaughter provision was changed from 201.3 to 210.3, the text has not changed since its adoption by the American Law Institute in 1959.

15. *Id.* comment 3 at 50.

16. The law's insistence on a connection between an accused's mental disturbance and his crime is problematical. According to the psychoanalytic theory of psychology, each act is the product of an entire personality, not just of one or more separable aspects of a personality. *See* Silving, *Psychoanalysis and the Criminal Law*, 51 Crim. L., Criminology and Police Sci. 19, 27 (1960). However, adopting this concept into law would destroy the law's normative function by permitting mitigation of any and all crimes committed by an individual with a mental disorder.

spective of a person in the defendant's situation under circumstances as he saw them.[17]

The effect of this modification is unclear. The only apparent reason for the amendment was "to clear up ambiguities which have caused problems."[18] According to Representative Lyle Hillyard, who sponsored an amendment to the statute in 1985, the 1975 amendment did not eliminate the statute's pervasive subjective aspect.[19] Even after the 1975 amendment, an untraditionally broad view of an accused's disturbance was possible.

B. *Judicial Interpretation of § 76-5-205(b)*

While the legislature has struggled to limit the scope of the Model Penal Code language, the courts have effectively ignored the statute, continuing to apply the common law provocation doctrine.

Before adoption of the Model Penal Code provision in 1973, Utah courts applied a narrow provocation test in determining whether a killing was murder or manslaughter. In 1888 the Utah Supreme Court in *Territory v. Catton*[20] explained that manslaughter must be evaluated according to whether the accused acted primarily from reason or passion. The court then stated:

> The passion must be such as is sometimes called "irresistible;" yet it is too strong to say that the reason of the party should be dethroned, or he should act in a whirlwind of passion. There must be sudden passion, upon reasonable provocation, to negative the idea of malice; and the passion must proceed from what the law accepts as adequate cause; else it will not reduce the felonious killing to manslaughter.[21]

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17. UTAH CODE ANN. § 76-5-205 note (1978).

18. Statement of Rep. David R. Irvine before the Utah State Legislature regarding S.B. 165 (March 13, 1975) (available on audio disk no. 14 from the Leadership Offices of the House of Representatives of the Utah Stata Legislature).

19. Representative Hillyard indicated that the purpose of the 1985 amendment was to replace the subjective elements with an objective standard. "The reasonableness of the explanation or excuse would be based on the viewpoint of a reasonable person under the then-existing circumstances, so we've gone to an objective standard rather than a subjective standard in these tests . . . ." Statement before the Utah State Legislature regarding S.B. 127 (February 5, 1985) (available on audio disk no. 50 from the Leadership Offices of the House of Representatives of the Utah State Legislature).

20. 5 Utah 451, 16 P. 902 (1888), *rev'd on other grounds sub nom.* Calton v. Utah, 130 U.S. 83 (1889).

21. *Id.* at 460, 16 P. at 907.

In 1972, the court held in *State v. Ross*[22] that provocation was legally sufficient if it would have rendered an ordinary man of average disposition capable of acting rashly and without due deliberation or reflection.[23] The court defined the passion resulting from legally cognizable provocation as a mental state which would "irresistibly compel an ordinary, reasonable person to commit the act charged."[24] In short, the pre-1972 manslaughter statute mitigated murder to manslaughter only when two tests were met: The provocation must have been adequate to induce murderous passion in the reasonable man, and the provocation must have actually induced such passion in the accused.

The Utah Supreme Court has heard only six cases dealing with section 75-6-205(1)(b) since 1973.[25] In a 1975 decision, *Farrow v. Smith*,[26] the defendant, charged with second degree murder, pled guilty to manslaughter and was convicted. He appealed his conviction, arguing that he could only be convicted of the offense charged or a lesser included offense, that is, an offense proved by establishment of the same or less than all the elements of the charged offense. Since manslaughter is proved in part by elements that are not included in second degree murder, the defendant argued that he had not been convicted of the offense charged or of a lesser included offense and that reversal of the conviction was therefore mandated. The Utah Supreme Court acknowledged the statutory rule that a defendant must either be acquitted or convicted of the offense charged or of a lesser included offense. It then relied on a pre-1973 case in holding that manslaughter is included in murder. Ignoring elements of the crime under the 1973 statute that are not elements of murder (namely that the homicide be committed under the influence of an extreme mental or emotional disturbance that has a reasonable explanation) the court explained: "For many years the definition of second degree murder has been the unlawful killing of a human being with malice aforethought, and that of manslaughter was the unlawful killing of a human being without

22. 28 Utah 2d 279, 501 P.2d 632 (1972).

