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No Provocation without Responsibility: a Reply to MacKay and Mitchell

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In a recent issue of the *Review*, R.J. MacKay and B.J. Mitchell make a thought-provoking contribution to the long-running debate about the relationship between provocation and diminished responsibility as defences to murder.¹ In part, their article is a reaction to an earlier contribution that we made to the same debate, also in the pages of the *Review*.² MacKay and Mitchell share with us a dissatisfaction with the state of the law after the House of Lords' decision in *R v Smith (Morgan)*.³ They agree with us that the House of Lords left the law in an unstable condition. But that is where the agreement ends. We argued that the House of Lords had erred in trying to knit the two defences together. MacKay and Mitchell, by contrast, see the decision as testament to the folly of trying to keep the two defences apart. They argue that the law should take *R v Smith* to its logical conclusion, and unify the two defences forthwith.

At the centre of our argument was what we regarded as an elemental contrast between *excuses* and *denials of responsibility*. To offer an excuse, we said, is to attempt to provide a decent rational explanation for what one did. To deny responsibility, by contrast, is to assert that (because at the time one was not a

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¹ "Provoking Diminished Responsibility: Two Please Merging into One?" [2003] Crim LR 745.

² "Compassion without Respect? Nine Fallacies in *R v Smith*" [2001] Crim LR 623.

³ [2000] 4 All ER 289.

sufficiently rational being) no rational explanation for what one did is called for. Defences in these two classes, we argued, are not only different but incompatible. To make an excuse is not only not to deny one's responsibility; it is positively to assert one's responsibility. To deny one's responsibility is not only not to make an excuse; it is to undermine any excuse one might have made. That is because one cannot claim to live up to rationality's standards while also claiming that one should not be judged by rationality's standards.⁴

Things are made more complex, of course, by the possibility of *partial* excuses and *partial* denials of responsibility. Provocation is a partial excuse for murder, whereas diminished responsibility is, as its name suggests, a partial denial of responsibility. Can't one intelligibly mix and match excuses and partial denials of responsibility, asserting one's responsibility up to a point and then denying it beyond that point? Perhaps in some contexts one can. But not in the law of murder. In the law of murder it is not possible to accumulate the two partial defences to create a full defence. What might be possible is to plead provocation and diminished responsibility in the alternative. We did not take a view on this question and here we will ignore MacKay's and Mitchell's rich discussion of it. What we criticised was the reasoning by which the majority in the House of Lords in *Smith* reached the more radical conclusion that the law of provocation should *itself* make allowances for the diminished responsibility of the defendant, i.e. for the fact that he or she is not rationally up to par. We argued that the reasoning of the majority was flawed in several respects. We also argued – in a companion piece published elsewhere⁵ – that a wish to make the criminal law more respectful of human diversity (or more 'socially inclusive', in the fashionable phrase) should not endear one to the ruling in

⁴ This follows from the fact that, by the very nature of a reason, any being that can follow reasons should do so. For further discussion see John Gardner, "The Mark of Responsibility" (2003) 23 *Ox J Leg Stud* 157.

⁵ "Provocation and Pluralism" (2001) 64 *MLR* 815.

Smith. In particular, the temptation to make the same kind of legal allowance for every kind of human disadvantage is a temptation that thoughtful believers in social inclusion should strenuously resist.

MacKay and Mitchell have, in our view, surrendered to this temptation. We will not repeat the argument against doing so. In what follows, instead, we will largely restrict ourselves to answering their three specific criticisms of our work, in some respects reinforcing our original comments.

1. MacKay and Mitchell do not challenge the distinction we drew between excuses and denials of responsibility. Instead they rely on the distinction to proclaim that “surely provocation is a partial responsibility plea rendering the accused not fully responsible.”⁶ This, of course, is precisely the view that we argued against. We claimed that provocation is a partial excuse as opposed to a partial responsibility plea. Meeting our argument by saying that “surely” we reach the wrong conclusion is not a way of meeting our argument. It is not a counterargument.

Is there any counterargument to be found elsewhere in MacKay’s and Mitchell’s paper? The only one we could find was gestured at in the remark that “both provocation and diminished responsibility are concerned with rationality defects.”⁷ But this is still not much of a counterargument. For we already showed, in the papers cited by MacKay and Mitchell, that even though this remark is true it is also misleading.