23. *Id.* at 282, 501 P.2d at 635.

24. State v. Leggroan, 25 Utah 2d 32, 33, 475 P.2d 57, 58 (1970).

25. State v. Crick, 675 P.2d 527 (Utah 1983); State v. Clayton, 658 P.2d 624 (Utah 1983); State v. Norman, 580 P.2d 237 (Utah 1978); State v. Butler, 560 P.2d 1136 (Utah 1977); State v. Gaxiola, 550 P.2d 1298 (Utah 1977); Farrow v. Smith, 541 P.2d 1107 (Utah 1975). A seventh case, State v. Howell, 649 P.2d 91 (Utah 1982), briefly mentions the subsection.

26. 541 P.2d 1107 (Utah 1975).

malice. In our opinion the new criminal code has not changed those definitions."[27]

In its only other significant treatment of the subsection, the court in *State v. Clayton*[28] affirmed a conviction of attempted second degree murder and upheld the trial court's refusal to instruct the jury on certain subsections of the manslaughter statute. The defendant had fought with an acquaintance at a bar. He left to get a gun and, after fifteen or twenty minutes, returned to shoot his acquaintance. The court found that the defendant's requested manslaughter instruction was properly denied because there was no rational basis for a conviction under section 76-5-205(1)(b) or (c). Relying on traditional provocation analysis set forth in 1888 in *Territory v. Catton,* the court neglected statutory language in reaching its conclusion:

> The passage of time between the fight and defendant's return to the bar tends to negate the "heat of passion" explanation. . . . The evidence offers no rational basis for the jury to conclude that defendant's passion preponderated over his malice so as to satisfy the requirement of "extreme mental or emotional disturbance" . . . .[29]

The 1973 version of Utah's manslaughter statute does not speak in terms of "heat of passion" or require a preponderance of passion over malice. Unlike the pre-1973 statute, it requires only tbat the defendant have killed under the influence of extreme disturbance and that the explanation for the disturbance be reasonable. The Utah Supreme Court has failed to recognize this distinction. As a result, a trial court may instruct a jury on the provisions of Utah's manslaughter statute in terms that blatantly undercut and contradict statutory language. This is precisely what happened in *State v. Bishop.*[30]

IV. *State v. Bishop*: OLD WINE IN A NEW BOTTLE

A. *The Trial*

Arthur Gary Bishop was prosecuted for the murder of five young boys. At trial, he called expert witnesses to testify of a

27. *Id.* at 1109. The court later acknowledged that manslaughter as defined in UTAH CODE ANN. § 76-5-205(1)(b) is not a lesser included offense of murder in the traditional sense, but held that it is included by statute.

28. 658 P.2d 624, 625-26 (Utah 1983).

29. *Id.* at 626.

30. No. 19907 (Utah Dist. Ct. Oct. 3, 1985)(Trial Record).

mental disturbance which he hoped would bring him within the Utah manslaughter statute. Bishop offered social scientific and psychological evidence to prove, among other things, that he was a homosexual pedophile, and that his mental disturbance had been extreme and constant for at least ten years. Although the specific cause of Bishop's pedophilia was admittedly inscrutable, the defense offered expert testimony at trial that there are reasonable explanations for the existence of this disorder and that any number of causes may have contributed to Bishop's disturbance.[31]

On March 15, 1984, a jury found Bishop guilty of five counts of first degree murder. He moved for a new trial, basing his motion in part on prejudice allegedly caused by the trial court's erroneous manslaughter instructions. He argued that the court's manslaughter instructions misconstrued the statute, effectively preventing the jury from considering Bishop's theory of the case. The motion was denied, and Bishop appealed.

Bishop had designed his case at trial to show the jury that he committed the five killings while under the influence of an extreme mental disturbance that could be reasonably explained.[32] His manslaughter argument repeatedly engendered debate in the trial judge's chambers,[33] particularly with respect

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31. Psychiatric testimony provided a number of possible explanations for Bishop's pedophilia. Dr. Philip Washburn testified that although constitutional factors can determine sexual preference and behavior, it is usually and primarily learned. *Id.* at 1771. In Bishop's case, factors in the socialization process in his home may have contributed to his deviance, since Bishop's younger brother is also a pedophile, *id.* at 1772-73, and Bishop had become fixated with pre-pubescent boys when he was a child. *Id.* at 1765. Dr. Victor B. Cline testified that virtually all sexual deviations are learned through accidental conditioning. *Bishop*, March 14, 1984, Transcript at 2059-60. He also testified at length regarding the escalation of pornography addiction, which culminates in the acting out of depicted behaviors. *Id.* at 2057.

32. *Bishop*, March 19, 1984, Transcript at 2479.

33. *See, e.g., Bishop*, March 8, 1984, Transcript at 1579-1618; March 9, 1984, Transcript at 1728-51; March 14, 1984, Transcript at 2229-33; March 19, 1984, Transcript at 2492, 2504-08; April 12, 1984, Transcript at 3-18.

Much of this debate further illustrates misapplication of the Model Penal Code formulation, which accommodates fair culpability assessments by permitting the introduction of mental and emotional disturbances when intent is not disputed. Conversely, Utah jurisprudence generally allows evidence of such disturbances only to negate intent.

The court and the state apparently felt that UTAH CODE ANN. § 77-14-3 (Supp. 1983) required notice of a manslaughter defense. *Bishop*, March 14, 1984, Transcript at 2231; March 9, 1984, Transcript at 1729-33. But manslaughter is not statutorily an affirmative defense. And extreme emotional disturbance is simply an element of the crime of manslaughter. It follows that section 77-14-3 is not applicable to manslaughter.

The confusion arises because manslaughter is normally raised by the defense, not by

to the jury instructions. Defense counsel argued that the instructions should leave open the possibility that the mental disturbance referred to in the statute could arise from an internal as well as an external source, and that the disturbance need not be suddenly provoked, but could be of long standing. Counsel also wanted a clear instruction that the statute requires a reasonable explanation for the existence of, and not the response to, the disturbance. In other words, the jurors should ask themselves, "Is it reasonable that Mr. Bishop was a homosexual pedophile? Was he under the influence of his pedophilia when he killed?" and not, "Is it reasonable that Mr. Bishop killed five children?"

The prosecution, on the other hand, urged upon the court a statutory interpretation requiring that the cause of the disturbance be external and sudden, and that the accused's reaction to the disturbance be objectively reasonable. The jurors were to ask themselves, "Would a reasonable man who had just sexually molested or exploited a young child kill the child when threatened with exposure?"

The court adopted the prosecution's interpretation and instructed the jury to find the defendant guilty of manslaughter only if it found an extreme mental or emotional disturbance "triggered by something external from the accused" to which his reaction was reasonable from the perspective of a reasonable man "under the then existing circumstances."[34] Coming eleven years after enactment of the 1973 statute, this instruction dem-

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the prosecution. *See* Haddad, *Allocation of Burdens in Murder-Voluntary Manslaughter Cases: An Affirmative Defense Approach,* 59 CHI. KENT L. REV. 23 (1982).

34. The court's manslaughter instructions to the jury were as follows:

Instruction No. 27

Criminal homicide constitutes manslaughter if the actor causes the death of another under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse.

Instruction No. 28

For manslaughter to apply, the "extreme mental or emotional disturbance" must be triggered by something external from the accused, and his reaction to such external stimulus must be reasonable, and the terms must be given the meaning you would give them in common everyday use. Such disturbance therefore cannot have been brought about by his own peculiar mental processes or by his own knowing or intentional involvement in another crime . . . . If you find that the defendant, Arthur Gary Bishop, caused the death of each individual child while under the influence of extreme mental or emotional disturbance, you must next determine whether or not there was a reasonable explanation or excuse for such disturbance. The reasonableness of the explanation or excuse for the extreme mental or emotional disturbance is to be determined from the viewpoint of a reasonable person under the then existing circumstances.

onstrates the judiciary's continuing determination to circumvent the statute's plain language.