The claim is misleading because it trades on an ambiguity in the expression “rationality defect” (and similar expressions). It is true that those who enjoy the provocation defence do something that they lack adequate reason to do. In that sense there is a “rationality defect” in their doing it. Their loss of temper leads them to wholly unjustified measures of retaliation. That is why

⁶ [2003] Crim LR at 757.

⁷ *ibid* at 757.

the killing is (partly) excused rather than (partly) justified. Still, the loss of temper itself is at least partly justified. And the killing is excused, we argued, *precisely to the extent that* the loss of temper is justified. The “rationality defect”, in other words, didn’t go all the way down: it extended to the action but not to the fury that impelled the action. This contrasts with the “rationality defect” claimed by somebody who pleads diminished responsibility. His rationality defect needs to go all the way down if his plea is to be successful. For if it turns out that he was even partly justified in losing his temper then his responsibility is intact, not “substantially impaired”, and his diminished responsibility plea must fail. A loss of temper needs to be delusional, groundless, or otherwise in defiance of rational explanation before it can meet the diminished responsibility test under section 2 of the Homicide Act 1957. Only if a loss of temper is rationally explicable (i.e. intelligibly attributable to a reasonable person) can it meet the provocation test as reconstituted by section 3.

So in invoking the ambiguous idea of a “rationality defect” MacKay and Mitchell do not provide any reason to agree with them that the provocation defence is a variation on the same theme as the diminished responsibility defence. What is more they do provide, elsewhere in their paper, one very powerful reason to think that the provocation defence is *not* a variation on the same theme as the diminished responsibility defence. They argue that, in order to provide better integration with the diminished responsibility defence, the provocation defence ought to be replaced with a new defence to murder based on “extreme emotional disturbance”.⁸ Under this heading, it would not matter what it was that disturbed the defendant. It would not matter whether she was provoked. So it could not help her that it was reasonable for her to be furious at her provoker. We doubt whether such a new defence would be a step forward in the law. It would require lust, jealousy, and hatred to be given exactly the

⁸ *ibid* at 758.

same legal credence as fear, despair, and anger. It would be ripe for exploitation by rapists and racists. But be that as it may, the proposed new defence is clearly not a provocation defence. It is not a provocation defence because nobody need do any provoking.⁹ Why would MacKay and Mitchell want to replace the provocation defence with one requiring no provocation? Because so long as the requirement of provocation remains in the defence the defendant's *reasons* for getting angry necessarily remain pivotal to the defence, and so the question of the *adequacy* of these reasons necessarily arises. To be exact, the question necessarily arises of whether the fact that the defendant was provoked (to the extent that she was) was an adequate reason for her losing her temper (to the extent that she did). It is because this question necessarily arises in a provocation defence that anyone who is trying to implement "a partial responsibility plea rendering the accused not fully responsible" needs to abolish the provocation defence and replace it with something more like the "extreme emotional disturbance" plea favoured by MacKay and Mitchell. If MacKay and Mitchell really thought that a provocation defence is "a partial responsibility plea rendering the accused not fully responsible", why would they need to get rid of it and replace it with something completely different?

2. MacKay and Mitchell charge us with being "naive" in wanting to "deny a defendant the chance of avoiding a murder

⁹ It may be said that, by this criterion, we have already lost the provocation defence thanks to the decision in *R v Doughty* (1986) 83 Crim App Rep 319, in which the word "provoked" in section 3 of the 1957 was interpreted to mean "caused". We criticised this decision in "Provocation and Pluralism", n5 above. But even if these criticisms are ignored, "caused" in *Doughty* must in turn be interpreted to mean "given a reason for". To avoid descending into nonsense the case must leave intact the minimal requirement that there be something said or done *by reason of which* the defendant lost her temper, such that the reasonableness of her having lost her temper remains at issue. How could it conceivably be reasonable to lose one's temper for no reason at all, not even something that one mistakenly takes to be a reason?