B. The Arthur Gary Bishop Amendment

The Utah State Legislature took notice of the defense Bishop offered in attempting to avail himself of the manslaughter statute and responded by altering the statute in 1985. Representative Hillyard sponsored the following substitute language:

> Criminal homicide constitutes manslaughter if the actor. . . causes the death of another under the influence of extreme [ ] emotional disturbance for which there is a reasonable explanation or excuse . . . . Emotional disturbance does not include a condition resulting from mental illness as defined in Section 76-2-305. The reasonableness of an explanation or excuse under Subsection (1)(b) . . . shall be determined from the viewpoint of a reasonable person under the then existing circumstances.[35]

In addition to appending specifically objective language, the amendment eliminates mental disturbances as a basis for mitigation; whereas the previous formulation referred to "extreme *mental or* emotional disturbance," the amendment refers only to "extreme emotional disturbance."

The stated purpose of the amendment was to "[go] to an objective standard rather than a subjective standard in these tests."[36] Since this was a direct response to Bishop's defense, the apparent intention was to prevent defendants charged with murder from offering mental disturbances in mitigation when the killing is intentional, and to require that explanations for conduct conform to the reasonable man standard. However, the

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> Instruction No. 28A
>
> . . . In determining whether the actions of the defendant may have been attributable to an extreme mental or emotional disturbance that was reasonably caused you must determine whether a reasonable person would have suffered an extreme mental or emotional disturbance from the same or similar circumstances. If a reasonable person in your judgment would have sustained an extreme mental or emotional disturbance from the circumstances involved that may have caused any death in this case then you should return a verdict of guilty of manslaughter. If, however, a reasonable person would not have sustained such a condition or reaction, manslaughter would not be a proper verdict.

Bishop, March 19, 1984, Transcript at 2364-66.

35. UTAH CODE ANN. § 76-5-205(2)-(3) (Supp. 1985).

36. *See supra* note 19.

Utah manslaughter statute retains many of the characteristics the legislature presumably intended to eliminate through the 1985 amendment.

In an effort to decrease the potential for subjective considerations, the amended statute no longer allows consideration of mental disturbances. Now a manslaughter candidate may offer his emotional, but not mental, disturbance to mitigate his crime. However, it is not clear what class of disturbances was deleted from the domain of manslaughter by dropping the word "mental" from the statute. The precise difference between mental and emotional disturbances is unclear, and trying to distinguish between them can cause confusion.[37]

Further evidence of the legislative intent to reduce or eliminate the statute's subjective aspect is the explicit statement in the 1985 substitute statute that the reasonableness of an explanation or excuse "shall be determined from the viewpoint of a reasonable person under the then existing circumstances." The impact of this new language is also unclear, since Utah's manslaughter statute has always been based on an objective test. Even the Model Penal Code formulation requires objective find-

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37. What are emotional disorders? Might pedophilia be so classified? The legislature may be relying on psychologists to explain emotional disturbances to the courts. However, "the words of [psychiatric] testimony carry implications for the judge and jury which these words do not have for [the psychiatrist]. . . . [S]light differences in the wording of their testimony, equally justifiable from a psychiatric point of view, may make all the difference in the world for the jury, and may provide either the prosecution or the defense with effective arguments for their causes." Waelder, *Psychiatry and the Problem of Criminal Responsibility*, 101 U. PA. L. REV. 378, 382 (1953). This language problem was illustrated in Bishop's trial during defense attorney Jo Carol Nesset-Sale's cross examination of Dr. Clark, an expert witness in psychiatry:

> Q: You defined, doctor, the disorder of pedophelia [sic] as a sexual disorder, when you discussed it with Mr. Horton, did you not?
>
> A: I view it as that, yes, generally as a form of sexual deviance.
>
> Q: Isn't it true that in the DSM III it is defined and categorized as a psychosexual disorder?
>
> A: Oh, that doesn't make any difference. By "psychosexual" you mean that the mind is involved in the behavior.
>
> Q: Would you answer the question, please. Is it true that it's categorized as a psychosexual disorder?
>
> A: Yes. I am simply trying to clarify that for you.
>
> Q: Does the "psycho" part refer to the mind?
>
> A: Yes.
>
> Q: Would you agree that sexual deviance originates in the mind?
>
> A: Oh, all behaviors relate to what the mind is doing because behavior eminates in [sic] the brain. And the mind is a subjective aspect of the function of the brain.

Bishop, March 15, 1984, Transcript at 2279-80. *See also id.* at 2301-03.

ings. Its subjective component is limited by allowing juries to decide which idiosyncracies to consider and which to ignore.[38]

Another ambiguity in the 1985 amendment is the term "then existing circumstances." The legislature probably meant circumstances existing at the time of tbe killing. But the accused's emotional illness is arguably one such circumstance. If so, reasonableness might be determined from the perspective of a reasonable emotionally ill person.[39] The statute does not preclude this reading.

Moreover, the statute does not rule out an interpretation of "then existing circumstances" that includes emotional disturbances that first began in the accused's childhood. That is, it does not preclude an evaluation of the reasonableness of the disturbance by reference to circumstances existing at the time the disturbance came about. Thus it is possible under the current statute, as it was under the 1973 and 1975 versions, to invite a jury to consider a defendant's long-standing emotional disturbances in the context of manslaughter.

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38. MODEL PENAL CODE § 210.3 comments 3, 5(a) at 49-50, 61-62. Allowing the jury to determine whether an accused's explanation of his disturbance is reasonable and whether he was under tbe influence of his disturbance when he killed is necessary because the balance between normative justice administration and pristine fairness to the individual will be struck differently in every community. According to Waelder, "[t]he seemingly factual question of whether or not a person is (or *was*) mentally ill, . . . covers a question of morality and public policy: whether he *should* be punished or subjected to some other disposition or be allowed to leave the courtroom a free man." Waelder, *supra* note 37, at 385. The prevailing standards of morality and the social interests at stake converge to create the policy of the law regarding each individual who is not fully culpable but whom the reasonable man would not allow to go unpunished. *Id.*

On the other hand, section 210.3(1)(b) perhaps also "triggers an individualized inquiry which does not lend itself" to even-handed application. Arenella, *The Diminished Capacity and Diminished Responsibility Defenses: Two Children of a Doomed Marriage*, 77 COLUM. L. REV. 827, 857 (1977).

39. George Fletcher endorses this interpretation.

> For the defendant to be treated justly, tbe jury instructions should refer to a standard of a reasonable man with the specific pathological fears of the defendant. . . . [T]he only way to make these adjustments in the standards is to decide . . . whether the personality disposition accounting for the act is one that the accused should be able to control. If the accused should be able to overcome his dispositions, as in the case of cowardice and selfishness, these dispositions should not be attributed to the reasonable man; if the accused could not control the relevant disposition, as in the case of documentable, pathological fears, the disposition must be included in the standard used to assess the defendant's conduct.

Fletcher, *The Individualization of Excusing Conditions*, 47 S. CAL. L. REV. 1269, 1292-93 (1974).

IV. You Can't Teach an Old Dog New Tricks

Criminal law is animated by dual objectives. It seeks to embody social norms and perpetuate them through the threat of punishment. At the same time, it aims to deal justly with the individual offender by correctly evaluating his culpability. To satisfy this second purpose, distinctions must be made even among individuals guilty of the odious offense of intentional homicide.

The American Law Institute designed Model Penal Code section 210.3(1)(b) to balance the normative and individual fairness goals of the criminal law by permitting the community through judges and jurors to decide which individual characteristics can reasonably be indulged and which cannot. However, Utah judges and legislators have been reluctant to allow arguments of partial nonculpability to make significant inroads into the normative function of the law in this area. Unwilling to adopt the balanced approach of the Model Penal Code, the courts have continued to apply common law doctrines. Similarly, the legislature apparently attempted to arrive at the common law doctrine of provocation through amendment of the Model Penal Code language.

And yet the current statute falls short of achieving this objective. By retaining parts of the Model Penal Code formulation, the statute creates confusion and allows criminal defendants to raise a wide range of manslaughter arguments under a broad reading of the term "emotional disturbance." The better way to achieve the legislative objective is to reenact the pre-1973 statute, which unambiguously defines intentional manslaughter as the unlawful killing of a human being without malice aforethought upon a sudden quarrel or in the heat of passion.[40]

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40. Utah Code Ann. § 76-30-5 (1953).