conviction with its mandatory penalty and all the stigma attached merely because he or she has an interest in maintaining self-respect.”¹⁰ We are not sure where MacKay and Mitchell got the idea that we want to deny any defendants a chance to avoid a murder conviction. In our piece in the *Review* we sided with Lord Hobhouse’s dissenting view in *Smith*, according to which there is no need to accommodate some kinds of diminished responsibility in the provocation defence since such cases are already properly covered by the diminished responsibility defence.¹¹ What we added was that provoked defendants who wish to escape conviction for murder should also have the opportunity to rely on a provocation defence and so avoid relying on a diminished responsibility defence. That is because everyone should have the opportunity to engage self-respectingly with the law, and all else being equal, any self-respecting person would rather have an excuse for what she did than call her responsibility into question. The words “all else being equal” are important here: *inter alia* they build in the assumption that the likelihood of the defendant’s being convicted or acquitted of murder is not affected either way. In reality the cruelty and confusion of many other aspects of the law of murder means that all else is rarely equal. No doubt defendants in murder trials are sometimes justified in sacrificing their self-respect for the sake of avoiding a conviction.¹² All this shows is that the law of murder fails the first test that we set for its propriety: it does not give everyone the chance to engage self-respectingly with it.

This shows that, as far as our writings are concerned, it is doubly irrelevant to ask, as MacKay and Mitchell do, “what would the majority of defendants prefer: a diminished responsibility manslaughter conviction, or one of murder.”¹³ It is irrelevant first because the options we offered were a diminished

¹⁰ *ibid* at 757.

¹¹ [2001] Crim LR at 630.

¹² As we made clear in *ibid* at 627.

¹³ [2003] Crim LR at 757.

responsibility defence or a provocation defence, not a diminished responsibility defence or a murder conviction. And it is irrelevant second because our only question about those options was what a *self-respecting* defendant would prefer, never mind what the majority of defendants would prefer. For all we (or MacKay and Mitchell) know, many defendants are people without much self-respect, who care little whether the law gives them an opportunity to engage self-respectingly with it.¹⁴ It does not follow that they should not *have* that opportunity, or that it is naive to want the law of murder to confer it on them.

3. In their third line of criticism, MacKay and Mitchell accuse us of “perpetuating an unfortunate attitude to the mentally disordered” by “telling us that a diminished responsibility verdict, like insanity, is one to which stigma is attached.”¹⁵ In fact we did not rely on the fact that stigma is attached to a diminished responsibility verdict. We claimed that stigma *should be* attached to it. The reason we gave is that (in the words of ours that MacKay and Mitchell disapprovingly quote) people whose responsibility is diminished are “not quite among us” and lack the status of “fully-fledged human beings”. No self-respecting person, we suggested, would wish this upon herself.

MacKay and Mitchell do not actually say that these characterizations of mentally ill people are wrong. They seem to be more concerned about the way these characterizations might be used against mentally ill people, or the way mentally ill people might feel about them. If so we share the concern. Mentally ill people have often been persecuted, neglected, patronised, and treated as objects of mirth. Their woes have often been compounded by quack treatments, pointless incarcerations, and brutal “care” regimes. They have often fallen victim to bizarre

¹⁴ Although arguably even those who lack self-respect cannot but want to secure it, other things being equal. For further discussion see Joseph Raz, *Ethics in the Public Domain* (paperback ed, Oxford 1995), 38-40.

¹⁵ *ibid* at 757.

superstitions and prejudices. But one should not conclude from the fact that mentally ill people have been on the receiving end of so much baseness and stupidity that their mental illness should be regarded with equanimity. Mental illness is not like homosexuality or left-handedness, completely unobjectionable traits that do not need any remedy, despite what some once thought. Mental illness really is a kind of illness and illnesses by definition call for treatments and cures.¹⁶ So long as it can be done without mistreating anyone, or committing other wrongs, the world would be a better place with all illnesses eradicated. Mental illnesses, in particular, make the following case for their own eradication. One cannot live a distinctively human life without a full range of rational faculties (cognitive, affective, deliberative, conative) in decent working order. Mental illnesses are illnesses that consist in the malfunction, partial or complete, of one or more of these rational faculties. In more severe cases they restrict, or even sometimes prevent, participation in a distinctively human life. And the ability to participate in a distinctively human life is one of the conditions for being a fully-fledged human being. That is what we meant by saying that mentally ill people whose responsibility is diminished (whose

¹⁶ We choose “illness” rather than “disease” or “disorder” (the latter being the term favoured by MacKay and Mitchell). There is a well-known sceptical charge that psychiatrists are not real doctors because they have to judge how well someone’s life is going in order to diagnose mental illness. But why does this stop them being real doctors? Physicians likewise need to judge how well someone’s life is going in order to diagnose physical illness. It is only *disease* (the explanation of some but not all illness) that physicians diagnose using blood tests, biopsies, etc. So it does not follow from the fact that psychiatrists lack technologies analogous to blood tests, biopsies, etc. that, as far as they can know, there are no mental illnesses. It only follows that, as far as they can know, there are no mental diseases. “Disorder” is a euphemism that tries in vain to evade the debates about illness and disease, and hence is best avoided. For further elucidation of these categories, as well as a clinician’s explanation of mental illness broadly harmonious with the one we sketch in the text, see K.W.M. Fulford, *Moral Theory and Medical Practice* (Cambridge 1989).

“mental responsibility” is “substantially impaired”) are, at that time, “not quite among us” as human beings.

The suggestion rings alarm bells because it sounds like (and has often been taken for) an invitation to treat mentally ill people as if they were not people, to treat them like wild animals or even like plantlife. But it is no such thing. We shouldn't want a wolf or a palm tree to be able to hold down a job or give an intelligible account of itself, but we should want a mentally ill person to be able to do these things. Why? Because a mentally ill person meets the *other* conditions for being a human being (notably the genetic and physiognomic conditions) and this makes the aspirations and expectations of a successful human life applicable to her.¹⁷ We should therefore all want to see her illness cured, and failing that, its symptoms alleviated. We should all aspire that she lives the best human life that is possible for her, with the maximum possible participation in distinctively human value. And we should all want her to have rights and resources that will protect her from further injustices and inhumanities, including those that have characterized some past misguided models of treatment and cure for mental illness. We should want a mentally ill person, in short, to be as fully human as possible.

Being responsible for one's own wrongs is a distinctively human capacity and one that is central to all distinctively human lives. It is the capacity that makes self-respect possible, for self-respect is the attitude of one who can sincerely say, of anything she did wrong, that she was justified in doing it, or, failing that, excused. We should all wish mentally ill people to have the opportunity to lead self-respecting lives. When we say 'all' we mean to include mentally ill people: they should also wish this for themselves. They should prefer to have justifications and excuses for their actions, and not to have to fall back on their illnesses to

¹⁷ Does this clash with the claim (above p 1) that to deny one's responsibility is to deny that one should be judged by rationality's standards? No. It is one thing to judge a person by rationality's standards, and another to wish that she were someone who could be so judged.

furnish them with a diminished responsibility plea. Alas, some mentally ill people do have to fall back on their illnesses to furnish them with a diminished responsibility plea on at least some occasions. Thanks to mental illness, their actions sometimes defy rational explanation and must, regrettably, be put down to pathology. To deny that this is regrettable is to claim that mentally ill people have nothing wrong with them. Is this what MacKay and Mitchell mean to claim when they accuse us of “perpetuat[ing] an unfortunate attitude”?

Above we criticised MacKay’s and Mitchell’s main positive proposal – to replace the provocation defence with an “extreme emotional disturbance” defence – for its indiscriminate handling of strong emotions. We suggested that this defence would require lust, jealousy, and hatred to be given exactly the same legal credence as fear, despair, and anger. A common worry, however, is that the defence of provocation errs in the opposite direction. If MacKay and Mitchell’s new defence would be too undiscriminating in its allowances for emotion, the provocation defence is surely too discriminating. As the Law Commission worries in its new Consultation Paper on the subject: “The defence of provocation elevates the emotion of ... anger above emotions of fear, despair, compassion, and empathy. Is [this] morally sustainable?”¹⁸ It is tempting to reply with a variant of the famous “levelling down” objection to egalitarianism. That some people (e.g. despairing people) may be denied an excuse to which they are entitled is no reason at all to deny an excuse to other people (e.g. angry people) who are entitled to it.¹⁹ But this evades the real issue to which the Law Commission is drawing attention. The real issue is this: Are despairing and angry people

¹⁸ Law Commission, *Partial Defences to Murder: A Consultation Paper* (London 2003), 82. The commission writes “sudden” anger but we omit the word as the question needs first to be asked about anger in general.

¹⁹ On which see Derek Parfit, “Equality and Priority” in Andrew Mason (ed), *Ideals of Equality* (Oxford 1998).

entitled to similar excuses? More generally, what is the difference between different emotions and different occasions for emotion, so far as their excusatory potential is concerned? Jeremy Horder did some valuable work on this problem a few years ago.²⁰ We are hoping to return to it in a future essay.

²⁰ Notably in “Cognition, Emotion, and Criminal Culpability” (1990) 106 LQR 469.